Building Dispute Resolution Institutions in Southern Afghanistan

Lessons from The Liaison Office Justice Shuras in Helmand, Uruzgan, and Nimruz

December 2011
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About The Liaison Office (TLO)

The Liaison Office (TLO) is an independent Afghan non-governmental organization seeking to improve local governance, stability and security through systematic and institutionalized engagement with customary structures, local communities, and civil society groups. TLO’s mission is to facilitate the formal integration of communities and their traditional governance structures within Afghanistan’s newly emerging peace, governance and reconstruction framework.

TLO main areas of activity are Research/Analysis using the do-no harm approach; Dialogue Facilitation and Participatory Peacebuilding; Access to Justice; and Livelihoods.

In addition to the TLO headquarter in Kabul, the organization has a total of three (3) regional (Paktia-Southeast, Kandahar-South, Nangarhar-East) and five (5) provincial (Uruzgan, Khost, Paktika, Helmand, Nimruz) offices across Afghanistan, with over 200 staff.

TLO was established in 2003 by Swisspeace on the request of community leaders in the Southeast. TLO has been funded by various donors from the non-governmental and governmental sectors, as well as international organizations and foundations. Current or recent TLO donors include the Heinrich Boell Foundation, the United States Institute of Peace, and the governments of Australia (AusAID), The Netherlands, Norway, Canada, Germany, and Switzerland (SDC).
Executive Summary

In 2010 The Liaison Office (TLO) established formal-informal dispute resolution bodies, called Justice Shuras, in six districts in Eastern Afghanistan. Later in the same year, TLO expanded its Justice Shura programming to three districts in Southern Afghanistan: Chahar Borjak district of Nimruz province; Deh Rawud district of Uruzgan province; and Grishk district of Helmand province.

As outlined in a previous report on the Eastern Justice Shuras, these bodies played a valuable role in improving dispute resolution within their districts, while also expanding and strengthening the role of the state in the dispute resolution process.

For better or worse, TLO’s Southern Justice Shuras met with more mixed success. In particular:

**The Chahar Borjak Justice Shura** solved sixty disputes, about half of which were referred from the district government. These cases included:

- **Thirty land cases**, largely between landlords and tenants. In these cases, the Justice Shura found some success in re-balancing land tenure arrangements in favor of tenants (landlord-tenant relations being a source of long-term tension within Chahar Borjak).
- **Ten minor criminal cases**, primarily over issues such as simple assault.
- **Twenty family cases**, including very serious disputes involving issues such as divorce, where the Justice Shura was able to mitigate some of the harsher aspects of customary law. In one case, the Justice Shura successfully prevented a happy couple’s being required to divorce as part of the settlement of a tangentially related dispute between other extended family members.

Chahar Borjak Justice Shura members also **met with the district government on a daily or semi-daily basis.** Local respondents in turn reported that the Shura improved local dispute resolution services along several metrics:

- Chahar Borjak Justice Shura members **coordinated their actions across the district.** Previously, the Chahar Borjak government had organized a shura to hear inter-tribal disputes. However, before the Justice Shura, no district-wide shura, regularly liaising with the government, was in operation for litigants from the same tribe.
- The Justice Shura **issued written decisions.** Before the Justice Shura, this practice had been rare, but litigants preferred it, as the existence of a written decision can help forestall future litigation.
- The Shura **decided equitably between wealthy and poor litigants.** Litigants, and some elders, in Chahar Borjak had reported the district’s traditional dispute resolution bodies as inequitably favoring the wealthy, and accordingly praised the Justice Shura for treating all parties fairly.
The Grishk Justice Shura liaised frequently with the district government, and improved on local dispute resolution practices in some ways. However, the Shura operated under severe security restrictions, and could neither reveal its existence publicly, nor inform even Justice Shura litigants of its connection to TLO – which, as a non-governmental organization, would have raised suspicions both with local litigants and with local Taliban. As a result, the Grishk Justice Shura could only solve about ten cases, referred from the district governor.

- Although small in number, these cases did include some major disputes. In one example, two parties possessed government documentation of the same land in Grishk City, an issue which the district government had failed for a number of years to sort through, but for which the Justice Shura was able to forge a settlement that has so far endured.
  - This case also points to some difficulties that land reform efforts as proposed by USAID will need to address: notably, that possessing government documentation is not seen as dispositive of ownership, in part for the valid reason of the government titling the same land to multiple persons.
- Notably, Grishk is also home to a number of other significant formal-informal shuras. The Grishk District Community Council (DCC)\(^1\) is reportedly the district’s main power-holder, and solves more cases than any other dispute resolution forum in Grishk; the Grishk Women’s Shura solves a large number of family cases; and the Grishk Shia Shura solves a large number of commercial cases.\(^2\) Even though the Justice Shura was the district’s only shura made up of traditional tribal elders, and in regular contact with the government, the presence of other powerful shuras probably lessens the demand for an institution of the Justice Shura’s type.

The Deh Rawud Justice Shura did not face comparable security restrictions. However, it also encountered significant problems. In particular, a large number of Justice Shura personnel began working for the Deh Rawud DCC, and subsequently ceased work on the Justice Shura. Thus, although individual Justice Shura members solved about two hundred cases within the past year, they also reported that they would have solved those cases anyway, and the Justice Shura had no influence on their behavior.

The cases they discussed do, however, contain interesting lessons of their own: notably that some elders admit to reaching case settlements at odds with Sharia, when doing so renders a more equitable judgment; and that customary land documentation is itself often inadequate to defeat competing claims on land due, in significant part, to its occasional failure to sufficiently detail land boundaries.

Those points aside, reasons for the relative lack of success of the Deh Rawud Justice Shura include:

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\(^1\) DCCs are an effort of the Independent Directorate of Local Governance, supported by USAID, or, in Helmand Province, DFID.

• The establishment of the Deh Rawud DCC represents a government effort to reach out to the district’s tribes – in particular its Babozai tribe, who have often remained cut off from the district government, but who now hold prominent places on the DCC. TLO by no means would discourage these efforts – but Justice Shura elders themselves reported the establishment of the DCC as the main reason that involvement with the Justice Shura dropped off, as elders serving on both bodies devoted their efforts mostly to the DCC after its establishment.

• Deh Rawud Justice Shura members in turn stated that, if the Justice Shura had provided them with more resources (e.g. salaries and dedicated meeting space), they would have worked more actively on the Justice Shura’s behalf. However, TLO, while taking Deh Rawud elders at their word, notes that elders in other districts occasionally echoed this statement (for example, in Chahar Borjak), but nevertheless continued their role on the Justice Shura. Thus the presence or absence of salary may constitute an issue in some, but not all, districts.
Lessons Learned and Recommendations

Based upon these variable experiences throughout nine districts in Eastern, Western and Southern Afghanistan, TLO can thus offer the following lessons learned on formal-informal dispute resolution:

- **Tribal support is necessary** for the operations of institutions like the Justice Shuras. The least successful of TLO’s nine Justice Shuras, in Deh Rawud, did not work largely because the tribal leaders enlisted to support it shifted their attention elsewhere. Unless tribal support can be enlisted and maintained, successfully setting up shuras of this sort is probably impossible.

- **Government opposition has a negative impact on Justice Shura operations, but government indifference does not.** TLO secured the agreement of the district government in each district in which it established Justice Shuras. Thus government opposition would, quite rightly, have foreclosed operation. However, across the nine Justice Shura districts, government involvement with the Justice Shuras ranged from the very close, to the rather distant, without a noticeable impact on the ability of the Justice Shuras to fulfill their mission.

- **Insecurity only affects Justice Shura operations if local armed opposition groups (AOG) oppose tribal dispute resolution.** TLO has established Justice Shuras in two less secure districts: Bati Kot of Nangarhar; and Grishk in Helmand. Bati Kot AOG (generally affiliated with Hizb-e Islami Gulbuddin) stage frequent attacks, but opposed neither tribal dispute resolution, nor Justice Shura operations. The Bati Kot Justice Shura thus operated successfully, and in a way very similar to the Justice Shuras in neighboring, and much more secure, districts of Nangarhar. Conversely, the AOG in Grishk (who are Quetta Shura Taliban) opposed tribal dispute resolution and, in the estimation of local staff, would surely have opposed Justice Shura operation, had Justice Shura operations been made public. The Grishk Justice Shura thus adopted stringent security precautions that hindered its ability to fulfill its mandate.

- **The preferences of litigants can change across regions.** On the one hand, litigants across regions nearly all endorsed some practices, such as issuing written decisions. On the other, litigants in different areas sometimes took divergent views on state-shura interactions, dictating closer state-shura interactions in some areas, but more distant state-shura interactions in others. In Chahar Borjak, and most Eastern districts, litigants preferred Justice Shuras to, perhaps, act as intermediaries with the state, but to otherwise maintain distance from the government. But in Deh Rawud, and probably Grishk, litigants wanted the Justice Shura to move closer to the state. Many interviewees from Deh Rawud even expressed a desire for Justice Shuras to become part of the state – perhaps an indication that state relations can affect shuras’ legitimacy differently in various parts of Afghanistan.

Similarly, in light of TLO’s long-standing justice findings and experience in establishing Justice Shuras, TLO can offer the following recommendations:
To the international community: The experience of the TLO Justice Shuras across nine districts indicates that institutions on this model can work in a variety of districts, and in a variety of conditions – in both secure and insecure environments, and with and without significant government involvement. Institutions like the Justice Shuras have the opportunity to contribute positively to dispute resolution in Afghanistan, even as choosing areas for intervention will require careful research, and not all such interventions will be successful. Thus the international community should remain open to engaging with traditional justice providers, and funding, as necessary and feasible, institutions like the Justice Shuras.

To the Afghan government: The relationship between the Afghan government and the country’s traditional justice providers has frequently been distant and strained. In late 2010 the government proposed a Draft Law on Dispute Resolution Shuras and Jirgas. This law is now defunct, and, in TLO’s estimation, its approach probably would have proven unworkable. Just as disturbingly, however, tribal elders – almost certainly Afghanistan’s majority justice providers – do not seem to have been consulted at any stage in the Draft Law’s development and discussion. Whatever course Afghanistan ultimately charts, these local leaders should be consulted and brought into the discussion process. In the same vein, the Afghan government should continue to support institutions such as the District Community Councils, especially as litigants in some areas prefer dispute resolution institutions with a higher degree of state involvement than the Justice Shuras, while still not wanting to take their cases to local courts.

