

CRIME AND WAR IN AFGHANISTAN

Part II: A Jeffersonian Alternative?

ALI WARDAK AND JOHN BRAITHWAITE*

In Part I of this article, US President, Barack Obama, is reported as saying to his inner circle that their objective in Afghanistan is not to build a Jeffersonian democracy. Part II is about the idea that a more Jeffersonian architecture of rural republicanism in tune with Afghan traditions is a remedy to limits of the Hobbesian analysis of cases like Afghanistan in Part I. Anomic spaces where policing and justice do not work are vacuums that can attract tyrannical forms of law and order, such as the rule of the Taliban. Peace with justice cannot prevail in the aftermath of such an occupation without a reliance on both local community justice and state justice that are mutually constitutive. Supporting checks on abuse of power through balancing local and national institutions that deliver justice is a more sustainable peace-building project than regime change and top-down re-engineering of successor regimes.

Keywords: restorative justice, Afghanistan, republicanism

Introduction

‘Crime and War in Afghanistan: Part I: The Hobbesian Solution’ (Braithwaite and Wardak 2012) argued that insurgents sometimes grab power when they build legitimacy through restoring order to dangerous, anomic rural spaces. This is an alternative path to legitimacy to that provided by Hobbes’s Leviathan. It is a path to power that exploits limitations of the Hobbesian solution. Part II of this paper is about the Afghan path initially not taken—complementing Hobbes with Jefferson: state-building combined with the strengthening of traditional rural ordering that delivers security.

State, Society and Social Order in Afghanistan

While state formal social control at the macro level has historically been weak (Saikal 2005) and problematic (Shahrani 1996), social order in Afghan society has mainly been maintained through the exercise of informal social control at micro and meso levels (Barfield and Nojumi 2010; Glatzer 1998; Wardak 2002; 2006). One important consequence of this has been that, when the Afghan state collapsed following the Soviet invasion, social order continued to exist in Afghan rural villages, where the overwhelming majority of Afghans live. Even today, there exists a higher level of social order in Afghan rural villages compared with large urban centres, where tens of thousands of Afghan

* Regulatory Institutions Network, College of Asia and the Pacific, Australian National University, Coombs Extension Building, Fellows Rd, Canberra 0200, Australia; John.Braithwaite@anu.edu.au.

and NATO-led International Security Assistance Force (ISAF) from nearly 50 countries concentrate. Ironically, the main sources of violence and disorder in Afghan rural villages are the very forces—the Taliban, ISAF and the Afghan state—that try to impose order. But their imposed orders have proven fragile, artificial and unsustainable.

Afghan and international strategists over the past 12 years failed to restore lasting order and stability in Afghanistan because they did not understand the complex relationships between the Afghan state and society at various levels. They failed to understand that the state and various non-state institutions contribute to the formation and the maintenance of social order in Afghan society in different spheres of life and at different levels. Importantly, there has also been a lack of political will on the part of the Afghan state and the international community to fully explore the complexities of this kind of understanding and translate it into policy. Drawing on [Wardak's \(2006\)](#) work on the formation and maintenance of social order in Afghan society, we identify the main agencies of social control as the extended family, kinship groups, tribes, ethnic groups and the state, as illustrated in [Figure 1](#).

[Figure 1](#) illustrates that the state at the top of the pyramid is considered a macro-level agency of social control; ethnic groups and tribes are meso-level agencies (although large ethno-linguistic groups settled in relatively self-contained regions may exhibit the characteristics of a macro structure); small-scale kinship groups and extended families are micro-level agencies of social control. The state is also different from the other forms of social control in another way: it is a formal agency that contributes to the maintenance of social and legal order through the enforcement of formal laws and the exercise of 'legal-rational' authority, as [Weber \(1964\)](#) called it. The state has historically been represented by *wolaswali* (district government) throughout much of rural Afghanistan; however, the state and its formal exercise of social control have often been received with suspicion. As [Barfield and Nojumi \(2010\)](#) put it: 'The view from Kabul is often received with suspicion by rural Afghans. Rather than seeing themselves as part

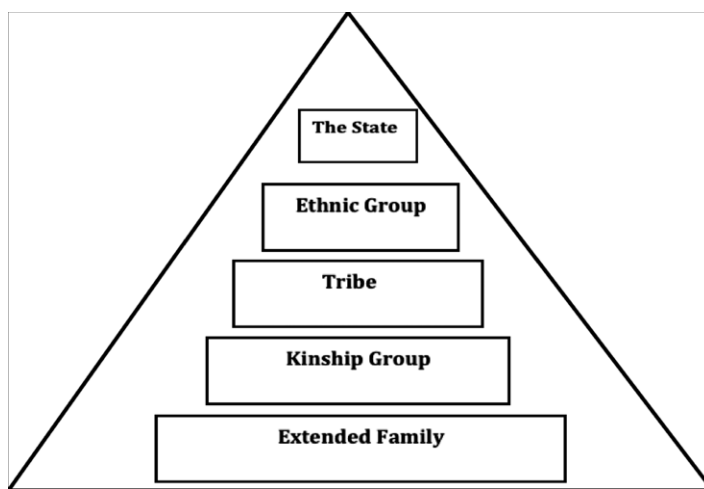


FIG. 1 Micro-, meso- and macro-level agencies of social control in Afghan society
(Source: [Wardak 2006](#))

of a single nation with common interests, their primary allegiance is to local solidarity groups based on kinship or locality' (Barfield and Nojumi 2010: 44). Ethnic groups, tribes, kinship groups and the extended family, on the other hand, are informal agencies of social control, each contributing to the maintenance of social order through informal processes and the exercise of 'traditional' authority (Weber 1964). Wardak (2006) concludes that *the lower the location of the agency of social control in Figure 1, the stronger is its role in the maintenance of social order in Afghan society*. Thus, social order in Afghan society has traditionally been maintained mainly from below through informal social control mechanisms. Although imperfect and male-dominated, these mechanisms empower ideals akin to Jeffersonian rural republicanism.

Most important decisions in Afghan society are made within the 'private' sphere of the extended family; problems are dealt with and disputes resolved on the spot before becoming a 'public' issue. When the extended family fails to resolve disputes and restore social order, however, or when disputes take place between members of more than one extended family, the involvement of the village (or inter-village)-based kinship group is sought. Village (or inter-village) *jirgas* operate as micro institutions of traditional non-state dispute resolution mainly within the context of small-scale kinship groups (Wardak 2006).

The plan for Part II is first to draw on our fieldwork to describe in more detail the place of *jirgas* in rural dispute resolution, then to consider the hybridity of *jirgas* as contemporary institutions of the large city that can be hedged with republican checks and balances against abuse of power. These analyses are then followed by discussion of two faces of *jirgas* as exclusionary and restorative, the contested feminist and rights politics of this, and what is possible from a republican rural and urban politics of non-violence and justice in Afghanistan.

