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Beyond Transitional Justice

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**The Quest for Transitional Justice in Afghanistan:
Exploring the Untapped Potential of Customary Justice¹**

1. Introduction

The quest for peace in Afghanistan has been a long one. The country has endured several cycles of war over the past 30 plus years. The most recent attempt at building peace started in 2001, with the now somewhat infamous ‘Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions’ (Bonn Agreement). Today, nearly 10 years later, security is still elusive and it seems that Afghanistan is further away from finding peace than it was a decade ago. The Taliban has re-emerged with new strength, backed by foreign sponsor nations and benefiting from a weak and corrupt Afghan government. They are fighting a government that has lost legitimacy, because, amongst other reasons, it absorbed many *jihadi* personalities whose inability to agree on power sharing after the defeat of the Communist government in 1992 gave rise to the first Taliban movement.

What has been falling by the wayside in all these discussions about peace is the issue of reconciliation and justice. While “[t]he UN mission in Afghanistan had from the beginning been mandated to ‘promote national reconciliation and rapprochement throughout the country’ [...] the Bonn conference, which was structured as a meeting of victors and set the framework for the transition period, made this role difficult” (Suhrke et al. 2009: 3). The fact that the Taliban, believed to be defeated at that time, were not party to the Bonn peace talks emphasized, even at this stage, a lack of focus on reconciliation. Backed by international supporters, the Afghan government has continued to argue that peace is more important than justice, and that dealing with past crimes and

those who committed them would only damage the fragile and fledgling new state.

For many Afghans, history is repeating itself and there are questions as to whether the new Afghanistan Peace and Reintegration Program (APRP) will indeed be able to bring about reconciliation and peace. Until now, all government programmes on peace and reintegration – most importantly the 2007 Amnesty Bill passed by Parliament for those involved in past wars (Suhrke et al. 2009), as well as discussions about the implementation of the APRP – have implied a focus on amnesty over justice, emphasizing job creation and development projects as a way to reconcile fighters, while ignoring existing grievances, both amongst communities and some insurgents. How can the Afghan people trust that their government is genuine in its interest in peace and reconciliation if it has once before firmly closed the door on justice for *jihadi* commanders, arguing that the government tent was big enough to accommodate everybody,² regardless of their past human rights records (Wilder/Lister 2007)?

The question remains this: if the Afghan government and its international supporters are unable to achieve transitional justice at a more national level, why there has been such little exploration of tapping into bottom-up approaches such as using customary justice providers to achieve some ‘dealing with the past’ at the grass-roots level? Even though, in principle, the APRP programme speaks of negotiations and addressing grievances at the community level as a first step to peace and reintegration, it remains unclear how this is to be done.

Building on calls by The Liaison Office (2011a), this article explores the possibility of using customary justice mechanisms as a form of grievance resolution in order to bring peace at least at village/community level, with an effective reintegration of some medium and lower-level commanders as well as fighters. It would also lay the foundations of a bottom-up reconciliation process until political will at the national level is strong enough to develop a more formal mechanism of transitional justice. This would at a minimum address some of the calls of Afghan citizens, as expressed by one who attended a ‘*jirga* for the victims of wars’ on 9 May 2010: “I want to know why they did what they did and I need them to at least admit it and apologise to the people” (Frogh 2010a). Much like Truth and Reconciliation Commissions undertaken in South Africa, working

with customary mechanisms, which emphasize restorative justice, would achieve some form of accountability for past crimes, even if punishment in the western sense is not forthcoming.

2. The failure of transitional justice in Afghanistan

It has been argued that, in order to “substantively address the past, political will needs to be developed and political institutions will need to be involved” (Winterbotham 2010: 20). The Afghan government, however, has quite a poor track record in this regard. Despite extensive consultations by the Afghanistan Independent Human Rights Commission (AIHRC) in 2004, which found a “rich understanding of and strong desire for justice among the people for both past and current crimes” (AIHRC 2005: 41), the Afghan Government has failed to tap into such popular support for transitional justice, succumbing instead to the pressures of those within their ranks that wanted amnesty for crimes committed.

