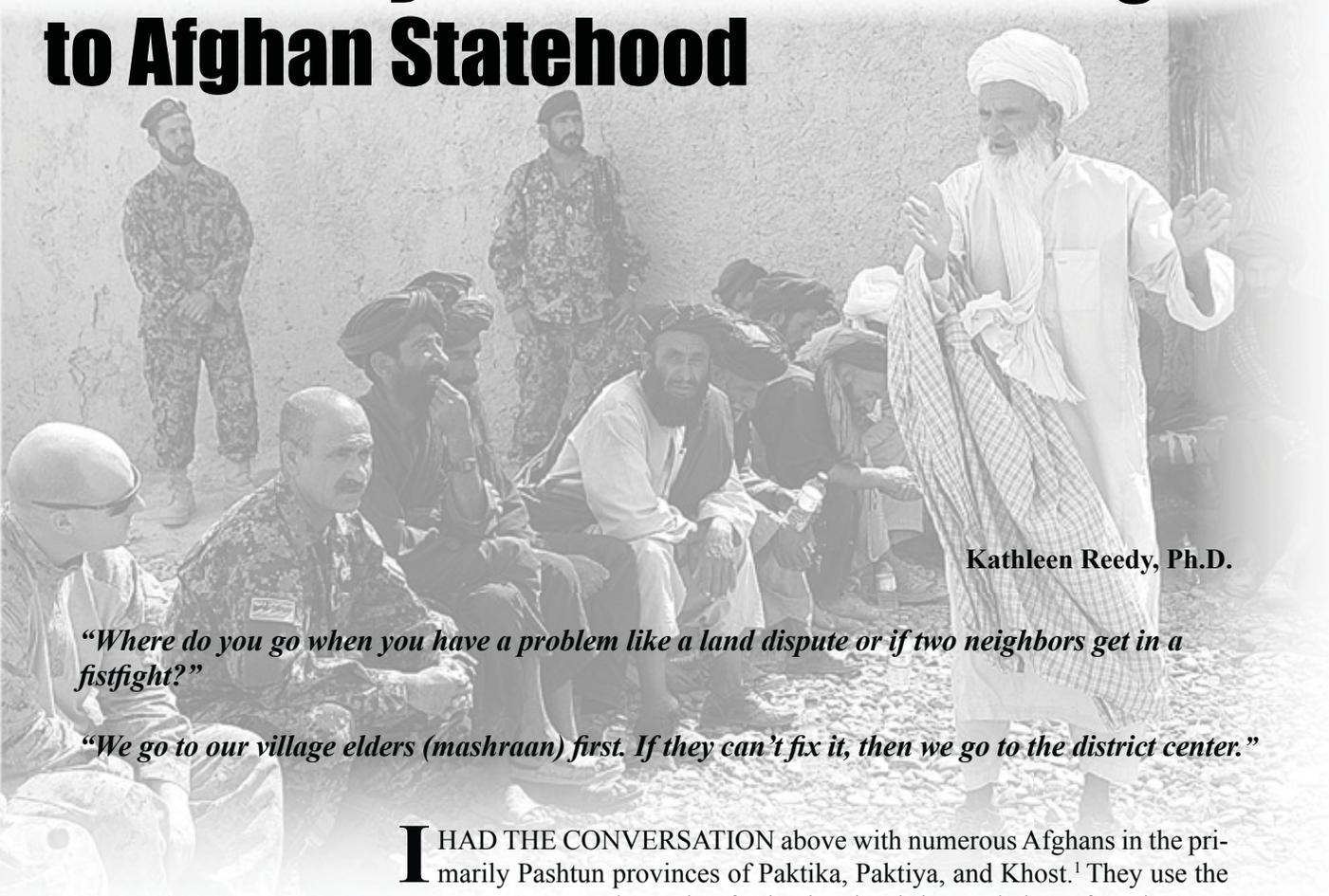


# Customary Law and Its Challenges to Afghan Statehood



Kathleen Reedy, Ph.D.

*“Where do you go when you have a problem like a land dispute or if two neighbors get in a fistfight?”*

*“We go to our village elders (mashraan) first. If they can’t fix it, then we go to the district center.”*

I HAD THE CONVERSATION above with numerous Afghans in the primarily Pashtun provinces of Paktika, Paktiya, and Khost.<sup>1</sup> They use the government as an alternative for justice, but it is not their preferred source for it, and this says a great deal about how effective the central government has been in extending itself into the everyday lives of the people. This kind of arrangement should come as no surprise to anyone familiar with Afghanistan or other societies where customary forms of justice are prevalent. However, in a country where government legitimacy is constantly in question, being in second place as a provider of governance has serious implications for state stability.

