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Cordaid
BUILDING FLOURISHING COMMUNITIES

Exploring Primary Justice in Insecure Contexts: South Sudan and Afghanistan

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Colophon

Synergy report of the project 'Supporting Primary Justice in Insecure Contexts: South Sudan and Afghanistan'. This project was funded by the Netherlands Ministry of Foreign Affairs and administered by NWO-WOTRO in collaboration with the Knowledge Platform on Security and Rule of Law.

Carried out by:
Van Vollenhoven Institute for Law, Governance and Society, and Cordaid in cooperation with The Liaison Office (TLO), Afghanistan and the Justice and Peace Commission of the Catholic Diocese of Tombura-Yambio (JPC), South Sudan.

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Table of contents

1. Introduction

This is the concluding report of an applied socio-legal research project that was carried out jointly by the Van Vollenhoven Institute (VVI) of Leiden University and Cordaid together with The Liaison Office (TLO) in Afghanistan and the Justice and Peace Commission (JPC) of the Catholic Diocese of Tombura-Yambio in South Sudan. The idea for this collaboration between academics and practitioners came about at a series of meetings of the Knowledge Platform on 'Security and Rule of Law', organised by the Netherlands Ministry of Foreign Affairs. Here Robert Sijstermans of Cordaid and Jan Michiel Otto of VVI met and developed the idea of what would become a research project titled 'Supporting Primary Justice in Insecure Contexts: South Sudan and Afghanistan'. In the drafting phase Fréderique van Drumpt of Cordaid and Bruno Braak and Dennis Janssen of the VVI contributed considerably. The project was carried out from October 2014 until June 2016 with funding provided by the Ministry of Foreign Affairs, and managed by NWO/WOTRO under its Security & Rule of Law programme, most notably the Applied Research Fund for Embedding Justice in Power and Politics. The initial proposal was informed both by the experiences of Cordaid and partner organisations with aid projects on the ground and the experience of VVI with socio-legal research in developing countries on access to justice at local levels.

In this research we have aimed to explore a) people's concerns and conceptions of justice, notably with regard to dispossession and other property conflicts; b) the responses and remedies provided, in particular to women, through community-based, state-based and other (e.g. religion-based or militia-based) mechanisms and practices, and c) the potential of synthesising 'elements that work' for strengthening 'paths to justice' (cf. Genn 1999).

On the basis of the field research, reports have been written on South Sudan (Braak 2016) and Afghanistan (Stahlmann 2016). These reports provide country-specific details about our research and 'case studies' on justice seekers and justice providers and constitute the core of our findings. The present report provides a brief summary of these country reports and an analysis of the combined findings from Afghanistan and South Sudan. Here we will discuss some of the main challenges, similarities and differences, with particular attention to the 'elements that work' within both state and non-state justice mechanisms, in both countries. We do not pretend this to be a systematic comparative analysis of the two research sites, as the conditions and research data from the various research sites differed considerably.

In addition to this report, the project has led to two literature reviews and a strategy report (Wardak 2016; Braak and Jacobs 2016; Cordaid 2016). The reviews consider recent publications on state and non-state justice mechanisms and discuss major challenges that justice seekers and providers encounter.[1] The strategy document is meant for programming and builds on our analysis. It provides recommendations that we hope will serve the community of practitioners and policy makers – those who work 'on the ground' or 'behind a desk'; those who represent state institutions, or local and international NGOs. Some of our findings and recommendations are obviously country-specific, while others may have relevance in comparable contexts.

1 The distinction between state and non-state justice institutions merely suggests that the respective institution is primarily state-administered or not. This distinction is not meant to preclude cooperation, mutual acknowledgment, or any other kind of relationship between these kinds of institutions.

1.1 Background and rationale

Cordaid and its local partner organisations have worked for decades with communities in Afghanistan and South Sudan. In the latter country, Western Equatoria State with its capital Yambio has been one of the areas in which Cordaid and its partners have been particularly active. In Afghanistan, Behsud and Istalif are two districts in which Cordaid and partners have set up interventions. These are also the areas on which our research has focused. They are described in further detail in Braak 2016 and Stahlmann 2016. It is clear that the two countries are worlds apart, but comparing them has been helpful to bring particular features to light. The understanding that Afghanistan and South Sudan share some of the basic configurations which make justice and security hard to attain has in fact led to this research. Cordaid, in order to increase its interventions to support mechanisms of justice in this complex field, requires contextualised knowledge. VVI used this valued opportunity to contribute and develop its academic knowledge in new, applied contexts.

Introducing primary justice

Before delving into the actual substance of our research, let us first lay out some of the concepts that are central to our research. As revealed in the title, this project is concerned with 'primary justice'. Although for some authors, this term is limited to non-state justice (e.g. DeGabriele & Handmaker 2005), we use the concept more broadly, including all forms of justice to which people refer as a first resort. As a starting point, we acknowledge the co-existence of different sources of normative ordering that play a role in people's behaviour, notably in dispute processes (Riggs 1964; Merry 1988; F. von Benda-Beckmann 2002). This includes state and non-state actors, formal and informal authorities. In practice, non-state and hybrid justice providers in varying degrees play a very significant role in both Afghanistan and South Sudan, as our literature reviews show (see 1.1; also Baker and Scheye 2007 and notably Isser 2011). We look at people's everyday concerns and conceptions of justice, and the responses and remedies that are provided through various mechanisms. Whereas our research has taken place in conflict-affected settings, we do not focus on the bigger political conflicts and the associated debates about transitional justice. Rather, we have studied the primary justice that people living in this context of prolonged conflict seek in their everyday lives.

Insecure contexts

Both South Sudan and Afghanistan have known protracted periods of violence in their recent histories, and periods of foreign occupation in recent and more remote history. The context of insecurity has an impact on society and on many of the injustices that people suffer from on a daily basis, on the primary justice that people are in need of, and the strategies they explore to get this justice. The insecure context also impacts on the functioning of justice providers. It has been argued by others that in fragile or insecure contexts, where state institutions are unstable and do not actually possess the monopoly of power, citizens do not expect too much from the state and therefore might (continue to) resort to non-state power-holders for justice and security (Baker and Scheye 2009; Börzel and Risse 2010; Isser 2011; Hoffmann and Kirk 2013). This, they stress, further undermines the position of the state and strengthens the position of these local non-state power-holders. We actually see this reflected in several of our case study reports. Yet, we have also seen in most cases that statutory justice continues to play a role (Braak 2016; Stahlmann 2016). The impact of the insecure context will be further analysed in section 3 of this report.