Jirgas and Dispute Resolution

In the Pashtun-majority areas of Afghanistan, village councils or *jirgas* ('circles')—or *maraka* in the south—are the key decision-making and dispute-resolution institutions, not only at the village level, but also from the smallest lineage up to tribal and inter-tribal confederations. *Shuras* are approximate equivalents to *jirgas* among the non-Pashtuns of Afghanistan (Carter and Connor 1989; Glatzer 1998; Malekyar 2000; Smith and Manalan 2009; Wardak *et al.* 2007). In this way, *jirga* and *shura* operate as the main institutions of dispute resolution throughout Afghanistan. If a village *jirga* or *shura* cannot resolve a conflict, the parties may request a greater tribal *jirga* of wider authority that calls upon respected elders from a balance of tribes to counter perceptions of bias. Pashtun society and history form a dialectic between egalitarian and dynastic aspects of Pashtun tradition, between 'royal pretensions and tribal republicanism' (Barfield 2010: 105). *Jirgas* represent the egalitarian side of this dialectic, at least among adult men. The circular structure of the *jirga* puts no person in a symbolically super-ordinate space over others. Key mediation roles are mostly taken by older men with a reputation for wisdom, balance and honesty to whom the community is willing to defer. 'Unlike government officials, local mediators were well informed about the background on the cases brought before them, and used that information to craft decisions designed to meet with the community's approval' (Barfield 2010: 223; see also Ledwidge 2009:

7). Nevertheless, when disputes are not resolved by a local *jirga/shura*, they are often referred in the south to district-level *shuras*, which bridge decision making to district governors (Wardak 2010).

Nanawate is one important kind of tribal *jirga*. *Nanawate* means seeking forgiveness/pardon and obligatory acceptance of a truce offer. Relatives of the accused send a ‘delegation’ to the victim’s house. The relatives include elders and a female holding a copy of the holy *Qura’n*, other relatives close to the offender, sometimes offenders themselves, and a mullah (Muslim priest). They bring a sheep and flour to the victim’s house, often slaughtering the sheep at the victim’s door. On being admitted to the house, they seek pardon on behalf of the perpetrator. Rejecting a *nanawate* is against the tribal code, so pardon and reconciliation generally follow. These *jirgas* have long been recognized as institutions that include many restorative justice features (Barfield *et al.* 2006; Schmeidl 2011; Wardak 2006). Restorative justice discourse is common in Afghan thinking, which links Western restorative thought to how to approach a ‘National Peace and Reconciliation Process’ and establish an ‘Afghan-led and adapted National Truth and Reconciliation Commission’ (Social Development and Stability Afghanistan Organization 2010: 4–5). One might say there is formidable ‘vernacularization’ (Merry 2006) of restorative justice discourse into Afghan thinking about reconciliation and violence prevention, but sadly little vernacularization of Afghan wisdom into Western restorative justice thinking.

We revealed in Part I that a result of NATO’s war against the Taliban is that Taliban courts are preferred over state courts. On the other hand, the justice of *jirgas* is preferred over both. When Afghans are asked whom they approached to solve a problem, ‘elders of the local *shura/jirga*’ was by far the most common response (42 per cent in 2010, increasing to 66 per cent in 2011), ahead of ‘district authorities’ (31, 35 per cent), police (25, 28 per cent), mullahs (18, 23 per cent), a member of parliament (10, 8 per cent), a non-governmental organization (NGO) (4, 6 per cent), foreign forces (2, 2 per cent) and various other options. When specifically asked why they went to *shuras/jirgas* in preference to state courts, their most common answers were (Asia Foundation 2010: 127):

- because local *shura* are honest (35 per cent);
- corruption in government courts (15 per cent);
- resolve disputes efficiently (10 per cent).

Jirga/shura received substantially higher approval than state courts on all five of the following evaluation criteria in four surveys when this was asked (Asia Foundation 2007: 159–60; 2009: 91; 2010: 134; 2011: 152): state courts/*jirga/shura*:

- are accessible to me;
- are fair and trusted;
- follow the local norms and values of our people;
- are effective at delivering justice;
- resolve cases timely and promptly.

This means, on 20 of 20 comparisons of these criteria at four points in time, state courts received much lower approval. The 2008 Asia Foundation survey also found a majority of Afghans who had experienced state court cases was dissatisfied with the

outcome compared with 20 per cent dissatisfaction among those who had experienced *jirga/shura* cases (Sharma and Sen 2008: 62).

Hybridity in a Very Large Metropolis

Preference for non-state justice is not just a rural phenomenon from Pashtun areas where *jirgas* have their roots. In Rebecca Gang's (2011) study of a historically Hazara and Shi'ite area of Kabul, a dispute-resolution programme that created space for female participation for disputes right up to the level of homicide was evaluated. It implemented a hybrid of Shari'a principles, rights principles from state law and indigenous traditions with a restorative character:

CBDR [Community-Based Dispute Resolution] processes are not static and do not rest on an unchanging version of tradition and custom. While traditional practices provide a model for some CBDR processes in the research site, Afshar's multi-tiered resolution structure is an adaptive response to government incapacity. (Gang 2011: 4)

This hybridity is evident in this quote from a participant in the programme who was a 60-year-old mullah:

In every *qawm*, in every province, the custom of *baad* still exists. [*Baad* is the marriage of a woman from a murderer's tribe to a close relative of the victim.] But, I tell people these practices are not allowed in Shari'a. It is not logical, for example, that if one person kills another that a girl, who doesn't know anything, hasn't done anything, is given to the other family. When this happens, the only result is that more people become harmed or guilty. (Gang 2011: 29)

Western commentators on non-state dispute resolution in Islamic contexts neglect both its hybridity and the fact that, within that hybridity, Shari'a is often a resource for women's rights. Women's rights may be best protected where each source of law in a hybrid order contests abuses of power motivated by alternative sources of norms:

My mother had a dispute with my father when he remarried and kicked her and her children out of the house without any money or household items. Although my mother believed that it was not appropriate for women to go to the district or to the whitebeards with this kind of problem, she still went to the whitebeards and asked that they organise a *jalasa*. My mother and father both sat in the *jalasa*. The whitebeards said to him, 'This is a respectable woman. You remarried and kicked her out of the house with nothing. Aren't you afraid of God?' Then my father agreed to give my other mother financial maintenance (*naqafa*) for herself and for us. (Gang 2011: 31)

Accountability to state law matters in this dispute resolution. In its regulation of family violence, for example, the threat of sending men to the police and to prison backs up demands to honour orders to desist from beating women. Nevertheless, the more important form of accountability is communal, even in a large metropolis:

