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The Liaison Office

TLO-Policy Brief / 2
December 2013

Where Do We Go from Here?

Towards Improved Structures for Dispute Resolution in Afghanistan

Summary

TLO's practical experience has shown that engaging traditional dispute resolution providers does not systematically undermine women's rights. Blanket denials as to the willingness of "traditional" leaders to uphold women's rights are overbroad; at the same time, TLO experience has shown great diversity in tribal leaders to engage with women's rights. The most important entry point in this regard is Sharia law.

Engaging traditional dispute resolution providers does not undermine Afghan government authorities and empower local elites, NGOs and international donors. Linking the state to these traditional dispute resolution processes in various capacities serves to increase, rather than diminish, state involvement in the justice sector broadly defined. In particular, provincial and district authorities usually cooperate productively in developing links to non-state capacities, and seem to see significant practical improvement to the government's reach and effectiveness.

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The Liaison Office is grateful to funding provided by the Heinrich Böll Foundation for this policy paper.

1 Introduction

Despite more than a decade of concerted effort, Afghanistan's state dispute resolution capacities remain a work in progress. At the same time, non-state capacities – particularly those offered by tribal and religious leaders in certain parts of the country – have retained a significant degree of integrity and legitimacy.

Between 2009 and 2011 the Afghan government and international community undertook dedicated steps to develop mechanisms by which state and non-state dispute resolution providers could interact within a recognized policy and legal framework. These efforts bore some fruit, including a Draft Policy on Dispute Resolution Shuras and Jirgas that received significant buy-in, and a Draft Law on Dispute Resolution Shuras and Jirgas that proved highly controversial. Ultimately, however, the Afghan government adopted neither document, reportedly due to opposition within the Ministry of Women's Affairs, Supreme Court and other institutions.

Since that time, significant non-governmental work on state and non-state dispute resolution collaboration has continued – not only by The Liaison Office (TLO), but also by the Peace Training and Research Organization (PTRO), the Welfare Association for the Development of Afghanistan (WADAN) and others – while official efforts appear to have stalled. Based upon the experiences of TLO – active in working with both state and non-state dispute resolution structures since 2007 – this policy brief has two goals: 1) to offer practical lessons from TLO's programming on the most contentious aspects of state-non state dispute resolution collaboration; and 2) to develop a practical way forward for all stakeholders seeking to improve Afghanistan's systems of dispute resolution – local communities, non-governmental organizations, the Afghan government, and the international community.

This policy brief will focus most intently on TLO's experiences in the Loya Paktia region (Paktia, Khost, Paktika, and parts of Ghazni and Logar), while also drawing on lessons learned in other parts of the country. Although we do not in this policy brief aspire to lay out a comprehensive framework for the interaction of state and non-state dispute resolution providers, we do hope that the experiences of TLO will provide insight on issues surrounding this interaction, and provide a rationale for re-starting national dialogue on dispute resolution issues.

To this end, after describing Afghanistan's dispute resolution systems as they are present in the Southeast (Section 2), the paper will go on to discuss particular lessons TLO has learned on dispute resolution stakeholder engagement: more specifically on effectively engaging non-state dispute resolution providers themselves, on working with women, and on promoting women's rights, during engagement; and increasing collaboration with the Afghan state. After reviewing these lessons learned, the final section of this policy brief will attempt to outline a path forward on dispute resolution issues.

2 Setting a Baseline

TLO's dispute resolution programming has focused on Loya Paktia for a variety of interrelated reasons. On a practical level, it was tribal leaders in Khost who first approached TLO with a request to help them facilitate a dispute resolution commission bridging state and non-state stakeholders (termed a Commission on Conflict Mediation or CCM).[1] On a theoretical level, beginning such work in Afghanistan's Southeast also made sense. Observers have frequently noted the strength of the region's tribes[2] and, especially in light of Afghanistan's decades of upheaval, a notable degree of continuity in their leadership structures and decision-making processes (if not in the rules of decision they follow, or, certainly, in their actual leaders), in large part because Afghanistan's Communist government in the Southeast did not "bring the fight" to rural areas or purge local elites to the same extent it did in other areas, such as the South.[3] As a result, Southeastern tribes

have been able to maintain a high degree of autonomy from the state.

Even as the terms of tribe-state interaction, have certainly continued to evolve, this same general pattern seems to persist in the provision of dispute resolution services in the Southeast. Here, tribal leaders have maintained primacy with, as further discussed below, Afghan state and insurgency systems in subsidiary roles. At the same time, practical tribe-state cooperation is occurring, if not quite frequently, then at least on a regular basis.The insurgency in the Southeast has vacillated between tolerating a degree of autonomy in tribal dispute resolution, and competing, sometimes violently but so far with limited success, in the provision of dispute resolution services.