The rule of law and the international community

In conflict settings, the international community often has a relatively strong presence. Many of its interventions start with a strong focus on the security sector and peace building before switching to more longer-term oriented rule of law programming (Melber 2012). The rule of law is clearly a rather general

concept that has been defined in various ways. Put briefly, it entails rebuilding 'the basic machinery of justice' (Feller 2009: 81). In more legal terms, Carothers defines it as:

> [L]aw applied fairly, uniformly, and efficiently throughout the society in question, to both public officials as well as ordinary citizens, and to have law protect various rights that ensure the autonomy of the individual in the face of state power in both the political and economic spheres (Carothers 2006: 19).

If we look into further detail at the way in which justice mechanisms in Afghanistan and South Sudan function, one of the most basic questions to ask about the rule of law is: Does this rule of law protect citizens against one another? (Bedner 2010) And, when justice providers fulfil people's hopes and expectations and meet their needs with regard to justice, should this necessarily be in line with prevailing ideas on the rule of law? In our analysis we discuss a number of these elements by setting out the 'adequacy of responses'.

Especially in post-Taliban Afghanistan, huge investments have been made by the international community to rebuild the formal state justice system through both bilateral and multilateral support, whereas international NGOs have also invested in civil society organisations working in the field of legal aid (Wardak 2016; Stahlmann 2016). In Afghanistan assistance has been prolonged and comprehensive compared to South Sudan,[2] but also in South Sudan there have been quite some international rule of law promotion projects. Serious challenges however remain in both countries. The premise underlying this collaborative research project is that a better understanding of primary justice mechanisms will provide a better knowledge base for interventions, including international assistance projects. We do hope that it will contribute to enhancing access to justice, and the quality and impact of remedies provided.

A complex landscape of justice providers

Since the mid-2000s, projects and programmes that aim to improve performance of the justice sector in conflict-affected settings are often geared to improving access to justice. Focus in most of such programmes is primarily on justice that is provided by the state, assuming that this is what citizens are in need of most (Baker and Scheye 2009). This can be seen in Afghanistan and – to a lesser extent – in South Sudan as well; in order to make state justice accessible to the population, donors have provided support to preparing draft laws, training judges and building court houses in districts, or by supporting legal aid assistance.

Non-state 'justice providers' are less self-evident targets of such interventions. But if state justice is not available to people or does not provide adequate outcomes, usually several non-state alternatives can be consulted. Among these are not only customary or traditional leaders, but also religious leaders, family members, elders and youth. In both South Sudan and Afghanistan, such justice providers offer supposedly low-cost and speedy justice in the direct vicinity of disputants. It is therefore important to also gain an understanding of the ways in which they function.

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2 As an indication: Total net ODA (Overseas Development Assistance) in South Sudan in 2012 was 1.187 million USD and grew to 1.964 million USD in 2014. More than half of this amount was spent on humanitarian aid. In Afghanistan, net ODA in 2012 amounted to 6.667 million USD and decreased to 4.823 million USD in 2014. About 8 percent of this was spent on humanitarian aid (OECD-DAC: http://www.oecd.org/dac/stats).

In South Sudan customary chiefs have a hybrid position in the so-called A, B- and C-courts that operate at *boma*, *payam*, and county level (see Braak 2016: Ch.1.1).[3] The chiefs' positions and the courts' forms and functions are laid down in state legislation. Yet, in this new state, the roles and competences of these different actors are still being defined (Braak and Jacobs 2016). From the customary courts, justice seekers can appeal to the 'judiciary courts'. The lowest level judiciary court that is operational in WES is the county court.[4] The structure is completed with a high court in each state capital, three courts of appeal countrywide, and a Supreme Court in Juba (Braak 2016). Reference to customary norms and to state legislation can be heard in both categories of courts. Next to these customary and state structures, people can resort to elders, church leaders, traditional religious leaders, police, or militia (Rigterink, Kenyi, and Schomerus 2014). Land disputes are often specifically dealt with by the County Land Authority (CLA) and its Land Dispute Committee. In our research we have focused primarily on the customary and judiciary courts and the CLA.

Afghanistan has, in theory at least, a clearer distinction between state and non-state justice providers. The state is represented at the district level through primary courts, at the provincial level through appeal courts, and finally has a Supreme Court in Kabul (Stahlmann 2016). To access state justice in civil cases, people are supposed to first refer to an administrative office at the district level termed *hoquq*. This office is part of the Ministry of Justice. The *hoquq* can either decide to refer cases to the court or mediate itself. In theory, the *hoquq* encourages disputants to reconcile but it does not have the means/expertise to do so. For criminal cases, people are supposed to resort in first instance to the police. Other governmental bodies such as the Ministry of Women's Affairs, the *woluswal* (district heads) or provincial governors are consulted as well by people in need of justice. It also happens that *hoquq* or courts refer civil cases back to community-based institutions. Among these institutions are the *jirga* (traditional dispute resolution circles of elders that are assembled at different levels) and *shuras* (bodies of decision making and traditional dispute resolution that exist at different levels). In addition, people can resort to religious leaders such as the *ulema,* to local power-holders, *maliks* or to locally elected Community Development Councils (Stahlmann 2016; Wardak 2016).

A focus on land and women

Amidst the wide range of disputes that take place, our research has focused particularly on land disputes. Land clearly has important social, political, economic and symbolic values in both countries. In both research settings, land disputes are prevalent. Such disputes can play out either within families, within communities, between members of different local communities, or between community members and government institutions or other (trans)national actors. Ways in which such disputes are being mediated can therefore provide valuable insights in the strategies that different types of justice seekers explore when facing different adversaries.

Moreover, land disputes are often seen to be at the root of larger conflicts. A good understanding of the dynamics of land disputes can therefore contribute to a better grasp of such conflicts.

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3 In South Sudan states like WES are subdivided in counties, counties in *payams* and *payams* in *bomas*. So below the national level, there are four administrative sub-levels. At the county level the administration is led by a state official: the county commissioner. The traditional chieftaincy has its own parallel structure. At the county level, there is the paramount chief, at *payam* level the head chief and at *boma* level the sub-chief.