While a National Action Plan for Peace, Reconciliation and Justice in Afghanistan was developed in 2005, and also included in the 2006 Afghanistan Compact and the 2008 Afghanistan National Development Strategy (ANDS), it was never implemented. “President Karzai subsequently refused a request from the Afghanistan Independent Human Rights Commission (AIHRC) and civil society groups to extend its deadline” when it expired in March 2009 (Winterbotham 2010: 18). This failure to address the legacy of impunity in Afghanistan is also visible in the rather superficial programmes to date attempting to reintegrate fighters of the past Afghan wars.

In the beginning, substantial funds were poured into two programmes – Disarmament, Demobilisation and Reintegration (DDR) and Disbandment of Illegal Armed Groups (DIAG) – both implemented through the Afghan New Beginnings Program (ANBP), which focussed exclusively on *mujahideen* fighters and not Taliban. While high-ranking commanders were allowed to enter the political arena early on, due to their predominance at the Bonn talks and subsequent support from the Afghan President, lower level fighters were not always successfully reintegrated into Afghan society. Some even argue that the recent proliferation of community

militias, such as in Afghanistan's North, is ample evidence of the failure of DDR and DIAG and the fact that many former *jihadi* commanders simply lacked prospects in a peaceful Afghanistan and so once again took up arms for personal gain (Schmeidl/Miszak 2011).

The first national programme focussing on reintegrating Taliban fighters, the *Proceay-e Tabkeem-e Solha* (PTS), or National Commission for Peace and Reconciliation, was established in 2005 (Suhrke et al. 2009; Waldman 2010). The programme, however, was immediately subject to wide criticism, such as that it failed to provide guarantees, that it was open to being subverted by local strongmen, that it did not provide for community involvement and, above all, that it failed to bring in genuine Taliban fighters, or at least not high ranking ones (Suhrke et al. 2009; Waldman 2010; The Liaison Office 2010b).

The proposition of 'The National Stability and Reconciliation Law' put forth by a coalition of powerful warlords and their supporters in 2007 to Parliament in order to prevent the prosecution of individuals responsible for large-scale human rights abuses in the preceding decades further underscored the push for amnesty and impunity over justice. When Afghan President Hamid Karzai quietly signed this 'Amnesty Law' in 2010, after repeated promises that he would not support it, he finally slammed the transitional justice door firmly shut by stating that "all those who were engaged in armed conflict before the formation of the Interim Administration in Afghanistan in December 2001 shall 'enjoy all their legal rights and shall not be prosecuted'" (Human Rights Watch 2010).

Enter the new Afghanistan Peace and Reintegration Program (APRP), trying to offer a way back into society for those Taliban fighters who have tired of war or no longer see fighting as way of achieving their goals. While the programme does speak of "good governance and legitimate grievance resolution with assistance to subnational formal and informal governance structures to promote peace, reconciliation and manage reintegration" (Islamic Republic of Afghanistan 2010: 4), the Minister of Education, Farooq Wardak "told a gathering of civil society representatives that 'justice' and 'human rights' were not on the agenda and would not be discussed" (Mojumdar 2010). Furthermore, at the 2010 Peace Jirga "[t]here was no mention of the war crimes during the civil war, nor the injustices and violence inflicted on Afghan nation in the past nine years" (Frogh 2010b: 8).

In light of the above, Afghan communities have developed considerable scepticism about government-led top-down reconciliation attempts, and particularly those that put government authorities in charge of reconciliation, thus dictating who would spearhead programmes (Theros/Kaldor 2011: 31). The selection of those sitting on the High Peace Council (HPC) and the Provincial Peace Committees (PPCs) that have been established in 28 of Afghanistan's 35 provinces (Afghan Peace and Reconciliation Program 2011) only re-emphasizes a tendency to put in charge those who likely benefit most from the current status quo and continued conflict (Nixon 2011). It also begs the question as to why Taliban fighters should be brought to justice if their *mujahideen* counter-parts were able to get away with the crimes they committed, including those against the very Taliban they are now trying to reintegrate. Indeed, the programme itself does not speak of justice, but only of grievance resolution.