Establishing the rule of law, based on an unbiased, trustworthy, and readily available judicial system, is essential for proving to people that their government is legitimate and worth supporting. Dispute resolution, especially when a dispute involves violence or death, provides a fault line to examine to what extent a government has developed influence central to its credibility and power. A lack of government services and the resulting absence of popular support are prerequisites for an insurgency, so developing the formal judicial system and extending it across the entire county is a necessity for stability.<sup>2</sup> Rather than spending resources formalizing a power-sharing agreement between state and customary authority, as some have recommended, coalition partners should focus on developing the government’s judicial capabilities and improving the system’s transparency so that Afghans begin to see their government as competent, a source of justice, and a valid authority.

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PHOTO: An Afghan elder discusses a recent weapons cache find with U.S. Marine Corps Maj. Thomas Grace during a shura in the Garmsir District, Helmand Province, Afghanistan, 30 May 2011. (U.S. Marine Corps, CPL Colby Brown)

## Building State Authority

A state, or at least the Weberian model of a state, is a democratic entity that derives its authority from a monopoly on legitimate violence, resting on a clear and universal application of the rule of law.<sup>3</sup>

One challenge facing the government of the Islamic Republic of Afghanistan (GIROA) is that most Weberian and European-style states spent many years in internal conflict until they reached a balance of power and rights acceptable to rulers and ruled. However, the reach of the central government of Afghanistan has rarely penetrated to the rural and peripheral areas of the country, providing little to and asking little of the population.<sup>4</sup> There has been no long-term progression of centralized authority, and the attempt to impose it quickly now is difficult in terms of providing services effectively and developing legitimacy. The rapid turnover of governments has not helped, as the people see a central government as a temporary condition that they need only wait out. In the country's nonurban areas, long-standing customary law and local forms

of authority reign supreme because local leaders have had time to prove themselves and the compromises of power and support have long since been accepted. The GIROA fights an uphill battle for recognition.

However, the most significant complication stems from the GIROA itself. Today, the Afghan government is centralized in terms of where power (especially financial power) resides. Although the lower house of the National Assembly (*Wolesi Jirga*) is an elected body, people living outside of Kabul rarely see their representatives. Lower-level officials such as provincial or district governors are appointed rather than elected and more accountable to the central government than to the people living under their jurisdiction. There is legislation, though, to correct some of this lack of local accountability: elected provincial councils already exist (although they rarely have much influence) and district councils are built into the governmental system. That the latter have not been implemented yet is mostly due to complications with funding and the election process.



(photograph courtesy of author)

A district center with no governor or tashkil, Musa Khel, Khost, 23 April 2011.

In the interim, the central government and its international advisors have pushed to create temporary, appointed *shuras* (semi-formal councils run by the Afghan Social Outreach Program) at the district level to help advise district governors, who cooperate with them based on individual relationships. These are usually inconsistent across time and space, changing every time a new district governor or shura member is appointed. To further complicate matters, a shura that relies on local elders runs the risk of having insurgents co-opt it through intimidation or infiltration, both of which have happened more than once.

However, the district government has the best chance to extend governance into the everyday lives of people. The district governors and shuras share responsibility for distributing development funding and handling disputes. One-third of the 35-man shura deals with disputes that come to the district center and the district governor works with them. There is also a member of the *tashkil* (civil servant roster) called the *huqooq* whose job it is to consider a dispute and decide whether district officials should handle it, pass it on to the provincial courts, or hand it back to the village elders. When they do take on cases, especially those that concern land rights, the shura and district governor act as mediators, bringing in the aggrieved parties and elders to look for solutions and then ratifying the results. In theory, judges and attorneys should participate in the process and codify relationships and responsibilities. However, reality is a messy business.

Many district centers have empty slots on their *tashkil*, and many have not yet been able to set up the shuras. The executive branch effectively co-opts the judicial role when the district governor arbitrates disputes. And, of course, district officials and shura members exhibit many human failings. (Popular accusations of corruption and favoritism run rampant.)<sup>5</sup> Some district governors do not show up to work for weeks at a time and some arrive to districts so dangerous that they do not feel safe living there, and their influence does not extend far beyond the walls of the district centers.

