

State-Building Interventions and their Impact on Formal and Informal Institutions: Paradox of Contestation and Cooperation in Post-2001 Afghanistan

Dr Shahida Aman and Dr M. Ayub Jan*

Abstract

Taking post-2001 Afghanistan as a case study, this article looks at the impact of state-building interventions on formal and informal institutions in a post-conflict state. Efforts to reconstruct Afghanistan after international intervention in 2001 remain under-researched in terms of studying the problematic interplay of contestation and collaboration between formal and informal institutions and its complex linkages with desired state-building goals. Notwithstanding the dominance of local, informal and traditional governance structures, attempts at introducing formal, centralist and top-down institutions have generally disregarded the social context of institutional success. As a consequence, adherence to formal practices is low, raising issues of legitimacy and effectiveness of state-building practices. The interplay between informal and the formal, in which *de facto* and *de jure* try to influence each other, show complex patterns of contestation when goals are non-complementary or dysfunctional; and cooperation when such goals are complementary and functional. In Afghanistan, such paradoxical interplay has been demonstrated in examples such as the formal engagement with community-based policing structures (*Arbakai*), customary dispute resolution bodies (*Jirgas*) and tribal (*Qawm*) elder's role in state-related functions. This interaction does not show linear lines of either cooperation or contestation; rather a complex mix of both, sometimes in the same domain. The varied attempts made by the state as well as international non-governmental organisations (INGOs) in engaging informal institutions for successful governance practices illustrate that bottom-up processes need to be engaged for increasing the effectiveness of formal institution building.

Key words: State-building, Afghanistan, Formal and informal institutions, Post-intervention, Paradoxes.

* Both the authors are working as Assistant Professors at the Department of Political Science, University of Peshawar in Pakistan.

Introduction

The post-Cold War era coincided with the rise of state-building interventions in the so-called ‘failed’ and ‘conflict’ areas, such as those in Afghanistan, the Balkans, East Timor, Haiti, Iraq, Liberia, Sierra Leone, Somalia and Sudan. These ‘failed’ states were an aberration to the normal states by being functionally and institutionally incompetent, deficient in the provision of essential services (particularly security) and prone to violence, war, hunger and deprivation.¹ Regionally and internationally, such ‘failed’ and ‘conflict’ states were believed to be the hotbeds of extremism and transnational terrorism. The security and humanitarian threats emanating out of states such as Angola, Bosnia, Croatia, Cambodia, East Timor, El Salvador, Guatemala, Kosovo, Liberia, Mozambique, Namibia, Nicaragua, Rwanda, and Sierra Leone inspired more than forty peace and state-building missions undertaken by the United Nations in the last decade of the 20th Century.² Inspired by the ‘failed state discourse’, state-building in post-intervened regions involves structuring new state institutions and improving their effectiveness; as well as evolving a liberal political and economic order. These two, often practised in tandem, produce certain paradoxes, which besides complicating the state-building process, may also inhibit its performance.

The state-building model in post-intervention period attempts at creating centralised and robust formal governance structures to undertake security and service provision. This is complemented by liberal attempts at creating democratic legitimacy through elections; developing a constitution that guarantees individual rights; and giving space to an independent media;

¹ Robert H. Jackson, “Surrogate Sovereignty?: Great Power Responsibility and ‘Failed States’,” Working Paper 25, (Institute of International Relations, The University of British Columbia, 1998),

http://www.comm.ucsb.edu/faculty/mstohl/failed_states/1999/papers/Jackson.html; Susan L. Woodward, “Fragile States: Exploring the Concept,” (Paper presented at the Peace and Social Justice meeting of the Ford Foundation for the States and Security Learning Group, Rio de Janeiro, Brazil, November 29, 2004), www.fride.org (accessed November 12, 2009); Robert I. Rotberg, “Failed States, Collapsed States, Weak States: Causes and Indicators,” in *State Failure and State Weakness in a Time of Terror*, ed. Robert I. Rotberg (New York: Brookings Institution Press, 2003), 1-10; Jonathan Di John, “Conceptualizing the Causes and Consequences of Failed States: A Critical Review of the Literature,” Working Paper 25, (Crisis States Research Centre, Development Studies Institute, 2008), 9-10; and The African Studies Centre et al., *Failed and Collapsed States in the International System*, (The African Studies Centre, The Transnational Institute, The Center of Social Studies, and The Peace Research Centre Report, 2003), http://www.ces.uc.pt/nucleos/nep/documentos/failed_collapsedStates-Report.pdf (accessed April 11, 2016). A large body of literature defines the ‘failed state’ as being deficient in functional, institutional, judicial and liberal aspects of a successful state.

² Roland Paris, *At War’s End: Building Peace after Civil Conflict* (Cambridge: University of Cambridge, 2004).

and encouraging civil society and institutions of a free market economy. Most state-building definitions focus on ‘formal government institutions’³ whose absence, ineffectiveness or erosion, are cited as the most important reasons for state failure in the first place. But such an emphasis on formal government institutions veils the role of informal institutions in the governance of conflict states. Conflict societies, including Afghanistan, are dominated by fragmented, traditional and indigenous governance arrangements, such as *Jirgas* (council of elders) *Shuras* (councils) and *qawm* (tribes); ‘shared mental models’, such as Pakhtunwali (Pakhtun code of conduct); and informal norms and practices, including patrimonialism and nepotism.

According to Helmke and Levitsky institutions can be defined as formal and informal rules and procedures ‘that structure social interaction by constraining and enabling an actor’s behaviour.’⁴ Nils Boesen uses D.C. North’s definition of institutions in his work and defines governance as the management and enforcement of formal and informal rules and the exercise of power and authority. The latter defined institutions as the ‘rules of the game in a society, or more formally, ... the humanly devised constraints that shape human interaction.’⁵ Boesen also cites W.R. Scott who saw institutions as ‘resilient social structures’⁶ and agrees with T.R. Zenger and S. G. Lazzarini who distinguished informal institutions as those based more

³ Dominik Zau, *The Sovereignty Paradox: The Norms and Politics of International State Building* (Oxford: Oxford University Press, 2007), 1; Charles T. Call and Elizabeth M. Cousens, “Ending Wars and Building Peace: International Responses to War-Torn Societies,” *International Studies Perspectives* 9, no. 1 (2008), 4; Richard Caplan, *International Governance of War-Torn Territories: Rule and Reconstruction* (New York: Oxford University Press, 2005), 3; Ashraf Ghani, Clare Lockhart and Michael Carnahan, “Closing the Sovereignty Gap: How to Turn Failed States into Capable Ones,” Working Paper 253, (Overseas Development Institute, 2005), <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2482.pdf> (accessed April 11, 2016); and Alan Whaites, “States in Development: Understanding State-building,” Working Paper (Department for International Development, 2008), 6-10, <http://tna.europarchive.org/20081212094836/http://dfid.gov.uk/pubs/files/State-in-Development-Wkg-Paper.pdf> (accessed April 4, 2016).