4 The Judiciary Act foresees the establishment of statutory *payam* courts, but those have not been established yet. The customary courts are established through the Local Government Act (2009), whereas so-called 'judiciary courts' are established through the Judiciary Act (2008). Both customary and judiciary courts are part of the judicial hierarchy of South Sudan (Braak 2016: Ch.1.1, see also Leonardi et al. 2010).

In both countries, women face particular challenges in obtaining access to justice, albeit in varying degrees. To gain further understanding of what these challenges constitute of, our research has paid special attention to female justice seekers and the barriers they face when trying to access different justice providers and to claim their rights, particularly in regard to land rights.

1.2 Research questions

The abovementioned considerations have led us to formulate the following research questions.

1. To which extent, how, and with which degree of success do men and especially women, in selected areas in Afghanistan and South Sudan, facing serious justice concerns, notably property dispossession and other property disputes, engage with the available state and non-state mechanisms and practices to achieve justice and peace?

2. To which extent do the available justice providers offer adequate responses and remedies?

3. How can successes and failures in the dispensation of justice through state and non-state mechanisms be explained, in particular by reference to:
   a. institutional and legal aspects of justice mechanisms and their interrelations;
   b. interaction and communication between justice seeker and provider;
   c. contexts of severe insecurity and power imbalances;

4. Which norms, mechanisms and practices among the whole spectrum of justice providers proved to be the main 'elements that work'? How can justice interventions effectively build upon those elements, and strengthen the linkages and complementarity between them, shaping coalitions for primary justice, for women in particular, and ultimately, adequate primary justice systems at the district/county level?

1.3 Methods, research locations and limitations

This set of questions was developed by the research team during and after a kick-off meeting that was organised in the Netherlands in October 2014. Before the actual data collection started, questions were further tailored to the local contexts. This was done locally in close consultation with the field researchers involved. Before and during the data collection, local researchers received tailor-made training to improve their skills in data collection and analysis. All researchers drafted reports on which they received elaborate comments.

In this research we tried to follow the course of events and to consult different parties involved whenever possible. Researchers talked to disputing parties, 'normal' citizens, and local state and non-state justice providers. This contributed to triangulation of the findings. In the case of South Sudan, we were able to gather court records and to attend court hearings. In addition, we were able to visit disputants a year after their case had been heard in the High Court, the highest statutory court at the state level, to see to what extent and how rulings had been implemented. In the case of Afghanistan, such undertakings were not possible due to the limited access to courts and court records, but also because security conditions limited our data collection.

The data collected through observations, structured, semi-structured and open interviews allowed us to build up 'case studies'. Following Yin, we see a case study as "an empirical inquiry that investigates a contemporary phenomenon in depth and within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident" (Yin 2009: 18). The country reports are the outcomes of these case studies. Some of these case studies refer to particular justice-seeking processes, others to certain state or non-state providers of justice, or to specific individuals. Our 'case studies' thus do not equate court cases. More detail on the ways in which the research was set up is provided in these reports.

In both countries a key role was to be played by a lead researcher acting as coordinator of a team of local researchers – in South Sudan this was Bruno Braak, in Afghanistan Lenny Linke who was later succeeded by Amiri Rahmatullah. As gender relations play a major role in accessing parties and institutional actors, we composed teams of researchers comprising both men and women. This enabled us to obtain access to female justice seekers (and in some occasions justice providers).

Research locations

To answer our research questions empirically, we initially selected two research sites in each of the two countries, based on their relevance for Cordaid's future programming and the embeddedness of local partner organisations in the area. In Afghanistan, the districts of Behsud in Nangarhar Province and Istalif in Kabul province were selected. Stahlmann added data from her own research in Bamyan, a relatively secure place where "formal conditions of the rule of law were largely fulfilled" (Stahlmann 2016: 78), which was less the case in Behsud and Istalif.

In South Sudan, we initially selected the town of Yambio in Western Equatoria State (WES) and Wau in Western Bahr el Ghazal State. Unfortunately, the security situation prevented us from carrying out research in Western Bahr el Ghazal.[5] Research in South Sudan was therefore limited to one state, i.e. WES, but instead of focusing on Yambio County only, the team carried out additional research in other counties, *payams* and cities in WES. In the country reports we provide more detail on the research locations.

Limitations

Few local researchers had experience carrying out qualitative research. In the beginning they felt most comfortable closely following the interview guide, and they were reluctant to ask follow-up questions. Through on-the-job training, feedback and supervision, they developed their research skills and felt more at ease conducting semi-structured and open interviews.

Social norms in Afghanistan dictate that women cannot easily speak to non-related men, making it difficult for the female researchers to obtain access to male disputants and to justice providers who are predominantly male. Triangulation therefore was often not possible.

In both South Sudan and Afghanistan the deteriorating security situation impacted the data collection and the way we were able to set up our research. For both countries, the lead researchers were not able to travel to the research sites after the end of the first phase of data collection. This greatly impacted on the supervision and guidance the lead researchers were able to provide to the other researchers. Besides, at various stages staff turnover at Cordaid's country offices in Juba and Kabul and at the local partner organisations TLO and JPC affected the smooth continuation of the research at both sites.

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5 Western Bahr el Ghazal was categorised 'code red' by the Netherlands Ministry of Foreign Affairs. Staff of Leiden University were not allowed to work in 'code red'-areas.

With much delay due to the unstable and insecure situation, a second phase of data collection took place in South Sudan between November 2015 and March 2016 but it had to be more limited in scope (see Braak 2016: 2.10 Epilogue). The new round of data collection nevertheless allowed us to strengthen the case study reports, and to obtain insights into the ways in which the insecurity had impacted both justice seekers and providers. For Afghanistan it proved not feasible to organise a full new round of data collection. We therefore opted for a number of stakeholder consultations to validate the findings of the first stage.

As a result of these limitations, our plan of 'following disputes' over time could not be conducted as long and as systematically as we had anticipated. Sometimes, the data are incomplete and information is not as profound as we had hoped for. Nevertheless, the research has produced many important insights, valuable analyses, and provides a good basis for suggestions for programming and for further research, notably with regard to the South Sudan cases.

2. A brief summary of the cases

For a glimpse into the eight case study reports of each country, we here provide a brief presentation of the cases but we strongly encourage the reader to take a look at the country reports for further details. The reports aim to set out people's 'concerns and conceptions of justice', the 'responses and remedies' provided by justice providers, and the challenges faced in Western Equatoria State, South Sudan and in Istalif and Behsud districts in Afghanistan. Cases have been selected both on the basis of their relevance in the communities studied and on the basis of their relevance for potential programming for Cordaid.