Given the variable success of institutions like Justice Shuras and DCCs, both the Afghan government and international community will need to remain open to a variety of dispute resolution models at the local level. Eventually Afghanistan will need a legal and institutional framework capacious enough to account for all present modes of dispute resolution that are efficient, fair, and popularly endorsed. However, in the meantime, neither the Afghan government nor international community should set itself in opposition to local institutions helping a large number of people solve their disputes.

Finally, TLO suggests the following avenues for further research:

- In some districts, particularly in Southern Afghanistan, DCCs appear to have worked substantially better than Justice Shuras. Governance development efforts in Afghanistan would benefit substantially from a systematic examination of these DCCs across the country, including, of course, their dispute resolution activities. This examination, preferably taken on by independent analysts, would fill a major gap in present knowledge about what is working, and why or why not, in Afghan dispute resolution.
- Throughout TLO’s areas of operation, the use of documentation for land title has been problematic. Often, state documentation is used as, at best, only evidence of ownership, to be balanced against other evidence of perhaps equal weight. By the same token, customary forms of documentation do not necessarily appear adequate to foreclose or quickly defeat
competing land claims. A broad-based study of the uses of land title by dispute resolution providers would thus prove highly beneficial, especially as efforts at land reform continue.
1 Introduction

Despite Afghanistan’s great variety of cultures and local realities, the country’s government remains highly centralized, and its formal institutions often under-developed at the local level (Saltmarshe & Medhi 2011). Very often, these same institutions have little reach beyond district centers, and a concomitant gulf between them and the local population. As a result, many local institutions are not only weak, but often distrusted (Asia Foundation 2011).

Afghanistan’s judicial institutions are particularly weak, and, in some areas, hear ten percent or less of cases and controversies (See, e.g., TLO 2011, TLO 2011b, Barfield et al. 2009). Rather, informal bodies such as jirgas and shuras solve most of the country’s disputes, from the very minor to those threatening to security and stability. These bodies can enjoy impressive reach and local legitimacy – although informal bodies can have trouble coordinating their own actions, let alone their relations with the Afghan state. Looking at these various problems, both the Afghan government and NGO’s have explored facilitating the creation of government-connected shuras and jirgas to solve disputes and act as a bridge both between the different tribes in a given area, and between the government and people.

The Liaison Office (TLO) has been undertaking programming along these lines since 2007. In that year, TLO facilitated the set-up of a Commission on Conflict Mediation (CCM) in Khost, followed by a CCM in Paktia in 2008. In their first year of operation, these bodies solved more than 40 major land conflicts, and the office of the Provincial Governor approved all CCM decisions. Building on these efforts, TLO then aided the set-up of six district-level Justice Shuras in Paktia and Nangarhar provinces in 2010. These Justice Shuras took cases of all types, solving about 240 disputes in their first twelve months of operation. They also proved successful in coordinating the activities of tribal elders from across districts, as well as receiving many of

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3 E.g. Government of Afghanistan 2008 (emphasizing the beneficial role that jirgas and shuras can play, in concert with the state, for dispute resolution).
4 E.g. Barfield et al. 2008 (proposing the creation of pilot shuras combining formal and informal elements).
5 Throughout, this report will use Shuras (with a capital “S”) to refer to Justice Shuras facilitated by TLO. A lower-case “s” will generally refer to shuras of other types or shuras in general.
their cases from, and usually having their decisions approved by, the office of the district governor (TLO 2011a).

Both the CCMs and Justice Shuras of course focused their efforts on Eastern Afghanistan. With these experiences in mind, in late 2010, TLO also began setting up shuras at the district level in Southern Afghanistan – notably, Chahar Borjak district in Nimruz province, Grishk district in Helmand province, and Deh Rawud district in Uruzgan province. These districts differ considerably in their political, security, and dispute resolution systems. They also, in various ways, differ from the Eastern areas TLO surveyed – even as, in each area, informal dispute resolution settles the overwhelming majority of all cases and controversies (TLO 2011, 2011b).

Perhaps unsurprisingly, then, Justice Shuras in these Southern districts did not operate in the same way (generally speaking) as Justice Shuras in Eastern districts. These differences arose, in large part, from the varying levels of political/legal development across the region (TLO 2011): in particular, Chahar Borjak displays a strong tribal system, but somewhat different social and land tenure structures than the other districts in which TLO has worked; Grishk is suffering from major and persistent problems of security and a significant Taliban presence; and Deh Rawud has seen its informal justice system, and formal-informal linkages, shaped by persistent tribal rivalries and government favoritism.

As a result, the experience of Justice Shuras in Chahar Borjak, Grishk and Deh Rawud, in addition to reinforcing some lessons about what formal-informal justice bodies can achieve, also indicates some of their limitations. Overall, TLO’s experience indicates that formal-informal institutions work best in areas that already have strong tribal structures and at least semi-regular links between formal and informal government. In areas like these – encompassing most of the Eastern districts surveyed before (TLO 2011a, 2011b), as well as Chahar Borjak – establishing new formal-informal bodies has helped strengthen district governance and expand access to justice for district residents. In less secure areas, such as Grishk, the Justice Shura helped strengthen ties between tribal and governmental leaders; although this Justice Shura necessarily operated under severe security restrictions and often kept its NGO connections secret, limiting the Shura’s ability to serve as a bridge between the people and government,
and the number of disputes it could solve. Finally, the Deh Rawud Justice Shura found itself largely coopted by the establishment a District Community Council (DCC), under the aegis of the Independent Directorate of Local Governance. This DCC is hardly a bad thing in itself, but both the district government and Babozai tribal leaders (with whom TLO also worked) seem to have decided to make it the district’s sole formal-informal linkage. This decision, in large part, led to the Deh Rawud Justice Shura meeting rarely, and taking very few cases.

In preparing this report, TLO surveyed both Justice Shura members and other tribal elders as well as local government officials in Justice Shura districts, and, as security permitted, litigants who had used the Justice Shuras. Overall, these interviews comprised around forty people. TLO also collected case studies from the three Justice Shuras for further analysis, yielding a fairly complete picture of these shuras’ operation. In concert with TLO’s previous report on the operation of Justice Shuras in Paktia and Nangarhar (2011a), a fairly detailed picture of the possibilities and pitfalls of formal-informal linkages is thus emerging. As Afghanistan’s local governance continues to develop, it is hoped that these lessons will prove valuable to government officials, other NGOs, and, not least, tribal leaders seeking to bridge the gap between themselves and the Afghan state.

With these points in mind, this report will then survey Justice Shura operation in Chahar Borjak (Chapter 2); Grishk (Chapter 3); and Deh Rawud (Chapter 4). It will then, in Chapter 5, move on to analyze cross-cutting lessons learned from Justice Shura operation, combining data gathered from these Justice Shuras and data from their Eastern counterparts. Chapter 6 will in turn conclude with reflections on formal-informal linkages in Afghanistan as well as suggestions for where such programs can, and should, go from here.

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6 Security limited litigant interviews in both Deh Rawud and Grishk. In the former district, a complex attack in Tirin Kot occurred around the time litigant interviews were scheduled, and litigants thereafter refused to travel. However, TLO field staff were able to interview some litigants in Deh Rawud itself. And, in the latter district, the Justice Shura by and large operated in secret, i.e. without litigants knowing it was sponsored by an NGO or had any international connections. These precautions obviously rendered follow-up litigant interviews impractical and unwise. This report’s section on the Grishk Justice Shura addresses these security measures at greater length, as well as analyzing their implications for shura formation and operation.
2 The Justice Shura in Chahar Borjak

Of TLO’s three Justice Shuras in Southern Afghanistan, the one in Chahar Borjak demonstrated the clearest record of success in solving cases and contributing to formal-informal government linkages. As TLO’s previous report on the area noted (2011), Chahar Borjak already boasted a strong informal justice system, and a number of homegrown links between this system and the district government. This Justice Shura successfully built on these existing links, and created new justice linkages that addressed remaining jurisdictional gaps in the district, as well as helping to address some of the district’s other informal justice issues. When viewed alongside TLO’s success in establishing Justice Shuras in Eastern districts where tribal governance has also remained strong, the results in Chahar Borjak suggest that establishing formal-informal bodies will work best in districts where the informal justice system has maintained a high degree of integrity and legitimacy, a point discussed below.

2.1 Cases and Controversies in the Chahar Borjak Justice Shura

More particularly, in its year of operation, the Chahar Borjak Justice Shura solved around sixty disputes – about thirty on land issues, twenty on family issues, and ten dealing with minor criminal matters. The Shura thus heard no major criminal matters: interviewees attributed this result to Chahar Borjak’s low level of crime in general. In Eastern areas – which, like Chahar Borjak, tend to have relatively low crime rates – some Justice Shuras nevertheless heard some major criminal cases (such as the Justice Shura in Nangarhar’s Mohmand Dara district), while others did not (such as the Justice Shura in Paktia’s Ahmad Aba district) (TLO 2011a). No obvious pattern in this data stands out to explain why some of these Justice Shuras heard criminal cases, while others did not – thus going to emphasize the point that each Justice Shura seems to have evolved to meet specific local needs.

Even though all Justice Shuras heard significant numbers of land cases, that point applies with no less force. TLO’s previous report on Southern Afghanistan’s justice system noted that Chahar

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7 Interview with Chahar Borjak Justice Shura Members, Received August 11, 2011.
8 Interview with Chahar Borjak Justice Shura Members, July 19, 2011.
Borjak (2011) showed a land tenure situation characterized by a few large landholders dominating the market, and, thus, the prevalence of landlord-tenant issues and disputes.

The caseload of the Chahar Borjak Justice Shura reflects this situation. The land cases reported to TLO all address landlord-tenant issues in one way or another. They also show the Justice Shuras making at least some tentative efforts to re-balance the inherently unequal landlord-tenant relationship. For example, in the case of Sarwar v. Mohammad Amin Khan, the former was the tenant, the latter the landlord. Sarwar was cultivating Mohammad Amin Khan’s land while Mohammad Amin Khan maintained a primary residence in Iran. During his tenancy, Sarwar added irrigation systems to the land, substantially improving its productivity. When he learned of these improvements, Mohammad Amin Khan then tried to revoke Sarwar’s tenancy and claim exclusive rights to the land and its produce. Sarwar objected, and both parties eventually agreed to take their case to the Justice Shura. The Justice Shura, in turn, worked out a settlement wherein Mohammad Amin Khan pledged to allow Sarwar to use the land for one more year, and, after that time, would have the option of keeping Sarwar as a tenant or not.