2.1 The Place of the Tribes in Dispute Resolution

As underlined by a now-substantial body of research, tribal leaders resolve the majority of disputes in the Southeast, both in rural and urban areas.[4] The most common sort of dispute seems to be over land, usually less than one jerib (0.2ha).[5] This aligns with the historical pattern of land ownership in the region, characterized by a large number of small, independent landowners. Tribal leaders within the dispute parties' village appear to be able to resolve such disputes fairly quickly (within a few weeks or months) and without the parties resorting to violence.[6]

By contrast, major disputes in the Southeast – defined as those having repeatedly resisted resolution, taking place over a large geographical area or important economic resources, and/or characterized by violence – usually take place not over agricultural land but, most commonly, over the region's valuable but dwindling forest resources. Within Khost province along, TLO has documented several dozen such disputes taking place currently, but with some dating back more than 100 years. Here, as with smaller disputes, tribal leaders take the lead in resolution efforts, even in some disputes with levels of violence approaching armed conflict.[7]

2.2 Government Involvement

By contrast, TLO has not observed any systemic pattern of government involvement in dispute resolution in the Southeast, although occasional, important intervention does occur, particularly by the executive branch.

2.2.1 The Executive

The executive appears to be the most active of all Southeastern government organs in dispute resolution. Within the aforementioned survey of major conflicts in Khost, TLO found executive branch involvement in the resolution or attempted resolution of 21 out of 40 cases.

Notably, though, the executive appears only rarely (if ever – TLO found no actual examples) to act as a dispute resolution provider as such. Rather, district governors, provincial governors, and to a lesser extent chiefs of police, are organizing, sitting on and, occasionally,

observing the enforcement of jirgas comprised primarily of tribal, and with a smaller complement, religious leaders.[8] Jirgas with executive branch involvement comprise only a small part of the total. More minor disputes, certainly the large majority of disputes overall, TLO could find no comparable examples of government involvement.[9] Nevertheless, this type of government involvement – led by the executive, filtered to an extent through tribal leadership – appears to be the most common in the region.

2.2.2 Courts

Court involvement appears less common, for reasons of both history and practicality.

Historically, the high degree of autonomy of the Southeastern tribes has enabled them to resist government attempts at expansion of services, or registration of persons or property holdings, even when those efforts have been well funded – which has not always been the case. This has included resistance to government mass attempts to survey land and distribute land title, which have occurred periodically, especially since the 1960s (and in large part with USAID funding).[10]

As such, at most five percent of landholders in the region appear to possess government documents for the land they are using. This paucity of formal title, on the one hand, creates a reluctance to go to the court[11], as land without formal title in most cases reverts to government ownership.[12] On the other hand, judges and other government officials in the Southeast do not seem to view themselves as well capacitated to evaluate land claims resting on witness testimony, community memory, or informal title documents.

As a result, court intervention is scarce: most dispute parties are reluctant to approach the court, and the courts seem reluctant to address many claims, even when they appear.[13]

2.3 Insurgency

Despite the region's purported insecurity, Taliban[14] dispute resolution also appears limited in its scope. While the Taliban do attempt to apply sharia law in the Southeast, they are also forced to compromise and let the traditional or customary justice system resolve numerous issues using Pashtunwali. In these instances, Taliban involvement appears broadly similar to the involvement of the government executive branch, with the Taliban playing a role in liaising with, and supervising, the decision making of tribal and local religious leaders.

Disputes between two tribes, subtribes, villages or manteqa[15] seem to be a particularly tricky issue. Taliban case verdicts which seem to be partial or observe only one conflict party's rights may not only be challenged by the other conflict party but lead to their opposition to the Taliban in general. In such cases, where the relations of force do not allow the Taliban to impose a verdict, they prefer to refer the case to local mediators or tribal elders to solve it for tactical reasons.

Similarly, more sensitive conflicts (between families or involving women) are often

referred to tribal elders or local mullahs because they know the context of the conflict better than Taliban judges.

This is not to say that the Taliban simply let tribal processes play out autonomously. A Paktia resident said that "when [the] Taliban judge or Taliban commanders refer conflicts or local problems to local *mullahs* or *spingiri* [white beards], they follow up on the case to make sure the verdict is impartial and to ensure that both parties accept the decision when the mullah or *spingiri* make decisions. Taliban also stamp the *spingiri's* decision so that both parties know that Taliban agree and fully support the decision."[16]

This process stands in contrast to more fully articulated Taliban dispute resolution systems elsewhere. In other areas where the Taliban are relatively established, such as parts of Logar[17] and Kunar, residents generally know where the Taliban courts are located. For example in Khurwar and Charkh districts of Logar, people know that they should write *Ariza* (petition) first to the District Governor, who refers it to the District commission and then the District Judge who will decide whether he or local mullahs or tribal elders will solve the conflict. "If there is conflict, people write their complain or suit against the opposite person, then go and present their letters to Taliban district governor, then governor refers the letter to commission and then commission refers it to the judges."[18]

3 Lessons from TLO's Programming and Research

The above represents TLO's understanding, supported by substantial research, of the dispute resolution conditions that prevail in Afghanistan's Southeast. This research, complemented by our implementing experience, has led to TLO incorporating a number of premises into our dispute resolution programming: 1) In areas where research indicates a relatively high degree of tribal cohesion, such as the Southeast, tribal leadership retains a reasonable degree of legitimacy, or at least is seen as a more equitable and desirable provider of dispute resolution services than the available alternatives; 2) This leadership is inevitably somewhat fragmented (e.g. between tribes with a historical rivalry), but effective programming requires engaging a broad spectrum of tribal (or other ethnic) groups; 3) Although tribal forms of dispute resolution do not, as a habit, deeply engage the state, the system is not itself anti-state; and 4) although tribal dispute resolution bodies do not as a rule observe the rights of women, the system itself is not necessarily anti-woman.