With national processes in question and impunity continuing to prevail, the calls to tackle transitional justice and reconciliation from the bottom-up, with communities settling their grievances first and engaging government at a later stage until "we can move up to national discussions", are growing (Theros/Kaldor 2011: 31; The Liaison Office 2011a). Pressured by civil society and international lobbying, the APRP has now recognized the need to "[m]obilize civil society organizations to facilitate customary justice providers to support restorative justice as a mechanism to reconcile insurgents into communities" (Afghanistan Peace And Reintegration Program 2011: 9). That being said, the same document (APRP) also highlighted the need to fine-tune the terms of interaction between the government and customary justice systems and develop a more specific action plan.

Drawing extensively on the previous work of The Liaison Office, this paper suggests the use of restorative customary mechanisms, focussing on restorative justice as a way to initiate such a grassroots process of transitional justice, even if these bodies, at first, only deal with relatively minor offenses and are unable to address more massive human rights violations and war crimes (e.g., a larger number of killings). It is worth emphasizing that reconciliation in many ways "harmonizes with Afghan traditions that stress pragmatic bargaining and flexible alliances" (Suhrke et al. 2009: 12).

3. The need for some form of transitional justice and accountability

As noted, there is a tendency by the Afghan government, and its international supporters, to focus reintegration programmes mostly on disarming fighters, compensating them for their ‘loss’ of weapons and trying to integrate them through development programmes. The notion of accountability for crimes committed is either intentionally or unintentionally overlooked. Assuming that a majority join the Taliban because of a lack of jobs or out of poverty is, however, fundamentally flawed. The new Taliban insurgency is more diverse than the first movement in the 1990s (Schmeidl/Miszak 2011).

“Afghans clearly differentiate between Taliban with a political or ideological objective, often accused of being externally steered and funded, and mid- and low-level commanders and foot soldiers who join and support the Taliban for other reasons” (The Liaison Office 2010a: 3). There are, for example, ‘political opportunists’, such as former *muja-hideen* commanders or local strongmen that hope to gain political clout through joining the insurgency, and/or attempt to gain advantages in local resource conflicts. Communities may need the political backing of government officials in order to deal with strongmen, as some may very well be ‘spoilers of peace’ that benefit from the status quo on which their supremacy rests and are thus unlikely to willingly address the grievances that are driving some of the insurgency.

Then there are ‘economic opportunists’ and criminal elements (e.g., drug and weapons dealers) that find it opportune to hide within the Taliban. Some of these elements cannot be reintegrated without addressing their past actions; otherwise they might disturb the peace in communities in the future. In particular, criminal elements (*Taliban-e duzd* or thief Taliban; van Bijlert 2009: 160) need to be punished in some form, as more often than not the Taliban itself cleanses its ranks of these individuals once they have gained control in an area.

Especially problematic are those Taliban that have political (because they were sidelined from political processes and government positions) or justice grievances, especially if they suffered past injustice at the hands of government officials or strongmen linked to the government. Communities

will be hard-pressed to address their grievances without the support of the Afghan government. Reintegration might be impossible, without some form of admittance and apology, if the local process is led by the very government officials that have committed rights violations. Here, a lengthier process of dealing with the past (especially injustices) is necessary.

In light of the above, “[r]eintegration needs to be understood as a process rather than a one-time event”, which involves an understanding of the grievances that have led an individual (or community) to join the insurgency and the conditions that are needed to bring them back to peace (The Liaison Office 2011a: 2). It is here that customary justice may be of assistance.

4. Customary mechanisms and transitional justice

Customary law (*rawaj*) in Afghanistan is a rather complex set of rules and regulations based on group norms and accepted community practices that are rarely codified and tend to differ between communities and over time (Wily 2003; Wardak 2004).³ It rests largely on the oral history of those using it (*spin giri/rishsafed* or white-bearded elders) in each community.