Even when people turn to the district governor or shura for help, officials are not always able to convince them to participate in court or to abide by court decisions.<sup>6</sup> Local police units are understaffed or so busy conducting counterinsurgency operations

**...the police tend to be woefully ignorant of the very laws they are meant to be upholding.**

that they do not have time for community police work. However, this is not necessarily all bad, because the police tend to be woefully ignorant of the very laws they are meant to be upholding.

Some people adamantly do not want district officials involved in their lives. In many remote areas, the GIROA has little or no presence, and that is how people prefer it. On visiting a village in Nader Shah Kot, Khost, I saw a large group of men getting ready to take some animals to another village. When I asked why, one explained that there had been a car accident where several people had died and they were going to make amends to deter any further violence. I asked if they had informed the local district governor and the man replied that they had not and then asked me not to do so. He and his friends did not want the GIROA meddling in their affairs, even in a case where multiple deaths had occurred. If support of the people is the basis for legitimacy, the villagers' desire to not involve government officials makes it clear they have no love for the government and do not consider it a true authority figure.<sup>7</sup>

In addition, an age-old problem exists as well: Afghans are famous for turning to a variety of sources to resolve their problems. If they do not like the decision one source makes, they will readily turn to another for an alternative.<sup>8</sup> In districts in more remote provinces, people usually do not even consider the government option, largely because there has never been much of a regular government presence in these areas. Large portions of Paktika, Paktiya, and Khost Provinces in the east fit this bill. The very absence of government services results in a lack of state allegiance. Pashtuns in the region have no reason to support a state and have been the instigators of numerous uprisings and insurgencies over the years.<sup>9</sup> In the absence of any higher or even hierarchical authority, people's first (and often only)

source for practical governance is the local village leaders.<sup>10</sup> The government is not the source of the most effective and pervasive rule of law in rural Afghanistan. Informal systems (such as the Pashtunwali code, *sharia* law, or other traditional codes) produce legalistic effects and thereby essentially do governance without a government.

This system is effective and practical, even if it is inherently in competition with a fledgling government trying to establish itself as the source of authority. Most of the time, people rely on local leaders and respected figures to help them solve their problems, and given their understaffed tashkils, most district officials are content with that solution. They see themselves as back-up justice providers. Elders who are more accessible provide villagers with local, trusted men they can turn to, rather than the highly corrupt judges and lawyers that they believe pervade what judicial system there is. When I asked Afghans if they would consider taking their problems to a court, most just laughed, telling me that the GIROA “only serves justice to those who can pay for it.”

## A Dual System as the Way Forward?

Some experts contend that informal and customary systems can be successfully integrated with formal ones in power-sharing agreements that help legitimize the state while relying on traditional methods and leaders to reach into remote areas.<sup>11</sup> Others suggest that such an arrangement is a good option to establish a rule of law acceptable and accessible to all Afghans.<sup>12</sup> They admit that local forms of justice are sometimes co-opted by warlords, often fail to recognize human rights and sometimes even violate them, but they argue that they are the most pragmatic solution available for the time being.<sup>13</sup> However, we should not forget that success stories in other countries may not be relevant in Afghanistan, because many of the countries initiated non-traditional councils and state-like apparatuses to fill the gap left by the state and were able to create a new government system from scratch. In Afghanistan, we must work with the existing political structures. No new or regional governance structures have appeared spontaneously. Afghans live at the village level and see no gap to fill.

Moreover, proposals to create a hybrid system in Afghanistan do not account for the precedent they would set. Even if the human rights issues could be resolved, alternative rulings challenge state authority. It is fine for a state to devolve power. It still acts as a state in doing so, and other authorities ultimately derive their power from it. However, the current set-up of resolving problems in the absence a legal system merely highlights that the state has once again failed to provide an essential service to its people. As a result, Afghans continue to regard their informal, customary power structure as being the first and final authority.

Systemizing the current informal arrangements is therefore detrimental to the long-term stability of GIROA as a state. While doing so may be practical in the short-term and even appear to benefit the state by filling a gap that the GIROA cannot currently fill, creating a system with multiple locations of authority ultimately undermines national governance. Ordinary Afghans already expect their new national government to fail as all the others have and are content to wait for this to happen. Government longevity and authority based on popular consent require the development of a judiciary that is effective, independent, accessible, and unquestioned.