⁴ Gretchen Helmke and Steven Levitsky, “Informal Institutions and Comparative Politics: A Research Agenda,” *Perspectives on Politics* 2, no. 4 (2004), 725.

⁵ Nils Boesen, “Governance and Accountability: How do the Formal and the Informal Interplay and Change?” in *Informal Institutions: How Social Norms Help or Hinder Development* ed. Jütting Johannes et al., (Paris: OECD Publishing, 2007), 3; Douglas C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990).

⁶ W. R. Scott, *Institutions and Organizations: Ideas, Interests and Identities*, 2nd ed. (Thousand Oaks: Sage, 2001), quoted in Boesen, “Governance and Accountability,” 2006: 3.

on ‘implicit understandings’, rather than sanctioned and created through ‘formal position.’⁷

The formal versus informal paradox emerges when post-intervention state-building reforms emphasise introduction of technocratic and top-down institutions. Such reforms fail to incorporate the successful pre-intervention bottom-up traditional practices and institutions of governance in host states, such as Afghanistan. The introduction of top-down formal institutions in the face of already dominant informal practices brings the formal into contestation with the informal. As the *de jure* tries to influence and assert itself over the *de facto*, complex patterns of contestation and cooperation emerge between the two sets of institutions. The local population’s adherence and dependence on traditional and indigenous practices of governance for regulating their lives continues unabated. For example, despite the introduction of formal judicial reforms (a judicial system based on Western legal traditions and institutions) in post-2001 Afghanistan, 80 per cent of the population still takes recourse to traditional dispute resolution mechanisms. This is paradoxical because the very purpose of state-building is creation of institutions that are legitimate and service providing to the citizens, but in practice, such external interventions end up giving birth to institutions that are remotely located; sparsely connected to the local populace; and lack compatibility with the traditional socio-political life of indigenous settings; and hence lead to contestation between formal and informal institutions.⁸

This article explores such contestation between the formal and the informal in the case of security, judicial and services sector reforms in Afghanistan. This introduction is followed by secondary literature review of formal and informal institutions in general and their compatible and incompatible modes of interaction in post-conflict state-building exercises. Then the article explores the complex interplay between the formal and informal institutions in post-2001 Afghanistan. It also attempts to decipher the manner in which such interactions are facilitating or hampering state-building goals in Afghanistan. The last section offers some concluding thoughts. The findings, generated after critical engagement with available literature on Afghanistan, suggest that technocratic, top-down state-building

⁷ Todd R. Zenger, Sergio G. Lazzarini and Laura Poppo, “Informal and Formal Organization in New Institutional Economics,” in *The New Institutionalism in Strategic Management (Advances in Strategic Management 19)*, ed. Paul Ingram, Brian S. Silverman, (Bingley: Emerald Group Publishing Limited, 2000), quoted in Boesen, “Governance and Accountability,” 3.

⁸ Shahida Aman, “Post 2001 State-building in Afghanistan: Institutional Paradoxes, District Governance and the Interplay of the Formal and the Informal,” *Central Asia*, no. 17 (2013), 25-55. However, it should be pointed out that such contestation can also at times contribute to the achievement of state-building goals in other unconventional ways.

reforms are bringing the formal in contestation with the informal structures, by either failing to incorporate them in their planning or ignoring their relevance altogether.

Formal vs. Informal Institutions and State-Building Interventions

Formal institutions are defined as rules and structures that are created and transmitted through formal channels, including the military, bureaucracy, legislature, state-sponsored laws, constitution and the like. Informal, on the other hand, are socially shared rules, which are usually unwritten and are enforced through non-official channels of sanction.⁹ Depending on their compatibility or utility to each other, scholars identify four dimensions of formal/informal interactions: i) accommodative, in case of successful integration of the informal into formal; ii) complementary or functional, when informal institutions provide problem solutions to enhance the competency of a formal one; iii) competitive or dysfunctional, in cases, where informal structures having incompatible goals with the formal ones compete with and undermine state institutions; iv) and substitution, where absence of formal state institutions allows space to informal ones to provide services through traditional and local structures.¹⁰ Informal institutions usually gain preponderance over formal ones when local or national elites find it difficult to change formal rules and create formal institutions. Difficulties in creating formal institutions may emerge because of financial constraints or because the leaders are pursuing goals, which may not be illegal and therefore need informal channels to pursue.¹¹ This happens, when historically and by function of geography, formal state structures are unable to penetrate a society fully and therefore, locals depend more on informal institutions to regulate lives. In Afghanistan, governance has historically followed a decentralised trend, where the peripheral districts and provinces have been in many respects independent in the conduct of their governance functions. Such a situation may also arise due to long and persistent conflict and war situations. Again Afghanistan is a pertinent example, where more than thirty years of constant warfare has helped to decentralise governance. The protracted war loosened the grip of the Central Government over local leaders which resulted in the emergence of

⁹ Helmke and Levitsky, "Informal Institutions," 725-26.

¹⁰ Ibid., 728-29; and Maren Kraushaar and Daniel Lambach, *Hybrid Political Orders: The Added Value of a New Concept*, Australian Centre for Peace and Conflict Studies Occasional Paper Series (Brisbane: University of Queensland, 2009).

¹¹ Helmke and Levitsky, "Informal Institutions," 730.

local commanders. The latter's hold over illicit trade in narcotics and minerals gave them the economic wherewithal to legitimise their power.