2.1 South Sudan cases

SS 1: *Women's paths to claiming land in court*. South Sudan has adopted progressive legislation on women's rights to land. But are these laws put into practice? Based on three cases of women from Yambio who litigated up to the High Court to claim their right to land, this study finds that some judges rule progressively. But also that enforcement is lacking, and that losing parties often resort to intimidation.

SS 2: *Customary courts and traditional authorities*. Chiefs in WES play a vital role in the resolution of disputes. This case study briefly investigates their legal roles between executive and judiciary and shows that their integration in statutory justice is not (yet) working out well in practice. It then offers an empirical study of the work of customary courts based on court records and observations. It shows that the customary authorities are indispensable for everyday justice on the local level; they are affordable for most and quick in offering culturally sensitive solutions. Contrary to findings of others, the report argues that they are not always aiming at reconciliation and that punishments can be harsh. It also argues that in certain instances women manage to get their rights recognised in customary courts.

SS 3: *The County Land Authority (CLA)*. The CLA is an administrative body set up in 2013 to perform a wide variety of land governance-tasks in Yambio. The case describes the functioning of the CLA and its committees such as the Land Dispute Committee. The case investigates typical disputes and responses, as well as popular perceptions. The CLA was initially meant to have an advisory role, but in practice it rapidly acquired a central role in land governance, including land registration and mediation of land disputes. The CLA clearly responded to existing needs among the population, but this is not always in line with its legal attributions in the Land Act.

SS 4: *Demarcation and land dispossession.* Since South Sudan's independence in 2011, a controversial process of formalising land tenure is ongoing. The CLA plays an important role in the demarcation that leads to formalisation. This case investigates the formalisation process in Yambio, Ezo and Tombura counties, and finds that it has led to dozens of land disputes, and that many people have been dispossessed and displaced without receiving any compensation. But the case also highlights the perspective of a state apparatus attempting to govern increasingly valuable land, while plagued by a lack of human and financial resources and political interference in an insecure context in which many people are on the move.

SS 5: *LRA-refugees: Safe on Church lands?* The presence of the Lord's Resistance Army (LRA) in different regions of South Sudan and in neighbouring countries has in recent years led to displacement of people. Many of them come to urban centres such as Yambio and Tombura, where they are in need of plots of land, both to reside and to cultivate. Such plots have been offered initially by churches, who are large landowners. This study focuses on resulting land disputes between displaced people and various churches, based on competing claims. The report argues that conflicting claims to land are legitimated

on different grounds. This study offers insights into the relationship between 'forced migrants' and 'host populations', and between 'powerful' and 'powerless'. It also shows that the boundaries between 'IDP', 'returnee', and 'refugee' are somewhat vague in this border region of South Sudan.

SS 6: *Land disputes and ethnicity in Maridi.* County between different groups of Dinka cattle keepers and agriculturalists who are members of other ethnic groups such as Azande and Muru. The report shows that different groups use different arguments to claim their right to access the land. Some of the Dinka claims are based on their role in the liberation war, whereas the local Azande and Muru claim their rights to land on the basis of their identity and history of belonging. The paper shows the difficulties parties face when trying to reconcile such competing claims. It also shows how micro-level disputes can escalate violently in the current fragile political context.

SS 7: *The mobile court of Judge Kaya.* Mr Kaya is president of Yambio's High Court; it is here that he hears most of his cases. In early 2015, the county commissioner of Tombura requested Judge Kaya to come hear 16 pending criminal cases. This study offers a summary of his visit and the cases before him, and lists some obstacles and successes. It finds that accused persons were arrested and imprisoned for long periods without having any recourse to justice. It elucidates the disadvantages of the periphery of WES, as well as a problematic relation between the statutory and customary courts. Yet, it also finds that personal interventions and relations can mitigate these difficulties.

SS 8: *Witchcraft and its place in court.* Witchcraft is an indisputable social reality in many disputes among Azande. This case offers a brief history of witchcraft and its uses in Zandeland, and examines how various justice providers today engage with it. It highlights in particular the legal dilemma that customary courts do not have jurisdiction over criminal cases, and statutory courts have no means to hear witchcraft cases. It also stresses the role of oracles and church officials.

Source: Braak 2016: 20-22.

2.2 Afghanistan cases

A 1: *Common challenges in claiming land rights - a case from Istalif.* Land disputes are often protracted due to cycles of displacement and return, and documentation that is either lacking or forged. This case shows the challenges of fact-finding and how justice providers – state as much as non-state – are often unwilling or unable to deal with such difficult, protracted cases. Daily and ordinary disputing scenarios have thus become endless and highly frustrating.

A 2: *Land disputing processes facing corruption and favouritism - an example from Behsud.* This study illustrates the immense value of land in Behsud. It makes land a likely prey of trespass and justice providers highly susceptible to corruption or favouritism. The report shows how abusive use of public office and its power manipulates both the state judiciary but also other sectors of the state such as the police. The judiciary seems to be weakened by this combination of favouritism and corruption, leading people to tend to prefer non-state justice systems to state justice.

A 3: *Intermediaries as part of the problem? A land dispute with a real estate agent, Istalif.* Real estate agents are supposed to forestall many of the ordinary procedural and practical challenges people have in claiming land. Many of them have become experts on land issues and their technical and local knowledge can be helpful. Yet this case illustrates how this institution, which in theory could bring relief, can easily

become part of the problem of power-abuse rather than part of the solution in an environment which lacks the rule of law.

A 4: *Commanders managing disputes - the case of the Shura-ye-Ejtemayee Mardomee Walouswali Istalif (SEMWI)*. This study describes the 'Mujahedin-*shura*' SEMWI that is led by a locally dominant civil-war commander. By effective solving of people's disputes, the commander increases his power and legitimacy. It is shown that his power of enforcement is regarded positively by interviewed disputants, who belong to his 'clientele' or constituency. Yet it is argued that the *shura* has considerable shortcomings for members of the 'out-group', whilst the commander is not controlled by anybody other than his political patrons higher up, so that accountability is lacking.

A 5: *Uncontrolled abuse of power - the example of Behsud*. This study shows how former commanders and local strongmen grab land with impunity using the insecurity and the weakness of state institutions. They use their power to manipulate especially state but also non-state justice procedures. This report discusses the causes and the dynamics behind a number of land conflicts with a focus on the role local strongmen play in these disputes. The study shows that strongmen are not only party to land disputes, but that they also play a role in the actual 'provision of justice', as intervening party or through their connections with powerful people among the justice providers. It is argued that such connections lead to major obstacles to access justice for the less well connected.

