



AN EVALUATION OF THE PAKTIA COMMISSION ON CONFLICT MEDIATION (CCM)

THE LIAISON OFFICE



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1 Introduction

Three years ago The Liaison Office (TLO) helped establish a Commission on Conflict Mediation (CCM) in Khost province at the Provincial Governor's request, the idea behind it being that the state justice sector was overwhelmed with cases and widely perceived to be an ineffective and corrupt body. By bringing together respected elders from the province to act as mediators in order to resolve cases - independently from the government yet with the endorsement and approval from provincial authorities – this would significantly relieve the burden of a government not yet equipped to deal with the vast number of cases being brought before the courts.

Khost's CCM also provided a much needed service to the local people. It soon became apparent that this body could serve as an effective medium through which local disputes might effectively be resolved, as the vast majority of civil cases are traditionally dealt with within the informal justice sector, through tribal *jirgas*, which are more trusted than government courts, with the added benefit that they get the job done quickly.

A TLO evaluation of the Khost CCM last year came up with positive results, with a number of cases having successfully been resolved through the CCM there. The initial success of the CCM in Khost prompted a favourable reaction from the Provincial Governor in neighbouring Paktia, who requested the establishment of a similar body in his province with TLO's help, where local tribal structures play just as important a role in solving local disputes¹. Strong tribal cohesion and the lack of an effective formal government mechanism to provide such an important service in Paktia rendered the province a suitable environment in which to replicate this model, particularly in light of the fact that the role of customary law is so strong in Paktia².

The purpose of this evaluation is to critically examine whether the CCM in Paktia has been successful over the past year, and if so, to determine the factors that have led to this success, while also identifying challenges that have arisen and which need to be addressed in order for this initiative to gain legitimacy and traction among both the government and communities.

2 Project Context

Paktia province forms part of Loya Paktia (which also comprises Khost, Paktika and the southern parts of Ghazni), and is very much embedded in tribal traditions, its social organization still regulated by tribal customary law known as *Pashtunwali*. Tribes in this part of the country are traditionally the largest permanent political and social units, where elites and notables obey traditional structures and hold great power at the tribe and sub-tribal level.

¹ Indeed a number of respondents throughout the course of this evaluation said that Paktia was the 'home' of *jirgas*.

² *Linkages between State and Non-State Justice Systems in Eastern Afghanistan: evidence from Jalalabad, Nangahar and Ahmad Aba, Paktia* (TLO, May 2009), p. 20.

Paktia's provincial capital city Gardez is situated 120 kilometres from Kabul and has traditionally been the region's political and administrative centre. A number of strategic transit routes pass through the province, linking the country's capital Kabul to important economic hubs such as Khost, as well as Peshawar and Parachinar in Pakistan, among others. Paktia borders Logar, Khost, Paktika and Ghazni provinces.

The province remains economically weak with little infrastructure or local industry. Comprised of fifteen districts, four of which are unofficial, it is a mountainous province with some arid desert in the southeast and some good agricultural grazing lands in the central and eastern parts of the province. Land disputes are common and are a cause of insecurity in many areas.

Historically government influence has been weak in Loya Paktia. District administrative structures are generally ineffective, with tribes being the main powerbrokers. The power of the tribes and their adherence to *Pashtunwali*, combined with the fact that most government employees are from local tribes, means that the Government of Paktia is generally subservient to traditional forms of governance in the province, including the informal justice system. The majority of all civil disputes are brought before local tribal *jirgas* and are solved outside of official government courts³.

Of note, the southern areas of the province have traditionally come under the influence of strong religious networks (unlike the more mountainous areas), some of which have links to the insurgency and span across the border into southern Ghazni. Also of note, Paktia is home to three important Zadran populated districts, Garda Serai (unofficial), Shwaq and Waza Zadran. These three districts lie along the main Gardez-Khost highway, which is currently under construction, linking Khost to Kabul. The road is insecure in parts and military logistical convoys are frequently subject to attacks or Improvised Explosive Devices (IEDs) planted along the road. One of the insurgency's main commanders, Serajuddin Haqqani (s/o Jalaluddin Haqqani), is from this area and there is a common feeling among the Zadrans that inhabitants are routinely subjected to indiscriminate searches, arbitrary arrests and military operations due to perceived links with this active insurgent network.