The first two premises appear relatively uncontroversial, although they do contain important implications for working in areas where the population is not tribal, or where tribal structures have degraded. By contrast, premises three and four are highly controversial and have formed the core of resistance to working with tribal dispute resolution providers. After

discussing our experiences working in tribally strong versus tribally weak or non-tribal areas, we will lay out the lessons we have learned from working with women, and promoting women's rights, within our dispute resolution programming, and how we have been able to carry out such programming in a way that appears to strengthen, rather than weaken, government involvement in dispute resolution. If TLO's observations of dispute resolution in the Southeast are accurate, then both engaging tribal leadership, and doing so in a way that goes toward answering objections to Afghanistan's non-state dispute resolution systems, will be necessary if collaboration between state and non-state systems is to occur.

3.1 *Engaging Tribal Strength*

For the most part, the recommendations in this policy paper derive from TLO's work in an area of notorious tribal cohesion. However, that condition does not obtain for Afghanistan as a whole. Some populations, such as Tajiks, are non-tribal, and have traditionally adopted various other forms of social organization.[19] In other areas, tribal structures appear weak, with tribal leaders not able to counter the power of local commanders or insurgents, and frequently unable to enforce their decisions.[20] Within areas of tribal strength, TLO's dispute resolution programming has achieved considerable success. By contrast, within areas of tribal weakness, such programs have encountered great difficulty, and seen their effectiveness sharply limited.

On the one hand, CCMs which TLO has facilitated in Khost, Paktia, and Logar have compiled an impressive record of dispute resolution. In each province, TLO began with its own surveying to identify tribal/ethnic groups (including minority groups such as Kuchis), and the leaders of such groups. This surveying led to lists of potential CCM members in each province (the lists of potential members varied considerably in length, as the Khost CCM has been operating since 2007, the Paktia CCM off-and-on since 2008, while the Logar CCM was a new initiative). TLO then further refined these lists through additional research, internal consultation (e.g. with TLO employees highly knowledgeable of the area but not working on the project as such), and consultation with both NGOs working in the area, and each province's government (line departments, Provincial Council, Provincial Governor, etc.). TLO's criteria for selecting final CCM membership were that each member should be a credible provider of dispute resolution services; acceptable to all project stakeholders, and particularly the provincial government; and that CCM composition would need to include all major ethnic and tribal groups, including minority representatives.

Between September of 2012 and October of 2013, these CCMs resolved 67 conflicts. Most of these were land and resource conflicts between tribes and sub-tribes, both in areas of government control, and outside government control. They have also included a smaller number of instances where the CCMs have arranged a

ceasefire in particularly violent conflicts, though without resolving the underlying conflict as such; and a number of family cases, particularly involving women's rights of inheritance and divorce, as will be explained in the next section.

Ascertaining the success of dispute resolution activities is neither short-term nor simple. But, within these very important limits, TLO regards these CCMs as robust and successful bodies, and very much hopes to work with them on future endeavours.

Of course, not all TLO projects have met with the same success. TLO's experience with CCMs in Deh Rawud district of Uruzgan and Grishk district of Helmand is particularly instructive here.

Deh Rawud district is divided among the Popalzai, Babozai, and Noorzai tribes (putting aside for the moment smaller groups). The CCM in that district, however, did not meet regularly, and ultimately TLO could not attribute any particular improvement in district dispute resolution to its activities. Upon examination, TLO found that, amongst other issues, shura leadership had not taken substantial steps to engage with Noorzai leaders – perhaps the district's largest tribe[21], but one at the time somewhat marginalized from both government and insurgent sources of influence. Although it does not fully account for the shura's non-performance, TLO's failure to ensure involvement of all district tribes arguably cut the shura off from the support of groups that might have been more disposed than others to lend it valuable support.[22]

Within Grishk, unlike Deh Rawud, TLO encountered an area where tribal leaders had lost considerable ground as insurgency and pro-government forces competed for territory and influence. Because of insurgent threats, the shura could only meet infrequently, and in secret. In turn, when the shura did address cases, parties with insurgent connections seemed to find it fairly easy to brush off CCM decisions. That the shura was able to occasionally meet, and did at times negotiate successfully for its decisions to be implemented, speaks to the dedication of its members. However, like the Deh Rawud CCM, TLO could not in truth identify any particular improvement in Grishk's overall dispute resolution due to the CCM's activities.