Afghan government and International Security Assistance Force officials take part in a shura, or meeting, with elders in Safidar Village, Zabul Province, Afghanistan, 1 February 2011. (DOD SSgt Brian Ferguson, U.S. Air Force)

The importance of developing the state becomes even more urgent when we examine flaws in the customary law structure. We should not easily dismiss concerns about human rights and equity before the law. While it often took a while for them to admit it, ordinary Afghans were suspicious of more than just official courts. They knew their elders were not above corruption and could be just as biased as government judges. I heard numerous stories about aggrieved parties being afraid to turn to elders for help.

In Mandozai District, Khost, I met a man at the district center who had gone there every day for years. Some time ago, his wife had taken their children to her parents' house, where the children had mysteriously died. His wife's family refused to let her return to him and eventually insisted that they had never been married, much less had children. He had gone to his village elders, but was shocked when they refused to help him. According to him, they dismissed him because his wife's family was far wealthier than he was. They were able to secure their own ends with bribes to the elders. He turned to the GIRoA, as some injured parties do, and though they actually had a legal team in Mandozai, they had no way to enforce subpoenas and could not get the defendants or witnesses to come to the district center.

This flouting of the formal system reveals that many people do not consider the government to be a true authority, but only an option for the marginalized who have no other recourse. In this case, the elders were corrupt and GIRoA was ineffective, so the man got no justice at all.

Although most Afghans initially turn to their elders for help, it is dangerous to assume that traditional methods for dispute resolution are preferable to state solutions. Implementing such a process can create a wealth of follow-on injustices: *badal* or blood vengeance can create new victims or, force the family of a murderer to give a bride to the victim's family as recompense for a life taken, thus compelling an innocent woman to pay for a relative's crime. While such solutions might be preferable for dominant males, the society's marginalized prefer a decision that would better protect them. However, when they try to access that justice, the results are often competing decisions (official and customary) that leave local politicians in a quandary. Should they enforce a decision that might go against the customary one?

If they contest a local elder's decision, they may delegitimize themselves by exposing their inability to force anyone to accept their rulings. Doing so is a risk some choose not to take, and in deciding not to take it, they fail in a vital aspect of governance: protecting the population.

Having spent 15 months working in rural Afghanistan, I realize that most Afghans prefer to solve their own problems in their own ways working with people they know and trust. Some—especially those whom customary law victimizes or leaves behind—actively seek the help of government, but the government is unable to provide it. If the GIRoA wants to be a state, it must act like one, and that means becoming the most popularly accepted source of justice and rule of law around.

### Slipping through the Cracks

Unfortunately, the many complications involved leave local government figures, their international partners, and everyday people in a bit of a mess when it comes to dispute resolution and extending the role of GIRoA into daily life. In cases where tension or competition exists between the systems, cases can go unresolved with people getting no justice from either side. However, if the government remains uninvolved, by default the community must try to solve its own problems at the risk of allowing marginal people to be victimized and delegitimizing the government's tenuous authority. Clearly, the role of the government and its future success are ambiguous (at best) under current and proposed power-sharing understandings.

I was visiting the district center in Khayr Kot, Paktika for the first time, when the district governor invited a couple of us to come in and have tea. After we had seated ourselves on the floor and exchanged pleasantries, I asked him what kinds of things he did, day to day. He became agitated and said that he was actually dealing with a case at that very moment and that he did not know what to do about it.

Some 15 years ago, a man from Khayr Kot had murdered a Kuchi man.<sup>14</sup> The elders had stepped in to prevent further bloodshed and provide restitution to the injured party by promising that one of the killer's sisters would marry into the dead Kuchi's family when she was of age. Customary law restored peace, and everyone was happy except the designated girl. She had just reached marrying

age and was terrified and furious at the thought of having to take up the nomadic Kuchi lifestyle because of something her brother had done. Her pleas to her elders to change the deal fell on deaf ears, so on her own initiative, she went to see the district governor and ask him to intercede. “You are from the West,” the district governor said. “What would you do in your country?”

Knowing the social dynamics were far more complicated here, I nevertheless answered honestly, “In America, we punish individuals for their own crimes. We don’t punish their family members.”