There is transparency between the people and the whitebeards. The people choose certain whitebeards because they know who is honest, respected and has a good background in the community. When the whitebeards come to resolve the dispute, they remember that the people chose them for these reasons. They think 'I must be honest to maintain my good reputation in the community'. (Gang 2011: 22)

Two other participants in this hybrid programme in Kabul explained that it exists because the state fails to provide justice for ordinary people:

When I came to Afghanistan in 2004, I voted for Karzai. I was happy that a good government had been settled. When I saw that Karzai was giving so many high positions to former commanders, I understood that he would not be able to control the government. Now, this government is not taking care of the people, it has sold out the Afghan people. For this reason, the government can resolve the disputes of rich people who can pay, but poor people can only go to the local elders for resolution. We made these shuras just to provide facilities for the people. We try to resolve the people's problems so that they don't have to go to the government. (Gang 2011: 25)

The restorative principles of *nanawate* are also present in this hybrid programme, where stigma is not focused on a responsible 'offender', but where many in the community take active responsibility for their part in an escalation of conflict:

In the Bicycle Dispute, women from the family deemed responsible for unnecessary escalation of the conflict led a procession to the home of the opposing side in a display of *nanawati*. Respectful of the gravity of the circumstances, members of the opposing side had swept the path leading to their home and were prepared with an offering of a headscarf to the women to signify acceptance of the apology. (Gang 2011: 28)

Because hybrid and more traditional justice was always preferred to courts, whether run by the government or by the Taliban's shadow government, the road not taken for most of the first decade after regime change was undercutting the appeal of the Taliban by state and NATO support for *jirga/shura* justice.

The Two Sides of Jirgas: Exclusionary but Restorative Justice

Traditionally, women were not allowed to participate in *jirga/shura* decision making. *Jirgas* sometimes ordered *baad* (the use of women as a means of dispute resolution) or *badal* (the exchange of daughters between two families for marriage). This caused human rights NGOs and women's groups and their supporters in the United Nations and the governments of NATO states to resist *jirgas/shuras* being granted a place in the governance of justice in the new Afghanistan after 2001. Another source of international state-building cynicism about *jirgas* was that, during decades of war, *jirgas* had been captured and bent to the anti-justice agendas of one warlord after another. Sadly, it is a reality of both formal and traditional justice in Afghanistan that powerful men can coerce or buy decisions by forum shopping to whatever jurisdiction gives them the decision they want. Indeed, if the judicial branch of governance gives them the wrong decision, they wield their influence in the executive government to reverse it. If someone is sentenced to prison, for example, prison authorities can readily be bribed to effect release. In our interviews, we were told of concerns that *jirgas* were captured by incumbent landowners when refugees returned to their villages to argue that their land had been stolen in past conflicts (see also Schmeidl 2011: 161). Another concern was that both sides in a dispute were required to pay *machalgha* (collateral usually in the form of money, guns and sometimes land) to the *jirga* and forfeited it if they refused to abide by the *jirga's* decision. This can disadvantage poor people who cannot afford to

lose their collateral, even if it may not be as oppressive as imprisonment for contempt of the orders of a Western court.

Before the ascent to power of the Taliban, village women's *shuras* were not uncommon in some districts. This sense of the *jirga/shura* as an institution that was reformable to honour human rights standards was lost by 2001 amidst the stigmatization of institutions with which the Taliban had been associated as irredeemably oppressive of women. On the key issue of corruption—which drives much ordinary Pashtun preference for the Taliban courts over state courts, and *jirgas* over both—*jirgas* are structurally more salvageable. This is because 'it is more difficult or costly to bribe a dozen or more Jirga members' than to bribe either Taliban or state judges (Schmeidl 2011: 162). Yet, the most important virtue of *jirgas/shuras* in a society where people must manage to live in proximity with people with whom they have terrible histories of atrocity is that *jirgas/shuras* are reconciliatory and people tend to abide by the resolutions they proffer to bring closure.

The Contested Politics of Traditional Justice

In the years up to 2007, *jirgas/shuras* survived under pressure from a formidable array of opponents. The former Communist regime had sought to crush them as part of its project of centralized state power, which broached no space for competing village power bases that they stigmatized as 'feudal'. Likewise, the United States was much influenced by feminist voices and Western-educated Afghan legal/political elites from 2001. This was a response to the American sales pitch led by First Lady Laura Bush that the invasion of Afghanistan was a war for the liberation of Afghan women. Both feminist advocacy and the United States pushed a policy line that a state court system should displace the patriarchal justice of *jirgas/shuras*. The Afghan judiciary relished this support; at one point, its leadership even threatened to prosecute the senior author for advancing the evidence that greater corruption of the judiciary was one ground for favouring the justice of *jirgas* (see [Supreme Court of Afghanistan 2007](#)). Many of the warlords who controlled the central and provincial and district governments also saw traditional *jirgas/shuras* as a competing power base to their own (and a dangerously bottom-up one). Like Communist politicians before them, they wanted to see *jirgas* crushed. President Karzai, in contrast, was always philosophically opposed to these combined efforts to denigrate traditional justice. He could see that all these efforts to sideline traditional justice had failed, with 80–90 per cent of civil and criminal disputes across the nation still going to *jirgas/shuras* (Claude 2010; Wardak *et al.* 2007).

After six years of this conflict between advocates of *jirga/shura* justice and of the justice of the courts, organizations like the US Institute of Peace (Barfield *et al.* 2006; Coburn and Dempsey 2010; Toomey and Thier 2007) began to advocate and then implement a hybrid model of re-empowering traditional justice, while making it more accountable to the formal justice system and to UN gender equality and human rights norms. This followed a 2007 *Afghanistan Human Development Report* proposal (Wardak *et al.* 2007; see also Wardak 2004) for a 'hybrid model of Afghan justice' with a synergy between state and non-state justice systems and a female-dominated human rights unit as a check and balance on rights abuses by both courts and *jirgas*, while courts and *jirgas* were each also checks and balances on the other (see also Schmeidl 2011). In Kunduz province,

this oversight idea has been given an architectural instantiation by the UN Assistance Mission in Afghanistan (UNAMA) Rule of Law Program, with the local *shura* office co-located in the same little buildings as the Department of Women's Affairs and the Hoquq (rights) Department of the Ministry of Justice.

Jirga/shura decisions were binding under Wardak's hybrid proposal only if they did not violate Afghan law, Shari'a law and international human rights principles—quite a suite of checks and balances (Choudhury 2011). *Baad* violates all three, including Shari'a law, and Wardak's proposal gave a council of religious scholars an important role in regulating *baad* as a breach of Shari'a law. Realization that rule-of-law failure was at the heart of the wider failure of the NATO intervention led to a doubling of the US rule-of-law budget for Afghanistan in 2007, another doubling in 2008, almost another in 2009 and another doubling in 2010 (Katzman and Wylar 2010), then a falling away from 2011. A very small fraction of this belated explosion of American funding went to support village *jirgas* and *shuras*, at least from 2010 after the Taliban horse had bolted back into contention as an 'armed rule-of-law movement'.