TLO does not attribute this lack of success to insecurity per se: Logar is hardly more secure than Helmand, but the former CCM is extremely active throughout the province. However, within Logar, tribal structures have shown themselves to have maintained sufficient autonomy for collective decision-making, and decision implementation, to take place. In the case of Grishk, however, tribal centres of power were simply unable to function effectively in the face of massive outside pressure. Taken together, these data indicate that CCM-type bodies may operate in both secure and insecure areas – so long as tribal structures in those areas have maintained a degree of coherence and autonomy.

Similarly, when working with the provincial CCMs in Khost, Paktia, and Logar, TLO took great pains to emphasize the neutrality and inclusiveness of CCM set-up. In the case of Paktia, this meant, as a focal point for the CCM, not working with tribal leadership at all, but with a prominent local religious leader seen as neutral between Paktia's major tribes. This credibility-via-neutrality has in turn built the capacity of the Paktia, Khost, and Logar CCMs to operate in all areas and among all tribal groups. For example, in 2012-2013, the Khost CCM resolved several disputes in highly insecure districts such as Mandozai and Spera, and even Naka district of Paktika province; while the Paktia CCM was able to address cases in areas including Wazi Zadran district of Paktia province, and Tere Zayi district of Khost province. This ability to operate province-wide, and even across provincial boundaries, points both to parties throughout the region seeing the CCMs as a desirable dispute resolution option, and to the CCMs themselves being well embedded in, and supported by, expansive tribal networks. Where these tribal networks have degraded, or where TLO has not fully engaged them, CCMs have functioned far less well.

3.2 *Working with Women*

Even in those areas where tribal structures remain functional, a significant number of women's and human rights organizations have, with reason, resisted working with non-state dispute resolution providers, seeing them as arbitrary, inconsistent, and violative of individual, and particularly women's, rights.[23] TLO acknowledges the validity of some of these criticisms. For example, TLO has found with great consistency that Afghanistan's non-state forms of dispute resolution deny virtually all property rights to women, notably in contradiction to sharia law.

However, TLO's research and experience have also shown that many people, including women, derive a great benefit from these same systems via the disputes they resolve and the subsequent stability they foster. What is more, TLO has also found that patient effort can at least partially address human rights, and particularly women's rights, concerns about non-state dispute resolution systems.

A key entry point for addressing women's and human rights in Afghanistan's non-state dispute resolution systems is in Islamic Sharia. Although non-state dispute resolution providers remain by and large sceptical of human rights and women's rights as concepts[24], they are willing to listen – on even highly controversial issues – to intermediaries whom they respect, and particularly intermediaries who have religious credibility. Along the same lines, TLO's experience, and that of others, strongly indicates that non-state dispute resolution providers hold acting according to the dictates of Islam as important, and would prefer to do so whenever possible.[25]

Within the past year, the CCMs in Khost and Logar, for example, have proven instrumental in improving the situation of

at least a small number of women. Here, TLO had provided the CCM members with Sharia-based training in family law topics. In one subsequent case, the Logar CCM learned of a woman whose husband had abandoned her, moving to England while leaving her in Afghanistan and refusing to grant her a divorce. In this case the CCM, applying family law principles derived from Sharia, decided that the woman should be given the divorce which she requested. They also negotiated the agreement of the husband's family to the divorce. In turn, in another recent case the CCM upheld the inheritance rights of a woman and her son against claims by the woman's brothers.

Similarly, the Khost CCM has periodically cooperated with the provincial Women's Affairs Department (WAD). Here, the Department meets regularly with CCM leadership, and has referred at least one case to the CCM. This case also saw the CCM upholding a woman's right to divorce, and the CCM, before finalizing its decision, submitted it to the WAD for approval, which was granted.

TLO does not wish to overstate these gains, which have proceeded unevenly and tended to be greatest in those bodies with higher levels of education ex ante (such as the aforementioned Logar CCM, as well as a group of elders with whom TLO was working in Jalalabad city). They also directly benefit a fairly small number of women, and do not deeply engage issues of women's unequal treatment in other aspects of life. However, they also indicate that blanket denials as to the willingness of "traditional" leaders to uphold women's rights are at the least overbroad. When all the evidence is taken into account, improving women's rights within non-state dispute resolution bodies does appear possible.

TLO's work with men's and women's non-state leaders reinforces this point – while also pointing to the importance of local context. While developing dispute resolution guidelines in Nangarhar, TLO collaborated with around 30 tribal and religious leaders, and around 15 women's leaders (the precise numbers varied meeting to meeting). Collaboration did not begin robustly, with each group preferring to engage the other via the intermediary of TLO. Nevertheless, by the end of the project, dialogue between them became frequent, and, when TLO polled the group, about 90% of both men and women stated that they would now be comfortable sitting on joint male-female working groups – whereas, at the beginning of the project, both men and women had rejected this idea out of hand.

It is within this context that TLO is now evaluating the set-up of women's CCMs in Khost, Paktia, and Logar. The idea for these CCMs did not come from TLO (although substantial local variation exists, TLO research tends to show women's councils as not being particularly sustainable or effective; hence, until recently, TLO has not pursued them). Rather, the idea began with the Logar CCM and then, after discussions where representatives of the three CCMs were meeting together, to have been adopted by the Khost and Paktia CCMs as well.