Similarly, in the case of Mohammad Ghaws v. Morad Khan, Mohammad Ghaws owned about fifty jeribs (10 ha) of land, and had title to some, but not all, of his holdings. His tenant Morad Khan, during the course of his tenancy, brought under cultivation barren lands adjacent to some of Mohammad Ghaws’s non-titled holdings by building an irrigation system. After Morad Khan had finished bringing the new land under cultivation, Mohammad Ghaws, seeking the full proceeds of the land for himself, tried to eject Morad Khan from the land. Morad Khan objected, and the two decided to bring their dispute to the Justice Shura. In resolving the dispute, the Justice Shura observed that Morad Khan was farming land to which Mohammad Ghaws lacked formal title, and even some land, as above, which Mohammad Ghaws had never himself claimed. Thus, although Mohammad Ghaws retained his rights as landlord, he could not summarily eject Morad Khan. Ultimately, the parties agreed that Morad Khan could continue his tenancy indefinitely, if he paid Mohammad Ghaws a settlement of 25,000 Afghanis (about 500USD). Morad Khan did so, and remained on the land.
In both of these cases, then, landlords were acting to maximize their personal revenues at the expense of their tenants’ interests. Indeed, the landlords were arguably taking advantage of the tenants’ labor and the lack of, for example, a long-term tenancy contract that might protect tenants from sudden eviction. That point aside, the landlords agreeing to take their cases to the Shura tends to show that landlords’ control in the district is by no means total, and that tribal bodies can help constrain their power. In both cases, as well, tenants emerged from the process clearly better off than they would have been otherwise. Thus, in these cases, the Justice Shura played a role in mediating not only between the district government and people, but also between Chahar Borjak’s economic power holders and those that depend on them.

A low rate of land ownership also appears to have contributed to the small number of minor criminal cases the Justice Shura solved. In particular, most individuals in the district keep small herds of livestock (often only a few animals), but lack land on which to graze them. As a result, people must transfer their animals between their homes and common grazing lands, and fights resulting from animals straying onto the property of others (particularly while being transferred) occur frequently.9 One such case occurred between Abdul Basher, a tenant farmer, and Mahmoud Khan, a shepherd taking care of the villagers’ sheep in common. Mahmoud Khan’s brother, who is mentally disabled, was driving the sheep and several strayed into a field that Abdul Basher’s brother was tending. Abdul Basher’s brother then became angry and broke Mahmoud Khan’s brother’s hands. Mahmoud Khan then took his brother for medical treatment in Iran. Upon their return from Iran, Mahmoud Khan referred the issue to the Justice Shura to “prevent it from growing.” The Justice Shura heard the case, and ruled that Abdul Basher’s family should pay the medical expenses Mahmoud Khan had incurred. Abdul Basher’s family did so, and the case was resolved and registered with the district government.10

In contrast to its rather small, and not particularly dramatic, criminal caseload, the Chahar Borjak Justice Shura heard the largest number of family cases of any of the Justice Shuras TLO has established (See TLO 2011a), including some very serious matters. This number of family cases is not particularly surprising – Chahar Borjak also has the highest per capita rate of Family

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9 Interview with Chahar Borjak Justice Shura Members, July 19, 2011.
10 Interview with Chahar Borjak Justice Shura Litigants, July 19, 2011.
disputes of any area TLO has surveyed (2011). That being said, family cases did make up a greater proportion of the Justice Shura’s caseload than for dispute resolution bodies in the district as a whole: fully 1/3 of Justice Shura cases, against about 1/5 for other Chahar Borjak dispute resolution bodies (See TLO 2011), indicating some litigants preference for Justice Shura resolution of these disputes.

The Chahar Borjak Justice Shura’s successful resolution of lengthy and difficult family cases strengthens this impression. In the case of Mohammad Khan v. Rasul, which had gone on for nearly two years before Justice Shura resolution, the two families had engaged in an exchange marriage: Mohammad Khan’s son, Abdullah, had married Rasul’s sister; and Rasul’s son, Nazar, had married Muhammad Khan’s daughter. After some time, Abdullah and his wife became unhappy, to the extent that his wife asked for a divorce. Abdullah then insisted that the marriage between his sister and Nazar also be undone, even though the couple was happy and wanted to stay together. The latter couple thus objected to being required to divorce, but Abdullah remained intransigent, and the case came to the Justice Shura. The Justice Shura then convinced Abdullah to grant his wife a divorce, in return for a payment of 120,000 Afghanis (about 2,400USD) toward securing marriage to another woman. In turn, Abdullah would drop his requirement that his sister and Nazar divorce. Both sides accepted this arrangement, and the Justice Shura reports that enmity between the families has ceased.

2.2 Formal-Informal Linkages in Chahar Borjak

In the midst of Chahar Borjak’s already fairly strong formal-informal linkages (TLO 2011), the Justice Shura played a somewhat unique role. As TLO’s previous report on Chahar Borjak’s justice system pointed out, the local government had already established an Ethnic Shura, responsible for hearing inter-tribal disputes of all levels of severity, and this body appears well-designed and popular. Its decisions also receive a government stamp.

The Ethnic Shura’s design, however, leaves a sort of jurisdictional gap in the district, as it hears only inter-tribal disputes – leaving no government-linked shura to hear disputes taking place between members of the same tribe. The Justice Shura seems to have fulfilled this role in several ways. To begin, the Justice Shura received about one third of its cases from the
government, with the Prosecutor and District Governor referring, between them, about twenty cases, all on civil disputes\(^{11}\) (including four family cases\(^{12}\)); this was probably more cases than heard in Chahar Borjak’s court during the same period (TLO 2011). These referrals only occurred with the consent of the litigants themselves.\(^{13}\) And for at least some of these officials, they reported not referring any other cases to any other shura during the past year\(^{14}\) -- thus indicating that both litigants and officials benefitted from Justice Shura establishment, and saw it as the preferred forum for at least some cases.

Second, Justice Shura leadership also took initiative in deepening cooperation with the government beyond case referrals. The Shura Head arranged weekly meetings with the government, as well as ad hoc meetings on a daily or semi-daily basis – a substantial increase over meetings before the Justice Shura’s establishment.\(^{15}\) The District Prosecutor also sometimes sat with the Justice Shura as it heard cases\(^{16}\), a somewhat unusual arrangement that speaks to considerable closeness between the formal and informal systems. Moreover, as TLO reported (2011), the district leadership had not previously recognized shura and Jirga decisions outside of government-backed bodies, meaning the Justice Shuras seem to have expanded parties’ access to state justice as well.

2.3 Evaluating the Chahar Borjak Justice Shura

As in its other Justice projects, litigants came to the Justice Shura in Chahar Borjak voluntarily: about two-thirds approached the Shura directly, and the rest came after the District Governor had given them the option, thus evincing at least some preference for the Justice Shura over other dispute resolution institutions available in the area. Litigants cited some specific reasons for this preference, similar to, if not quite the same as, reasons that litigants in the East liked the Justice Shuras there.

\(^{11}\) Interview with the Chahar Borjak Justice Shura, Received August 10, 2011.
\(^{12}\) Interview with Chahar Borjak Justice Shura Members, July 19, 2011.
\(^{13}\) Interview with the Chahar Borjak Rights Department Head, Received August 10, 2011.
\(^{14}\) Interview with the Chahar Borjak Prosecutor, Received August 10, 2011.
\(^{15}\) Interview with Chahar Borjak Justice Shura Members, July 19, 2011.
\(^{16}\) Interview with the Chahar Borjak Prosecutor, Received August 10, 2011.
Many of these reasons have to do with the specifics of Justice Shura practice, especially those that improve the finality of decisions. In particular, litigants preferred to receive written decisions. Indeed, even illiterate litigants preferred to receive them, so that they could later prove, if necessary, that the issue of the case had been settled.

The Shura’s registering decisions with the district government was more controversial, although some litigants clearly preferred it. A majority of litigants stated that they preferred that the Shura not register its decisions with the government, as the government is either powerless to enforce decisions or might intervene and prolong disputes. Similarly, for family cases, all litigants interviewed preferred the government not be notified: here, considerations of privacy led many litigants to not even seek written decisions.

However, a distinct minority of litigants – about one-third of interviewees – preferred to register the disposition of their cases with the government. Specifically, they preferred to receive government approval of their decisions to prevent counter-parties from later raising the case in a government forum.

More broadly, the Chahar Borjak Justice Shura also appears to have improved informal justice itself in the district, in a way at least reminiscent of its Eastern counterparts. In several of those districts, respondents reported that the Justice Shuras improved on previous practice by not taking fees for their work, so improving access to justice for poor litigants (TLO 2011a). Similarly, this report has already referenced the dominant position of large landowners in Chahar Borjak, a situation about which Chahar Borjak Justice Shura litigants complained. In particular, both they and Shura members themselves, stated that informal justice bodies in Chahar Borjak have tended to unduly favor the interests of the wealthy. Respondents denied that informal justice in their district suffered from bribery, per se, but they said that, during the

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17 Interviews with Chahar Borjak Justice Shura Litigants, Received October 5, 2011; Interview with Chahar Borjak Justice Shura Litigants, July 19, 2011.
18 Interview with Chahar Borjak Justice Shura Litigants, July 19, 2011.
19 Interviews with Chahar Borjak Justice Shura Litigants, Received October 5, 2011.
20 Interview with Chahar Borjak Justice Shura Members, July 18, 2011.
21 Interviews with Chahar Borjak Justice Shura Litigants, Received October 5, 2011; Interview with Chahar Borjak Justice Shura Litigants, July 19, 2011.
22 Interview with Chahar Borjak Justice Shura Litigants, July 19, 2011.
23 Interview with Chahar Borjak Justice Shura Litigants, July 19, 2011.
course of litigation, wealthy disputants would commonly provide facilities (such as meeting rooms) for hearing the case, as well as food and other expenses to shura members. These practices, in interviewees’ telling, lead to a justice system biased in favor of the wealthy.²⁴ And, by the same token, respondents praised the Justice Shuras for not taking money or in-kind contributions from any litigants, and treating both wealthy and poor litigants equally.²⁵

Moreover, similar to other districts (TLO 2011a), respondents praised the Justice Shura as faster and more equitable than the courts: they noted that the Justice Shura solves cases quickly, does not “make disputes bigger” in an effort to extract bribes and is less biased toward parties.²⁶ Taken together, then, the performance of the Chahar Borjak Justice Shura, and district residents’ reaction to it, point to it both expanding dispute resolution services in the district and, in some important ways, improving their quality.