The security situation in the north-eastern and north-western areas of Paktia Province has deteriorated considerably over the past 12 months, putting the province back on the map. The worsening security situation is due to the infiltration of both foreign and local insurgent groups into the area from Pakistan and Khost province. Some insurgent groups infiltrated from the Kurram Agency (Pakistan) into Garda Serai district, while others infiltrated into Zazi Aryub through Dand-e-Patan and moved further southwards into Jani Khel district. Taliban bases established along the border in the Kurram Agency and continuing sectarian tensions between the Turi Shi'a majority (who inhabit the areas around Parachinar) with the Sunni Bangash minority, have led to heightened insecurity along Paktia's northern border. A number of districts in Paktia's north-eastern areas, in particular Jani Khel

³ For more information see *Linkages between State and Non-State Justice Systems in Eastern Afghanistan: Evidence from Jalalabad, Nangarhar and Ahmad Aba, Paktia* (TLO, May 2009), p.5.

but also parts of Dand-e-Patan, Chamkani and Sayed Karram, have become easy transit routes for insurgents travelling back and forth from Pakistan, where insurgent headquarters are based. The tacit involvement of Paktia's security forces, notably elements within the Afghan National Police (ANP), has ensured that these passages remain open and unhindered for the insurgents using them. The security situation in other parts of Paktia, such as Zurmat and Shwak, also took a turn for the worse.

There is a perceived lack of attention and resources flowing into Paktia compared to other parts of the region.⁴ Tribal representatives often complain that any project undertaken is poorly monitored and implemented. The main donors and 'development' actors in the province are the US military forces whose turnover is frequent and whose COIN-influenced infrastructure projects are often a cause of tension within communities. Local powerbrokers are generally the people with whom the military consult and are asked to identify suitable implementing partners. This exacerbates tensions among community members who feel marginalized from such processes, frustrated they are not getting a share of the proverbial pie.

Whilst tribal cohesion in Paktia is still relatively intact, some of the larger and traditionally stronger tribes such as the Zazi or the Mangal have come under increasing pressure from insurgent activity in these areas. The need therefore to reinforce state institutions in order to support the tribal structures is all the more important, particularly given Paktia's strategic location and proximity to Kabul. This is also of paramount importance for maintaining security in those districts that are now heading towards full-blown insurgency.

The rule of law sector in Paktia, as in many areas of Afghanistan, suffers from serious personnel and logistical shortcomings and is also undermined by widespread corruption. Salaries remain very low, although with the new Pay and Rank Reforms in the past couple of months, judges will get paid significantly more (between 20,000-30,000 Afs. a month, or approximately \$520 US dollars⁵). Approval of these reforms by the Attorney General's office, however, is still pending⁶. Currently the salary of a primary court judge (between \$40-\$50 US dollars) is still less than that of a police officer.

The sheer number of cases as well as a lack of qualified staff and resources places immense pressure on the justice department to allow disputes to be addressed via the traditional conflict resolution process, the *jirga*. The other main concern that government prosecutors have is a lack of security for the official courts. The ANP have often withdrawn police guards, citing a lack in their staffing table (*tashkeel*).

Paktia provides a suitable environment and opportunity for engaging customary structures into

⁴ Though according to 2008 figures, in reality Paktia, Khost, Paktika and Ghazni have all received similar amounts (on average \$68 million per province, representing total and planned spending in 1386). For more information, see Matt Waldman's *Aid Effectiveness in Afghanistan* (ACBAR Advocacy Series), March 2008.

⁵ According to current exchange rates, i.e. 48 Afs to the US Dollar

⁶ Source: United Nations Assistance Mission in Afghanistan (UNAMA).

security, justice and governance arrangements. Whilst the CCM model is still in its infancy, there is nonetheless great scope for a merging of both the formal and informal justice systems in this context. The CCM (or similar) model is clearly a useful component through which to explore the possibilities of bringing both the formal and informal justice systems together thereby ultimately strengthening and legitimising government justice institutions.

3 Methodology

Information for this evaluation is predominantly qualitative and was collected via semi-structured interviews and Focus Group Discussions (FGDs) in December 2009 and January 2010. Due to security concerns in Paktia, non-probability sampling was used in order to reduce the risk to local surveyors. A mix of purposive/stratified, judgement and convenience sampling was used to select those interviewed. Surveyors also relied on the snowballing technique, where they used referrals from initial interview partners to identify additional ones.

Approximately 88 people were interviewed overall. Twenty-three people were interviewed individually, and up to 10 Focus Group Discussions were held, in which between 4 to 14 people were interviewed in each session. In addition to interviewing 14 members of the sixteen-member CCM, TLO spoke to 14 government officials, 14 traditional *jirga* mediators as well as a cross-section from the public (approximately 13 people); 22 people working for Civil Society Organisations (CSOs), four (4) United Nations Assistance Mission in Afghanistan (UNAMA) officials from both UNAMA's Rule of Law and Political sections, and six (6) conflict parties whose cases had been resolved by the CCM, as well as the AIHRC.

4 Project Description – the CCM in Paktia

The Commission on Conflict Mediation (CCM) is a mechanism designed to alleviate the burden on the official court system, which in many cases lacks the capacity deal with the plethora of cases brought before it, including land and resource-based conflicts. Unresolved disputes have the potential to create great instability in an already highly militarized and insecure environment.