Though customary justice seems a potent tool for reconciliation, due to its focus on restorative justice rather than retributive justice, its use for transitional justice has been largely left unexplored. While the Afghan government has acknowledged the need to engage with customary structures (Islamic Republic of Afghanistan 2008), and elders have offered their services to the state, the pending ‘Draft Law on Dispute Resolution Shuras and Jirgas’ does little to utilize the strength of customary justice providers and more to control something the state feels threatened by. There are further concerns by both women and human rights advocates about the violation of women’s rights under customary laws and about the fact that customary justice lacks alignment with national and international law (Barfield et al. 2006). There is also the occasional critique – not so much in the international community as from some government officials – of customary justice’s lack of alignment with *sharia* (The Liaison Office 2011b).

This section first outlines the elements of customary justice that are beneficial for transitional justice purposes, using the example of the *Pash-tunwali* of the Pashtun ethnic group (Glatzer 1998; Steul 1981), while also

highlighting the areas of traditional justice practice that need some refinement in order to meet the needs of a genuine reconciliation and transitional justice process.

4.1 The benefits of customary law and its institutions for transitional justice

First, customary justice institutions have shown considerable persistence and accessibility. While formal state law collapsed during the Afghan wars, customary justice has shown remarkable resilience, even in the light of internal and external challenges from various actors, including the Taliban. Even today, after extensive international assistance has been poured into the formal justice system while relatively little attention and funding was paid to the informal system, the latter still handles the vast majority (an estimated 80 to 90 per cent) of all disputes in areas not controlled by the Taliban (Barfield et al. 2006; The Asia Foundation 2010; Wardak 2004).

In Afghanistan's rich and layered legal history, formal state law has always co-existed with religious (*shari'a*) and customary law (Barfield et al. 2006). As the Afghan State, and with it the formal court system, never fully reached beyond urban areas (and still does not), it, in many ways, has been irrelevant for the rural majority (Wardak 2004; Wimmer/Schetter 2002). Traditional customary institutions, in contrast, are not only considered more accessible, but also more swift in dispensing justice (Schmeidl 2011). Many government officials (e.g., governors and chiefs of police), including the independent department of Huqooq (rights) of the Ministry of Justice, which is tasked with helping to resolve civil disputes outside the courts, frequently refer disputants to customary resolution mechanisms, with the reference to the shari'a principle of *sulh* (peace; Barfield et al. 2006: 19; The Liaison Office 2009a, 2011b).

An annual survey by The Asia Foundation (2010), supporting more qualitative findings by other sources (The Liaison Office 2009a, 2009b), concluded: "More than four-fifths (86%) of respondents agree that the local customary mechanisms of *jirga/shura* [see Box 1] are accessible. Around three quarters agree that local *jirgas/shuras* are fair and trusted (73%) and more than two-thirds agree that they follow local norms and values (70%), are effective at delivering justice (69%) and resolve cases promptly (66%)"

(The Asia Foundation 2010: 132). Disruptions caused by the Afghan wars have started to reduce the number of *jirgas*, with more and more disputes being settled by *shuras* or individual tribal or religious figures.

Customary justice bodies

A *jirga* is an *ad hoc* and temporary decision-making mechanism⁴ chiefly focussing on resolving communal disputes. The form and composition of a *jirga* depends on the dispute dealt with, but by and large includes tribal elders, community notables and sometimes religious figures and, since the Afghan wars, also commanders (Jones-Pauly/Nojumi 2004). Once a *jirga* decision or ruling (*prikra*) is reached, it is binding for the entire community and the *jirga* is dissolved (Wardak 2004: 326). Before the proceedings begin, all parties involved must agree on which version of tribal laws (*narkh*) will be used in the mediation or resolution process. This may even include elements of *sharia*, which is increasingly invoked in the south.