²⁴ Interview with Chahar Borjak Justice Shura Litigants, July 19, 2011; Interview with Chahar Borjak Justice Shura Members, July 19, 2011.
²⁵ Ibid.
²⁶ Interviews with Chahar Borjak Justice Shura Litigants, Received October 5, 2011.
3 The Justice Shura in Grishk

Unfortunately, the same cannot be said for the Grishk Justice Shura. Although it clearly provided a valuable service for the few people who used it – and its cases bear examining for other reasons, as detailed below – deteriorating security severely inhibited the Shura’s operation. More specifically, members could not announce, or discuss, Shura operations publicly, and some even hid their involvement from their own immediate families. As a result, the Shura took very few cases, even as it met regularly for other reasons. Moreover, as TLO has previously reported, Taliban presence appears to weaken tribal dispute resolution considerably, and Grishk already has a significant number of powerful shuras already operating (TLO 2011). This record of few case resolutions, along with the presence of both the Taliban and other district shuras, perhaps call into question the utility of the Justice Shura model in districts like Grishk.

3.1 Cases and Controversies in the Grishk Justice Shura

The Grishk Justice Shura heard about ten cases overall: one criminal case, six land cases, and roughly three family disputes. Some of the Shura’s land cases point to a system of land titling which is confused, at best, and might pose difficulties for future reform, while the Grishk government found the Shura useful to settle even criminal matters, possibly a sign of weak capacity overall – all points discussed below. With that said, the very small number of the Shura’s cases make judging its comparative advantage to other forums difficult.

In one case speaking to these observations – Lal Mohammad v. Abdul Hakim – the latter, an ungulate dealer in Grishk, accused the former’s son of pilfering livestock, and took his complaint to the district authorities. In the meantime, the case turned violent with Abdul Hakim’s son beating Lal Mohammed’s son, severely injuring him and taking his motorcycle. Despite the case’s indisputably criminal nature, the District Governor referred it to the Justice Shura for resolution. After satisfying themselves of Lal Mohammed’s guilt, and taking into account the injuries inflicted on all sides, the Shura ordered 25,000 Afghanis (or about 500USD) to be paid to Abdul Hakim, and both parties accepted the decision, without the state taking any further action.
The Justice Shura played a similar role in land cases, helping to make up for a land title system that is not able to meet parties’ needs. TLO’s previous report on the area (2011) noted that the district’s high incidence of land title appeared to be having no effect in restraining land conflicts. Some Justice Shura cases allow for informed speculation as to why this pattern persists. In particular, government title does not always serve as a strong enough indication of ownership to preempt or quickly defeat competing claims.

For example, in the case of Sayed Ismael v. Abdul Razaq, both parties were able to produce apparently valid government documents establishing ownership of a plot of land in Grishk City. Both the authorities who initially heard the case (it spent around a year in various government departments and at the bank), and the jirga that ultimately resolved it, took Sayed Ismael’s earlier documentation of ownership as strong evidence of his rightful claim. However, they also weighed it against Abdul Razaq’s actual possession and use of the land at the time of the dispute, and the later documentation he possessed. Thus, even though the jirga, in resolving the dispute, established Sayed Ismael’s ownership, he still had to pay Abdul Razaq for the improvements the latter had made to the property during his occupation. As was also seen in TLO’s previous reports (2008, 2011a, 2011b), this treatment of documentation, while understandable in the context of decades of upheaval and a formal state semi-functional at best, still provides very skewed incentives to parties. If Abdul Razaq was occupying the land illegally, with forged documentation, then he has now profited from his conversion and fraud. However, if Sayed Ishmael has produced forged documentation, then he has also profited from his misdeed by gaining a piece of land to which he is not entitled (there is also the possibility that the local government is double-selling plots of land, a practice for which there is also evidence in Nimruz province (TLO 2011)).

Whatever the case, a party in the wrong – whether the plaintiff, the defendant, or the government – almost certainly profited. The circumstances of the case also seem to indicate that the government is not enforcing Afghan land law very aggressively: the case spent about a year with the government, with neither party able to satisfactorily establish ownership. In such circumstances, the government could have easily invoked the Land Management Law of 2008.
to determine that neither party had legally valid title, meaning the land belonged to the state\textsuperscript{27}, but did not do so. This lack of enforcement might stem from a lack of knowledge of the law, although the circumstances of the cases – at various stages involving the court, the Huquq Department\textsuperscript{28}, the Cadastre, and the bank – make this possibility unlikely. Quite possibly, then, the government did not feel enough confidence in its own title regime to actually apply it rigorously. As with the Deh Rawud governor mediating private disputes over government land (TLO 2011), the government here has perhaps acted in a humane and pragmatic fashion – but one made necessary by extremely weak capacity.

Such a finding is potentially troubling in light of the presumed importance of land title, and land title reform for economic development and stabilization.\textsuperscript{29} For example, the United States Agency for International Development (USAID), first in its \textit{Land Titling and Economic Reform in Afghanistan} (LTERA) project, and soon in a new project titled \textit{Land Reform in Afghanistan} (LARA), has placed considerable emphasis on the importance of expanding legal title.\textsuperscript{30} Without taking issue with these development priorities as such, the evidence presented here does indicate that, in line with other strands of law and development thought\textsuperscript{31}, title only fulfills its economic potential when embedded within a functioning administration and dispute resolution system. TLO’s previous report on Grishk (2011), however, also indicates that a great deal of the title at issue is between 35 and 130 years old, and might no longer bear much of a relationship with actual ownership of land either now, or in any recent decade. As a result, simply enforcing existing title could severely injure a significant number of people in long-term actual possession of land, and land reform efforts, to be both effective and humane, would probably need to tackle title enforcement and title reform at the same time.

\textsuperscript{27} At Art. 3.8 (Defining government land as, inter alia, land without a valid deed to a private owner).
\textsuperscript{28} This department deals with civil complaints, by settling disputes itself; referring them to a shura, or referring them to a court. However, in many districts, the Huquq has not been set up, or is not really functional.
\textsuperscript{29} Miceli (2010) lays out the traditional case for the economic importance of land title: by cementing ownership, titling and registration of land, first of all, incentivizes owners to invest in immovable improvements such as houses and irrigation systems, as well as to make other investments in the land that will only pay-off in the long term. Second of all, land titling and registration, also encourages outside investors by reassuring them that their investment is safe from ownership claims by other private individuals and the state.
\textsuperscript{30} See LARA “DESCRIPTION/SPEC/STATEMENT OF WORK” (On file with author).
\textsuperscript{31} See, e.g., Michael Trebilcock & Paul-Erik Veel, Property Rights and Development: the Contingent Case for Formalization, 30 U. Pa. J. Int’l. L. 397 (2008)(Surveying literature indicating that functional property rights in land depend upon both social norms supporting their use, and a broader system of enforceable property rights already existing. Neither of these factors would seem to exist in unstable areas of rural Afghanistan).
3.2 Evaluating the Grishk Justice Shura

Overall, the Grishk Justice Shura appears to have been institutionally sound, but quite limited. These results, in turn, suggest that informal institutions can still organize themselves in less secure areas, but their scope of work reduces considerably if local AOG oppose their actions.

The Grishk Justice Shura met at least once a month, shifting its meeting place among several different locations. The District Governor came to a couple of the Shura’s meeting, with the Prosecutor attending more often. Conversely, the Justice Shura sent representatives to twice-weekly meetings at the District Governor’s office, and registered all of its larger cases with him. The Justice Shura thus encountered at least some success in improving coordination between the government and informal justice providers.

Nevertheless, one must remember that the Grishk Justice Shura solved very few cases, less than one per month. It thus met with government officials more frequently than it solved actual disputes. Several of the Shura’s security precautions at least partially account for this pattern. In particular, Justice Shuras in other districts publicized themselves largely through word of mouth; elders sitting on the Shuras, as community leaders, informed people in their areas of the Shura’s existence, method of operation, and purported advantages. Elders on the Grishk Shura did not do so, however. They felt that they would place themselves in danger from the Taliban if it were known they were sitting on an NGO-connected shura. Rather, litigants would only learn of the Justice Shura after they submitted a case to the government, and the government suggested the Justice Shura to them. And, even when litigants met with the Justice Shura itself, Shura members did not reveal its NGO connection. Indeed, at least one Justice Shura member reported that he did not even tell his immediate family of his involvement with the Justice Shura. Such precautions may have been necessary, but they obviously reduced Shura awareness, and almost certainly resulted in its hearing fewer cases than it would have otherwise.

Moreover, it is not entirely clear what niche the Grishk Justice Shura was filling. In most Justice Shura districts, no other dispute resolution shuras were regularly operating at the district level;

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32 Interview with the Grishk Liaison Officer, August 23, 2011.
33 See, e.g., Interview with Chahar Bojak Justice Shura Members, July 19, 2011.
were not operating very well; or were operating with well-defined jurisdictional limitations. For example, Bati Kot district of Nangarhar had two other shuras operating: a Jihadi Shura that did not usually solve disputes; and a DCC that heard few cases, and was not very active (TLO 2011a). By contrast, Grishk’s DCC is perhaps the district’s most powerful governance institution, and reportedly arranged the replacement of an uncooperative District Governor (TLO 2011). The district also boasts other significant shuras – an active Women’s Shura hearing mostly family cases, and a Shia Shura hearing mostly commercial disputes (TLO 2011).

According to interviewees for this report, these shuras suffer from being identified with the government, reducing the public’s trust in them. However, the Justice Shura could not itself reveal its NGO connections or source of funding, and received most of its cases from the government in any case. It is thus not clear how much the Justice Shura benefitted from its relative distance from government influence. Indeed, if the Justice Shura were closer to the government, it might have been able to receive government protection, and so operate more openly and address a larger caseload. Of course, if the Justice Shura operated in that fashion, it would find itself in direct competition with Grishk’s DCC.

This situation points to the difficulty of establishing formal-informal institutions in insecure districts where local armed opposition groups (AOG) object to them. On the one hand, no evidence suggests that trust in the Grishk government is particularly high, or its hold on the district particularly stable. Indeed, the area’s large insurgency presence (significant towns regularly fall under Taliban control (TLO 2011)) counsels otherwise. In other areas with weak government control, such as Mohmand Dara of Nangarhar (TLO 2011a, 2011b), Justice Shuras thus fill a local need for an institution with tribal legitimacy that can nevertheless speak to, and coordinate its actions with, the state. On the other hand, however, the Grishk Taliban itself opposes the operation of tribal dispute resolution bodies, and the effect of Taliban presence seems to be an increase in the power of the state’s executive branch. As TLO observed previously, in areas of current Taliban control in Grishk, tribal dispute resolution ceases operation; and, in areas of recent Taliban control, the District Governor and District Chief of

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34 Interview with the Grishk Liaison Officer, August 23, 2011.
35 Ibid.
Police hear the large majority of disputes (TLO 2011). As a result, in insecure areas where AOG oppose tribal dispute resolution, tribal governance appears to weaken considerably, and remain weak even after insurgents have left the area.