Institutional paradoxes emerge when state-building interventions by external actors, including Western governments as well as multilateral donor and funding agencies engage in centralised, top-down and technocratic practices of creating institutions, which have little or no basis in the host society. Such state-building exercises ignore the necessity of creating state institutions from the bottom-up¹² and fail to account for the prevalence of informal governance institutions and practices and their dynamic interaction with formal state structures. Domination of the social milieu by informal and community-based local structures makes them more powerful and resourceful in influencing and determining state-building outcomes as compared to weak, formal state structures and practices. This understanding is remotely taken into consideration by external state builders because of their lack of knowledge about the *de facto* role of traditional and localised governance structures. For example, in the 1990s, intervention in the Balkans (specifically Kosovo), deficiency of knowledge about local property rights stalled the drafting of legislation and implementation of the privatisation process.¹³ Such problems emerge, either due to a lack of knowledge about intervened societies, or because of what scholars term, 'poverty of knowledge,' meaning, there is no sharing of knowledge and, hence no learning of state-building experiences and lessons among the donor agencies and governments.¹⁴

The introduction of depoliticised structures with little regard to the dynamics of traditional societies, stands out in the case of East Timor as well, where local peoples' adherence to traditional mechanisms of dispute resolution were ignored. The subsequent initiation of top-down formal judicial structures, limited to urban centres, made no difference in the lives of a predominantly rural population, which continued to depend on traditional structures for dispensing justice.¹⁵

The conflictual aspect of the formal/informal institutional relationship may be explained through differences in their nature of working. The formal (institution) is rule-based and regulates the market through contracts

¹² Bottom-up here implies adopting state-building strategies that are more in tune with or conform to local practices, indigenous political structures and social norms.

¹³ 15. Marina Ottaway, "Democratization in Collapsed State," in *Collapsed States: The Disintegration and Restoration of Legitimate Authority*, ed. William Zartman (Boulder: Lynne Rienner Publishers, 1995), 245-46.

¹⁴ Fritz Verena and Alina Rocha Menocal, *Understanding State-Building from a Political Economy Perspective*, ODI Report for DFID's Effective and Fragile State's Teams, 2007, <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/1979.pdf> (accessed December 11, 2015).

¹⁵ Call and Cousens, "Ending Wars and Building Peace," 16.

and enforcement of property rights, and therefore, enjoys a level of autonomy from the economy and society.¹⁶ The working of informal institutions, on the other hand, is relationship-based: patron-client, ethnic, clan and family interests dominate power sharing arrangements.¹⁷ It exists and thrives on the very ethos of society and social relationships.

The relationship between formal and informal institutions turns sour when their goals are dysfunctional. This is exemplified by the case of Uganda's Revenue Authority (URA) which was created in 1990 to boost state revenues. The URA failed to make significant progress in revenue collection because informal-patronage based appointments in the organisation became incompatible with the formal goals of the institution. Here, their case can be described as one of competitive or dysfunctional interaction.¹⁸ In India, on the other hand, the working of local government bodies in coordination with local informal structures shows the functional aspect of the formal-informal relationship. This is exemplified by the state (province) of Karnataka, where traditional and customary informal local governance institutions are engaged in providing justice, social welfare and security functions. These informal institutions enforce their decisions through social pressure. They further influence formal institutions through participation in elections, leadership overlap, selection of the government's poverty relief recipients and resource mobilisation.¹⁹ This example reflects the complementary or functional aspect of the relationship, where serving each other's interests makes goals mutually compatible, ensuring longevity and sustenance of informal institutions.

In order to understand the interplay of formal/informal institutions, it is also important to recognise variations in the socio-political order in specific contexts, which either enables or restricts the successes of state-building endeavours. Debiel and Lambach, contrast Somaliland and Afghanistan to illustrate this point. In Somaliland's Awdal region, the presence of tribal homogeneity and a 'Shared Mental Model' helped the tribes and clans broker a successful agreement with the Government in co-opting their traditional structures and leaders into the indigenous state-building process. Here, state-building was attempted during the post-conflict period (unlike other cases where intervention happened), by Awdal's local leaders. In Afghanistan's case, such formal/informal interactions in the post-1979 period were more nuanced. As stressed by Debiel and Lambach), in some areas, such as Paktia province, the long war was unable to erode traditional governance practices and institutions.

¹⁶ 15. Ottaway, "Democratization in Collapsed State," 245-46.

¹⁷ Boesen, "Governance and Accountability," 4.

¹⁸ *Ibid.*, 5-21.

¹⁹ *Ibid.*, 5-21.

Hence, the strength of tribal governance institutions did not allow 'warlordism' to emerge. On the other hand, in Kunduz, the war negatively influenced local practices of governance as tribal leaders and the rural landed elite were uprooted and dislodged from their homes and forced to become refugees. The subsequent absence of tribal traditions and dislodging of tribal elders (most migrated to Pakistan as refugees), encouraged warlords to emerge and dominate the political scene. This domination of warlords persisted as informal institutions of governance in Kunduz in the post-2001 period. In fact, they are continuing their domination of the local scene, courtesy of the national government's backing and international community's support.²⁰

These examples illustrate that in cases where state-building was attempted without the interference of external actors during the post-conflict period, such as in Awdal, there was relatively greater success in retaining certain informal traditional governance institutions (which had greater legitimacy, and therefore, greater acceptance within the local population); and transforming the same into formal positions. On the other hand, in Afghanistan, when informal traditional governance institutions survived the war, they successfully regulated peoples' lives, even during the post-intervention period and helped the local population absorb the traumas of post-war rehabilitation, re-building and re-construction. However, in areas such as Kunduz, the uprooting of traditional institutions as a result of the war led to the emergence of the anomic warlord phenomena. Even now these warlords are able to influence and regulate lives due to the short-term benefits which their connivance has provided to external interveners. This has come at the cost of harming long-term state-building objectives and goals.

Debiel et al. support the role of traditional structures in building communal cohesion and stability in regions and stress that state-building may succeed in fragile societies only when traditional and state institutions are linked in a constructive relationship, wherein the latter build their legitimacy based on service provision.²¹ For example, the post-2001 Bougainville²² state-building process is praised by Boege for attempts to integrate top-down with grass-roots level peace building efforts through participation of all stakeholders in the peace process. He argues that

²⁰ Debiel and Lambach, "Global Governance." This is because these local warlords were co-opted by the U.S. Army for capturing the Taliban and Al-Qaeda associates.

²¹ Tobias Debiel et al., "Local State-building in Afghanistan and Somaliland," *Peace Review: A Journal of Social Justice* 21, no. 1 (2009), 38-44.