A *shura* is a more permanent local council that was introduced during the Afghan wars as a way for commanders to influence community decisions (Barfield et al. 2006). Today, *shuras* have become semi-formal, as the government has created district and provincial *shuras* under various programmes, such as the Afghan Social Outreach Programme (ASOP) of the Independent Directorate for Local Governance (IDLG). There are also *ulema shuras*, councils of religious scholars, which are linked to the Ministry of *Hajj* and Religious Affairs. More recently, non-governmental organizations, such as The Liaison Office, and USAID contractors (USAID 2011) have also set up *shuras* working on alternative conflict resolution using customary law elements integrated with *sharia* and statutory law, the latter promoted through training.

Shuras also mediate disputes (mostly property, family and business but also a sizeable criminal caseload), similarly disputing parties can also approach individual elders (*spin giri*) or religious figures to help them settle a dispute.

Secondly, customary law focuses on restorative and not retributive justice. As with any community rights approach the emphasis is less on punishing individuals than restoring harmony and peace in communities (Barfield et al. 2006). Retributive justice here is secondary, as most customary justice providers lack the enforcement elements of formal justice (e.g., police and jails). Instead, the mechanisms and rulings emphasize the accountability of the offender while also giving him a way back into the community (Monaghan 2008). While nobody goes to jail, however, there is still ‘punishment’. Wrongdoers are ‘sentenced’ for crimes committed and have to ask for forgiveness from the family of the victim (Wardak 2004 provides a detailed description of the process of asking for and granting forgiveness, which involves multiple family and community members, both men and women). In addition, customary law stipulates clear compensation (or blood money) to be paid for crimes committed and occasionally also the death penalty for severe crimes (Rzehak 2011; International Legal Foundation 2004).

However, how and what form of compensation is paid will likely need some more improvement in order to comply to International Human Rights Laws. A much-criticized practise under *Pashtunwali* for example, is the exchange of women (*baad*) as a form of compensation, which violates individual rights. This is often practised, however, in the absence of other valuables, as non-compensation can lead to a blood feud between communities, hence provoking conflict escalation and (further) bloodshed.⁵ With increasing prosperity in communities, however, elders are using this practice less today than in the past (USAID 2011).

4.2 Limitations of customary justice mechanisms for transitional justice

Despite some clear benefits, customary mechanisms should not be engaged uncritically. Their limitations vis-à-vis reconciliation need to be clearly understood and addressed, in order to ensure that they do not fail due to being overburdened.

The effectiveness of the informal system rests on community cohesion and the sharing of common values and attitudes, which tend to disintegrate when communities are fragmented, as has happened throughout the years of the Afghan wars and also under the current Karzai administration. There is evidence that strong individuals can and will “subvert the

principles of equity upon which the [customary justice] system relies for its popular legitimacy” (Barfield et al. 2006: 3), with *jirga* mediators no longer functioning independently, but rather as puppets of strongmen, for either patronage or financial interests (The Liaison Office 2008). Thus, bringing to justice strongmen, whether former *mujahideen* or Taliban commanders, may be difficult without the backing of the Afghan State and its international supporters. As a result, a customary system may be more effective in dealing with reintegrating foot soldiers than higher level individuals.

Secondly, as each tribe has its own version of *Pashtunwali*, community-based customary mechanisms are already hard pressed for addressing inter-tribal, little alone inter-ethnic or inter-sectarian grievances, as well as crimes committed far away from the community where an ex-combatant comes from, and so wishes to reintegrate into (Barfield et al. 2006). While possible in principle, the need for a greater *jirga* would be given, with elders from both communities who are well versed in the specific *narkh* of their tribe in attendance. As the Taliban is aware of the limitations of ‘customary jurisdiction,’ they often send fighters from one community further away for battle, with ‘local’ Taliban taking over once an area has been taken control of. Thus, customary justice may only be able to deal with such local Taliban, who may also have only committed lesser crimes.