These observations, when combined with the secrecy the Grishk Justice Shura had to observe, and the very small number of cases it solved, call into question the utility of the Justice Shura model in Grishk. Concomitantly, Grishk’s relatively large number of active and powerful shuras make it unclear just what need the Justice Shura was filling. Of course, it is not really possible to disentangle these factors but, taken together, they do start to suggest that some districts are less suited than others to institutions of the Justice Shura’s type.
4 The Justice Shura in Deh Rawud

The Justice Shura in Deh Rawud likewise encountered a number of problems, related not to security, but to shifting support from the district government and even Justice Shura members themselves. As TLO has previously documented (2009, 2010) Deh Rawud is made up of three large tribes, as well as a number of smaller ones. These three tribes are the Popalzai, Babozai, and Noorzai and, since 2001, each has played a somewhat different role politically. In particular, the Babozai had in the past supported the Taliban, and so been excluded from district power structures after Deh Rawud returned to government control in 2009 (TLO 2010, 2011). In 2010, TLO worked with a powerful Babozai leader in setting up the Justice Shura; this individual subsequently became Head of the Justice Shura. However, in 2011, the district government began both to reach out to the Babozai, and to designate the local DCC as the only formal-informal justice body in the district. Taken together, these developments led to a large number of Justice Shura members, including the aforementioned Head of the Justice Shura, more or less abandoning this body in favor of the DCC. As a result, the Justice Shura met very rarely, and solved very few cases.\(^{36}\)

These developments suggest several salient points. To begin, that bodies like the Justice Shura will fail without continuing tribal support. More positively, however, one can legitimately doubt the need for the Justice Shura, in the presence of a powerful DCC, a point that also might apply to Grishk. Even as doubts remain about the Deh Rawud DCC (see below), it has a chance to significantly improve district governance, and may, in the end, prove a better model for Deh Rawud.

4.1 Cases and Controversies in the Deh Rawud Justice Shura

Overall, Justice Shura elders in Deh Rawud reported solving a large number of cases, nearly 200,\(^{37}\) including at least some serious family, land and criminal matters. However, the

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\(^{36}\) Interviews with TLO Justice Shura Members, July 25-26, 2011; see also Interview with Deh Rawud Justice Shura Members, Received September 25, 2011 (where elders stated that they saw no advantages to the Justice Shura over other shuras in the district); Interviews with the Deh Rawud District Governor, District Chief of Police, and Huqûq Department Head, Received September 25, 2011 (where these officials stated that they did not send any cases to the Justice Shura, although they did work with some individual elders who also sat on the Justice Shura).

\(^{37}\) Interview with TLO Justice Shura Members, July 26, 2011.
organization of the Justice Shura did not seem to have any significant impact on elders’ process of resolving cases (indeed Justice Shura members stated that they would have solved all of those cases anyway, and the Justice Shura did not change their behavior\textsuperscript{38}). Government officials reported a similar pattern, saying that, although they worked with some Justice Shura members in their capacity as local elders, officials did not work with the Justice Shura itself, and many were unaware that the Justice Shura had even received government registration.\textsuperscript{39} The Justice Shura thus did probably not have any noticeable impact on access to justice in Deh Rawud. Because the Justice Shura met so infrequently – only two or three times during its ten months or so of operation\textsuperscript{40} – it thus stands out as the least active, and least successful, of TLO’s Justice Shura projects.

That being said, this sub-section will provide a brief overview of cases that elders on the Justice Shura reported solving. According to the Justice Shura, its elders individually solved 195 cases overall: 120 on land; 30 on family issues; 30 minor criminal issues; and 15 major criminal issues.\textsuperscript{41} Even though the Deh Rawud Justice Shura does not appear to have been a notably active or important institution, these cases themselves offer some valuable lessons regarding justice issues: specifically that elders are willing to depart from their understanding of Sharia principles in the interest of justice; that, despite some government officials stated preference to handle all criminal matters themselves\textsuperscript{42}, they will still refer such cases to shuras in some circumstances; and finally the limits of customary land documentation (particularly salient as the debate over its use continues).

For example, in one reported case combining family and land elements, both of a young man’s parents were killed in a bombing (it is not clear by whom), leaving him an orphan. His grandfather is still living and so, under the local understanding of Sharia principles, inherited all of the decedents’ property, which was 1.5 million Afghanis (about 30,000USD) plus land holdings. The grandfather refused to share this property with his grandson, thus leaving him

\textsuperscript{38} Interview with TLO Justice Shura Members, July 25, 2011.
\textsuperscript{39} Interviews with the Deh Rawud District Governor, District Chief of Police, and Huquq Department Head, Received September 25, 2011.
\textsuperscript{40} Interviews with TLO Justice Shura Members, July 25-26, 2011.
\textsuperscript{41} Interview with TLO Justice Shura Members, Received September 25, 2011.
\textsuperscript{42} Interview with the Deh Rawud District Governor, Received September 25, 2011.
destitute, and the grandson approached a Justice Shura member. Elders then met, and decided that the grandfather should give his grandson one jerib (0.2 ha) of agricultural land, an amount thought sufficient for the grandson to sustain himself. Interestingly, elders involved in this case freely described their resolution as a departure from Sharia – more specifically that it had combined principles from Afghan civil law and Sharia to reach a more equitable solution.43

Shura members, if not the Shura itself44, also heard some cases referred from the government, including criminal disputes, such as the case of Fazl ul Rahman v. Abdul Mohammad. The case began with a dispute over the border between agricultural fields. A low mud barrier, a khul, separated the properties, but had apparently become damaged. The parties also possessed some customary documentation of their holdings, but it did not indicate property boundaries clearly. The conflict itself began with a verbal disagreement, but then escalated quickly and culminated with Fazl ur Rahman attacking and injuring Abdul Mohammad with a scythe; the police then arrested Fazl ur Rahman and he was sent to jail. According to Justice Shura members, the parties initially referred their case to the government because they are Popalzai, a tribe, as above, historically close to the government (TLO 2010, 2011). However, the government then referred the case to elders associated with the Justice Shura, who negotiated a solution whereby Fazl ur Rahman would compensate Abdul Mohammad with 100 maan (about 450kg) wheat. The parties agreed, and the governor released Fazl ur Rahman from jail. The elders involved reported their resolution to the government verbally, but did not take any action to register it or secure government approval of their decision.45

This case also provides some insight into the limits of customary land documentation. As was noted in this report’s chapter dealing with Grishk, the Afghan government, in cooperation with international partners such as USAID, is planning on undertaking some reform of Afghanistan’s land law and land registration and management systems. This reform will probably include

43 Interview with TLO Justice Shura Members, July 26, 2011.
44 Interviews with the Deh Rawud District Governor, Chief of Police, and Huquq Department Head, Received September 25, 2011.
45 Interview with Deh Rawud Justice Shura Members, July 25, 2011.
increased recognition of customary land documentation.\textsuperscript{46} The case of Fazl ur Rahman v. Abdul Mohammad, however, tends to highlight what is perhaps an obvious fact: not all customary documentation is itself adequate to prevent or quickly defeat land claims, even as it remains in some ways superior to formal documentation, which, in Deh Rawud as in Grishk, probably bears little relationship to the realities of present land ownership (TLO 2011).

4.2 Evaluating the Deh Rawud Justice Shura
Putting aside these successful case resolutions by individual elders attached to the Justice Shura, the question thus becomes why the Deh Rawud Justice Shura underperformed. Shura members, who agreed with this characterization\textsuperscript{47}, offered two reasons: the Shura may have had inadequate resources, or at least incorrect incentive structures; and it certainly suffered from shifting local politics. A different shura design might have been able to address the first problem, a point also echoed by government officials and even litigants who had worked with Justice Shura elders; while the second problem is more generally illustrative of the pitfalls of forming a new institution. Even if TLO had designed the Justice Shura differently, it had no chance of success once it had ceased to receive tribal support. As this reports subsequent chapters discuss, Justice Shuras can survive, and even prosper, without significant government support. However, a lack of support from tribal leaders is obviously deadly.

4.2.1 Economic and Incentive Problems in the Deh Rawud Justice Shura
As above, most Justice Shura members stated that the Justice Shura had no impact on their behavior. The only exception was the Head of the Justice Shura, who stated that the salary received from TLO caused him to be more personally active in dispute resolution.\textsuperscript{48} The structure of these remarks implies the first problem with the operation of the Deh Rawud Justice Shura. Just as the Shura Head reported that his salary from TLO motivated him to solve more disputes, other elders on the Shura reported that they did not change their practices because they did not receive a salary.\textsuperscript{49} They also added that, because Deh Rawud is a

\textsuperscript{46} USAID, 2011a, \textit{LARA Fact Sheet} (LARA intends to “Strengthen land tenure security by supporting the Supreme Court and communities with rights formalization and informal dispute resolution processes . . .”).

\textsuperscript{47} Interviews with Deh Rawud Justice Shura Members, July 25-26, 2011.

\textsuperscript{48} Interview with Deh Rawud Justice Shura Members, July 26, 2011.

\textsuperscript{49} Interviews with Deh Rawud Justice Shura Members, July 25-26, 2011.
geographically large district, going to different areas to solve disputes is highly expensive, as is going to the district center for Justice Shura meetings. As a result, the elders said, they only solved disputes they could reach easily and usually would have solved anyway as local leaders, and the Justice Shura, as a body, only met three times.\(^50\)

Both litigants who interacted with Justice Shura elders and government officials also suggested improvements to the Justice Shura along these lines. In particular, a number of respondents from both groups suggested that the Justice Shura should meet on a regular schedule (once a week seemed preferred), and receive a salary for their efforts.\(^51\) Others suggested that Justice Shura members should receive additional training\(^52\), or have permanent meeting facilities.\(^53\)

These comments point to the Deh Rawud Justice Shura being inadequately organized because it received inadequate resources. However, further analysis suggests that this conclusion requires some qualification, at least as applied to other districts. To begin, this report will take Deh Rawud Justice Shura members (and others) at their word that, if they had received salary or other compensation, they would have developed the Justice Shura further than they did. These remarks thus directly suggest a path for further shura development: like the DCC (which offers compensation for members), the Justice Shura and other similar institutions should in the future put their members on salary, build permanent shura meeting places, and so on. Justice Shura members in Chahar Borjak echoed this point\(^54\), as did some from Eastern districts.\(^55\)

But, with that said, Deh Rawud elders were the only group who, in response to not receiving salary, did not solve cases or meet regularly. Despite their not receiving compensation, elders both in Chahar Borjak and in the East demonstrated substantially increased government ties, beneficial changes in shura practice, and the resolution of a large number of difficult cases, during the course of Justice Shura operation (for the latter, See TLO 2011a). It thus seems that,

\(^{50}\) Ibid.
\(^{51}\) Interviews with Deh Rawud Justice Shura Litigants, Received September 25, 2011; Interviews with the Deh Rawud Huquq Department Head and Chief of Police, Received September 25, 2011.
\(^{52}\) Interview with a Deh Rawud Justice Shura Litigant, Received September 25, 2011; Interviews with Deh Rawud Huquq Department Head and Prosecutor, September 25, 2011.
\(^{53}\) Interview with a TLO Justice Shura Litigant, Received September 25, 2011.
\(^{54}\) Interview with Chahar Borjak Justice Shura Members, July 19, 2011.
\(^{55}\) See, e.g., Interview with Ahmad Aba Justice Shura Members, June 5, 2011.
while Deh Rawud elders may have required additional compensation to change their practices, elders in other areas did not, even if they clearly would have liked more resources. Indeed, Chahar Borjak district is much larger than Deh Rawud geographically, and Grishk presented formidable logistical difficulties of its own. But, in both these districts, Justice Shuras were more active than in Deh Rawud.