²² Anthony J. Regan, "Bougainville: Beyond Survival," *Cultural Survival* 26, no. 3 (2012), <https://www.culturalsurvival.org/ourpublications/csq/article/bougainville-beyond-survival> (accessed December 11, 2015). Bougainville is an autonomous region of Papua New Guinea, located in the Solomon Sea, SouthWestern Pacific.

traditional structures of governance committed to becoming stakeholders in the state-building exercise, not only to get material benefits, but also because it brought them prestige and honour.²³ However, it is important to keep in mind that the Bougainville state-building experience was an indigenous one, that is, it was not initiated by the international community nor followed an external invasion.

There is now a greater recognition among scholars and policy makers of the importance of integrating local and traditional community structures in technocratic state-building exercises. Concepts, such as ‘hybrid political orders,’ also call upon state builders to focus on local realities and agencies to help the locals create governance systems appropriate to their surroundings.²⁴ This concept places emphasis on seeing the conflict and the ‘failed states’ phenomena not from the perspective of lacking institutional features, but as ‘hybrid systems’, where state weakness allows societal governance mechanisms to regulate social, political and economic life. By recognising the necessity of such institutions, this approach calls upon external state builders to focus on state strengths, however informal, rather than its weaknesses. There is, therefore, emphasis on donors in conflict settings to integrate informal structures (which are already delivering justice, security and services to the population) with formal state structures. This is supposed to be achieved through integration, rather than creation of parallel state institutions.²⁵ However, such a hybrid approach to state-building may carry the danger of letting those informal structures survive which were responsible for causing conflict in the first place, such as clientelism, warlordism and the like. Hence, strategies for building meritocratic institutions may be borrowed from abroad, but need adaptation to local variations and social conditions. Fukuyama, rightly stresses

²³ Volker Boege, *Traditional Approaches to Conflict Transformation-Potentials and Limits*, Australian Centre for Peace and Conflict Studies Occasional Papers Series 5 (Brisbane: University of Queensland, 2007). Boege considers legitimate ‘indigenous forms of control over violence’ as more effective in transforming conflict. But also highlights its weaknesses, such as, non-representation of women, minorities, erosion of traditional institutions due to urbanisation, modernisation and monetisation; and context limited to a small community.

²⁴ Mariano Aguirre and Chris van der Borgh, “Building Peace, States and Hybrids: International Operations in Post-conflict Countries,” *The Broker*, February 2, 2010, <http://www.thebrokeronline.eu/Articles/Building-peace-states-and-hybrids> (accessed December 11, 2015). Western democracy may never be fully replicated in non-Western settings because of the differences in political behaviours derived from history, needs, experiences and evolution. Therefore, intervention can create a hybrid order that is different from the ideal in Western perspective.

²⁵ Achim Wennman, “Grasping the Strength of Fragile States: Aid Effectiveness Between Top-down and Bottom-up State-building,” Working Paper (The Graduate Institute, 2010), [http://graduateinstitute.ch/files/live/sites/iheid/Vfiles/sites/ccdp/shared/Docs/Publications/Working%20paper_6_BD.pdf](http://graduateinstitute.ch/files/live/sites/iheid/Vfiles/sites/ccdp/shared/Docs/Publications/Working%20paper%20paper_6_BD.pdf) (accessed December 11, 2015).

avoiding what he calls, ‘a best practice mentality’; the assumption that a successful institution building strategy can be replicated in other settings.²⁶ Such a best practice mentality can only be avoided when external state builders gain a thorough knowledge of constraints, needs, cultural practices, norms and values of the intervened societies.

It is important to examine why Western technocratic institutions fail to take hold in non-Western societies and how the dynamics of their relationship unfolds viz-a-viz informal traditional institutions. Some of the recent research underlies the importance of social context in determining the success or failure of importing successful Western formal institutions to Third World settings. North, for example argues about differences in norms and enforcement characteristics of societies influence the performance of formal institutions adopted from other societies; for successful ‘institutional adaptation’, there needs to be a change in the belief system in a society.²⁷ Khan, asserts that institutional success or failure is not dependent on production technologies, rather profoundly affected by the balance of power between classes and groups impacted by such institutions. By comparing the 1960s industrial policy of Pakistan and South Korea which were based on the neo-classical growth philosophy, but yielded different results, he argues that Pakistan lagged behind in industrialisation because there were ‘strong clientelist linkages between middle and lower middle class groups and the state’, which prevented the latter from ‘making centralised decisions except at a much higher cost in terms of lost net benefits (compared to South Korea)’.²⁸ These observations suggest that technocratic exercises at state-building will have a hard time adjusting to new societies because of differences in social contexts and political dynamics. Informal political and economic linkages based on patron-client practices and those of rent-seeking and corruption may work to influence negatively the adoption of any successful formal institution from the West. Several scholars have highlighted the negative influences these informal practices

²⁶ Francis Fukuyama, *State-building: Governance and World Order in the Twenty-First Century* (London: Profile Books Ltd., 2004), 112-13.

²⁷ Douglas C. North, “The New Institutional Economics and Third World Development,” in *The New Institutional Economics and Third World Development*, ed. John Hariss, Janet Hunter and Colin M. Lewis (London: Routledge, 1995), 23-26.

Douglas North defines institutions to include both formal rules (statute law, common law, regulations), informal constraints (conventions, norms of behaviour and self imposed codes of conduct) and enforcement characteristics of both.

²⁸ Mushtaq H. Khan, “State Failure in Developing Countries and Institutional Reform Strategies,” in *Towards Pro-Poor Policies: Aid, Institutions and Globalization*, ed. Bertil Tungodden, Nicholas Stern and Ivar Kolstad (New York: Oxford University Press and the World Bank, 2004), 171-75.

bring to formal practices of governance, leading to destabilisation and failure.²⁹

In conclusion, institutional paradoxes may be generated when top-down technocratic practices fail to develop local, bottom-up approaches by disregarding informal institutions of governance and ignoring prospects of their inclusion in state-building exercises. Institutional functioning, therefore, depends not only on formal design, but the social context too, within which these operate.³⁰ Formal and informal interplay will benefit state-building only when goals are compatible/functional and not when these are incompatible. However, there may or may not be a linear pattern of interaction; rather functionality and dysfunctionality may combine in complex prototypes. Contestation may turn into cooperation when appropriate policies are initiated based in local legitimacy and acceptance.