A 6: *Socio-economic barriers to women's access to justice - an inheritance case from Istalif*. The Afghan constitution stipulates equal rights for women and men, and national legislation also attributes a range of rights to women. Yet poor law enforcement, a general lack of knowledge and appreciation for women's rights laid-down in the country's *sharia*-based legislation, and highly patriarchal attitudes prevent women from claiming their rights. The description and analysis of an inheritance dispute between a woman and her nephew shows how the concept of shame is meant to bar women's access to justice. It argues that there is much to gain for women, as well as justice providers if state and non-state institutions join ranks in defending *sharia*-based and statutory norms. On a positive note, this dispute also shows that shame was actually overcome.

A 7: *Socio-political barriers to women's access to justice - the example of Behsud*. This case demonstrates that social restrictions placed on women to access justice providers are imposed in different realms, i.e. the family, the local community and the state. Even if women have been able to withstand their families' resistance and expressed their willingness to do so, both community and state actors are often complicit in upholding this patriarchal regime.

A 8: *Women's participation in dispute management - the case of the women's shura in Istalif*. This report examines the role of a women's *shura* in Istalif and describes the role of the woman who is the driving force behind this *shura* and the challenges she faces. The women's *shura* in Istalif helps women to overcome many of the barriers they face in claiming their rights. It is argued that the particularly supportive role of this *shura* is possible largely thanks to the female leader's personality. It provides a sign of hope for the empowerment of seemingly powerless actors, when someone who enjoys their trust can provide effective support and dares to confront existing power structures.

Source: Stahlmann 2016, 16-18.

3. Analysis of primary justice cases in South Sudan and Afghanistan

The respective contexts of the cases of primary justice described above are important, not only as background information but also because they impact the justice concerns people have and the way in which justice providers respond to these concerns. In the following we first provide a brief description of the general contexts in Afghanistan and South Sudan, by referring to history, or rather histories, of insecurity. We then provide an analysis of consequences of such histories on people's justice concerns today and the challenges they encounter in seeking remedies for their concerns. The second section of this chapter describes the main justice concerns people, especially women, have, notably in relation to land. The third section briefly describes the justice providers that are available to people, in both South Sudan and Afghanistan. Here, we also explore the strategies people use to obtain responses from these justice providers. The final section of this chapter explores a number of elements that contribute to the adequacy (or inadequacy) of the justice providers' responses to justice seekers.

3.1 The impact of insecurity

After decades of war, the Government of Sudan and the Sudan's People Liberation Movement/Army (SPLM/A) signed the Comprehensive Peace Agreement (CPA) in 2005, ultimately leading to South Sudan's independence in July 2011. But after an initial period of euphoria, violence flared up in the capital Juba in December 2013. The conflict at this point was attributed to weak governance and internal power struggles, but also to a general militarisation of a country that has been used to violence for such a long period (Rolandsen et al. 2015; Braak 2016). Western Equatoria State for a long time remained relatively peaceful even during the civil war, with people proudly presenting this image. But from the second half of 2015 onwards, violent conflicts slowly engulfed WES too. At present the fighting and violence in South Sudan is often very localised. Yet, our findings also show that micro-level conflicts have to be understood within the 'macro-level narratives of marginalisation and oppression' (Braak 2016: 92). In the epilogue to the country report, further detail is provided about the latest developments that took place after the main period of data collection in South Sudan (Braak 2016: Ch. 2.6).

In Afghanistan, many people are losing their hopes for more peaceful times. At the 2001 Bonn conference a political roadmap on the post-war order was agreed upon by the signatories, and meanwhile a number of important steps have indeed been taken, such as the enactment of a new constitution and several elections. However the empowerment of warlords in the post-Taliban era has seriously hampered any return to a culture of justice. In spite of efforts to promote the rule of law, serious challenges remain, especially in relation to the rampant corruption and lack of accountability enabling widespread power abuse. Violence continues to flare up with regularity in many areas of the country and the Taliban have gained ground again (Stahlmann 2016; Wardak 2016). In Istalif district security is in fact provided not by the Afghan government, but by a former civil war commander with strong connections with powerful politicians in the Afghan government. In Behsud, the governing elite that consists of former civil-war commanders is strongly connected to criminal networks. It leads to uncontrolled abuse of power without any accountability assured, as described in case report A 5 for Behsud (TLO and Stahlmann 2016: Ch.2.5).

Consequences of insecurity

Conflicts and insecurity have led to large-scale and sometimes long-term cycles of displacement and return of people in both research sites. In Afghanistan for decades people have been leaving their

district, province or country for shorter or longer periods. In the border region of WES in South Sudan, displacement has concerned not only South Sudanese citizens, but also involves refugees coming from the DR Congo and the Central African Republic. The first case report on Istalif, Afghanistan and the sixth and seventh case reports on South Sudan testify to their problems and disputes. They underline that population movements result in increasingly complex land tenure arrangements and hence increase dispute potential. Displacement and return should therefore not just be seen as consequences of insecurity, but also as causes of injustice that need to be addressed carefully without harming the weaker parties. A further discussion of such disputes will follow in the next section.

A second observation is that micro-level disputes as well as the ways in which justice providers intervene in such disputes should be understood in the larger macro-level context of fragility. Such context makes micro-level disputing processes more volatile as shown notably in the county of Maridi in South Sudan (Braak 2016: Ch. 2.6). To understand the course of disputes and the paths to justice that are taken, one also needs to pay attention to the power relations that are at stake. The mobilisation of strategic connections by the disputing or intervening party tends to affect the course of events and the solution that is proposed. This is well illustrated by a judge in Behsud who argued that "a powerless person usually does not even file a case against somebody supported by a power-holder, because the results are known beforehand" (TLO and Stahlmann 2016: 37).

Governments and governance in South Sudan and Afghanistan have been in many different hands over the last decades. The epilogue of the South Sudan report testifies to a rapid replacement of the governor of WES, and to fights between different armed groups over power. In Afghanistan also, the shifts in power constellations have significant impacts. They render it risky and sometimes dangerous for people to take sides and to attribute legitimacy to a power-holder who might be substituted soon for another. Many Afghans who stayed in the country throughout all the wars have repeatedly changed party membership (Stahlmann 2016), whether out of conviction or out of strategic considerations.