Of course, this observation by no means invalidates the claim of Deh Rawud Justice Shura. Rather, it indicates that elders in different areas respond to different incentive structures, with some requiring more incentives than others to organize themselves or modify past practices. Thus, it seems fair to say, formation of formal-informal shuras in Deh Rawud might require providing salary and other compensation to a higher degree than in at least some other districts.

4.2.2 Political Problems in the Deh Rawud Justice Shura

The decisions of tribal and government leaders also had a major effect on the Justice Shura. During the ten months or so of Justice Shura operation, Babozai tribal leaders sitting on the Justice Shura, including its aforementioned Head, almost entirely shifted their time and effort to the district’s DCC. They seem to have done so as part of a process of changing local political structures that led to significantly improved relations between the Babozai tribe and district government.

Traditionally, the Popalzai tribe – under the leadership of former militia leader, and current provincial Chief of Police, Matiullah Khan (See Schmeidl 2010), and with solid connections to the Karzai family, who are themselves Popalzai – has had the closest connections to the Kabul government. From the ejection of the Taliban from Deh Rawud in 2009 until quite recently, the tribe has tended to dominate district politics (TLO 2009, 2010). When TLO was conducting its baseline survey of justice in Deh Rawud (2011), only a few months before the present report, Popalzai dominance appeared firm. By contrast, the Babozai tribe aligned itself with the Taliban until at least 2009 (Mullah Omar having family ties in Deh Rawud (Schmeidl 2010)), meaning that, since the Taliban’s ejection, the Babozais’ relations with the government have been

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56 Interview with TLO Justice Shura Head, July 26, 2011.
strained, and its exclusion from government resources and support frequent. And, finally, the Noorzai tribe is the district’s most numerous, but has not developed strong, consistent connections with either the government or the Taliban, and the tribe’s leadership has been divided since at least the time of the *jihad* (c. 1979-1992) (TLO 2009).

In its previous report on justice in Deh Rawud (2011), TLO documented how tribal history and politics appeared to influence the connections that developed between formal and informal justice institutions. At the time of writing that report, Babozai tribal leaders complained that they had repeatedly tried to reach out to the district and higher levels of government, but the government had not reciprocated and they had not established solid formal-informal connections. Babozai leaders also stated that the Popalzai enjoyed much closer government relations and had more or less monopolized government connections in the district; Babozai elders also related examples of conflicts in which the Deh Rawud government had allegedly favored the Popalzai (TLO 2011). The elders did speculate, however, that the recent establishment of the DCC might bring them closer to the government.

They seem to have been right in their prediction. Between the writing of the aforementioned report and the present one, Deh Rawud’s political situation has started to change, due at least in part to this shura. When interviewed for this report, the same Babozai leaders reported increasingly warm and close government relations. They especially praised the District Governor, and spoke highly of his performance and ability to forge connections to all of the district’s tribes.57

Such developments had a direct impact on the Justice Shura. As its district Liaison Officer and Shura Head, TLO, as above, had recruited a Babozai tribal leader. This same elder subsequently became the Deputy Head of the DCC. He himself reported focusing most of his efforts on that shura after its establishment, and also opined that it could take care of Deh Rawud’s formal-informal justice linkages in the future.58 Other Babozai members of the Justice Shura echoed

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57 Interview with Deh Rawud Justice Shura Member and Babozai Tribal Elder, July 26, 2011.
58 Interview with Head of Deh Rawud Justice Shura, July 26, 2011.
these sentiments exactly: that since the DCC would fulfill the district’s needs, there would be no need for institutions like the Justice Shura in the future.\textsuperscript{59}

As a result, a substantial number of Justice Shura members, including its Head, either ceased work on the Justice Shura after the establishment of the DCC, or decided that the Justice Shura was unnecessary. As above, these elders might very well have continued work on the Justice Shura if it had paid them a salary – and it does seem likely that both economic and political factors played a role in the Justice Shura’s difficulties, with the salary paid being a reason elders preferred the DCC to the Justice Shura.\textsuperscript{60}

In turn, the DCC addresses some, but not necessarily all, of these governance problems. In particular, Noorzai tribal leaders complained of continuing political isolation and said that they did not trust the district governor. They also opined that the DCC was staffed by mostly “unqualified” and sycophantic people.\textsuperscript{61} As the Noorzai are the most populous tribe in Deh Rawud (TLO 209), their distance from the government demonstrates that substantial work still has to be done in crafting formal-informal linkages.

No easy solution exists in addressing such problems. On the one hand, the rivalry between Deh Rawud’s large tribes might suggest letting a variety of government, civil society, and formal-informal institutions develop, to balance among their interests. For example, the Popalzai might enjoy the closest relationship to the police; the Babozai the DCC; and the Noorzai another formal-informal institution like the Justice Shura. On the other hand, the latter model of institution did not work in Deh Rawud, and the district government has reportedly decided to limit the formal-informal institutions in the district to the DCC.\textsuperscript{62} More broadly, limiting the number of such institutions might then induce Deh Rawud’s various tribes to cooperate within institutional frameworks, instead of dividing them in a spoils system. Whatever model is more attractive in the abstract, Deh Rawud will nevertheless be working with a limited number of

\textsuperscript{59} Interview with Deh Rawud Justice Shura Members, July 26, 2011.
\textsuperscript{60} Ibid.
\textsuperscript{61} Interview with Noorzai Tribal Leader, July 31, 2011.
\textsuperscript{62} Interview with Justice Shura Members, July 26, 2011.
formal-informal institutions for the foreseeable future, but which nevertheless stand some chance to improve district governance.
5 Lessons Learned from the Justice Shuras in Chahar Borjak, Deh Rawud, and Grishk

In its previous report on Justice Shura operation in the Eastern part of Afghanistan (2011a), TLO found that the Justice Shuras had been highly successful in their core missions of providing a forum for resolving disputes that local litigants preferred, and helping the local government become more involved in providing dispute resolution services. In particular, TLO found that litigants endorsed the Justice Shuras issuing written decisions with the stamp of the district governor or other local government official, and not taking any money for doing so. Litigants and elders sitting on the Justice Shuras also reported their having some structural advantages: the Justice Shuras incorporated representation from across their respective districts, making decisions more fair and enforceable, and they also sometimes played a role in supervising the work of village-level jirgas and shuras and influenced their practices for the better (Ibid.).

Since the Eastern Justice Shuras operated with a high degree of uniformity, each of those six bodies tended to present somewhat similar lessons for review. As this report has already made clear, Justice Shuras in the South of Afghanistan did not operate with much uniformity, and each, whether successful or unsuccessful, faced very different local conditions and constraints. As a result, the Southern Justice Shuras do not present a unified set of lessons learned, but rather reinforce or qualify those lessons learned from the larger Eastern Justice Shuras project.

More specifically, the Chahar Borjak Justice Shura operated the most like its Eastern counterparts, with parties feeling that it filled a jurisdictional gap, and improved on prior informal justice practices. The Grishk Justice Shura, by contrast, operated under severe security constraints and often in secret. Its operation shows that such constraints do not make shura operation impossible. But, by the same token, they do limit the Shura’s ability to solve a significant number of cases. And, finally, the experience of the Deh Rawud Justice Shura shows how tribal politics and the government’s own efforts to establish formal-informal linkages can endanger program operation.

This chapter, then, will discuss lessons learned across TLO’s nine Justice Shuras. Most of these bodies established a formidable record of success, while a few encountered significant
difficulties. This positive, but mixed, record will hopefully serve as a guide for those seeking to establish other formal-informal dispute resolution bodies as part of Afghanistan’s justice system development.

5.1 The Impact of Tribal Support on Justice Shura Operations

Although the point is perhaps obvious, continuing tribal support is the most necessary condition of Justice Shura operations. TLO has now worked with nine Justice Shuras across Afghanistan, six in the East, and three in the South. Of these, all but the Justice Shura in Deh Rawud achieved and maintained some degree of functionality, whether by solving large numbers of cases, improving tribal links with the government or, in most cases, both. By contrast, the Deh Rawud Justice Shura failed in these tasks – primarily because many of its own members, and its Babozai members in particular, ceased to support it. In turn, these members largely ceased to support the Justice Shura because they saw a better opportunity in that district’s DCC – an understandable decision, but one of course prejudicial to Justice Shura operation.

This sequence of events also contains other lessons for formal-informal bodies. Notably, in districts with multiple formal-informal dispute resolution bodies, there might be a tendency for tribal leaders to choose one body over the others, and concentrate their efforts on that institution. Within TLO’s areas of work, Bati Kot and Mohmand Dara in Nangarhar; Chahar Borjak in Nimruz; Grishk in Helmand; and Deh Rawud in Uruzgan all have multiple informal bodies operating. The governance situation in all these districts is changing rapidly, but all seem to be moving toward some division of labor between local shuras.

Notably, the Justice Shuras in Bati Kot and Mohmand Dara received strong tribal support, while those districts’ DCCs, as of yet, have not (TLO 2011a). By contrast, the DCC in Deh Rawud is receiving strong tribal support, while the Justice Shura did not, as already discussed extensively. In Chahar Borjak, all formal-informal institutions appear to receive an adequate level of support, but there is a clear division of labor between them, with the Justice Shura taking cases from all parties, while that district’s Ethnic Shura hears only inter-tribal disputes. Finally, in
Grishk, the DCC is extraordinarily powerful (2011), and other shuras have developed specialties in family or commercial disputes, with the role of the Justice Shura being highly constrained.