Formal/Informal Institutional Paradoxes in Post-2001 Afghan State-Building

In Afghanistan, efforts at state-building in the post-2001 period have primarily involved the building of centralised state structures, confined to urban centres and improving their scope of effectiveness. It was after 2005 that greater efforts were initiated in adopting more bottom-up approaches to state-building. This has involved a two pronged strategy: establishing and strengthening formal structures and institutions at the sub-national provincial and district-level; and engaging more directly with indigenous and traditional structures of governance. The strategies for engaging with informal structures of governance have focused on securing cooperation of community policing structures for fighting insurgency and securing areas and evolving such structures under the state's control and patronage.

In Afghanistan, the reasons and rationale for engaging tribal structures for policing and counterinsurgency have focused on varied

²⁹ Morris Szeftel, "Clientelism, Corruption and Catastrophe," *Review of African Political Economy* 27, no. 85 (2000), 427-41; Michael Bratton and Nicolas Van de Walle, "Neopatrimonial Regimes and Political Transitions in Africa," *World Politics* 46, no. 4 (1994), 453-489; Paul D. Hutchcroft, "The Politics of Privilege: Assessing the Impact of Rents, Corruption, and Clientelism on Third World Development," *Political Studies* 44, no. 3 (1997), 639-658; Peter B. Evans, "Predatory, Developmental, and Other Apparatuses: A Comparative Political Economy Perspective on the Third World State," *Sociological Forum, Special Issue- Comparative National Development: Theory and Facts for the 1990s* 4, no. 4 (1989): 561-587; and Chris Allen, "Understanding African Politics," *Review of African Political Economy* 22, no. 65 (1995): 301-320.

³⁰ Fritz and Menocal, "Understanding State-building," 19-21. As stressed by scholars that institutional ineffectiveness should not be treated as an institutional *tabula rasa* (blank slate) for importing Western models of governance alien to local conditions, characterised by low fiscal and human capacity and weak infrastructure.

arguments. Jones and Munoz, argue for incorporation on the basis of historical reasons when security was a shared burden and responsibility of the Central Government and local tribal communities; and further anthropologically, on account of individual identification with their tribal group (*qawm*).³¹ Susanne Schmeidle and Masood Karokhail assert that tribal *Arbakai*³² can be engaged to maintain peace in Afghanistan, only in regions where tribal structures have survived the ravages of war. They insist that such an engagement can only come with clearly outlined responsibilities, without compromising the autonomy of these structures and their community linkages and also under limited supervisory role of the state over them. They, however, warn at the same time, that any mis-engagement with non-state actors may lead to the collapse of the state as happened in the 1980s, under the Government of the People's Democratic Party of Afghanistan (PDPA).³³ Others, such as M. Osman Tariq, citing the historical relevancy of the *Arbakai* in Afghanistan, argue for its use by the state only in instances when these are strongly backed by their respective communities. He cites the example of the Tagheb district of Kapisa where experimentation with establishing the *Arbakai* failed because it was created by the state, rather than the tribe itself; consequently, the tribes refused to support the *Arbakai*, when attacked by insurgents. The argument being that only the *Jirga* (which consists of tribal elders) is legitimately authorised under tribal traditions to manage the *Arbakai* and therefore, the state's role needs to be one of facilitator.³⁴ There are other practitioners, including Ken Guest, who support engaging the *Arbakai* as a bottom-up process of governance for the reason that historically Afghan society's traditional kinship structures have survived either as *khel* (clans), *Shura* or *Jirga* structures. Even war and conflict have not been able to destroy or uproot

³¹ Seth G. Jones and Arturo Munoz, *Afghanistan's Local War: Building Local Defense Forces* (Santa Monica: RAND Corporation, 2010), ix-xi, http://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG1002.pdf (accessed December 5, 2015). They argue in favour of providing training to local and traditional forces through NATO and coordinating their activities with the Afghan National Security Forces (ANSF) under *Jirga* supervision.

³² Masood Karokhail, "Informal Structures and Approach of Tribal Liaison Office," in *Scratching the Surface: Democracy, Traditions, Gender*, ed. Jennifer Bennet (Lahore: Heinrich Böll Foundation, 2007), 115-16, https://www.boell.de/sites/default/files/assets/boell.de/images/download_de/scratching_the_surface_commentary.pdf (accessed November 7, 2015). The *Arbakai* is a temporary security body formed by the *Jirga* to enforce its decisions.

³³ Susanne Schmeidle and Masood Karokhail, "The Role of Non-State Actors in Community Based Policing- An Exploration of the 'Arbakai' in South-Eastern Afghanistan," *Contemporary Security Policy* 30, no. 2 (2009), 318-42.

³⁴ Mohammed Osman Tariq, "Tribal Security System (*Arbakai*) in Southeast Afghanistan," *Crisis States Occasional Paper 7* (Crisis States Research Centre, 2008), <http://www.lse.ac.uk/internationalDevelopment/research/crisisStates/download/op/OP7Tariq.pdf> (accessed December 11, 2015).

these. Though the *Arbakai* needs to be regulated under the tribal umbrella, however, Guest also insists that the state must shoulder the responsibility of maintaining and strengthening a well-trained army as well as police and use the same for support of tribal structures, whenever the need arises.³⁵

Notwithstanding the above arguments, the actual practice of engagement has suffered different outcomes. The initial US attempts at enlisting the cooperation of the tribal militia forces through the 2002-Afghan Militia Force Programme and Afghan Security Group Programme had to be abandoned because of criticism as they were undermining the central state's authority by propping up non-state security forces and encouraging the warlord power base.³⁶ Another attempt, the 2006 Afghan National Police Auxiliary (ANPA),³⁷ suffered a similar fate of disbandment in 2008, under charges of militia type recruitment and control by factional groups.³⁸ More successful attempts at engaging non-state and informal institutions were launched in the post-2008 period under the control and blessing (rather than as parallel to state institutions) of the Afghan government. This included the Public Protection Force Programme (PPFP): a 1200 militia force, raised in 2009 by tribal *Shuras* under the supervision of Wardak's governor for patrolling roads and manning check-posts.³⁹ There are, however, limitations on the geographical expanse of this exercise too. Some reports cite this experiment to have more successes in the Tajik North and less in the Pakhtun South, where Taliban had kinship ties with the tribes.⁴⁰ This reflects an important aspect in such a relationship - such exercises will fail in regions where insurgents have blood ties (and therefore more legitimacy) with the tribal groupings. There was also criticism of their

³⁵ Ken Guest, RAM Seeger and Lucy Morgan Edwards, "The Tribal Path: Commanding the Prime Battle Path," *The Beacon Blog*, May 20, 2010, <http://the-beacon.info/countries/united-states/the-tribal-path-commanding-the-prime-battle-space-a-more-hopeful-strategy-for-afghanistan-2/> (accessed February 22, 2011).