In the context of Afghanistan, Stahlmann (2016) argues in the country report that in a number of cases a shift can be seen from what some authors identify as a *khan*-model of power to a warlord-model of power, meaning that some power-holders no longer derive their power from social prestige, but from physical force, weapons and support by higher warlords and politicians.[6] In Istalif, people acknowledged that the real power-holder is not the state but a former civil war party. In Behsud, people observed how criminal networks are intertwined with high state officials (TLO and Stahlmann 2016). A number of recent violent incidents in South Sudan have underlined that also here the state does not have the monopoly over the use of violence. What is more, the state has been internally divided; in Yambio, some people contended that the violence in WES was incited by the central government in an attempt to undermine the position of the governor, and eventually to remove him (Braak and Minaida 2016). People's loss of trust in the state is a latent force undermining state-based justice providers.

Another dimension of the impact of insecurity is that the social fabric in communities is weakened. This relates partly to the already mentioned cycles of displacement. After prolonged periods of absence, upon return social connections which were interrupted turn out to be not as stable and valuable as assumed, not only within communities but even within families. Previous agreements are no longer taken for granted or even simply denied. People who had stayed behind feel they can take the opportunity to claim rights over land that did not belong to them before. Such happened in the case of Anne who was described in case study SS 1 (Braak 2016: 25-26; see Ch.2.1). It also happened to Sharifullah in case

6 Stahlmann here follows (Elwert 2002) who wrote about these different power models in African settings, using the terms 'big men' and 'warlords'.

study A 2, who found his father's land in Behsud taken by a relative and the document of his father's land transaction to be forged (TLO and Stahlmann 2016; see Ch.2.2). In such settings mutual trust cannot be taken for granted. Not only have certain power-holders shifted from prestige-based power to weapon-based power, but in some instances citizens actually find it easier to solve their disputes with the help of warlords instead of the 'competent' customary or state-based office-holders.

3.2 People's justice concerns

> Nothing excites deeper passions or gives rise to more bloodshed than do disagreements about territory, boundaries, or access to land resources (Shipton 1994: 347).

In times of insecurity, demand for land is self-evidently relatively low, with people fleeing the area or not able to cultivate their plots. Still, these are times of violent and illicit appropriation of land and pressure on the land increases in relatively safe urban centres within such areas. When people flee from insecurity, or when they return, they need to claim or reclaim plots of land in order to be able to make a living or to build their shelter. However, ownership documents are often lacking or unclear, as is shown in cases A 5 and SS 3 and 4 (TLO and Stahlmann 2016: Ch. 2.5; Braak 2016: Ch.2.3. and Ch.2.4). Pressure on the land not only increases the prices of the land, but also makes it more important to claim ownership. When security in Behsud increased for some time, land prices started to rise. In South Sudan, another factor that contributed to an increased importance of the land (and higher value) was that due to the economic malaise employment opportunities dwindled, forcing people to turn (back) to agriculture to provide food for their families.

Types of land disputes (with particular focus on women)

Zooming in on the different types of land disputes, our research roughly distinguished three categories. Each category has its own dynamics, which we briefly describe in the following sections. Firstly, we see rather general disputes over land between citizens that are more or less at equal footing. In many instances, but not always the disputing parties are related to each other. Secondly, there is the category of land disputes that involve parties that are not at equal footing in terms of power; with one party being significantly richer, more powerful, or better connected. The third category concerns land disputes that involve citizens and state actors.

Land disputes between 'equal' citizens

In a context in which land is increasingly claimed, demarcated, and monetised, it becomes more important for people to make their perceived land rights explicit. As said above, due to insecurity people in certain instances find land taken by others, despite agreements made earlier and despite a belief that they could claim their land back upon return. Before the unrest in Yambio Anne had allowed her niece to occupy a part of her plot. When Anne fled, her niece stayed behind on this plot. Sometime later, her niece died. Upon Anne's return, she found the plot to be occupied by her niece's in-laws, who refused to return the land to Anne and who later even sold the plot to another party, increasing the complexity of the dispute (Braak 2016: 25-27).

In Afghanistan, our research came across similar disputes between citizens. They often involved family members making competing claims over land based on inheritance. An example of this is presented in case report A 6 where a woman in Istalif, Sabera was disputing with her nephew about the inheritance of her deceased brother's land, the nephew's father. The land originally belonged to Sabera's father, and according to both Afghan law and *sharia*, Sabera was entitled to inherit part of that land. She had not claimed it after her father's death to avoid losing her public reputation by claiming a right that is customarily

denied to women. But when her brother died and when her economic situation had deteriorated, she felt the need to claim her rightful share. Sabera's nephew was clearly in disagreement with his aunt about her making the case public and therefore showed limited willingness to grant his aunt the land that he actually also agreed she was entitled to (TLO and Stahlmann 2016: Ch.2.6).

Land disputes between citizens and in families are common everywhere and in all times. A number of context-specific reasons contribute to the complexity of these disputes in the Afghan and South Sudanese contexts. Firstly, ownership claims have often been interrupted because of displacement, making it more difficult to follow the claims, and making it more likely that claims become overlapping. Secondly, in several cases the social fabric appeared weaker than before and not strong enough to solve the dispute internally and to find mutual agreement without any external intervention. Especially in Afghanistan not only the social fabric seems to have weakened but there is also often disagreement on which rules apply to inheritance. Women's rights to inherit seem to be acknowledged mostly by those who have an interest in acknowledging the right, i.e. women themselves, or her male relatives who can benefit from a woman inheriting a plot. It is a clear expression of 'rule shopping' that is applied in such instances.

Land disputes and power differentials

Defending or claiming one's rights becomes more difficult if the other party involved is more powerful. It was argued by respondents in Afghanistan that in many such instances people would not even take the case to a justice provider, not trusting that the outcome could ever be in their favour. Such disputes therefore remain largely invisible within the state legal system.

The challenges people are facing when seeking justice are greatly related to the responses they receive from justice providers but also from society at large. We here discuss some of the factors that contribute to power differences. Firstly, and to a significant extent, power differentials can be ascribed to gender differences. The communities in both countries were described as patriarchal and as giving less voice to women than to men. Social norms in Afghanistan make it hardly possible for women to claim or defend their rights against an external party. This can be overcome by sending a male relative as representative. Sabera, described above, requested her husband to go to the *malik*, a locally powerful commander. Her husband agreed to do so, although this was considered shameful. Asking for outside help and demanding the inheritance rights of his wife can be read as a sign that he is not able to provide for his family himself.