The logic of male tribal and religious leaders endorsing the creation of women's dispute resolution councils is also notable. While the CCMs are resolving women's cases, the men composing the significant majority on each CCM, are not well situated to address these disputes (e.g. they are not able to interview parties to the case who are women). As currently constituted, no good options exist for increasing the number of women leaders sitting on the CCMs. Thus, because CCM leadership wants to see women's disputes addressed, but cannot do so themselves, they feel women's CCMs are a good option, to which the local population, and even local insurgents, would not necessarily be opposed.[26] Whether women's CCMs ever become a reality or not, this course of events tends to show local "traditional" leaders as being at least somewhat solicitous of women's wellbeing, and even not opposed to women assuming a more public leadership role, at least under certain conditions.

Finally, it must be said, these "certain conditions" matter a great deal. In particular the prescriptions offered by the Southeastern CCMs contrast with TLO's experience in Nangarhar. In the latter case men and women leaders were far more open than their counterparts in Paktia, Khost, and Logar to undertaking joint work – but Nangarhar women's leaders in particular opposed the creation of a women's CCM, or increased women's involvement in dispute resolution more broadly, which, in their judgment, local insurgents would take as an extreme provocation, and which would thus endanger the women undertaking this activity.

3.3 *Working with Government*

As with women's rights concerns, major stakeholders have questioned whether working with traditional dispute resolution (TDR) providers might actually undermine efforts to better establish Afghanistan's courts and other government institutions. For example, in a recent paper Torunn Wimpelmann has argued that the rise of what she terms the "informal justice assemblage" empowered international donors, local elites, and NGOs (she mentions TLO explicitly), at the expense of Afghan government authorities accountable to their constituents.[27]

Even putting aside that the *formal* "justice assemblage" in Afghanistan has been far more well-assembled and well-funded than its informal counterpart[28] [29], such an analysis seems to discount the benefits of engaging rural stakeholders – primary "informal justice" providers often not deeply involved in Kabul-driven statebuilding processes – as well as the potential of such programming to link the government to non-state justice processes. Because these processes are resolving most cases and controversies in Afghanistan and because the state role in them, ex ante, is minimal, linking the state to these processes, in practical terms, serves to increase, rather than diminish, state involvement in the justice sector broadly defined.

TLO's practical experience bears this out: within our programming, provincial and district authorities usually cooperate productively in developing links to non-state capacities, and seem to see significant practical improvement to the government's reach and effectiveness. At the same time, cooperation at the Kabul level has been far more sporadic: this is the level at which the lack of agreed law and policy truly undermines state and non-state collaboration.

Outside of Kabul, and particularly outside of provincial centres, as above, government authorities do not appear to have a high level of involvement in dispute resolution.[30] TLO's projects have themselves always attempted to involve government authorities as stakeholders in three ways: for the referral of disputes which have come to the government, but which the government does not feel well capacitated to address, such as disputes taking place outside of administrative centres; for the registration of dispute outcomes; and, in more recent projects, for the review of CCM decisions regarding their basic consistency with Afghan statutory and Sharia law. Thus, in practical terms, CCM activities provide for an *increase* in government involvement in dispute resolution.

Especially as projects progress, government authorities in general seem to come to agree with this assessment. In a recent letter to TLO, the provincial Huquq Department[31] of Khost wrote: "the establishment of the CCM was a good step which is considered to be closely cooperating with judicial and governance administrations/organs . . . The Huquq office of Khost province appreciates the activities of the CCM and hopes for further achievements in the future."

Similarly, TLO has recently begun working with ARAZI on pilot projects to link that entity's department in Khost with prominent TDR providers for the joint resolution of conflicts over land titled to the state. Although the project is far too new for TLO to properly evaluate its effectiveness, we feel it does represent a particularly concrete example of how tribal leadership – with reach throughout Khost province – may complement a government organ – with technical capacity, but without extensive reach.

With that said, cooperation at the Kabul level has proceeded more slowly, though much depends upon the government entity involved. On the one hand, the lack of a viable Draft Policy or Draft Law on engaging non-state dispute resolution providers appears to have limited abilities to engage with the Ministry of Justice. At the same time, the Ministry of Tribal Affairs has expressed increasing interest in working with TDR providers for dispute resolution, and recently hosted a conference in Kabul to explore these issues.

4 Recommendations and Next Steps

Contrary to what is sometimes suggested[32], debates over formal and informal justice sector policy in

Afghanistan have not ceased with the collapse of the Draft Law and the Draft Policy. At the least, the problems that have led to an interest in Afghanistan's non-state dispute resolution capacities have not been resolved. The question still remains of what strategy to pursue, if any, to link Afghanistan's primary providers of dispute resolution to the larger, continuing statebuilding process. Without discounting the importance of governmental processes, or seeking to prescribe what shape any final settlement to these questions ought to take, not seeking to work with non-state dispute resolution providers in the short- and medium-term can seem wilfully perverse – an attempt to construct a dispute resolution system while leaving out most dispute resolution providers.