³⁶ Adam Grisson, "Making It Up as We Go Along: State-Building, Critical Theory and Military Adaptation in Afghanistan," *Conflict, Security and Development* 10, no. 4 (2010), 505-515.

³⁷ International Crisis Group, "Policing in Afghanistan: Still Searching for a Strategy," Asia Briefing 85 (International Crisis Group, 2008), <https://www.ciaonet.org/attachments/11772/uploads> (accessed December 4, 2010). The village youth were given three weeks training before induction in the ANAP. However, large numbers defected and the programme was terminated in September 2008.

³⁸ Robert M. Perito, *Afghanistan's Police: The Weak Link in Security Sector Reform*, Special Report 227, (United States Institute of Peace, 2009), <http://www.usip.org/sites/default/files/resources/SR322.pdf> (accessed November 17, 2015), 10.

³⁹ Grisson, "Making It Up," 505-515.

⁴⁰ Perito, "Afghanistan's Police," 10.

non-extension to interior districts and their reported penetration by Taliban fighters.⁴¹

Some examples of other more successful attempts at formal/ informal integration in Afghanistan in the post-2001 period include: training, arming and humanitarian assistance to the Noorafzhal tribe of Mangwel village in Kunar province by the U.S. Special Forces, for countering Taliban militias in the region; reconstituting the traditional power structures by the Task Force I-91 Cavalry and Asadabad Provincial Reconstruction Teams (PRTs), to achieve the International Security Assistance Force (ISAF) objectives of securing local support through humanitarian development assistance; and raising militias under government authorisation and under the Local Defense Initiative (LDI) in five districts subordinate to the Afghan National Police (ANP) district commanders.⁴² These practices are suggestive of a new approach in Afghan institution building that is cognizant of the importance of engagement with bottom-up institutions and processes for increasing the effectiveness of formal state-building strategies. These also suggest that such approaches will succeed only when the informal structure's support is co-opted through humanitarian and developmental assistance and these are run under (broader) state supervision, rather than as parallel to it.

Technocratic vs. informal paradoxes play out in the judicial field in Afghanistan in several ways. Its manifestations include plurality of legal culture⁴³ and resultant complications and contestation between formal and traditional dispute resolution structures. Afghanistan's legal tradition has followed a mix of statutory, *Shariah* (Islamic law) and customary laws. Statutory laws were devised in Afghan history as an important modernisation tool and incorporated in the various constitutions. Its formal incorporation began in the 1920s under King Amanullah's government. However, the applicability of legal statutes has remained a problem not only because of the quick rotation of regimes leading to numerous changes in the constitutions, but also because of the centre's remoteness from the rural population, which conducted their lives under maintained customary laws and adjudicated disputes accordingly. Here the tradition of *Jirga* is

⁴¹ Douglas Saltmarsh and Abhilash Medhi, "Local Governance in Afghanistan: A View from the Ground," Synthesis Paper (Afghanistan Research and Evaluation Unit, 2011), <http://www.areu.org.af/Uploads/EditionPdfs/1114E%20Local%20Governance%20in%20Afghanistan%20SP%202011.pdf> (accessed July 12, 2012), 25.

⁴² Grisson, "Making It Up," 505-515. These efforts show an understanding among field level practitioners about the futility of imposing Western approaches on traditional societies and the importance of adapting expectations to local conditions.

⁴³ Kraushaar Maren and Daniel Lambach, "Hybrid Political Orders." Legal pluralism is defined as multiple sets of laws existing in the same field and the competition, contestation and contradiction between formal and customary law.

strongest, which is called upon on *ad hoc* basis to decide cases through debate for reaching a negotiated consensus in accordance with customary traditions. Prior to 1979, more than 85 per cent of the population (rural) took recourse with customary practices and structures to adjudicate disputes. This has remained constant as recent figures cite the same number of people resorting to dispute settlement through informal and customary institutions.⁴⁴

Shariah law has been an important element of Afghan legal traditions. The different constitutions in Afghanistan's history, including the 2004 one recognises the supremacy of *Shariah* law with the provision that no law repugnant to Islam shall be promulgated. The influence of *Shariah* law grew with the displacement of tribal communities in the wake of the 1979 war (Soviet invasion) and especially with the ascendancy of the Taliban regime to power in Afghanistan (1996). Since the collapse of the Taliban, there are instances of tribal communities returning to re-establish their tribal modes of customary organisations in a slow process riddled with shortages in local resources (from years of war and draught) and under the influence of armed groups and warlords.⁴⁵

In some provinces, such as Paktika, Paktia and Khost, traditional dispute settlement traditions survived the war and therefore, are strongly relied upon to dispense justice in the post- 2001 period.⁴⁶ Besides *Jirgas*, *Shuras* (consisting of permanent tribal representatives headed by a leader), which primarily emerged in the post-1979 period, are also relied upon to dispense cases in the country.⁴⁷ These non-state customary and *Shura* bodies are dispensing cases related to a wide variety of issues including property, family, crime and even blood feuds among local disputants. Notwithstanding the propriety of such informal mechanisms for dispute settlement in locally integrated communities, these bodies may be less effective in instances where disputants fail to see themselves as part of a common community. Other problems include, infringement of gender rights, and problems of applicability to disputes spawning a wide geographical area and different tribes.⁴⁸ Its applicability is limited by law too because the first two articles of the Afghanistan Civil Code put them in

⁴⁴ The American Institute of Afghanistan Studies, *Rule of Law in Afghanistan*, Conference Report, (AIAS, Boston University, 2010), http://www.bu.edu/aias/reports/AIAS_ROL.pdf (accessed December 1, 2015).

⁴⁵ Thomas Barfield, Neamat Nojumi and Alexander Their, "The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan," in *Customary Justice and Rule of Law in War-torn Societies*, ed. Deborah H. Isser (Washington, D.C. : United States Institute of Peace Press, 2011), 15.