Thirdly, while the customary system may be considered, on the whole, as being less corrupt than the formal system, corruption and bribery have also made inroads into the *jirga* system (even if they are less prevalent than among state judges). While in the past tribal notables saw resolving conflicts as a community service, in recent years *tijaraati* elders (commercial elders) have set up shop in district centres rendering their services purely for financial benefit (The Liaison Office 2009a). Furthermore, in a society where hospitality is particularly valued and seen as a sign of grandeur, it seems important that a local customary mechanism tasked with reconciliation involves offering food to those in attendance, as such gestures of generosity can create trust, even among the most difficult and hardened conflict parties, and hence set the stage for an amicable solution (The Liaison Office 2009b: 12-13). Thus, there would be a need to provide support for customary mechanisms to offer their services free of charge. This is only possible through some form of external or government funding, as can be provided via the APRP.

Lastly, and possibly most importantly, customary mechanisms in general, and *Pashtunwali* in particular, have also been much criticized for their exclusion of women. In theory, all Pashtun (men) have an equal status (especially in front of the law) and no one should possess more rights and power than others (Schmeidl/Karokhail 2009). This equality, however, is often limited to male elites of a certain age and standing and, by extension, is inapplicable to all women and younger males (Barfield et al. 2006). In addition to the law itself being applied unevenly, customary bodies (*shura* or *jirgas*) traditionally included neither women nor young men.

4.3 The way forward: the devil always lies in the details

The above discussion shows that customary justice has some important reconciliatory elements, yet also holds clear limitations. For example, while customary institutions can address, and already have successfully addressed, community disputes, such as resource conflicts (The Asia Foundation 2010), they are limited to dealing with rights violations by strongmen and former government officials. This may limit reconciliatory processes to foot soldiers and low-level commanders at first and, additionally, to those ex-combatants who don't see rights violations by government officials as their main grievances. While here customary mechanisms can clearly build a bridge between insurgent fighters and the Afghan Government, the latter needs to be willing to address 'spoilers' within their ranks and possibly to hand out compensation on their behalf.

In addition, the Afghan Government needs to realize the independence of customary justice providers when dealing with reconciliation. Only then can they be seen to be neutral when addressing grievances, rather than working on behalf of an already discredited government. This, however, is not to say that oversight should not exist.

Thus, The Liaison Office has been exploring the establishment of an 'Association for Customary Justice Providers' (The Liaison Office 2011a) which could work on setting clear standards, both as to who is best skilled as well as to who can engineer solutions and ways of reconciliation that most community members will perceive as just, while also setting standards for *jirga* procedures more generally. Such an association, if independent, can then decide on whom to include (rather than relying on government appointees) and begin recording decisions made, which

would help to improve transparency. Rather than individual customary justice providers being controlled by the Afghan State, the association can help to supervise conflict resolution provided by its (accredited) members, much along the lines of a professional association (e.g. of mediators and arbitrators) ensuring the quality of service delivery.

For this purpose TLO has also proposed the creation of ‘*jirga* houses’ where this association could not only hold its meetings, store its records and reference documents, as well as undertaking additional capacity-building activities such as training courses on Afghan statutory and *sharia* law, but also on how to best work towards transitional justice.

If such an association were to be initially supported by donors, the problem of payments and corruption would be irrelevant. The association, however, could also work on setting fee structures with the long-term aim of being self-funding; and it might also explore the possibility of establishing a legal aid fund for those unable to afford the services of association elders.

While initially such an association can work to support village justice providers, it can also move to join district and provincial justice bodies, with the ultimate aim of being able to deal with inter-community problems. There is also a possibility of linking up with different regional associations to jointly work on inter-ethnic and inter-sectarian reconciliation, albeit this being more a long-term goal as it would necessitate strong local associations in the first instance, and efforts of trust building between the different groups of justice providers. The Liaison Office tried such a first dialogue in March 2011 (The Liaison Office 2011c), which indicated a willingness to exchange experiences and expertise.

The gender bias of customary justice providers may also not be as insurmountable as some may think. While women’s groups in particular criticize customary justice for this all-male ethos, some do see it also as a form of conflict resolution where women can be involved (The Liaison Office 2011d). In most cases the process of asking forgiveness involves not only individuals, but entire families, hence also women. Furthermore, participants at a recent workshop of The Liaison Office identified numerous historical mediation roles that women have played – both in Pashtun and non-Pashtun communities – that could be employed to bolster local reconciliation and grievance resolution efforts (The Liaison Office 2011d).