Although the timing was far too late in a strategic sense, the philosophical shift to seeing *jirgas/shuras* as sometimes abusing rights, but also seeing them as reformable, was a sensible policy shift, especially given the evidence that both *badal* and *baad* as *jirga* outcomes had become increasingly rare (Dunn *et al.* 2011; Smith and Lamely 2009). In the 2006 Asia Foundation (2010: 137) survey, respondents identified 'Forced marriages' as the third-biggest problem that women faced (results were similar for women and men) after 'Education/illiteracy' and 'Lack of women's rights'. The frequency of this being rated as one of the biggest problems more than halved in the 2008, 2009 and 2010 surveys, falling to become the lowest-ranking of the six problems for women covered in these more recent years. By the mid-2000s, only 67 per cent said women were never present in local *jirgas/shuras* in a national survey of dispute resolution (CPHD 2007)—still extremely high, but no longer the tradition of universal exclusion, and not as bad as the formal justice system, where only 3 per cent of judges were women in 2007 (Wardak *et al.* 2007) and fewer than 1 per cent of police (SIGAR 2011). Moreover, *jirgas/shuras*, according to Waldman (2008: 18), have actually been at the forefront of contributing to lower levels of domestic violence and have transformed attitudes to women's rights:

One SDO [Sanayee Development Organization] peace *shura* in Badghis, for instance, ended a long tradition of forced marriages in the community; another determined that beating of wives and children was no longer allowed [Suleman and Copnall 2006: 43]. Given the extent to which such practices are entrenched in parts of Afghanistan, these achievements are nothing short of extraordinary. CPAU [Cooperation for Peace and Unity] also has found that its programmes have brought about a reduction in domestic violence; in particular, the resolution of a small number of individual cases was found to have a positive knock-on effect on the wider community. (Waldman 2008: 18)

We interpret this as women's rights work that is more effective than stigmatizing *jirgas/shuras* precisely because it uses *jirgas/shuras* themselves as high-legitimacy vehicles for 'vernacularizing' (Merry 2006) women's rights into the discourse of traditional justice. In fact, the 2007 *Afghanistan Human Development Report* proposed a practical and testable mechanism for this vernacularization.

Finding a New Path to Non-Violence and Justice in Afghanistan

A ceasefire in a war President Karzai, NATO and the Taliban cannot win (Braithwaite and Wardak 2011) is the last best hope to lay a foundation for all sides to work to disempower themselves in favour of village *jirgas/shuras* and a plural, inclusive republican constitution. Most Western military commanders have held to the view that, even if they cannot defeat the Taliban militarily, killing Taliban fighters maintains military pressure, and this might help them cut a better peace deal. Braithwaite and Wardak (2011) argue that this approach is wrong, particularly where it counts most: for high-level Taliban. The military pressure that *high-level* Taliban members feel most is from the Pakistan ISI, who assure them that, if they do not keep fighting the Americans, they will hand them over to the Americans to be sent to Guantanamo Bay or be killed. In the past, the ISI has quite often won credit from the United States by advising them of the whereabouts of senior Taliban commanders who were suing for peace.

NATO military pressure on *mid-level* commanders has led to the replacement of older Taliban who long for peace and who fight for their valley and their people with young men who are more radical, more bloodthirsty and more disconnected from their valley and their people. This is because they have been indoctrinated in Pakistan-based religious schools and further radicalized by drone attacks and the repeated killings of civilians in Afghanistan and Pakistan. As one Afghan leader put it: ‘Pakistan has the machinery of producing more Taliban. These are funding, *madrassas*, illiteracy’ (July 2011 interview, Kabul). ‘Pakistan cannot deliver reconciliation in Afghanistan, but reconciliation in Afghanistan cannot be delivered without Pakistan’ (July 2011 interview, UN, Kabul).

Killing *low-level* Taliban members is also counterproductive because of Pashtun revenge culture: ‘If you kill me, my brothers will kill you.’ One way they do this is by joining the Afghan Army and Afghan National Police and killing their foreign trainers— known as ‘green-on-blue’ attacks. The evidence is that low-level operatives who are killed have their places taken by younger relatives. Moreover, night raids that kill members of the Taliban also kill innocent citizens in collateral damage; resentment over this also fuels the insurgency.

Criminologists should be capable of seeing killing in Afghanistan through a broader lens than just a war lens. They should be able to see it through the eyes of victims, for example. Oxfam survey results in Figure 2 (Waldman 2008: 12) show that ordinary Afghans certainly fear being killed by the Taliban, but fears of warlords, criminal gangs, international forces, drug traffickers (which, were they combined with ‘criminals’, would be perceived as the top security threat), Afghan police and armed men hired to do the bidding of Afghan government officials are all extremely high; and fears of the Afghan Army, family violence and inter-tribal violence are also quite high. What is needed is a paradigm shift that responds to this fear of violence and war-weariness as a political resource to motivate a multidimensional ceasefire combined with concrete steps towards disarmament and replacement of militarized policing with community policing and with regulation of violence by both *jirgas* and courts.

In 2011, US President, Barack Obama, first became open to this kind of paradigm shift, though minority voices for it had been raised for years within his national security circle (Woodward 2011). A policy of reconciliation with the Taliban on condition of renunciation of links to al-Qaeda and of terrorism, and declaration of respect for

the equal rights of women, would have been a more effective policy had it been pursued consistently since 2001. Yet, it remains the most hopeful policy today. As a former Taliban minister put the inevitability of coming to terms with the Taliban and replacing the then negotiators (subsequently assassinated by the Taliban):

Pashtuns are like a rubber ball. The more you will oppress it, the higher it goes. You will never be able to make it the underdog. The Northern Alliance are the main obstacle to peace. They resist peace cleverly through controlling the High Peace Council (August 2011 interview).

Among the Afghan people themselves, the [Asia Foundation \(2010: 4\)](#) surveys found 83 per cent support peace negotiations and reconciliation with armed antigovernment elements—up from 71 per cent in 2009.

Just as it is mistaken to stigmatize *jirgas* as irredeemably abusive of human rights, so it is a mistake to stigmatize the Taliban in this way. Peace negotiators can separate the principle of unwavering commitment to the human rights of the Afghan people from a politics of stigmatization of those who have violated them in the past. The literature that is critical of the shallow and insincere reconciliation efforts in Afghanistan but which advocates a more consistent and multidimensional dedication to reconciliation (e.g. [Sajjad 2010](#); [Semple 2009](#); [United States Institute of Peace 2009](#); [Waldman 2008; 2010](#)) now finally commands respect in Western policy circles.