The initiative came about in 2006 at the initiative of Khost's governor at the time, Arsala Jamal, who requested TLO to facilitate a *jirga* between customary structures (tribal elders, religious figures, district councils) and local government (district governor and line departments) in order to discuss how one could assist the provincial authorities in dealing with the resolution of conflicts in the province. One of the outcomes of this *jirga* was the idea of the CCM. It was decided that six commissioners representative of the tribal diversity on Khost would be selected.⁷ The CCM formally

⁷ For more information on the initial Khost CCM, see *An Evaluation of the Khost Commission on Conflict Mediation (CCM)* The Liaison Office, June 2009

started its work in March 2007.⁸

As the Khost CCM was successful in dealing with some high profile conflicts and was able to prevent their escalation, the governor of neighbouring Paktia province became interested in having such a commission in his own province. He requested TLO to assist him in replicating the Khost CCM in Paktia. About two years after the establishment of the Khost CCM, and prior to an evaluation of the mechanism, the Commission on Conflict Mediation (CCM) for Paktia was established.

Though it essentially builds upon the customary structure of the *jirga*, the unique feature of the CCM is that it is authorized and sanctioned by the Provincial Governor. Customary structures generally function independently of the government. While not yet formally linked to the court-system, the CCM does function along the lines of an out of court arbitration/mediation mechanism, with the one exception that its decisions have the endorsement of the Provincial Governor.

4.1 CCM Membership in Paktia

While the Khost CCM followed a single province-wide *jirga*, the Paktia CCM came about following a series of five smaller *jirgas* (each consisting of 6 to 12 tribal representatives) conducted by the TLO in Gardez with elders from the Ahmadzai, Banozai, Totakhail and Garmashy tribes, as well as with Kuchi representatives from different parts of the province. During these *jirgas*, the participants were asked to nominate an elder as their representative to the CCM. Based on the *jirga*'s recommendations, and also those of the Provincial Governor, 10 CCM members were selected. In order to be able to include representatives of some of the smaller tribes in the CCM, something for which the Khost CCM had been criticised, a further six (6) CCM members from the Mangal, Zadran and Jaji tribes were added; their selection was also approved by all the tribal representatives as well as by the Provincial Governor.

Thus, with its sixteen (16) members Paktia's CCM is double the size of the original one in Khost. By and large all Paktia CCM members are highly regarded throughout the province and are genuinely seen to be impartial and neutral mediators. This perceived neutrality and respect accorded to the Commission's members has to date been one of the most important components of the project in Paktia⁹.

In contrast to local respondents, UNAMA officials in Gardez gave a more sceptical view of the CCM's composition. Whilst optimistic and supportive of the approach, they cautioned that the CCM

⁸ In retrospect it is important to note that the Khost CCM was not made up of entirely impartial or neutral members, and was later criticized by some members of the population as well as UNAMA officials for its perceived lack of impartiality, particularly given the fact that the Commission was led by Deputy Governor Tahir Khan Sabari, who is arguably a somewhat divisive figure in Khost's highly politicized environment.

⁹ Almost all people interviewed for this evaluation said that the CCM's members were effective and trusted mediators with excellent knowledge of local customs and Islamic law, and that their standing in Paktia society ensured that the CCM would be trusted and successful. The exception came from Paktia's head of the tribal affairs department, who felt left out because he had not been consulted on the composition of the CCM (interview held on 8th December 2009).

membership was somewhat dominated by individuals who had been influential and active during the *jihadi* era, and whose political affiliations in Paktia society still coloured their vision and decision-making capabilities. They were also seen to have too close a relationship with Paktia's Provincial Governor Juma Khan Hamdard (a Pashtun former *mujaheddin* commander from Balkh province). It must be borne in mind, however, that Afghan society is fragmented and highly politicized and there will invariably be competing factions and multiple allegiances dating back decades. An entirely neutral body in this context will therefore be difficult to assemble, however the *perception* of neutrality by the overwhelming majority of the people interviewed is clearly an important factor. This, particularly in light of the Khost model, as the CCM's ultimate success hinges very much on the reputation of its members. Whatever the case, with these concerns in mind and with sufficient knowledge of the political and social dynamics of a specific area, it should be possible to mitigate these factors by ensuring that representatives from different groups are brought together.