What is more, TLO's experience has tended to show that the most common objections to working with non-state dispute resolution providers – that doing so would undermine women's rights and state justice sector involvement – are not necessary conditions, and should not be considered so decisive as to exclude further debate and dialogue.

With this observation in mind, TLO thus offers the following recommendations:

Efforts to Engage Non-State Dispute Resolution Systems Need to Be Broad-based

At the same time – and while acknowledging that it is impossible that one dispute resolution architecture embrace all of Afghanistan's diverse and horizontally organized dispute resolution providers – attempts at engagement, to achieve maximum effectiveness, should seek to embrace stakeholders of all affected parties. Putting aside government and women's stakeholders (who are addressed separately below), this means that engagement efforts need to remain vigilant in neither purposefully nor inadvertently excluding important population groups. This effort thus requires extensive and detailed local knowledge, best gained through bottom-up research and consultations. Especially given Afghanistan's diversity, the necessity of ground-level engagement also suggests that such efforts need to proceed province-by-province (or even district-by-district) rather than through a "one size fits all" national model.

Put another way, failure to engage all groups (of which TLO has sometimes been guilty) at the least limits the effectiveness of such engagement; and, at the most, risks tainting efforts at engagement as – in fact – efforts at partisan empowerment. Especially as dispute resolution institutions need to be seen as neutral (and also *be* neutral – but that is a slightly different matter[33]), efforts at engaging non-state dispute resolution providers need to consistently take steps to ensure they are representative and give all groups at least a chance to be heard.

However, it must be said that this does not mean that TLO to any extent endorses the empowerment of non-state, insurgent dispute resolution fora, which TLO research shows to be often arbitrary,

brutal, and unpopular with local populations.[34] Within its programming, TLO has found tribal leadership to be willing to work with the Afghan state, and TLO further recommends that this willingness be incorporated as a condition of state-non state engagement efforts (certainly, if state or non-state actors are unwilling to engage with one another, then efforts to link them together almost certainly will fail to launch).

Nevertheless, our research and program experience also indicates that this willingness exists in a substantial number of cases, and does not pose any insurmountable obstacle to state and non-state dispute resolution providers collaborating productively.

Experiences working with the government and with women need to be consolidated

Of course, even when a degree of representativeness (and the appearance thereof) can be achieved, this achievement does not answer the two most persistent charges against the engagement of non-state dispute resolution: that these efforts undermine the Afghan state, and enable the abuse of women's rights.

In this policy brief, TLO has attempted to outline how, in our experience, careful engagement with non-state dispute resolution capacities promotes, not diminishes, the Afghan government's involvement in dispute resolution. It has also attempted to show how these engagements can lead to practical improvement in the observance of women's rights, and that tribal and religious leaders are not unalterably opposed to greater women's empowerment if approached in a framework, such as Sharia, which they respect.

We think these experiences undermine allegations against non-state dispute resolution providers, and suggest ways to make further progress on these crucial issues.

However, TLO remains equally aware that our research and experience, especially on such crucial and sensitive matters, covers only some provinces, in a few regions of Afghanistan. The experiences of other organizations, non-governmental, governmental, and international, certainly have much to add. Thus, because of the sensitivity of these issues, and because of the many and various experiences of different organizations throughout Afghanistan, stakeholders sharing their knowledge and experience is particularly important. However, no strong mechanisms for exchange currently exist.

National dialogue needs to begin anew

Even more broadly, since the collapse of the Draft Policy and Draft Law, broad-based, systematic dialogue on the engagement of non-state dispute resolution providers seems to have more or less ceased: even as programming on these issues has continued, and the role of Afghanistan's non-state dispute resolution providers has not diminished.

For all the reasons outlined throughout this paper, national dialogue on these

issues must re-start. The imperatives for this conversation have not gone away, but the mechanisms for it have withered. In turn, if efforts to re-start discussion on a Draft Policy or Draft Law succeed, they ought not to, as with previous efforts, proceed without substantial input from stakeholders outside Kabul.

If this dialogue occurs; and if its outputs are incorporated into processes of policy, legal, and institutional reform; then Afghanistan stands the best possible chance of developing dispute resolution sector policies that are inclusive and sustainable. By contrast, if sectoral policy develops without sufficient regard to the knowledge and experience of current stakeholders (Kabul, provincial; governmental, non-governmental, and international), then the very process of policy or legal development risks undermining the very institutions it ought to strengthen.