The same Oxfam survey reported in [Figure 2](#) found that ‘the single most popular mechanism for the resolution of disputes is community or tribal councils of elders (usually known as *jirgas* or *shuras*)’. It also reported from another national survey of 8,000 people conducted by the [Afghanistan Independent Human Rights Commission \(2006: 14–17\)](#) that ‘58 per cent of people said that state institutions had failed to help them

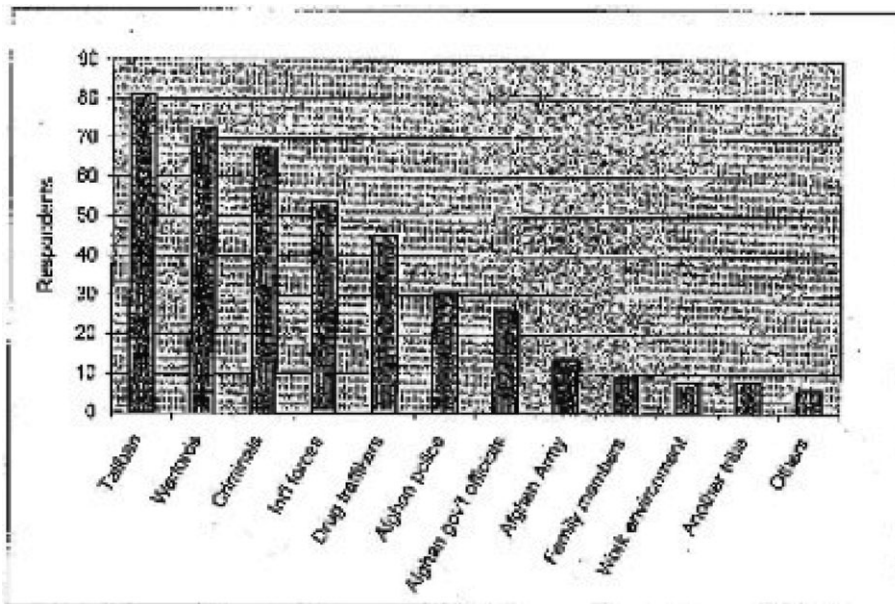


FIG. 2 Security survey of 500 Afghans in six provinces, 2007: greatest threats to security (Source: [Waldman 2008: 12](#)).

resolve problems, whereas just 13 per cent said that *shuras* had failed to help them' (Waldman 2008: 14). Waldman (2008: 14) also pointed to the UNDP (2007: 93–4) survey result that, for 80 per cent of cases handled by *shuras*, peace resulted 'always or sometimes' and 50 per cent resulted in compensation for the victim.

There is no simple prescription for exactly how to more effectively mobilize *jirgas/shuras* to foster peace, compensation and justice in alliance with the courts across the whole range of hybrid war-crime threats in Figure 2. For example, while traditional male-dominated *jirgas/shuras* enjoy more legitimacy, more than 16,000 *shuras* covering 70 per cent of the nation's villages have been elected with an increasingly balanced participation of women (in 2011, 35 per cent of members were women) through the National Solidarity Program. These *shuras* can lack local legitimacy and can be seen as tools of the government and of foreign donors. Our interviews nevertheless suggest that, on balance, these *shuras* of the Community Development Councils (under the National Solidarity Program) are accepted as positive in many areas. They are often accepted as positive when they concentrate on the task-oriented work of channelling aid in a bottom-up way that empowers locally elected voices, including the voices of women and youth, to decide local development priorities to which they choose to direct funding. The Oxfam survey found that only a small proportion of people would turn to these modern *shuras* for the resolution of disputes (Waldman 2008: 14). Nevertheless, Community Development Council *shuras* are training women in *shura* participation, even if it is only in all-female *shuras* that operate in parallel with an all-male *shura* in their village. Figure 3 reports the results of a survey that asked 'Is there a woman in the village who is well respected by men and women?'. The answer to this question is significantly more likely to be yes in an Afghan village with a *shura* supported by the National Solidarity Program.

In an encouraging, more recent, large-scale survey in Kunduz province of northern Afghanistan, respondents were asked 'How strongly do you support the involvement of local elderly women [*speensari/sarsafida*] in *Jirga/Shura* proceedings and decision making processes?'. Figure 4 shows that 62 per cent of respondents said they strongly supported the idea of getting local elderly women involved in *jirga/shura* processes, 14 per cent somewhat supported the idea and only 22 per cent somewhat or strongly opposed it.

The data in Figure 4 indicate an overwhelming majority in the multi-cultural Kunduz province is supportive of inclusive (of men and women) processes of traditional

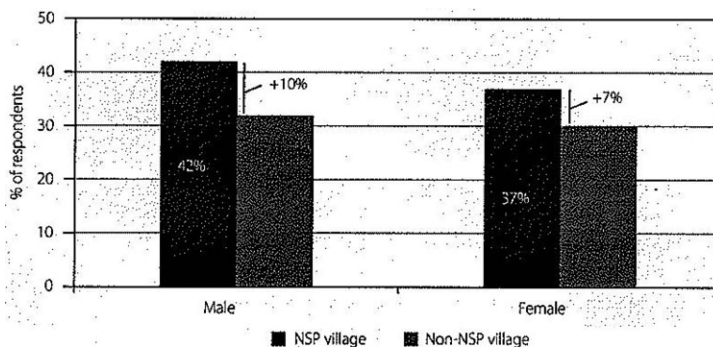


FIG. 3 'Is there a woman in the village who is well respected by men and women?'

(Source: World Bank 2011: 170)

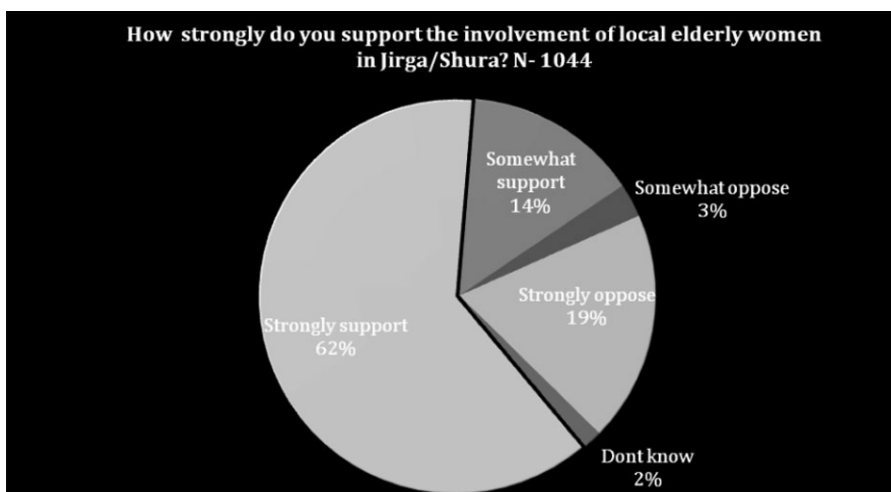


Fig. 4 Support for the idea of the involvement of elderly women in *jirgas/shuras* (Source: CPAU forthcoming)

dispute resolution; however, the modalities and conditions for the participation of *speensari/sarsafida* in *jirga* proceedings and decision-making processes may be more complex than a survey could quantify simply. In response to the changing attitudes to women's participation in *jirga/shura* processes in Afghan society, some USAID-funded programmes have supported the formation of *speensari* groups in some districts of southern and eastern Afghanistan in culturally appropriate ways (USAID 2012).