In addition to the 16 permanent CCM members, the Commission has followed the Khost CCM example of bringing in ad hoc members with the consent of the plaintiffs if specific knowledge of a case or area is needed. This enhances the diversity and composition of the CCM. For example, in a land dispute in Garmikhai village between the Tirawal and Gardizwal in Ahmadabad district another prominent member of the Ahmadzai shura was brought in. The resolution of the case is still pending.¹⁰

Membership of the Paktia CCM:

- 1. Haji Hazrat:** a well known and respected elder from Ahmadabad district and leader of the Ahmadzai tribe, he is a former member of the *Harakat-e-Inqilabi Islami* party and also served as a *jihadi* commander during the Soviet occupation. He initially sympathised with the Taliban movement until they captured Kabul, after which he decided he did not like the way they were treating people.
- 2. Wakil Sarwar Khan:** a respected member of the Mangal tribe and resident of Ahmadabad district. He is a former tribal leader (Malik) from both Sayed Karram and Mirzaka districts in Paktia province. He was a vocal opponent to the Taliban regime in the '90s.
- 3. Haji Bali Khan:** S/O Haji Banak Khan, and respected Zadran tribal elder from Shwak district. A businessman from Paktia, he is not affiliated with any political parties.
- 4. Haji Rozai Khan:** a respected tribal leader from the Totakhail tribe in Sayed Karram district in Paktia province and former member of *Harakat-e-Inqilab Islami* party and *jihadi* commander with Maulawi Mansur's network. He is a member of the National Alliance of Tribes (*Milli Yuwali*), the *Mujaheddin* Shura, the Tribal Union Shura and the CCM.
- 5. Zanikhail:** a tribal leader from Laja Mangal district from the Mangal sub-tribe of Janikhel Plarina. He joined *Hezb-I Islami* during the Soviet occupation and became a *jihadi* commander. He is currently a member of the *Mujaheddin* Shura and the CCM.

¹⁰ Interview with Muqbal Fazlee, tribal elder of Ahmad Aba district, 15th December 2009

6. Doctor Wali Mohammad: a tribal leader from the Hashamkhel tribe and resident of Zazi Aryoub. He worked in the Ministry of Tribal Affairs during the Communist regime in 1980 and was subsequently appointed as 'tribal director' in Zazi Maidan (Khost). He participated in the Constitutional *Loya Jirga* and is now a member of the CCM. He is also a member of the Tribal Union Shura (*Qawmono Yowali Shura*).

7. Janat Khan Mangal: S/O Malak Zalmay from the Mangal tribe in Mirzaka district (unofficial). He is loosely affiliated with the *Mahaz-e-Milli* party and is a member of the Tribal Union Shura and also serves as an advisor to Provincial Governor Hamdard.

8. Maulawi Khaliqdad: S/O Allahdad from the Banozai Plarina Andar tribe, he joined Mansur's *Haraqat-e-Inqilab Islami* party at the time of the Soviet invasion, then joined Maulawi Khalis' party. He was an active member in the *jihad* against the Russians. He later graduated from *Akora Khatak Dar-ul-Ulum Haqqania* in Peshawar. He started work with the Taliban government in 1996 as Chief of Revenues Office. He claims he was coerced by friends to work in Karzai's government. He serves as the head of the *Ulema Shura* in Paktia and the wider Southeast region.

9. Haji Sangeen: A Zadran tribal elder from Garda Serai (unofficial). He joined Maulawi Khalis' party in the *jihad* against the Russians. Following his experience as a commander, he worked as a respected elder within his community to help solve disputes. He also worked on Karzai's re-election campaign in 2009.

10. Maulawi Mohammad Hanif: A member of the Ahmadkhel tribe, he fought alongside *Hezb-I Islami* against the Soviets. He works as a teacher in the *Talimul Quran* Madrassa.

11. Haji Gulam Khan: A resident of Ahmadabad district and member of the Ahmadzai tribe, he joined the *Haraqat-e-Inqilabi Islami* party in *jihad* against the Russians and was then appointed district governor of Sayed Karram district at the time of the *Mujaheddin* government at the request of the people.

12. Ghulam Mohammad: A member of the Salikhel tribe, resident of Zurmat district and member of Mansur's *Haraqat-e-Inqilabi Islami* party during the Soviet occupation. He then went to Pakistan at the time of the Taliban regime. Since his return, he has been involved in tribal activities (dispute resolution).

13. Haji Din Mohammad: A member of the Niazi tribe (his grandfather Nasrullah Khan was the head of the Niazi tribe) and resident of Gardez centre, he fought against the Russians, though subsequently did not take an active part in the Taliban regime. His brother, Daud Shah Niazi was head of the Kuchi Ministry under the Taliban regime in Kabul.

14. Haji Habiburrahman: A tribal elder and S/O Haji Wahdee from the Karmashi tribe in Gardez centre. During the Taliban regime, he served in the Ministry of Justice.

15. Haji Wali Totakhail: A respected tribal leader from the Totakhail tribe in Sayed Karram district in Paktia.

16. Qazai Abdul Haq: S/O Khan Mohammad, he is from the Hussain Khel tribe in Nahrishahi district in Balkh province. He graduated from the Islamic Madrassa in Kabul in 1977 and later studied at Kabul University. He migrated to Pakistan during the Soviet occupation, where he joined the *Hezb-I Islami* party. He was introduced to the CCM by Provincial Governor Juma Khan Hamdard.