All of this could be built upon to give women a larger role, not just in the process of forgiveness, but also, for example, in deciding how much compensation needs to be paid in order to reintegrate an offender back into the community without violating the rights of women.

There are already cases in Afghanistan's Southeast of women sitting on *shuras* alongside men. Furthermore, many Community Development Councils of the National Solidarity Program (NSP) include women. These have been increasingly approached for conflict resolution, even though their main mandate is development. Under APRP, NSP is the recipient of some 50 Million US Dollars for the purpose of assisting communities with reintegrating ex-combatants. Here, following a correct sequence is of great importance. "Outside assistance should come only after communities have resolved underlying conflicts and grievances that facilitated insurgency recruitment, as opposed to the current practice which is to give aid first and hope that this will prompt stability" (The Liaison Office 2011a: 5).

Furthermore, the association of customary justice providers can also be encouraged to include women mediators. Some elders have already expressed considerable enthusiasm for the idea, and have shown a willingness to pilot women's subcommittees in local associations that could be consulted and brought into negotiations in order to ensure that women's rights are not violated. First pilots of this will start in some provinces of Afghanistan's Southeast where The Liaison Office has worked longest with elders, both on the setting of standards and the opening up of public spaces for women. The idea is to start small and then have elders share their experience of working with women with other elders in order to encourage them to include women in their associations elsewhere. The sharing of such concrete experiences of men who have worked successfully with women is often more powerful in bringing women into previously all-male bodies than top-down quotas, even though this is often lobbied for by women's groups. When working with customary justice providers it is thus crucial to identify male allies in the attempt to promote the advancement of women.

Traditional justice institutions have also made headway vis-à-vis the reduction of discriminatory practises such as *baad*. Exchanging women was largely intended as a way to provide valuable but non-monetary compensation. However, as communities have grown more prosperous,

they have access to other resources (e.g., property, valuables such as cars) that can be used to pay compensation. Furthermore, some communities have questioned the long-term durability of a settlement where women have been exchanged, especially given that the exchanged girls are often not treated well and sometimes even commit suicide. As a result, rather than lessening conflict, *baad* can actually lead to a renewed dispute. These concerns have led elders to abolish this practise in some parts of Afghanistan (Afghanistan Today 2011; USAID 2011).

It is here again, that the association can help by working on a standard setting that disallows practices that violate women's rights. Contrary to popular belief, elders do have the right to break new ground in customary law as long as this is met with general agreement by other customary justice providers and the communities they represent (Schmeidl 2011). Those elders consulted about the association have already noted the wish to align their practises with *sharia* and statutory law, especially the Afghan constitution. Hence, the seeds are sown for a change within which will very likely be more sustainable than imposing rules and regulations from above.

5. Conclusion

This article has explored the advancement of reconciliation and transitional justice in Afghanistan through the utilisation of customary justice. Up to now, the issue of transitional justice and dealing with the past has been a taboo in Afghanistan, with the Afghan government preferring providing amnesty to past *mujahideen* fighters and warlords.

Nevertheless, the argument of peace first and justice second has not helped the peace process ushered in by the 2001 Bonn Agreement. Instead, insecurity has been on the rise and the Taliban insurgency has partially reemerged as a result of poor governance and unaddressed grievances. Especially in the area of justice provision, the Taliban, with its *sharia* courts, has been clearly 'out-governing' the current Karzai administration.

While it may indeed be true that it is difficult to combat impunity at a national level, especially as long as past 'offenders' are part of government bodies (up to and including ministries, Parliament, and the High Peace Council), this should not preclude working at the grassroots level

with customary mechanisms that have survived the past years of war and political upheaval. In particular, their focus on restorative rather than retributive justice and community harmonization shows that such mechanisms can play a valuable role in furthering transitional justice at a community level.