Among these many different circumstances where elders support multiple shuras, a division of labor, and specialization, concomitantly emerges. Thus identifying a jurisdictional “gap” – where parties’ needs are not being met – is highly desirable, even if not as necessary as receiving tribal support.

Finally, lurking in the background is the question of the strength and quality of an area’s tribal governance. TLO has always attempted to develop Justice Shuras, and related projects like CCMs, in areas where tribal governance is thought to remain strong (See Karokhail 2007 on TLO’s general approach). However, significant parts of Afghanistan are not tribal, or tribal governance has become very weak, often with commanders, insurgents, or criminal networks (which is not to suggest that these categories are entirely distinct) filling the gap. In areas like these, the Justice Shura model does not seem very promising, as there is little foundation on which to build. Nevertheless, even in Grishk, where tribal governance is, at the least, troubled (TLO 2011, Ledwidge 2009), the Justice Shura was nevertheless able to issue a small number of decisions in complex cases, and liaise with the government regularly. From one perspective, this experience suggests that, even in troubled areas, institutions like the Justice Shuras can find some success. From another perspective, however, the experience also suggests that this success will be distinctly limited, and Justice Shuras, or the like, will probably not develop into sustainable and important institutions for the long term.

5.2 The Impact of Government Support on Justice Shura Operations

By contrast, TLO’s experience indicates that Justice Shuras can function well with a wide variety of different government relationships, even as actual government opposition rightly forecloses shura operation entirely. In some Paktia districts (TLO 2011a)63, as well as Grishk, the government and Justice Shuras worked together very closely, with the Shuras receiving virtually all their cases from the district governor. In some Nangarhar districts (Ibid.)64 and Chahar

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63 These districts were Ahmad Aba and Sayed Karam.
64 These were Mohmand Dara and Bati Kot, although the latter received significantly more cases from the government than the former.
Borjak, the Shuras received a significant number of their cases from the district governor, and a significant number from private litigants. In yet other Paktia and Nangarhar districts (Ibid.)\(^65\), the Shuras liaised with the government, but received almost no cases from it. And, finally, in Deh Rawud, the government neither sent cases to the Justice Shura nor liaised with it regularly. It is probably impossible to disaggregate the effects of a lack of government support from a lack of tribal support in Deh Rawud, but the apparent decision of the district government to extend full support only to the DCC would probably have made Justice Shura operation impossible in the future, in that the district government has hinted that it would not allow a shura in competition with the DCC.\(^66\)

Thus, government support, as in the case of Grishk, does not guarantee success; while relatively little government involvement, as in the aforementioned Paktia and Nangarhar districts, does not ensure failure. Indeed, the overall experience of the Justice Shuras indicates that a wide variety of government-relations models can work reasonably well, as long as, as above, the shuras continue to receive support from tribal leaders.

5.3 The Impact of Crime and Stability on Justice Shura Operations

Instability would seem to go hand in hand with weakened formal governance and, more importantly for Justice Shura purposes, weakened tribal governance in a district. Nevertheless, TLO has set up Justice Shuras in two districts with a difficult security environment: Bati Kot of Nangarhar, suffering from a large Hizb-e Islami Gulbuddin (HIG) presence (TLO 2011b, 2011c); and Grishk, suffering, as above, from a large Taliban presence (TLO 2011). Despite their common insecurity, the Justice Shuras in these districts operated in very different ways. Their differing experiences suggest, in turn, that it is not the presence of insurgency, per se, that weakens Justice Shura operations but, rather, the attitude that those insurgents take toward tribal governance and formal-informal governance projects.

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\(^65\) These were Jalalabad Nahiya Five of Nangarhar; and Mirzaka of Paktia.

\(^66\) Interview with Deh Rawud Justice Shura Members, July 26, 2011; See also, Interview with Deh Rawud Government Officials, Received September 25, 2011 (stating that the Deh Rawud government does not officially recognize the Justice Shura, and that the Justice Shura should register with the government in the future. The statement is odd – TLO did register the Justice Shura with the district government, and has kept that document on file – but does indicate the Deh Rawud government preferring shuras with closer government connections in the future).
In short, the HIG of Bati Kot, although staging frequent attacks on government and international military targets, never threatened the Justice Shura or its operations. Indeed, TLO’s previous report on dispute resolution in the district found that its pattern of cases and dispute resolution bodies very closely resembled that of the neighboring peaceful district of Mohmand Dara: tribal elders, unmolested by insurgents (although also not reporting insurgent activity to the government), solved most cases, and with neither insurgent leaders nor the government playing a large role in dispute resolution (TLO 2011b). The Bati Kot Justice Shura also operated more or less like other Nangarhar and Paktia Justice Shuras (TLO 2011a); the only obvious concession to security was that international research staff from TLO could not conduct in-person interviews in Bati Kot.

By contrast, the Grishk Taliban oppose both tribal dispute resolution, and the presence of NGOs (TLO 2011). Thus, as already noted, the Grishk Justice Shura had to operate in secret. It could not publicize its existence for fear of the Taliban, could not reveal its NGO connections, and, as the project went on, virtually all travel to and from the district became impossible. In other words, the presence of the Taliban in Grishk profoundly impaired the Justice Shura’s operations, and very much limited the cases it could hear.

As a result, there does not appear to be any linear relationship between insurgent presence and Justice Shura operations. If local insurgents do not oppose tribal dispute resolution, and are willing to tolerate at least some NGO presence, then the evidence indicates institutions like the Justice Shura can succeed. If, however, local insurgents oppose NGOs and district tribal leadership, then institutions like the Justice Shura will find their operations far more difficult. Taken together, then, Justice Shuras might be a viable option for some unstable districts (especially Southeastern or Eastern districts where tribal governance remains relatively strong (Karokhail 2007; Schmeidl & Karokhail 2009; TLO 2011c)). Whatever the case, knowledge of local insurgent groups, and their proclivities, will be necessary before chances of success or failure for institutions like the Justice Shuras can be predicted.
5.4 The Preferences of Litigants and Government Officials

Over the long term, as Afghanistan continues to develop is democratic governance framework, the preferences of local officials, as well as ordinary Afghans in need of dispute resolution services, should probably play a large part in how government institutions develop. Based on its prior experience, TLO, in its previous report on Justice Shura operation (2011a), recommended that the Justice Shuras follow certain practices in issuing their decisions, and develop a mutually beneficial framework for interaction with the state. In particular, TLO tried to ensure that the Justice Shuras write all its decisions, and issue them to four parties: two copies to the litigants; one copy to remain with the Justice Shura; and the final copy to the district government for registration and approval in the form of receiving a government stamp.

By and large the Chahar Borjak and Grishk Justice Shuras followed these practices (the Shuras did not, however, issue written decisions for very minor cases that could be resolved quickly and verbally; or for family cases where the parties preferred not to receive a written decision in order to maintain their privacy\(^\text{67}\)). The Justice Shura in Deh Rawud did not follow these procedures, not issuing many written decisions, and only verbally reporting some case resolutions to the government, as above. Nevertheless, some litigants who interacted with Justice Shura elders did express opinions on proper shura practice.\(^\text{68}\)

In short, TLO found broad-based support, across all districts, for issuing written decisions, but only mixed support for registering such decisions with the state or for the Justice Shura operating in close contact with the state apparatus. Taken together, these points indicate a continuing role for NGO-connected shuras in Western Afghanistan (along with the role for such shuras in Eastern Afghanistan suggested previously (2011a)), while the place for such shuras in Southern Afghanistan remains more difficult to define.

To begin, parties throughout the covered area expressed support for the idea of receiving written copies of shura case resolutions. As above, even illiterate parties said they preferred to receive written decisions, as they would then later be able to prove that their case had been resolved, and should not be reopened.\(^\text{69}\) Parties also more-or-less universally thought it beneficial for the Justice Shura to issue

\(^{67}\) See, e.g., Interview with Chahar Borjak Justice Shura Members, July 19, 2011.

\(^{68}\) Please note that Grishk litigants and officials could not be interviewed for this part of the report. Grishk officials flatly refused interview requests, while the project Liaison Officer in Grishk decided it would be too risky to interview Justice Shura litigants, as doing so might reveal the Justice Shura’s hitherto secret NGO connections.

\(^{69}\) Interview with Chahar Borjak Justice Shura Litigants, July 19, 2011.
decision copies to both dispute parties, as well as keeping a copy of the decision with the Shura. TLO has thus recorded these preferences in all of its Justice Shura projects, in Eastern, Southern, and Western Afghanistan, regardless of how successful those shuras otherwise were. Issuing written decisions in at least three copies thus stands out as a baseline for shura operation in the future.

Beyond this baseline, though, litigants’ preferences start to diverge, particularly with regard to registering Shura decisions with the government, the connection of the government to the Shura, and the institutional structure of the Shura itself. Underlying these divergences is, of course, the question of how shuras should relate to the government, a discussion taken up in this report’s final chapter.

Nearly across the board, litigants in Chahar Borjak favored less of a connection to the state than did litigants in Deh Rawud. In terms of registering case outcomes, Deh Rawud litigants almost all favored the practice, while Chahar Borjak litigants remained divided on its merits. Of the ten or so Deh Rawud litigants interviewed, all but one favored registering case outcomes with the government, and even that one himself pointed out that he had a very small case, and registration was thus probably not worth the hassle. Indeed, one interviewee went so far as to say that the Shura should register its decisions with the government because the government can then supervise decisions, and make sure that Shura members are doing their job correctly.

By contrast, only a minority of Chahar Borjak interviewees favored registration of decisions at all. Some litigants were in favor of the practice, reasoning that keeping the government informed would save them trouble later. For example, in a case involving what may be government land, the litigants said they preferred to apprise the government of all parts of the dispute resolution process, so that the government would have fewer reasons to take the land from them later. In other words, the litigants seem to have wanted to prove to the state that they were doing the right thing, and were respectful of the state’s land claims, even if the state could not defend them at present.

Most Nimruz litigants, however, stated that they did not want the Shura to register its decisions with the government, either because state presence is minimal, and so registration is an unnecessary complication; or because they approached the Shura specifically to avoid government dispute

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70 Interviews with Chahar Borjak Justice Shura Litigants, Received October 5, 2011; Interviews with Deh Rawud Justice Shura Litigants, Received September 25, 2011.
71 Interviews with Deh Rawud Justice Shura Litigants, Received September 25, 2011.
72 Interview with Chahar Borjak Justice Shura Litigants, July 19, 2011.
resolution. This latter point was made repeatedly in relation to family cases – that government dispute resolution was normatively undesirable, not just inconvenient.