4.2 Brief Overview of Caseload

So far, a total of 30 cases have been resolved by the CCM, and five are currently under review. In contrast to the CCM in Khost which by and large has dealt with land conflicts, the CCM in Paktia has dealt mostly with civil cases relating to family disputes, issues of personal enmity and revenge killings.

The speed with which the CCM resolves a case depends on a number of things, the complexity of a case, its location, the availability of the CCM members to visit the plaintiffs and collect the necessary information to solve a case. The CCM members mediate, but not necessarily as a group. If a dispute originating in Zazi Aryoub is being resolved, the CCM might appoint three or four of its members with connections to or knowledge of that area. They will then make several visits if necessary to both parties to collect information about the case. Sometimes a case can take a day to solve, sometimes two or three months.

One recent case, a blood feud between a Gardezi family and one from Logar, took a few months to solve. One son was killed by one family, which resulted in that family trying to kidnap a member of the other family. This in turn prompted further violence during which another son from the same family was killed. The CCM were given *waak*¹¹ by both conflict parties to solve the dispute. The case was referred to them on 3rd November 2009 and was resolved on 14th February 2010. The CCM decided that compensation of 1000,000 Pakistani Rupees (approximately 11,800 US dollars, the dowry price of three women) be paid to the family who lost two sons. Both parties happily accepted this decision.

Another case involved the killing of a young boy from Ghafoor Khel village in Sayed Karram district. The case was a thorny one, as the boy was killed by a car which was being driven by the son of Sayed Karram's governor. The case was referred to the CCM on 1st October 2009 and was peacefully resolved ten days later; the CCM asked the victim's family to forgive the perpetrator. The Commission members paid a couple of visits to the victim's family to ask for forgiveness on behalf of the district governor's son. According to this practice, the victim's family had to accept this apology, as a sincere show of regret was publicly made on more than one occasion. The district governor also paid 100,000 Pakistani Rupees (1,180 US dollars) to the victim's family in compensation.

4.3 Overview of Mechanism

Based on the experience of the Khost CCM, cases should be referred to the Paktia CCM by the Provincial Governor. Prior to referral, the governor would have discussed with both conflict parties the possibility of the CCM mediating and trying to resolve their dispute, rather than the case being taken up by the state court. However sole government referrals were soon seen to be ineffective and time consuming,¹² and conflict parties began to refer their cases directly to the CCM. Whereas in Khost, former Governor Arsala Jamal and especially the Deputy Governor Tahir Khan Sabari, who was a member of the Commission, were actively involved with the CCM, the Provincial Governor of Paktia has left a very light footprint on the entire process. Whilst supportive of the process, the Governor is

¹¹ Authority given to the *jirga* (and its participants) to resolve the conflict on behalf of the conflict parties.

¹² Interview with *jirga* mediators in Khost, 12 January 2009.

often not around¹³ and local disputes are often left to Deputy Governor Abdul Rahman Mangal to deal with.

According to CCM members, the majority of the conflicts dealt with to date by the Paktia Commission were referred to them directly by the people. Nine, including one land dispute between the Banozai tribe and the government, were referred to the CCM by either by the Provincial Governor or his Deputy.¹⁴

In addition to the lack of support by the Governor's office for the Paktia CCM, the Commission's members also appeared somewhat resentful of the fact that they had to first 'report' to the Provincial Governor and ask for cases to be given them to handle, as they felt this was insulting¹⁵. This already indicates that the state / non-state cooperation, which was a strength of the Khost CCM, is somewhat in question in Paktia.

The cases, according to the Commission members, are dealt with 'according to the customs of the area'.¹⁶

5 Reasons for CCM success

The success factors of the Paktia CCM were predictably very similar to those of the Khost CCM. As noted earlier, key reasons cited for the success of the CCM were the reputation of its members, their knowledge of conflict resolution, work ethics and in particular their perceived neutrality and respect among the population. The age of CCM members, as well as their knowledge of the *jirga* system, local customs and 'Islamic ways' were also often cited as positive aspects. Another issue that has been repeatedly mentioned is the careful collection of information by the CCM in order to resolve cases. Government employees were criticised for simply taking bribes and not looking into cases closely. Of those conflict parties interviewed who had dealt with the CCM, none took issue with the way in which their case had been resolved even if they lost – generally because the CCM have managed to ensure that even in the case of a case being lost, compensation is paid to the plaintiff.