⁴⁶ Karokhail, "Informal Structures," 115.

⁴⁷ *Ibid.*, 116.

⁴⁸ Barfield, Nojumi, and Their, "The Clash of Two Goods," 17.

third place in the hierarchy of legal sources, after the Afghan law and the *Hanafi Shariah* law.⁴⁹

The contestation between the statutory, *Shariah* and customary law has generated tensions in the current state-building process in Afghanistan. Attempts by foreign state builders at establishing legal supremacy of the statutory law that is modeled largely on Western legal tradition resulted in an atmosphere of mistrust and suspicion between the reformists and the conservative elements in the former President Hamid Karzai's administration. This tension manifested itself openly when the Afghan experts on law refused to sign the final draft of laws crafted by Italian legal experts, structured largely on the Italian code.⁵⁰ It also reflected the naivety of Western experts regarding local legal traditions, people's sensitivities by ignoring such traditions and the mindset of external state builders who saw legal deficiencies in Afghanistan as a purely technical exercise of moulding Afghan law on Western traditions and building the necessary infrastructure. Perhaps this was the reason that Afghan experts on law were seldom consulted when drawing the Afghan legal code and the reason why they refused to sign the final draft.

Suhrke and Borchgrevink's about the local *ulema's* opinion in Saidabad district of Wardak on the role of Western judicial experts and legal reforms found that the latter rejected Western assistance and advice in matters of law. They concluded that Western involvement in justice sector reforms was raising legitimacy and effectiveness issues and that the local religious leaders were pre-disposed to support these reforms, only if they were carried out within the framework of *Shariah* and without a high profile Western involvement.⁵¹

In some cases, the pervasive influence of informal over the formal assumes patrimonial features, but such patrimony is also said to be advancing in non-traditional ways, the goals of state-building in Afghanistan. In Nangarhar, for example, Gul Agha Sherzai, its governor, employed informal practices, such as co-opting tribal leaders' support through exchanging gifts, providing development funds and employing them in state offices for forwarding state-building goals of opium control and security. This patron-client relationship works to the benefit of both; it helped the governor maintain control over the province by making the tribal leaders extend government directives to the locals; and in maintaining

⁴⁹ Ibid., 23.

⁵⁰ Astri Suhrke and Kaja Borchgrevink, "Negotiating Justice Sector Reform in Afghanistan," *Crime Law and Social Change* 51, no. 2 (2009), 211-230.

⁵¹ Ibid. Though welcoming foreign assistance, they were not pre-disposed to the presence of foreign troops in Afghanistan.

security and stability in their regions.⁵² Such practice was also evident in the post-1979 period in the case of Ahmad Shah Massoud of Northern Alliance and Ismail Khan of Herat who created informal structures to carry out state related functions of administration, security and dispute resolution. They also engaged with NGOs to provide health and other services to the people and even developed administrative systems for the income earned from non-legal and non-state collected revenues from customs check-posts, on the illegal transfer of contraband items and regional sponsorships.⁵³ In other instances even patrimonial appointments, as illustrated in the appointment of a Jamiat-e-Islami governor in Kohistan (district of Faryab province) helped in providing security and reconstruction of institutions by the ANP and the PRT.⁵⁴ Though the above cases are positive manifestations, these are, nonetheless, more relevant where traditional structures survived the war and where traditional leaders may be patronised to galvanise allegiance from entire tribes. In other cases, the very strongmen, who based their authority on local security and economic networks, have failed to either secure their areas or deliver other essential goods to the people.⁵⁵

The role of other informal bodies, such as mosque *Shuras*, and *Jirgas* are very much relevant in the context not only of dispute resolution, but also development functions at the sub-national district and city-level. In Jalalabad *nahias* (city districts) for example, mosques and *Nahia Shura* regularly adjudicate cases among disputants and also perform functions related to aid distribution.⁵⁶ The reason why such institutions still adjudicate

⁵² Dipali Mukhopadhyay, *Warlords as Bureaucrats: The Afghan Experience*, Carnegie Papers no. 101 (Washington, D.C.: Carnegie Endowment for International Peace, 2009), <https://www.ciaonet.org/attachments/15191/uploads> (accessed December 1, 2015), 15-20.

⁵³ Daniel Biro, "The (Un) bearable Lightness of...Violence: Warlordism as an Alternate Form of Governance in the 'Westphalian Periphery?'" in *State Failure Revisited II: Actors of Violence and Alternative Forms of Governance*, ed. Tobias Debiel and Daniel Lambach, INEF Report, (Institute for Development and Peace, 2007), <http://inef.uni-due.de/page/documents/Report89.pdf> (accessed December 12, 2015). Daniel Biro attributes the success of these informal patrimonial warlords on their ability to cooperate and interact with traditional authority structures that define Afghanistan's micro societies.

⁵⁴ Himesh Nixon, *Subnational State-Building in Afghanistan*, AREU Report, (Afghanistan Research and Evaluation Unit, 2008), <http://www.areu.org.af/Uploads/EditionPdfs/806E-Subnational%20State-Building-SP-print.pdf.pdf> (accessed December 4, 2015). It signifies the gatekeeper role of the district governor to people's access to services.

⁵⁵ Vitalino Canas, *Governance Challenges in Afghanistan: An Update*, Special Report, (NATO Parliamentary Assembly, 2011), https://www.tbmm.gov.tr/ul_kom/natopa/docs/raporlar_2011/173.pdf (accessed April 10, 2012). In Helmand, for example, the corrupt rule of Sher Mohammad Akhunzada not only estranged significant groups in the province, it also failed to curtail poppy cultivation and heightened provincial insurgency.