Women in South Sudan experience fewer barriers to take their land disputes to court. Braak 2016: Ch.2.1 describes three cases of women who claim their rights even up to the High Court. Women have legal rights to equal treatment and property, and this case study found that in newly independent South Sudan often justice providers are willing to award those. What is more, without referencing legislation directly, traditional authorities also acknowledge that things have changed, and that women are gaining more rights. Yet, also here, patriarchal practices such as 'widow chasing' continue to be applied in some instances, albeit with lesser frequency than in the past (Braak 2016).

Apart from power differences based on gender, the social, economic and political status of parties matters a lot. If a 'higher', a more powerful party is involved, people might refrain from seeking justice at all in both South Sudan and Afghanistan. In other cases, people make efforts to defend or claim their rights, but do not manage to compete with the more powerful party, whether this is a church in South Sudan, or a local warlord or police officer in Afghanistan, as the reports show (Braak 2016: Ch.2.5; TLO and Stahlmann 2016: Ch.2.5). Sometimes the other party in a dispute is the one with power; sometimes the other party simply has powerful connections. Such power differences clearly frequently influence the outcomes of disputing processes. Power is also a profoundly relational quality – and so the same person can be powerful in one dispute or arena and powerless in the next. The case from Maridi (Braak 2016:

Ch.2.6) demonstrates that it is precisely the comparative power position that Dinka hold nationally, that results in their discrimination by the government locally.

Land disputes and the government

Disputes between citizens and 'the state' deserve particular attention as they clearly have different dynamics than disputes between citizens. The South Sudanese Land Act (2009) demands for classification of all land in the country and the process of formalisation of land tenure and demarcation of the land is ongoing. But the demarcation has led to countless contesting claims over land and people are being dispossessed without the compensation that they are entitled to according to the Land Act. As a result, in all researched counties in WES the demarcation leads to disputes. Significantly, the demarcation was seen as one of the main sources of conflict by people interviewed for this research, both among justice seekers and providers (Braak 2016: Ch.2.4). Not only does the demarcation lead to less trust in the government, it also increases or creates tensions between citizens, with people competing to get their rights acknowledged.

3.3 Available justice providers and people's strategies to engage with them

People who are in need of justice have various options to choose from. The following sections first provide the various options available to people and ways in which these justice providers are organised. We then proceed with a section in which we highlight some of the prevalent opinions people have about these providers. We discuss some of the challenges related to the provision of justice in section 3.

State actors

In South Sudan, the formal court system incorporates the customary A, B and C-courts. The traditional leaders heading these courts are not necessarily seen by the population as state representatives, but they nevertheless ensure the state of a presence in the veins of society and customary court rulings in principle can be appealed against in statutory courts, as detailed in the country report (Braak 2016: Ch.2.2).[7] By attributing a role to the customary courts, the state makes the everyday administration of justice relatively accessible to citizens. In doing so it also caters for justice concerns that are difficult to administer within a legal-rational framework, such as witchcraft accusations that lack material evidence (Braak 2016: Ch.2.8). Our findings however also show that the relationship between the customary courts and the statutory courts is at times an uncomfortable one, as we will further discuss below.

Another interesting example of a state body that responds to people's justice concerns regarding land in South Sudan is the County Land Authority (CLA). Although it functions in a manner that differs from its legal attributions and it is not meant to be a mechanism for dispute settlement, the CLA, and especially its Land Dispute Committee plays an important role in the administration of justice. For many disputants, the CLA is crucial in making successful claims over land ownership (see Braak 2016: Ch.2.3).

Afghanistan has a formal justice structure that goes down to primary courts at the district level. In the past one and a half decades, international efforts have been aimed at strengthening this state justice sector, resulting in better equipped offices and in judicial staff that have been trained (Stahlmann 2016: Ch.1; Wardak 2016). Yet, these formal courts, for various reasons which will be discussed below, do not figure very prominently as actual providers of justice in our research findings. People who decide to go to state courts often end up disappointed, as their justice concerns are not adequately responded to. Major

7 Linkages between these different levels are discussed below.

problems are related to corruption and favouritism, inaccessibility and lack of security, as shown notably in various cases from Afghanistan.

Just like in South Sudan, the Afghan state consists of various (executive) bodies that are involved with the administration of justice, albeit not as their primary function. These bodies include amongst others the Ministry of Women Affairs (MOWA), the Afghanistan Land Authority (*Arazi*), and the Community Development Councils. At different levels and in different ways, these bodies contribute to the establishment of the state as a provider of justice to the population.

Non-state actors

Not surprisingly, our research came across a wide range of non-state actors involved in the provision of justice, as was briefly set out in the introduction of this report. In situations of insecurity in which state authorities do not have full control over their territories, a power vacuum arises. It has been argued in other contexts that non-state actors are usually quick to take over state-like functions in conflict-affected settings in an effort to gain legitimacy from the population (cf. Hoffmann & Kirk 2013; Hoffmann & Vlassenroot 2014). An absent or weak state hence does not necessarily mean an absence of governance or justice (Baker and Scheye 2009; Börzel and Risse 2010). Non-state actors have often received legitimacy by providing security – or at least a level of stability at the local/regional level. This enables them to provide other public services as well, including justice. By resorting to arms or by mobilising their powerful connections, such actors are often well positioned to impose their judgements and enforce verdicts. This gives trust to disputants in search of a solution, but as long as the power these actors rely on is beyond the control of the state or of society, neither can hold them accountable if they misuse power for biased or partisan rulings.

Our research findings from the cases in both South Sudan and Afghanistan confirm this picture. TLO and Stahlmann (2016: 2.5) show how a civil-war commander in Behsud sets up his 'own' dispute resolution institution. The order he imposes ensures certain levels of security that people are in need of. It helps him to gain legitimacy and to play a role in the settlement of disputes. Through his force and the security he provides, people tend to accept his rulings. In South Sudan, the picture is more diffuse with community-based militias known as 'Arrow Boys' initially providing protection against the Lord's Resistance Army, and later clashing with the national army and – in some instances – preying on civilians themselves. Members of the Arrow Boys have been active as local youth in processes of dispute settlement in tandem with traditional authorities, but so far it is unclear whether they resolve disputes autonomously (see Braak 2016: Ch.1 and 3).