“Exactly!” said the governor as he slapped his leg and pointed at me for emphasis. “And that is the Afghan law, too! But that is not the culture here, so what can I do? I want to help her, but if I do, they will not listen to me, or if they do, they will just nod and then find a way to go behind my back. Or she will be shunned by her family and village and no one will ever marry her, which is very bad in Afghan culture. But if I do nothing, I am letting them break the law and she is being hurt for something that is not her fault. What can I do?”

“I don’t know. What will you do?” I asked.

His eyes were heavy and his face grave.

“I don’t know.”

He had not made a decision by the time I left, and I never heard what it was. This was a lose-lose situation for him and the GIROA, and he was fully aware of the implications for his authority and government legitimacy. The governor genuinely wanted to enforce the law and protect the girl, but was worried that doing so would destroy whatever credibility he had and reveal the government’s powerlessness. Because politicians in Afghanistan are often cynical and only out for their own gain, it was disheartening to see someone who actually believed in the rule of law caught in such a bind.

## The Way Forward

Searching for a way to blend the state and customary legal practices in Afghanistan is certainly the most pragmatic short-term solution available for the future. It covers areas where the GIROA lacks manpower and provides a process that is familiar to people. However, if the coalition intends to create a stable, long-lasting government, such power sharing will undermine those goals, even in the short-term. In Afghanistan, a large number



**A rare district attorney, with very few files and very few visitors, Nader Shah Kot District, Khost Province, Afghanistan 28 May 2011. (photograph courtesy of author)**

of people have lived for a long time without any government involvement in their lives; customary law and local leaders are the primary authorities in their lives. They see any government as transient and likely to fail, and they see representatives as inherently corrupt. The government is at most an annoyance to be out-waited. A dual system will make it look like the government does not believe in its own capabilities and will reaffirm the widespread belief that its officials should only be a secondary source of justice. In other words, compromise favors the status quo—where the GIROA is in second place—and will never help the state develop the legitimacy it needs to thrive. Instead, it will likely lead to yet another instance of an Afghan state only existing in and for urban populations and leaving rural areas in the same condition that set the stage for the current insurgency.

Providing justice and establishing the rule of law are central parts of governance, it is beholden

on the GIRoA to become the primary authority in these realms. Maintaining the status quo for practicality's sake will not help to develop stability. Most people handle minor problems on their own—this is true anywhere—but the overwhelming majority of Afghans must eventually acknowledge that the government is and should be the sole authority that can resolve major conflicts or concerns the people cannot themselves handle. Therefore, instead of focusing time and resources on building some sort of dual system in slow trial stages as a “band-aid” solution, the GIRoA and its coalition force supporters should devote themselves to making rapid and aggressive improvements to the Afghan judicial system. A plan to do so should include the following points:

- **Capacity.** To fill the gap, the GIRoA needs to quickly develop and train a strong corps of judges and lawyers, or legal-advisers-in-training knowledgeable about the formal law.

- **Presence.** The legal professionals need to be in every district, especially rural ones that do not have access to provincial courts. They must work full-time, be available to all, actively seek out situations where they can become involved, and not cross boundaries separating the judicial role from the executive one.

- **Degree of involvement.** Every situation, accidental or intentional, involving death should be the government's responsibility to investigate.

- **Transparency and trust.** Accusations of corruption are hard to fight, but the best way to do so is to provide oversight to ensure rulings are fair and just. The government then must make judicial proceedings public, perhaps by having weekly radio broadcasts of current cases and impartial dispute resolutions. Such public announcements will help develop popular trust in the system and enforce accountability.

- **Enforcement.** The customary dispute resolution system generally works because people buy

into it. Creating a reliable and trustworthy formal judiciary process will help create the same buy-in, but the police must be ready to get involved, regardless of personality conflicts.

- **Community involvement.** Although this method places the GIRoA in the forefront, it does not lose the elements of community involvement in dispute resolution. Judges and lawyers can call in local elders to provide advice, with the understanding that they are there by invitation and that ultimately the judges' decisions are final, even if contrary to their recommendations or to traditional customs.

Developing state legitimacy and authority in regions where large numbers of people have long lived without any substantive external influence is a daunting task. This is especially true in the realm of justice where state laws may sometimes conflict with local traditions. Building schools and clinics seems easy work next to the challenges facing the GIRoA as it attempts to provide good governance and assert itself as the primary authority in legal matters. However, its doing so is essential to build long-term stability and popular support. Otherwise, the government may well find its foundation continually challenged by uprisings born of one of the prerequisites of insurgency: the lack of justice.