There is also a less well-funded programme of the Ministry of Women's Affairs that is encouraging 'quietly remarkable women' to participate in village governance and dispute resolution through women's *shuras* (July 2011 interview, provincial Director for Women's Affairs). In fact, the Ministry of Women's Affairs is increasingly present and active throughout much of Afghanistan.

Men are beginning to accept the participation of women through *shuras* because that participation is delivering practical benefits to the village such as funding for a new well or a new orchard. The Asia Foundation surveys show that people are considerably less opposed to being represented by women in local *shuras* or *jirgas* and in Community Development Councils than the opposition they express to being represented by women in the National Parliament and their Provincial Council (Asia Foundation 2010: 144). Gradually, this is creating a platform for women's participation in peacemaking *shuras* that responds to the many forms of violence that afflict Afghan men and women. The most recent Asia Foundation (2010: 6; 2011: 69) surveys found that, while *jirgas/shuras* enjoy the highest confidence of all representative bodies (66 per cent in 2010; 70 per cent in 2011), Community Development Councils were closing the confidence gap (at 61 per cent in 2010 and 68 per cent in 2011) and enjoyed more popular confidence than the parliament as a representative body.

The Oxfam survey shows that ordinary Afghans want access to both formal court and informal *jirga/shura* dispute resolution, even if the majority prefers *jirgas/shuras* as the forum to which they first turn (Waldman 2008: 14–15).

Expanding Pacified Spaces and Democracy via Village/Town Moots

Afghanistan is a case study of how hard it is to build a democracy from the top down via a state executive, even with unprecedented support for that state from all the world's major powers, and initially with the overwhelming support of the relieved citizens of Afghanistan in 2001. Insecurity is a central reason democracy is not working in Afghanistan. The [Asia Foundation \(2010: 4\)](#) found that the percentage of Afghans afraid to vote in national elections is rising and, in mid-2010, was 60 per cent, 83 per cent in the south-west of the country. Most flourishing democracies started to build democratic institutions first in towns that were very small by contemporary standards—towns like Lubeck in Germany and Bruges in Flanders, which remain small today, and like Hamburg, Boston, York and Florence, which have become large cities. Most people prefer democracy to autocracy, yet they must learn to be democratic before they can enjoy its benefits. Throughout history, citizens have learnt to be democratic in sub-national institutions like guilds, town councils and village moots. Among the things these institutions delivered was space for citizens to settle disputes and allegations of crime without autocratic edicts from the courts of feudal masters. These feudal courts fused judicial and executive authority. It proved more possible to break away judicial authority than executive authority (particularly to wage war) from the courts of kings and feudal overlords.

Through this prism, it is hard to understand why the discipline of criminology has not been more theoretically assertive in debating the possibility that criminal adjudication has always been a key site where citizens learn to be democratic. As one recent minister from the north of Afghanistan put it, thinking about his particular area: 'Village governance is traditionally democratic. The state is the undemocratic institution that comes top-down to influence the democratic institutions of the village' (July 2011 interview). This can be so even within hotspots of violence and democratic failure in a place like Afghanistan. The Afghan case study of the institution of the *jirga/shura* shows that, in conditions of a Hobbesian war of all against all, it is in local crime control that citizens most crave a democratic voice. Yet, the Afghan case also shows how forces of tyranny—local Taliban tyrants and local NATO and Afghan military commanders—can co-opt this craving for participatory, reconciliatory local regulation of crime. Even when they do, a little local space is still created with the possibility that citizens at the periphery can learn to be democratic. There is no simple, straight path from tyranny to democracy. Just sending in peacekeepers to hold a national election is not such a path. Top-down peace-making and constitutional development are important, but will only take root if the soil of democracy is cultivated locally and spreads out from 'islands of civility' ([Kaldor 1999](#)).

Our conclusion is that criminologists need to be part of a debate about the path to democracy that starts at the periphery of a society rather than at the centre. This debate sees it as important to jump-start the journey to democracy in the judicial branch within rural and small-town spaces as much as in the executive branch in the capital. In mature democracies where citizens feel increasingly remote from and cynical about their government, criminology can lead a debate about whether the judicial branch rather than electoral politics provides the more fertile soil for democratic renewal. The argument is that most young citizens might enjoy better prospects of learning to be meaningfully democratic in participatory restorative justice conferences in schools and neighbourhoods than in Labour Party branch meetings. If movements of scholars

like the Taliban continue to be more open to this insight than communities of liberal scholars, more poor nations may be co-opted to tyranny by Islamic and other armed rule-of-law movements.

It is strange that we are so closed to this insight when the good-hearted or bad-hearted sheriff who rides into town to outgun the incumbent bad guys is such a leading genre in the West's most influential art form. In some of these scripts, the democratic sheriff subdues the lynch mob and replaces it with a participatory court; in others, the ruthless sheriff gives the lynch mob its head or is a corrupt agent of moneyed men who abuse women and oppress small ranchers.

Democratizing Leviathan from the Periphery

None of this is to deny the Hobbesian insight that large swathes of territory are unlikely to be pacified unless there is broad acceptance of who has the right and the power to dominate that territory militarily. A Leviathan must disarm competing armies within that territory. The Leviathan move is step one to peace. Establishing a republican democracy is step two because it allows political contestation to occur through voices and votes rather than through bullets and violence (see [Pinker 2011](#)). Yet, Leviathans do not readily transform themselves into republican democracies. In societies where most people live in villages and tiny towns, people need not only the protection of the Leviathan from invading armies, but also the protection from local gangs that can only be delivered at the village level by village institutions—though village institutions can deliver security better when they are backed by state power and productively integrated with state institutions.

A key path to the Leviathan becoming a republican democracy is village and town folk learning to become democratic as they manage local crime. In this process, some democratic villages and towns flourish commercially to such an extent that the Leviathan in the long run of history is forced to reach an accommodation with their power and their democratic demands ([North et al. 2009](#)). Village crime control is the undervalued and unrecognized path to peace and national democracy. On the other hand, when the starting point is a Hobbesian world, another Taliban that offers security laced with tyranny is also a possibility for expanding its sway, starting from the periphery.