Taking the above limitations of customary justice into account, as well as the troubled history of state-civil society relations in Afghanistan (Schmeidl 2007, 2009), this article has discussed the possibility of developing a process that can provide communities with the space to reintegrate insurgent fighters, especially those that have committed crimes and/or damaged ties to their families and community. For this, however, the limitations of customary justice providers – such as their representativeness, reach and qualifications – need to be understood and overcome. Here, the article has introduced the idea of a best practice association, which The Liaison Office is currently setting up in some parts of Afghanistan. Such an association can not only function as a tool for setting standards, but can also break new ground on aligning customary justice more with *sharia* and Afghan state law, including the constitution. As noted, such an association can also work toward including women, and ensuring their rights are not violated.

With the strength of customary justice institutions in rural and hard to reach areas, international actors are encouraged to overcome their reservations about customary justice and embrace a process that could bring peace to communities. Here, however, donor support to the Afghan Peace and Reintegration Program should be used wisely and funds (or projects) only provided to communities that have started to address reconciliation and justice issues first. Otherwise, the cycle of violence will be hard to break in Afghanistan.

1 I would like to thank my colleagues Nick Miszak and Peyton Cooke for useful input into this article.

2 The “big tent” approach to government’ largely focused on the inclusion of strongmen, trying to bring them into government (rather than fighting them). Inadvertently though many in the end held far more power than a fledgling state could potentially manage, managing to spoil from within.

- 3 It has been influenced by the turmoil of the Afghan wars and resulting displacements. Within the Pashtunwali, the customary law of the Pashtuns, for example, each tribe has their specific narkh (set of customary rules, comparable to a civil code), which only their own elders are allowed to interpret.
- 4 Jirga originates from jirg, 'which means a wrestling ring', or 'circle', but is commonly used to refer to a gathering of people. There is a similar word in Turkish, which makes some scholars believe it originates from there (Wardak 2004: 326).
- 5 The alternative would be a blood feud that can easily escalate into a full-blown tribal conflict. Since other ethnic groups in Afghanistan do not use baad and it is in violation of the religious sharia law, Pashtuns have been under some pressure to abandon it (including by the Taliban), so it is an outcome that is justified on a cost-benefit basis.

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Abstracts

Based upon an analysis of the peace process in Afghanistan since 2011, the article argues that past top-down approaches have failed to achieve the twin goals of peace and justice. Thus, customary justice and its associated structures offers an alternative approach to furthering reconciliation and addressing grievances, as well as to ensuring accountability for wrongs committed at the community level. Drawing from the work of The Liaison Office, the article highlights the advantages of customary justice institutions, but also cautions that their limitations (e.g., discrimination against women, an inability to reign in strongmen and address inter-ethnic conflicts) need to be addressed. The article concludes with the recommendation to establish a best practice association that can set standards for customary justice providers and guarantee the inclusion of women.

Anhand einer Analyse des Friedensprozesses in Afghanistan seit 2011 zeigt dieser Artikel, dass Top-down-Ansätze in den letzten Jahren weder Frieden noch Gerechtigkeit geschaffen haben. Eine Alternative bietet das Gewohnheitsrecht (*customary justice*) und dessen Institutionen, um die Versöhnung weiter voranzutreiben und Ungerechtigkeiten, die auf Gemeinschaftsebene stattgefunden haben, aufzuarbeiten. Ausgehend von der Arbeit des „Liaison Office“ beleuchtet die Autorin die Vorteile von traditionellen Rechtsverfahren, dabei müssen aber auch deren Einschränkungen

bedacht werden (zum Beispiel Benachteiligung von Frauen, eine Unfähigkeit Kriegsfürsten die Stirn zu bieten und inter-ethnische Konflikte zu bearbeiten). Der Artikel schließt mit dem Vorschlag, einen Zusammenschluss von traditionellen Rechtsschlichtern zu gründen, der Standards für die Anwendung des Gewohnheitsrechts und die Einbeziehung der Frauen garantieren kann.

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