Rule of law must extend beyond the cities and into the most rural and remote areas of Afghanistan. It must do so in a consistent and transparent way and soon. Time is of the essence. The longer it takes to get the rule of law in place, the harder it will be to do so. The government must prove to the population that it is and should be the primary authority. Playing second fiddle to, or sharing power with, customary law, as pragmatic as doing so may seem at first, will only weaken the government's standing. Only by demonstrating that it, the government, is the primary source of judicial power can the GIRoA develop true and lasting legitimacy. **MR**

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#### NOTES

1. The views expressed in this paper are entirely the author's own. They do not represent the views of the U.S. Army, TRADOC, or the Human Terrain System. Data for this paper was collected via first-person interviews with Afghan civilians and officials while the author was deployed to Afghanistan (2010-2011). Many thanks to the men and women of TFs Rakkasan and Duke and the many civilians and Afghans who offered support and hospitality.

2. FM 3-24, *Counterinsurgency* (Washington DC: U.S. Government Printing Office [GPO], 2006).

3. For analysis and critique, see Theda Skocpol, *States and Social Revolutions: A Comparative Analysis of France, Russia and China* (Cambridge: Cambridge University Press, 1979); Alexander Wendt and M. Barnett, "Dependent State Formation and Third World Militarization," *Review of International Studies* 19 (1993): 321-47; Joseph Hiatt, "State Formation and the Incorporation of Nomads: Local Change and Continuity among Jordanian Bedouin," in Peter Skalnik (ed.), *Outwitting the State* (New Brunswick: Transaction Publishers 1989): 65-80; Beverly Milton-Edwards, "Palestinian State-Building: Police and Citizens as Test of Democracy," *British*

*Journal of Middle Eastern Studies* 25,1 (1998): 95-119.

4. This is especially true for war functions, where the state requires manpower and support from its population and must be willing to grant people rights and protections as incentives for support. Charles Tilly, *Coercion, Capital and European States, AD 900-1992* (Cambridge: Blackwell, 1992).

5. For details on perceived corruption, see Integrity Watch Afghanistan, "Afghan Perceptions and Experiences of Corruption: A national survey 2010" (2010).

6. While the question of enforcement is beyond the scope of this paper, it is worth noting that for customary law decisions, there is no enforcing mechanism aside from shunning. For GIRA, the police theoretically work in coordination with the local government, but the rules about what that should look like are vague and depend on whether the District Governor and Chief of Police get along.

7. See Ann Mason, "Constructing Authority Alternatives on the Periphery: Vignettes from Columbia," *International Political Science Review* 26, 1 (2005): 37-54.

8. For an overview of this theory, see David Kilcullen, *The Accidental Guerrilla* (New York: Oxford University Press, 2009), 77-82.

9. Thomas Barfield, "Weapons of the Not So Weak in Afghanistan: Pashtun Agrarian Structure and Tribal Organization for Times of War & Peace" (Yale: Agrarian Studies Colloquium Series, 2007).

10. It is not uncommon for people to look to "tribal" authority, but aside from sharing

names, Pashtuns are highly egalitarian and prefer not to organize according to hierarchical models for real decision making.

11. Ken Menkhaus, "Governance without Government in Somalia: Spoilers, State-Building and the Politics of Coping," *International Security* 31, 3 (2006): 74-106; Volker Boege, "Bougainville and the Discovery of Slowness: An Unhurried Approach to State-Building in the Pacific," ACPACS Occasional Paper No. 3 (Brisbane: Australian Centre for Peace and Conflict Studies, 2006).

12. See Thomas Barfield, Neamat Nojumi, and J. Alexander Their, *The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan* (Washington, DC: United States Institute of Peace, 2006); Noah Coburn, John Dempsey, *Informal Dispute Resolution in Afghanistan* (Washington, DC: United States Institute of Peace, 2010); Ali Wardak, "Building a Post-War Justice System in Afghanistan," *Crime, Law and Social Change* 41, 4 (2004): 319-41.

13. Though they are considered common, warlordism is not part of a traditional Pashtun social organization, which is based on strict egalitarianism.

14. Kuchis are a traditionally nomadic Pashtun group who travel across Afghanistan and Pakistan. They once were major merchants in the region and quite wealthy, but lost that source of income. Many remain nomadic, travelling by tractor and camel train with their herds, taking day jobs as they move, and living stark lives in tents.



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