"We wanted our conflict to be solved peacefully and the tribal elders [of the CCM] did so. It was advantageous to both of us. There was no pressure from the CCM or the government. We knew they were sincere and neutral, so we gave them *Waak* to resolve our conflict. Our conflict was fair just and advantageous".¹⁷

A second reason that is cited for customary systems in general is the ability of the CCM to resolve cases quickly, especially in contrast to formal courts. According to one individual who was in the

¹³ Interview, CCM members, Gardez December 2009

¹⁴ Interview, CCM members, Gardez December 2009

¹⁵ Interview, CCM members, Gardez December 2009

¹⁶ Ibid.

¹⁷ Interview with a resident of Gardez whose conflict was resolved by the CCM. January 2010

middle of trying to get a conflict resolved (over the shared use of a motorcar), *jirgas* and in this instance the CCM, are much more efficient than the formal justice system as they resolve the cases quickly and without hassle, are accessible and also collect good background knowledge of cases and individuals.¹⁸

A third success factor is that the Paktia CCM does not exact any form of payment from the plaintiffs for the resolution of cases. Thus, unlike traditional *jirgas*, which usually request that the conflict parties pay for the *jirgas'* food and travel expenses where necessary as well as the costs of a formal court system, the CCM increases access to justice, even to poorer members of the community. "The CCM is of interest to the people because no expenses are charged on the plaintiffs and also the CCM solves the conflicts sooner than others"¹⁹. In order to make this "free service" possible, TLO has been discreetly paying CCM members a nominal monthly sum of approximately US\$200 to each member for their services rendered. Far from a full fee, however, this is a paltry sum to cover some basic food and transportation costs. The sustainability of the CCM's payment will have to be reviewed, as in the long-run there are problems with externally supported funds, not least because any perceived association with an NGO or other external body could not only tarnish the reputation of individual CCM members in the eyes of the people, but also render them vulnerable to unwelcome insurgent scrutiny.

Lastly, the social stigma associated with the formal court system has assisted the success of the CCM as it puts social pressure on individuals to use the customary system.²⁰ In cases involving questions of honour (women or murder), a government court system might deliver a verdict according to Afghan Law, but will be unable to resolve the associated long-standing animosity between the conflict parties.²¹ Furthermore communities may feel the formal courts might lack the necessary information or sensitivity needed to treat such cases, with families losing face by exposing such problems to the public. This was brought up by local respondents, who stated that there was no loss of face for conflict parties judged to be at fault by the *jirga*, and that their decision is respected either way²². It seems that the reputation of the elders ensures that when cases are judged in a restorative justice system, this issue of sullied honour does not arise.

6 Challenges / Weaknesses

In contrast to the Khost CCM, where the link to the governor's office was seen as a key to success (as it lent government oversight to a customary body), there is significant concern among the Paktia Commission that any perceived collaboration with an outside affiliate (such as TLO), relevant

¹⁸ Interview with a resident of Aghajan village in Ahmad Aba district, December 2009

¹⁹ Interview with a tribal elder from Ahmad Aba district, 12th December 2009

²⁰ Cf. Christina Jones-Pauly and Neamat Nojumi, 2004, "Balancing Relations between Society and State: Legal Steps towards National Reconciliation and Reconstruction of Afghanistan", *The American Journal of Comparative Law*, 52

²¹ Interview, *jirga* mediator, 12 January 2009, Interview, CCM members, 9, 12 January 2009

²² Interview with a group of Zazi elders, 'experts' on tribal *jirgas*, December 2009

government departments or authorities could render them vulnerable to ‘insurgent accusations’²³, as well as discredit their work in the eyes of the people. It will also ensure that any decisions taken on conflicts will be viewed with scepticism and mistrust, rendering the CCM ultimately ineffective. The members stated that the Provincial Governor had offered to provide their office with chairs and desks, but they refused this assistance, as they did not want to be seen to be working with or for the government.²⁴

Further reluctance to work with government line department employees was mentioned as a result of government corruption and the fact that the government was seen as less interested in gathering information on the sources of the conflicts than in taking bribes from the conflict parties.²⁵ The CCM members have requested TLO’s continued assistance, but have asked that it be given ‘secretly’, otherwise they will not be willing to carry on providing this service²⁶.

Conversely, the CCM members in Paktia have been critical of the government’s lack of recognition or support to their work this past year²⁷. To this end, the CCM in Paktia have requested to meet with President Karzai in order to request that he formally authorize *jirgas* across the country to solve people’s disputes and that their decisions be officially recognized and legitimized. With regards to the CCM itself, the members have stated that the government must recognize its existence and endorse its work. That this position is somewhat contradictory (on the one hand of not wanting to be associated with the government, but on the other seeking official recognition), was not acknowledged by CCM members. However, it clearly reflects the tensions between customary structures looking for some official role and the reality that in a conflict environment such an official link can prove rather dangerous.