The United Nations and donor nations should do what they can to support and protect traditional justice institutions in conflict zones that help people to stay safe when these institutions come under attack from warlords. In opportunity theory terms, this helps deny one path to tyrannical power for armed rule-of-law movements like the Taliban. The United Nations can also help open up one legitimate path to local crime control and to national democracy through people learning to be democratic as they preserve strengths of village governance in fighting crime. Of course, this is only one of many paths to peace and democracy that must be supported. Yet, it is a neglected one, even among criminologists.

Séverin [Autesserre's \(2010\)](#) book on the failures of UN peacekeeping in the Democratic Republic of Congo sees the problem as one of Western and African intellectuals with a metropolitan orientation to national diplomacy—to the neglect of sources of conflict that are mainly rural in contemporary civil wars. 'Peacebuilders viewed decentralized conflicts as a Hobbesian challenge: They were private and criminal' ([Autesserre 2010](#):

42). Their view was that the focus of UN peacekeeping should only be on the national policy agenda and the larger armies who fought to control the state. Autesserre's analysis is that peacekeeping in the Congo could have been much more effective had the United Nations worked with rural leaders, as well as national ones, to sort out the rural Hobbesian challenges step by step. We agree that best-practice contemporary peace building is as much about the rural and small-town criminology of gangs seeking very local forms of control as it is about international relations and national politics. A recent study of 501 tribal wars in Papua New Guinea concluded that customary justice institutions with a restorative justice character have been effective in reducing violence and restoring peace in the country (Wiessner and Pupu 2012).

When Westerners see strange, non-Western village crime-control institutions that have some features that are offensive in human rights terms, they might resist the temptation to demand that Western-backed peacekeeping sides with the Hobbesian forces that seek to destroy village governance as competing power bases. If, on more careful inquiry, it is found that these institutions count among the surviving institutions that provide people with some protection from violence and anarchy, then peacekeepers and donors would do better to support those urging their reform rather than those urging their marginalization. In the case of Afghanistan, for example, most indigenous feminist voices support reforming *jirgas* and *shuras*:

- by advocating more participation of 'whitehairs' alongside 'whitebeards';
- by helping establish women's *shuras* to balance and interact with male-dominated *shuras*;
- by holding male-dominated *shuras* accountable to human rights institutions, to the media and to the courts when they abuse rights;
- by requiring the recording of *shura* decisions on a register and making this register available to feminist NGOs and courts who might demand action against decisions that abuse women's rights;
- by especially requiring *jirga/shura* registration of marriages, so it is possible for wives to check how many earlier and current wives a proposed or arranged husband has;
- by working with mullahs to demand the reversal of *jirga* decisions to offer a bride as being in breach of Shari'a law.

This is not to deny that there are other Afghan feminist voices who are not comfortable working with local mullahs to eliminate *baad*, who are not comfortable working to reform *jirgas* and who work instead to completely replace their crime-control jurisdiction with the jurisdiction of Western-style courts. Indeed, the advocacy of abolitionist Afghan feminist voices has been better understood in the West and has attracted more Western donor funds from 2001 than the reformist feminist voices. Some of these voices operate as expensively funded civil society NGOs, which ironically call for the abolition of the oldest and self-sustained civil society organ in Afghanistan: *jirgas/shuras*.

The reality of Afghan society is that it has historically resisted the imposition of social order from above: the drastic failures of King Amanullah Khan's modernist, Western-inspired radical reforms in the 1920s and the Afghan Communists' Soviet-inspired 'socialism' in the 1980s are lessons not to be lost. Both tried to impose modernity on a very traditional Afghan society. Similarly, the imposition of different versions of theocracy by the Mujahideen and Taliban in the 1990s and early 2000s drastically failed. In order for

Afghanistan to live in a lasting peace with itself, its neighbours and with the rest of the world, its local traditional institutions need to be bridged with modernity. It may not be too late for the United States and its Western allies to help build peace and promote justice in post-Taliban Afghanistan from below—through an Afghan form of rural republicanism—supported by a Hobbesian Leviathan from above. This Afghan *bottom-up and, at the same time, top-down* approach is more likely to deliver effective justice and provide lasting peace to all Afghans. Peacekeepers may be required to protect both the Afghan state and its society, including those involved in bottom-up reconciliatory work. Top-down imposition of a new social order supported by Western military power and night raids to search for and kill Taliban fighters are likely to prove counterproductive in the long run.

Funding

This research was supported by two Australian Research Council grants.

REFERENCES

- Afghanistan Independent Human Rights Commission (2006), *Economic and Social Rights in Afghanistan*. Kabul: Afghanistan Independent Human Rights Commission.
- Asia Foundation (2007), *Afghanistan in 2007: A Survey of the Afghan People*. Kabul: The Asia Foundation.
- (2009), *Afghanistan in 2009: A Survey of the Afghan People*. Kabul: The Asia Foundation.
- (2010), *Afghanistan in 2010: A Survey of the Afghan People*. Kabul: The Asia Foundation.
- (2011), *Afghanistan in 2011: A Survey of the Afghan People*. Kabul: The Asia Foundation.
- AUTESERRE, S. (2010), *The Trouble with the Congo: Local Violence and the Failure of International Peacebuilding*. Cambridge and New York: Cambridge University Press.
- BARFIELD, T. (2010), *Afghanistan: A Cultural and Political History*. Princeton, NJ: Princeton University Press.
- BARFIELD, T. and NOJUMI, N. (2010), 'Bringing More Effective Governance to Afghanistan: 10 Pathways to Stability', *Journal of Middle East Policy*, XVII: 40–53. .
- BARFIELD, T., NOJUMI, N. and THIER, A. (2006), *The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan*. Washington, DC: United States Institute of Peace, available online at www.usip.org/files/file/clash_two_goods.pdf.
- BRAITHWAITE, J. and WARDAK, A. (2011), 'Is Killing Taliban a Good Idea?', *Inside Story*, available online at <http://inside.org.au/is-killing-taliban-a-good-idea/>.
- (2012), 'Crime and War in Afghanistan: Part I: The Hobbesian Solution', *British Journal of Criminology*. doi: 10.1093/bjc/azs066
- CARTER, L. and CONNOR, K. (1989), *A Preliminary Investigation of Contemporary Afghan Councils*. Peshawar: ACBAR.
- Centre for Policy and Human Development (CPHD) (2007), *A National Survey on Local Dispute Resolution Mechanisms in Afghanistan*. Kabul: ACSOR.
- CHOUDHURY, N. (2011), 'Reconceptualizing Legal Pluralism in Afghanistan', *Windsor Review of Legal and Social Issues*, April: 21–52.
- CLAUDE, A. C. (2010), *Afghanistan: Justice and Reconciliation: The Informal Justice System in Afghanistan*. Kabul: Civil Military Fusion Center.
- COBURN, N. and DEMPSEY, J. (2010), *Informal Dispute Resolution in Afghanistan*. Washington, DC: United States Institute of Peace.