Endnotes:

[1] TLO, CCM Evaluation (TLO 2009).
[2] *Southeastern Cluster: Paktia, Khost and Paktika, Afghanistan Border-district Exploratory assessment*, Tribal Liaison Office, 2008.
[3] Defining the "strength" of a tribe is a notoriously fraught undertaking. As a general proposition, TLO defines the term as meaning the tribes have seemed to maintain continuity over time both in their criteria for selecting leadership, and in their criteria for recognizing valid decision-making.
[4] The Liaison Office, Formal and Informal Dispute Resolution in Paktia and Nangarhar (TLO & USIP, 2011). *See also* BARFIELD, Thomas (2003), *Afghan Customary Law and Its Relationship to Formal Judicial Institutions*, USIP/ Boston University; BARFIELD, Thomas (2008), *Culture and Customs in Nation-Building:* Law in Afghanistan, University of Maine School of Law; SMITH, Deborah J. (2010), *Examining Community Based Dispute Resolution Processes in Afghanistan*, AREU*;* RZEHAK, Lutz (2011), *Doing Pashto. Pashtunwali as the ideal of honourable behaviour and tribal life among the Pashtuns*, Afghanistan Analysts Network; The Liaison Office, *Formal and Informal Justice in Southern Afghanistan: Evidence From Helmand, Uruzgan and Nimruz*, (TLO & USIP 2011).
[5] The Liaison Office, Formal and Informal Dispute Resolution in Paktia and Nangarhar (TLO &USIP 2011).
[6] TLO observed much higher levels of violence in other parts of the country, particularly those that seemed to lack powerful, or even coherent, non-state leadership. *See* The Liaison Office, Formal and Informal Dispute Resolution in Southern Afghanistan: Evidence from Helmand, Uruzgan, and Nimruz (TLO & USIP 2011) (outlining per capita levels of violence in Southern and Eastern Afghanistan).
[7] The Liaison Office, Land Conflicts and Tenure Systems of Khost Province (TLO & USIP, forthcoming 2013).
[8] Religious are particularly involved in disputes that implicate Islamic law, such as matters pertaining to divorce or inheritance (although even here adherence to Sharia is the exception rather than the norm); and by contrast disassociate themselves from dispute resolution bodies that engage in practices such as taking an oath on the Qur'an that religious leaders tend to view as un-Islamic.
[9] The Liaison Office, Dispute Resolution in Paktia and Nangarhar (TLO & USIP 2011).
[10] Liz Alden Wily, "Land Rights in Crisis: Restoring Tenure Security in Afghanistan" (Afghanistan Research and Evaluation Unit 2004).
[11] Even looking beyond issues of institutional corruption: corruption is many respondents primary complaint against Afghan courts, but documenting concrete instances is extremely difficult. Moreover, it is unclear why corruption, by itself, would deter parties from addressing the court in particular, and not government in general. Thus, while certainly present, corruption is not here treated at length, as the phenomenon is both difficult to document and seems to have limited explanatory force as to parties actual behavior vis-à-vis different government institutions:
[12] Government of the Islamic Republic of Afghanistan, Law on Managing Land Affairs (2008) at Art. 3.1 (defining "Landowner" as a person who "actually owns his/her land on the basis of legal documents"; i.e. implicitly denying ownership based on undocumented possession, or on possession only documented with customary instruments).

[13] The Liaison Office, "Formal and Informal Justice in Paktia and Nangarhar" (TLO & USIP 2011) (noting that only in cases of murder does the court system appear regularly involved in dispute resolution)
[14] Here we use the term "Taliban" in its umbrella sense, to encompass all groups expressing allegiance to the Islamic Emirate of Afghanistan.
[15] A traditional unit of geographical delimitation bigger than a village but smaller than a district. Traditionally, a district is composed of several manteqas.
[16] Paktia Interview 07 May 2013
[17] Here Logar stands as a particularly interesting intermediate case. As will be explained below, TLO's own experience in Logar is that tribal decision-makers still possess a high degree of autonomy. Taken together with research on Logar's Taliban dispute resolution system as such, these data might suggest that Logar is in a period of transition – with both functional tribal systems and a more developed Taliban system existing simultaneously. This set-up would seem inherently unstable and rivalry between tribal and insurgent sources of authority might go to explaining the rise in violence in that province.
[18] Logar Interview May 12 2013
[19] Noah Coburn, *Bazaar Politics* (Stanford University Press, 2012) (detailing how the Tajik population of Istalif, a district of Kabul, employs a great variety of non-tribal solidarity groups in its social organization, including familial, political, and economic).
[20] TLO, Formal and Informal Justice in Southern Afghanistan: Evidence from Helmand, Nimruz, and Uruzgan (TLO & USIP, 2012)
[21] The Liaison Office, Deh Rawud District Profile (TLO 2009) (noting that both the Babozai and Noorzai are about 30% of district population, with some persons stating the Babozai are a subtribe of the Noorzai).
[22] Similarly, in Paktia TLO for a time over-relied on Ahmadzai tribal leaders, creating a certain amount of suspicion among the district's other tribes. In this case, TLO treated reformulation of the Paktia CCM as an opportunity to mend fences with other tribal stakeholders – which seems, at the time of writing, to have been fairly successful.
[23] *See, e.g.*, Jean McKenzie, "Afghan women Trapped in Tribal Court System", Global Post March 7, 2012 (at http://www.globalpost.com/dispatch/news/regions/asia-pacific/afghanistan/120306/afghan-women-trapped-tribal-court-system) ("Critics say these tribal courts have grounding in neither constitutional nor Islamic law, and that international efforts to support and reform them only legitimize an inherently misogynistic legal framework. . . "This is very worrisome," said Latifa Sultani, Coordinator for Women's Protection with the Afghanistan Independent Human Rights Commission (AIHRC). "Tribal courts will never allow justice for a female victim."").
[24] For example, elders with whom TLO worked on the development of land dispute resolution guidelines in Nangarhar tended to reject human rights rhetoric as a western imposition, but were willing to embrace practical measures that improved human rights, such as protections for women's inheritance rights in Sharia.
[25] Admittedly, some non-state dispute resolution providers have told TLO that acting according to Islam is in some cases simply not possible: this reaction particularly occurs when one or more dispute parties has demanded a dispute resolution outcome unacceptable in Islam (e.g. *baad*), and indicated that they will walk away from the dispute resolution process, and possibly resort to violence, if their demands are not met. As this description perhaps implies, dispute matters implicating family honor prove particularly resistant to even Sharia-based resolution. Indeed, when discussing disputes of this sort, otherwise powerful dispute resolution providers have disclaimed any ability to prevent the parties from carrying out their will. Although we might meet this expression of inability with skepticism, the conclusion persists: non-state dispute resolution institutions are, in at least some cases, unwilling to disclaim preferred community solutions when honor is on the line.
[26] On the reasoning that what local insurgents, and other elements of the population, might strongly oppose is more extensive male-female mixing on the same body. However, an exclusively female shura to address women's issues would be far more acceptable.
[27] *See, e.g.*, Wimpelmann "Nexuses of Knowledge and Power: the Rise and Fall of the Informal Justice Assemblage in Afghanistan" 32 Central Asian Survey 406 (2013) (arguing that the push for "informal justice" disrupted lines of accountability that run from the Afghan people, to their elected leaders, to government courts).
[28] As of September 2013, USAID had obligated 18.9 million USD to "formal" justice sector support, and 15.7 million USD to "informal" sector support. In turn, as of December 2012, the US Department of State obligated 212.7 million USD to "formal" justice system support, which does not include 47.2 million USD from the State Department's Bureau of International Narcotics and Law Enforcement Affairs for "formal" system support (figures taken