The importance of a link to the government, however, should not be underestimated, as, similarly in Khost, the local community felt that without the government’s endorsement or referral of cases, the CCM’s decisions would not hold as much sway. In most interviews, respondents from both the local population as well as government employees suggested that there should be some form of official government recognition of cases resolved through the CCM, and that cases be logged and documented within relevant line departments²⁸. This form of government oversight, they argue, would help prevent the re-emergence of conflicts in the future²⁹. Both CCM members and most of the people interviewed for this evaluation stated the importance of any decision reached by the CCM being passed on and recorded by the government, particularly by both district and provincial

²³ Interview with CCM members, December 2009

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ CCM members complained the governor was never there to meet with them, and never referred cases to them (interview with CCM members).

²⁸ Separate interviews with 3 individuals whose cases have been resolved by the CCM, 19 January 2010; interview with

²⁹ The CCM members see (pashtun) tribal *jirgas* all over the country as having the potential to significantly enhance the country’s prospects for long-term stability and security as they decrease the chances of a conflict reemerging once it has been solved through a tribal *jirga*.

prosecutors and by provincial authorities. This, they claimed, would prevent the future outbreak of tensions. The Chief of Police stated he would keep a separate file for cases referred to either *jirgas* or the CCM. He suggested that any tribal dispute be automatically referred to the CCM for resolution.

As in Khost, however, the provincial government's reaction to the CCM in Paktia so far has varied. By and large, most relevant line department heads see the CCM as a useful and necessary body, and a means by which conflicts, through their resolution by respected and neutral tribal elders and with the provincial government's stamp of approval, stood less chance of re-emerging. However, similar to Khost, criticism arose around the issue of the CCM not having been formally introduced to different government officials, and in particular that line departments had not been informed of the CCM's establishment, or consulted regarding its membership³⁰. Here the Paktia CCM should have learned from the lessons in Khost that a lack of formal introduction of the CCM members to provincial government officials and relevant line department heads was considered a crucial element to ensure its acceptance at the local level. If the CCM is meant to serve as valuable link between the formal and informal justice system, it is important that existing government bodies be included in any such process. The provincial Chief of Police raised several noteworthy points about the link between a hybrid body such as the CCM and formal law enforcement bodies such as the ANP.³¹ For example, should it be the role of the ANP to enforce CCM decisions as in the case of formal court decisions? Thus, as highlighted already in the Khost evaluation, the future of any hybrid body lies in a further examination of how it should be positioned within the formal law and justice system.

This said, however, it should be acknowledged that some of the criticisms levelled against the CCM by government respondents could stem from the fear that a formalized CCM system might decrease opportunities to levy informal taxes or seek bribes from conflict parties.³²

In light of the above, it will be important to examine the extent to which a hybrid body like the CCM might realistically become formally institutionalized within the Afghan government's justice sector. Customary law in Paktia plays an extremely important role, with state courts already relying heavily on *jirgas* to resolve cases referred to them³³. These cases are not registered systematically with the *hoquq* department of the Ministry of Justice³⁴, as their registration might depend several factors: the competence of a particular district prosecutor or the relationship between the mediators and the local government authorities. It might also depend on the significance of the case or the perceived

³⁰ This was particularly the case for the head of the Department for Tribal and Border Affairs, who felt insulted that he had not been informed or consulted on the CCM's composition.

³¹ Interview with General Wardak, Paktia's Chief of Police, 6th December 2009

³² This has been mentioned widely by both government and non-government respondents: for example in the interview with CCM members; in interviews with individuals who successfully referred their cases to the CCM, January 2010; in an interview with Ahmad Aba's district shura, December 2009; in a number of Focus Group Discussions; in an interview with the Director of the Hoquq Department in Ahmad Aba district, December 2009.

³³ *Linkages between State and Non-State Justice Systems in Eastern Afghanistan: evidence from Jalalabad, Nangahar and Ahmad Aba, Paktia* (TLO, May 2009), p. 20.

³⁴ This department, a judicial organ operating within the framework of the Ministry of Justice, was established to facilitate the adjudication of disputes (e.g., debts, properties) and civil right cases arising between citizens and real and legal persons; to follow-up on those cases; and to effectuate resolution through tribal elders, or patriarchs, and chiefs; see <http://www.moj.gov.af/?lang=en&p=e6>

influence of the conflict parties. The CCM, if officially recognized, supported, trained and equipped could well be an important step towards a systematic registration of cases.

A further related problem, and one which may pose the most challenges at a later stage if and when trying to mesh the two systems, is the issue of how to reconcile *jirga* decisions based on customary law with Afghan formal law, particularly in regard to criminal cases (*jazay*)³⁵ and those involving women.