- DUNN, D., CHISHOLM, D. and MASON, E. (2011), *Afghan Rule of Law and Stabilization Programme (Informal Component): Assessment*. Kabul: USAID.
- GANG, R. (2011), *Community-Based Dispute Resolution Services in Kabul City*. Kabul: Afghanistan Research and Evaluation Unit.
- GLATZER, B. (1998), 'Is Afghanistan on the Brink of Ethnic and Tribal Disintegration?', in W. Maley, ed., *Fundamentalism Reborn? Afghanistan and the Taliban*. New York: St Martins.
- KALDOR, M. (1999), *New and Old Wars: Organized Violence in a Global Era*. Cambridge: Polity Press.
- KATZMAN, K. and WYLER, L. (2010), *Afghanistan: US Rule of Law and Justice Sector Assistance*, Congressional Research Service, Report No. R41484, 9 November.
- LEDWIDGE, L. (2009), 'Justice and Counter Insurgency in Afghanistan: A Missing Link', *RUSI Journal*, 154: 6–9.
- MALEKYAR, S. (2000), 'Qadamhaie Ashti wa Solh dar Anannaie Hazarahaie Afghanistan', in *Qadamhaie Ashti wa Masauliate ma Afghanistan*. Falls Church, VA: Kabultec.
- MERRY, S. E. (2006), *Human Rights and Gender Violence: Translating International Law into Local Justice*. Chicago: University of Chicago Press.
- NORTH, D. C., WALLIS, J. J. and WEINGAST, B. (2009), *Violence and Social Orders*. New York: Cambridge University Press.
- PINKER, S. (2011), *The Better Angels of Our Nature*. New York: Viking.
- SAIKAL, A. (2005), 'Afghanistan's Weak State and Strong Society', in S. Chesterman, M. Ignatieff and R. Thakur, eds, *Making States Work: State Failure and the Crisis of Governance*. Tokyo and New York: United Nations University Press.
- SAJJAD, T. (2010), *Peace at All Costs? Reintegration and Reconciliation in Afghanistan*. Kabul: Afghanistan Research and Evaluation Unit.
- SCHMEIDL, S. (2011), 'Engaging Traditional Justice Mechanisms in Afghanistan: State-Building Opportunity or Dangerous Liaison?', in W. Mason, ed., *The Rule of Law in Afghanistan: Missing in Inaction*. New York: Cambridge University Press.
- SEMPLÉ, M. (2009), *Reconciliation in Afghanistan*. Washington, DC: United States Institute of Peace.
- SHAHRANI, N. (1996), 'State Building and Social Fragmentation in Afghanistan: A Historical View', in A. Banuazizi and M. Weiner, eds, *The State, Religion and Ethnic Politics: Afghanistan, Iran, Pakistan*. New York: Syracuse University Press.
- SHARMA, S. and SEN, P. K. (2008), 'Institutionalization of the Justice System', in R. Rennie, ed., *State Building, Security and Social Change in Afghanistan*. Kabul: The Asia Foundation.
- SMITH, D. and LAMELY, J. (2009), *A Holistic Justice System for Afghanistan*. Kabul: Afghanistan Research and Evaluation Unit.
- SMITH, D. and MANALAN, S. (2009), *Community-Based Dispute Resolution Processes in Bamiyan Province, Afghanistan Research and Evaluation Unit*. Kabul: AREU.
- Social Development and Stability Afghanistan Organization (2010), *Concept on a National Comprehensive Peace and Reconciliation Process*. Kabul: Prepared for The Asia Foundation.
- Special Inspector General for Afghanistan Reconstruction (SIGAR) (2011), *Tenth Quarterly Report by the Special Inspector General for Afghanistan Reconstruction to the United States Congress*. Washington, DC: SIGAR.
- SULEMAN, M. and COPNALL, D. (2006), *Evaluation of Peace-Building Programmes in Farah and Badghis, Western Region of Afghanistan*. Kabul: Sanayee Development Organization.

- Supreme Court of Afghanistan (2007), 'Resolutions of the Supreme Council of the Supreme Court of Afghanistan', *Mizan Weekly*, 47 (6 December). Kabul: Supreme Court of Afghanistan.
- TOOMEY, L. and THIER, A. J. (2007), *Bridging Modernity and Tradition: Rule of Law and Search for Justice in Afghanistan*. Kabul: United States Institute of Peace.
- United Nations Development Programme (UNDP) (2007), *Afghanistan Human Development Report*. New York: UNDP.
- United States Institute of Peace (2009), *Afghanistan: Progress in Peacebuilding*. Kabul: United States Institute of Peace.
- USAID (2012), *District Assessment in Tirin Kot, Rule of Law and Stabilisation Component*. Kabul: USAID.
- WALDMAN, M. (2008), *Community Peacebuilding in Afghanistan: The Case for a National Strategy*. Oxford: Oxfam International.
- (2010), *Dangerous Liaisons with the Afghan Taliban: The Feasibility and Risks of Negotiations*. Washington, DC: *United States Institute of Peace*.
- WARDAK, A. (2002), 'Jirga: Power and Traditional Conflict Resolution in Afghanistan', in J. Strawson, ed., *Law after Ground Zero*. London: Cavendish.
- (2004), 'Building a Post-War Justice System in Afghanistan', *Crime, Law & Social Change*, 41: 319–41.
- (2006), 'Structures of Authority and Local Dispute Settlement in Afghanistan', in H.-J. Albrecht ed, *Conflicts and Conflict Resolution in Middle Eastern Societies: Between Tradition and Modernity*. Berlin: Duncker & Humblot.
- (2010), 'A Field Assessment: Linking Formal and Informal Customary Justice Mechanisms in Ahmad Aba (Paktia) and Zone 5 of Jalalabad: An Exploratory Project', unpublished Field Report, Kabul, TLO.
- WARDAK, A., SABA, D. and KAZEM, H. (2007), 'Bridging Modernity and Tradition: Rule of Law and the Search for Justice', *Afghanistan Human Development Report*. Kabul: CPHD, available online at <http://hdr.undp.org/en/reports/nationalreports/asiathepacific/afghanistan/name,3408.en.html>.
- WEBER, M. (1964), *The Theory of Social and Economic Organization*, edited by T. Parsons. New York: Free Press.
- WIESSNER, P. and PUPU, N. (2012), 'Toward Peace: Foreign Arms and Indigenous Institutions in a Papua New Guinea Society', *Science*, 337: 1651–3.
- WOODWARD, R. (2011), *Obama's Wars*. New York: Simon & Shuster.
- World Bank(2011), *World Development Report*. Washington, DC: The World Bank.