⁵⁶ The Liaison Office, *Linkages Between State and Non-State Justice Systems in Eastern Afghanistan: Evidence from Jalalabad, Nangarhar and Ahmad Aba, Paktiya*, TLO Report, 2009,

disputes in villages as well cities in Afghanistan is because they enjoy greater legitimacy in popular perception and are seen as more just and immune from manipulation by outside influences.⁵⁷ However, despite these perceptions, there are also contending reports that such facilitating role of *Shuras* and *Jirgas* may result in patrimonial and rent-seeking practices, resulting in unjust decisions or favoured distribution of aid and resources.⁵⁸

While there are calls for integrating formal and informal justice traditions in building the legal and judicial set-up in Afghanistan, such integration is already practised in some cases. For example, executive officials at the sub-national level, including police chiefs and provincial and district governors participate actively to resolve disputes outside the formal court system and this role is even carried out by the provincial councils and district *Shuras*. While deciding which cases should go to formal and which ones to the informal mechanisms for dispute resolution, these officials act as filters.⁵⁹

There have been attempts by NGOs in engaging local processes by seeking support of local elites and traditional structures in state-building initiatives. For example, the Liaison Office has been engaged in facilitating cooperation between development agencies and local tribesmen in Loya Paktia (2003) by involving communities in assessing development needs and ensuring the security of such projects.⁶⁰ Another attempt by the same NGO was the forming in Khost (November 2006) of a Commission on Conflict Mediation (CCM). Under the *Wali's* (Governor's) authority, this Commission (comprising of six respectable elders), arbitrates on conflicts referred to it by the Government and has helped settle land disputes between tribes and the disputes between district-level government bodies.⁶¹

[http://www.tloafghanistan.org/linkages%20Between%20State%20Justice%20Systems%20in%20Eastern%20Afghanistan%20\(2009\).pdf](http://www.tloafghanistan.org/linkages%20Between%20State%20Justice%20Systems%20in%20Eastern%20Afghanistan%20(2009).pdf). Each of the Jalalabad districts also consists of business *Shuras* (unions) that resolve 65-70 per cent of business disputes in Jalalabad city.

⁵⁷ Jan Koehler and Christoph Zurcher, *Assessing the Contribution of International Actors in Afghanistan: Results from a Representative Survey*, SFP-Governance Working Paper Series 7 (Berlin, DFG Research Centre, 2007), 10-11, www.sfb-governance.de/en/publikationen (accessed July 15, 2011).

⁵⁸ The Liaison Office, *Linkages Between State and Non-State*, 20-22.

⁵⁹ United States Institute of Peace, "Conference on the Relationship between State and Non-State Justice Systems in Afghanistan," Briefing Paper (United States Institute of Peace, 2006), http://www.usip.org/sites/default/files/file/conference_summary_paper.pdf (accessed December 12, 2015).

⁶⁰ Karokhail, "Informal Structures," 119-20.

⁶¹ United States Institute of Peace, "Between the *Jirga* and the Judge: Alternate Dispute Resolution in Southeastern Afghanistan," TLO Program Brief 1 (Washington, D.C.: USIP, 2009).

Unlike the *Jirga*, it approaches the disputants for mediation without any charge deposit (*machalga* or *baramta*), issues a non-binding decision (no penalty for rejecting its decisions), and works under the oversight of the provincial governor.

There are suggestions by scholars of officially recognising informal settlements, training of *wakils* (legal agents) in statutory codes and local administrators' recruitment for developing stronger contact with the local population.⁶² Scholars like Suhrke and Borchgrevink recommend building on existing informal and traditional mechanisms of dispute resolution, rather than emphasising quick and massive reconstruction of the formal justice sector.⁶³ There are others who argue for creating linkages between the formal and the informal, but warn against the formal integration of non-state dispute resolution mechanisms because of their historical relevance of providing communities with mechanisms to cope with conflict even in the absence and weakness of state institutions.⁶⁴

Conclusion

This article argued that external state-building exercises often emphasise a centralist and technocratic top-down approach of building institutions which disregard the social context of local institutional success and ignores the necessity of creating bottom-up processes of state-building by integrating traditional governance mechanisms. Technocratic institutional processes and their success or failures can be better explained within the paradigm of interaction and interplay of formal and informal institutions. In case of complementary goals, the formal and the informal work in cohesion to support the state-building practice. When goals are non-complementary or dysfunctional, their interplay fails the state-building process.

In Afghanistan, the top-down centralised and technocratic practices have created a façade of institutions that are remotely connected to local institutional practices. Some attempts have been initiated in the security and judicial sectors to integrate informal security and conflict resolution practices with the formal ones. However, such practices have been haphazard, patchy and when initiated outside of formal authority have raised dangers of creating and supporting structures that run parallel to state institutions.

Initially, in post-2001 Afghanistan, state-building strategy focused on developing centralised state structures confined to the urban centres. This trend started changing in the post-2005 period, when more decentralised institution building practices were adopted. Efforts were made to engage with informal structures of governance, including integrating community-

⁶² The American Institute of Afghanistan Studies, *Rule of Law in Afghanistan*.

⁶³ Suhrke and Borchgrevink, "Negotiating Justice," 2009.

⁶⁴ Barfield, Nojumi, and Their, "The Clash of Two Goods," 22-28. Barfield et al., recommend practical approaches, such as reviewing, recording and enforcing informal decisions in formal courts, referring certain types of claims to the formal (mostly criminal cases) and educating the public about their rights and obligations.

based policing structures (*Arbakai*) with state-building goals of providing security and fighting counterinsurgency. Setting aside the reasoning for such efforts to link traditional structures, for example, by function of history or cultural norms, the actual practice of engaging *Arbakai* has shown varied results. In some instances, successes came when such indigenous institutions were run under the supervision and direction of the official (*Wali's*) supervision, rather than running them as parallel institutions to the state. In other cases, the state-created militias were defeated for the precise reason that these were not manned by traditional institutions, such as the *Jirga* and refused help by the tribes when attacked by insurgents.

In the judicial field, the formal vs. informal paradox manifestations include plurality of legal culture and resultant complications and the contestation between formal and informal dispute resolution mechanisms. The plurality of legal culture emanates from multiple legal practices: the statutory, the *Shariah* and the customary laws. This plurality generated tensions between the Western legal experts, who devised the Afghan penal code on Western legal traditions and the Afghan experts on law, who refused to accept it on account of being left out of its planning process and for it being too Western-oriented and outside the framework of *Shariah*. There are, however, instances in Afghan state-building which show forms of cooperation between the formal and informal judicial processes. For example, state officials including the judicial ones participate in informal bodies (such as *Jirgas*) to resolve disputes among people and the formal judiciary accepts the judgments of informal customary bodies by registering them with the formal court system. Some NGOs are also making attempts to engage tribal elders in *Shuras* to resolve inter-tribal disputes under the supervision of provincial *Walīs* (governors). These practices show an understanding among external state builders that bottom-up processes need to be engaged for increasing the effectiveness of formal institution-building strategies. ■