This attitude carried over in responses about the relationship between shuras and the state in general. The significant majority of Chahar Borjak respondents stated that the government cannot or should not regulate who sits on dispute resolution shuras, or the cases that those shuras hear. Rather, to the extent respondents favored a relationship between the government and shura, they tended to do so because the Shura would help the government improve its performance, and establish better relations with the people.

Deh Rawud litigants sometimes showed almost the opposite conception. They universally stated that the government could and should regulate shura activities, including defining shuras’ jurisdiction and selecting elders who could serve on shuras. Moreover, as above, a few even saw the state as an avenue to improve shuras’ practices, by providing elders with guidance and funding. These Deh Rawud respondents thus seem to view the state as the senior partner in the government-shura relationship, while Chahar Borjak respondents hold a more or less contrary view.

Going forward, such views have some fairly obvious implications for how institutions like the Justice Shuras should be developed. On the one hand, both Chahar Borjak and Deh Rawud respondents said that the Justice Shuras should receive material support in the form of buildings and transportation. On the other hand, Deh Rawud respondents also wanted to see the Justice Shura establish closer relations to the government, as well as for shura members to receive a regular salary. This latter group of litigants, then, clearly wanted a higher degree of institutionalization and state integration, if the Justice Shura project were to continue, while Nimruz litigants also favored some additional support to the Justice Shura, but remained quite wary of state involvement. In turn, these preferences, especially to the extent they reflect broad-based local preferences and expectations, have direct implications for the development of dispute resolution systems throughout Afghanistan.

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73 Interviews with Chahar Borjak Justice Shura Litigants, Received October 5, 2011.
74 Interviews with Chahar Borjak Justice Shura Litigants, Received October 5, 2011; Interviews with Chahar Borjak Justice Shura Litigants, July 19, 2011.
75 Interviews with Chahar Borjak Justice Shura Litigants, Received October 5, 2011.
76 Interviews with Chahar Borjak Justice Shura Litigants, July 19, 2011.
77 Interviews with Deh Rawud Justice Shura Litigants, Received September 25, 2011.
78 Ibid.
79 Interviews with Chahar Borjak Justice Shura Litigants, Received October 5, 2011; Interviews with Deh Rawud Justice Shura Litigants, Received September 25, 2011.
80 Interview with Deh Rawud Justice Shura Litigants, Received September 25, 2011.
6 Conclusion: Models of Formal and Informal Justice

At the district level, distinguishing between state and non-state actors in Afghanistan can be surprisingly difficult. In particular, this report and its predecessor (TLO 2011a) have analyzed four districts that, in addition to Justice Shuras, also host District Community Councils, which are part of the Afghan Social Outreach Program administered via the Independent Directorate of Local Governance (IDLG): Mohmand Dara and Bati Kot in Nangarhar; Deh Rawud in Uruzgan; and Grishk in Helmand. In their conception, the DCCs, funded either by USAID or DFID (the latter in Helmand only), coordinate activities between the people and the government. USAID often tends to treat the DCCs as a government institution, the institutional forerunner for the District Councils called for in the Afghan Constitution\textsuperscript{81} (USAID 2011), while occasionally also emphasizing their formally non-governmental nature.

Whatever their precise nature, TLO has witnessed the universal assumption at the district level that DCCs are government bodies, part of the state apparatus (TLO 2011, 2011a). And, certainly, the DCCs represent a more thorough state-shura integration than the Justice Shura model. In particular, the District or Provincial Governor at least nominally leads the DCC (USAID 2011)\textsuperscript{82} (even if, as in Grishk, this requirement is not always followed in practice), while the Justice Shuras were instructed only to maintain regular government contact, and register their decisions with a government body (in practice, usually the District Governor or Chief of Police). Comparing the performance of these bodies thus provides one starting point for examining the optimal level of government versus NGO involvement in setting up dispute resolution bodies. In particular, the available evidence indicates that the Justice Shura model works better in areas of Eastern and Western Afghanistan known for maintaining strong tribal governance, while the DCC model appears to work better in Southern Afghanistan, where neither of TLO’s Justice Shura projects were truly successful. These observations appear to hold true for both secure and insecure districts, and those with low and high degrees of urbanization.

Specifically, in Eastern and Western Afghanistan, Justice Shuras worked alongside DCCs in Bati Kot and Mohmand Dara districts of Nangarhar. In these districts, the Justice Shuras reported solving between fifty and sixty major cases in a year, about half of which were referrals from the government. There was

\textsuperscript{81} At Art. 140.

\textsuperscript{82} The precise role of the District Governor on DCCs is in practice variable. The Woluswal in Mohmand Dara and Bati Kot appear to have taken a hands-off approach; the Woluswal in Deh Rawud has been, to this point, very active; and the Woluswal and DCC in Grishk are reportedly competitors for power.
also overlap between Justice Shura and DCC membership. Most prominently, the Head of the Bati Kot DCC was also a Justice Shura member. Despite the DCC members receiving a regular stipend and other support, TLO’s research strongly indicated a local preference for the Justice Shuras. The Head of the Bati Kot DCC went so far as to state that, although he appreciated receiving a stipend, people in that district did not really trust the DCC, and did not want to refer their cases to a body with that level of government connections. Similarly, the Mohmand Dara DCC appears to take very few cases, and be even less a part of district governance than its Bati Kot counterpart (TLO 2011a). Thus in neither Mohmand Dara nor Bati Kot did TLO find the DCCs to be highly active or influential, while the Justice Shuras operated successfully, as they worked with the districts’ most well-established tribal elders, coordinated elders’ actions, and fostered some improvements in dispute resolution practice (Ibid.).

The situation in Southern Afghanistan seems somewhat reversed. As above, in those districts the Justice Shuras did not solve a significant number of cases, and the Deh Rawud body did not even meet regularly. By contrast, the DCC in Grishk is that district’s most active dispute resolution body and, whatever its precise details of operation, is plainly quite powerful and influential. Within the past year, it heard more than fifteen times as many cases as the court, and ninety times as many cases as the Justice Shura (TLO 2011).\(^83\) Similarly, although the Deh Rawud DCC has not yet achieved this level of power and influence, it has received the full-throated backing of both influential Babozai tribal leaders, as well as the district government, and thus stands a good chance of continuing its development into a powerful local institution and, within its relatively short life to this point, has already functioned better than the Deh Rawud Justice Shura, hearing more cases and meeting more regularly. Moreover, as in Bati Kot, there was an overlap in membership between the DCC and Justice Shura in Deh Rawud. Yet, in Deh Rawud, the elders in question made the opposite choice from the elders in Bati Kot, deciding to support the DCC exclusively to the detriment of the Justice Shura.

In turn, it should be noted that the relative strength of these bodies appears to accord with the preference of local litigants. In many ways, this observation is unsurprising: it would probably be impossible, as well as undesirable, to force litigants to use one forum or the other – meaning, for present purposes, that litigants’ choice of forum itself reveals their preference in dispute resolution institutions. Following from this observation, litigants in Bati Kot and Mohmand Dara preferred the

\(^83\) More specifically, the Grishk DCC reported solving 909 cases in the past year; the court reported around 60; and the Justice Shura around ten.
Justice Shuras to the DCC by a wide margin; while litigants in Grishk, and probably Deh Rawud, preferred the DCCs by an equally wide margin, if not an even greater one.

The directly expressed sentiments of litigants interviewed for this and previous reports reinforce this point. Throughout Eastern and Western Afghanistan, respondents were at best wary of government involvement with shuras, and many saw government involvement as being more trouble than it was worth. By contrast, respondents in Deh Rawud clearly felt otherwise, and would have preferred the Justice Shura to be more closely aligned with the state – which is to say, more like the DCC.

In turn, the variable success of these institutions suggests different paths forward for donors, the Afghan state, and other stakeholders over the short and long term. In particular:

- The potential for non-state dispute resolution institutions in areas of Afghanistan with strong tribal governance, be they Baluch or, especially, Pashtun, now appears well established. These institutions have the likely benefit of also according with the preferences of many local litigants. Importantly, although institutions on the Justice Shura model are not as close to the Afghan state as are DCCs, they should not be seen as a competitor to state institutions for several reasons. Most importantly, the Justice Shuras, in all covered districts (except perhaps Deh Rawud), actually increased state involvement in the justice sector, by ensuring that traditional dispute resolution providers liaised with the state on a regular basis. Moreover, although the Justice Shuras played a coordinating function among district elders, the institutions themselves possessed no appreciable resources, beyond their local legitimacy, or higher-level connections. Both TLO baseline studies and reports on Justice Shura operation have tried to give an idea of the sort of areas in which bodies along these lines will work, and bring broad-based benefits to the Afghan people. The international community should thus continue to engage with traditional dispute resolution providers, and – after careful research and with an awareness that not all interventions will succeed – fund institutions along the lines of the Justice Shuras.

- Likewise, the Afghan state should continue to engage with traditional justice providers. In some districts, informal (or semi-formal) dispute resolution bodies might benefit from a greater state connection. In parts of the country, particularly the South, semi-formal dispute resolution bodies with a more robust state connection (the DCCs) outperformed those that relied more on tribal leadership (the Justice Shuras). This result suggests that, in some parts of the country, the Afghan state can more aggressively expand its role in dispute resolution services while also abiding by the preferences of litigants and other stakeholders. Doing so, however, will require
the Afghan government’s own continued engagement with tribal and other traditional governance structures so that this engagement will occur with genuinely legitimate local leaders, and not end up empowering those who are themselves threatening good governance.

That being said, the relationship between the Afghan government and the country’s traditional justice providers has frequently been distant and strained. In late 2010 the government proposed a Draft Law on Dispute Resolution Shuras and Jirgas. This law is now defunct, and, in TLO’s estimation, its approach probably would have proven unworkable. Just as disturbingly, however, tribal elders – almost certainly Afghanistan’s majority justice providers – do not seem to have been consulted at any stage of the Draft Law’s development. Even beyond TLO’s opinion on the merits of this proposed law, the failure to engage with tribal leadership represents, at the very least, a failure of dialog ill befitting Afghanistan’s emerging democracy.

Of course, the final form Afghanistan’s justice system should take is beyond the scope of this paper – yet it is hopefully clear that a variety of institutions have the potential to succeed, increasing state involvement in the justice sector, and improving the services that average Afghans receive. Whatever course Afghanistan ultimately charts, local, informal dispute resolution providers and the Afghan state should work as partners, not competitors, both strengthening one another and addressing one another’s shortcomings. Working in this way, litigants, elders, and the state will stand the greatest chance of achieving truly broad-based, durable, and sustainable solutions.
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