Whilst the CCM may be able to play a positive role in solving civil cases, a question already raised in the Khost evaluation is whether or not criminal cases should be left to the courts to judge? The legal challenges of institutionalizing a *jirga*-style system of for resolving criminal cases are significant. One of the CCM respondents brought up the case of murder. In Shari'a law, there are two ways through which a murder might be judged: through *Haq-ullah* which refers to the rights of society (i.e. any issue which might potentially disrupt the peace within a community for which the state has a duty to intervene) and through *Haqul-abd*, a concept of Shari'a similar to the notion of civil law, referring to the rights of the individual, through which reconciliation between perpetrator and victim takes place. The CCM member was sceptical as to how these two aspects could be reconciled, as in his view even if a person goes to jail for 15 years for a murder, he could be killed by the victim's family upon his release if *Haqul-abd* had not taken place³⁶. Nevertheless, as the Khost evaluation shows, state prosecutors usually believe that criminal cases should be judged within the formal state system.³⁷

Some respondents also felt that the CCM, using customary law, may violate women's rights. "Most of the conflicts are solved through *jirgas* but the rights of women are trampled"³⁸. This has been linked to the fact that customary bodies, and the CCM here is no exception, tends to exclude women.

Another weakness of the CCM, as already noted in the Khost evaluation, is the fact that its work is unknown throughout the province, though after some probing, most respondents acknowledged having heard of it. One respondent said that he had not referred his case to the CCM as it was far from his area³⁹ (this was also echoed by several others).

6.1 Recommended improvements for the CCM

The following recommendations were put forth during interviews on how the Paktia CCM could improve:

³⁵ This issue was brought up by General Wardak, Chief of Police for Paktia, interview held in December 2009

³⁶ Interview with CCM members, December 2009

³⁷ For more information, see TLO's Evaluation of the Khost CCM as well as TLO's *Linkages between State and Non-State Justice Systems in Eastern Afghanistan* (May 2009).

³⁸ Focus Group Discussion with Human Rights Commission members supportive of women's rights, December 2009

³⁹ Interview with a resident from Aghajan in the Gharak area of Ahmad Aba district, December 2009.

- The inclusion of formal 'legal and Islamic aspects' within the decision-making process of the CCM; to this end
 - o trainings and workshops should be organised for CCM members, especially on formal Afghan Law⁴⁰
- An establishment of CCMs in district centres, to improve access to justice for people not living near the provincial centre.
- A formalization of CCM "office hours" in order to improve access to the Commission.
- A consideration of how the Commission could improve its deliberation of conflicts involving women. To this end,
 - o Women should be included on the CCM mediation team in such cases, or a separate *jirga* should be made for women.
 - o Women's cases should be deliberated on the basis of formal and Shari'a Law.

7 Conclusion and Words of Caution

In conclusion, a number of similar observations can be made about both the Paktia and Khost CCM, both in terms of success factors and challenges. The fact that success is still strongly based on the reputation of individuals and not on the mechanism *per se*, raises serious questions about reliability elsewhere. It also indicates that a lot more work is needed to institutionalize and formalize a hybrid mechanism such as the CCM for its sustainability.

The CCM's establishment in Paktia has thrown up a number of questions regarding the possibilities for institutionalising a hybrid conflict resolution mechanism within the formal justice system – primarily how to reconcile the contradictions between Afghan, Shari'a and customary law if a mechanism such as the CCM should ever be replicated on a wider scale and formally acknowledged. What is clear is that people genuinely want to see some conciliatory relationship between the two, with a view to legitimising *jirga* decisions and strengthening the formal justice system. One of the successes, and also criticisms, of the CCM is its use of customary law. While respondents praise the speed of customary law as well as its focus on restorative justice, there are key questions as to its legality when it comes to criminal cases, especially murder. This problem was raised during the Khost evaluation, but was less of an issue because the CCM there dealt mainly with land conflicts. The CCM in Paktia, however, seems to be engaged in the full range of customary mechanisms, and therefore runs into far greater risk of being seen as a competitor to the formal court system rather than as a complementary form of out-of-court arbitration. The Khost CCM currently functions more as a peace building commission that could cease to exist when most highly 'explosive' cases have been dealt with.

Similarly, the fact that the CCM and its members were not officially introduced by the provincial government to relevant provincial authorities and line department heads could exacerbate tensions

⁴⁰ This recommendation was made by the Provincial Prosecutor Bismillah Mangal, 6th December 2009

among government actors, and make people feel marginalised and redundant. The challenge here is to render state institutions more capable of working with informal structures, particularly with the informal justice system. Another challenge will be to examine how linkages might be institutionalised in order to ensure that a turnover of provincial authorities, such as Governors and line department heads, does not lead to a break down in relations and impact the government's relationship with the informal justice system. This will also apply to the districts, should a CCM model be replicated at that level. Relationships can be frail, they can be strong, but there needs to be a mechanism through which they are systematically maintained.