from Special Inspector General for Afghanistan Reconstruction, "Governance" (SIGAR October 2013) (available at http://www.sigar.mil/pdf/quarterlyreports/2013-10-30qr-section3-governance.pdf) . At the same time, although other support to the "informal" sector exists, it is far more fragmented and oriented toward small grants that are dwarfed by those granted to "formal" sector programming.

[29] In the interests of full disclosure, TLO should here mention that it currently receives both funding directly from USAID and from implementing partners of USAID's Rule of Law Stablization – Informal project. However, we also note that TLO's support for non-state dispute resolution programming dates from 2007 in our work with the Khost CCM - before the receipt of any US government contract, and in fact before our receipt of any sectoral funding whatsoever.

[30] Giustozzi, Franco & Baczko, "Shadow Justice: How the Taliban Run Their Judiciary?" (Integrity Watch 2013, available at http://www.iwaweb.org/reports/PDF/130207%20-%20Taliban%20Justice%20Report-%20English.pdf) for example provides evidence for Taliban dispute resolution being in many cases seen as legitimate. This also accords with credible news reports (e.g. Bilal Sarwary, "Why Many Afghans Opt for Taliban Justice", BBC, December 2, 2013 (at http://www.bbc.co.uk/news/world-asia-24628136). This evidence is not to be discounted lightly. However, several points must be kept in mind. First, such reports have disproportionately centered around areas, particularly Kunar, that have the best-articulated Taliban justice systems in the country, including a relatively strong cohort of judges, relatively clear separation of powers between judges and commanders, as well as appeals processes. This situation does not obtain in most other parts of the country, including some (others) with long-term Taliban control. Rather, TLO's research has tended to show that within most areas, over the last several years, commanders have predominated over judges in Taliban justice administration, with all the lack of procedural safeguards that implies (here we must note that this is not entirely inconsistent with the findings of Giustozzi et al., but our research tends to show a greater predominance of commanders than does the research of Dr. Giustozzi and his co-authors). Second, even in areas where the Taliban justice system has maintained safeguards, the Taliban often punish those who attempt to approach any other dispute resolution institution but their own. In such conditions, calling the system "popular" is somewhat misleading. Certainly, some persons do prefer Taliban dispute resolution, and the system probably does possess some of the virtues occasionally attributed to it. However, judging its actual popularity is nearly impossible under conditions where support for any other system is a punishable offense.

[31] Literally "Rights Department", tasked, in the broad strokes, with settling disputes out of court, including by referral to tribal elders.

[32] *See, e.g.*, Wimpelmann 2013.

[33] For example, it is not possible that a single judge can be properly "balanced" in his or her background amongst all relevant groups. However, functioning judiciary systems very much rely on this individual maintaining neutrality. Or, perhaps, one can say that dispute resolution shuras function more like neutral political bodies – with membership balanced among stakeholders – and less like neutral judicial bodies – where the dictates of the office assume and, ideally, confer an aura of neutrality.