For the population, such types of non-state mechanisms may provide welcome alternatives to failing or distrusted state actors; yet, their 'side-effects' may also be undesirable. TLO and Stahlmann (2016: 2.5) testify to instances of uncontrolled abuse of power, not subject to any checks-and-balances. Such lack of control does not necessarily mean that there is no support for these actors. Arrow Boys at least initially enjoyed considerable legitimacy locally[8] and the commander's *shura* is frequently consulted. It should be pointed out however that the risk of abuse of power is always there, that such justice providers can hardly be neutral in a socio-political sense, and that 'rule of law' standards are not necessarily part of the rules of their game. Therefore, for disputants who appreciate these values of socio-political neutrality and rule of law, these non-state actors are viable options by default, with some performing better than others (TLO and Stahlmann 2016: Ch.2.5 and 2.6). The hard question is whether or not such mechanisms, in the end, do or do not undermine longer-term efforts to establish justice structures that can be held accountable.

8 Although the picture has grown more complicated over the course of 2015, when the Arrow Boys also got involved in predatory acts vis-a-vis the local civilian population (Braak and Minaida 2016).

Hybrid actors

In South Sudan, the customary A-, B- and C-courts in fact are hybrid actors in the sense that they are formally recognised as part of the judiciary, and endowed with legal powers, but at the same time operated for and by community members who are not state-officials. They are supposed to apply customary rules within their legal mandate. This is reflected in the mix of legal and customary norms they apply when coming to their verdicts, and their expressed desire to obtain more legal instructions as a basis to work from (see Braak 2016: Ch.2.2 for more detail).

In Afghanistan, different pieces of state legislation recognise the role of non-state justice providers, but no formalised, institutional links exist between the *jirga*/*shura* and the state justice institutions. It has been argued that such formal linkages, by way of a hybrid model of justice could help "to promote a more accessible, cost-effective and sustainable justice system" (Wardak 2016: 17). Such a hybrid model would give the *jirgas* and *shuras* a formal place within the state's justice system, attributing them the responsibility to deal with minor civil disputes and criminal incidents (Wardak, Saba, and Kazem 2007). Lobby and advocacy efforts to realise this design are still ongoing (Wardak 2016).

Apart from the hybrid nature of the courts in South Sudan, the structures and functions of state and non-state actors sometimes overlap. Boundaries between different providers are sometimes blurred and it might not be clear where one institution's jurisdiction ends, and where the jurisdiction of another institution begins. Certain individuals might wear different 'hats' at the same time; others have connections that bear an influence on their way of dealing with disputes.

People's preferences in engaging with different justice providers

In general, as everywhere else in the world, people in South Sudan and Afghanistan first try to solve disputes on their own. The next step is usually still within the close vicinity as people often avoid going to the court. Preferences are well summarised by the secretary of the County Land Authority in Yambio. "If they can sit together as brothers, they can call their elders to resolve the dispute," the CLA secretary explains. "If they don't manage, they might go to the headman. If he also fails, they might come here – to avoid having to go to the courts" (cited in Braak 2016: 45).

Respondents in Afghanistan expressed a similar preference for non-state justice providers, mostly because procedures are seen to be less costly and less time-consuming, even though people's expectations about outcomes may be low. This was illustrated by one of the respondents as follows: "If these problems are solved by the government, none of us will use the non-state justice system or none of us will prefer the non-state justice system. We are preferring it only because the formal justice system is weak in our area" (cited in TLO and Stahlmann 2016: 23). A local community leader shared this opinion, but at the same time expressed the wish to change things, when he said: "If the government officials were professional, just and honest, then this is the best way for the dispute resolution, but it should not be the officials like those of the Karzai government" (cited in TLO and Stahlmann 2016: 38).

In contrast to these words, one of the statutory judges in Afghanistan complained that people do not understand the judicial process and the reasons for trials taking long time. It is especially these procedures that differ between state and non-state justice providers in Afghanistan, whereas the rules that are applicable in fact overlap to a large extent. An additional reason why people put trust in the elders is their intimate knowledge of the community. This knowledge entails being aware of the problems people have, and on who is right and who is wrong, enabling them to judge on a quick and fair basis (Stahlmann 2016). In addition, this knowledge also ensures that these local leaders are aware of the social relations that are at stake and will often have a strong orientation towards reconciliation rather than punishment. This works best when the disputing parties are in a more or less equal power relationship.

3.4 Adequacy of justice providers' responses to justice seekers

Having described the main concerns of justice seekers, the justice providers that are available to them and the preferred strategy of people when in need of justice, we now turn to an analysis of a number of factors that contribute to the way in which justice providers can function and the extent to which their responses are adequate. This requires looking at both state and non-state justice providers.

Institutional and legal environment

As mentioned earlier, in both South Sudan and Afghanistan efforts have been made to strengthen or reconstruct the legal order, under the assumption that legislation can positively impact on the justice that people find. We here discuss some features of the legal and institutional environment and their conduciveness for justice seekers and for the responses that justice providers can give.

The Southern Sudanese resistance against Sudan was driven in part by discontent about Khartoum's policies and laws that promoted Islam and Arabisation over a population that was generally Christian and more self-identified African (Deng 2011). And so the legislation that has been adopted since the CPA in 2005 and independence in 2011 breathes the ambitious aspirations of the SPLM/A resistance movement and its late leader Dr John Garang. The South Sudanese Transitional Constitution (2011) envisions a stronger role for traditional authorities and customary law, while at the same time reserving particular rights for women – such as to inherit and own land (Land Act 2009: 13 (4)), and to representation in government. The Land Act (2009) stipulates that "all land in Southern Sudan is owned by the people of Southern Sudan and its usage shall be regulated by the Government" (Article 7: 1). Here the establishment of state control goes at the expense – at least legally – of the control that traditional authorities (used to) exercise.

The Afghan state legislation is largely based on positive law and Islamic *sharia,* with article 3 of the Constitution stipulating that: "No law shall be contrary to the beliefs and provisions of the sacred religion of Islam" (cited in Stahlmann 2016: 8). Zooming in specifically on how land rights are regulated, various sources of law are important. Apart from the 2004 Constitution, there is the 2007 Land Policy that was supposed to address a number of the bottlenecks in land rights administration (KIT Royal Tropical Institute 2011). It has been argued however that implementation of this Land Policy is largely lacking, due to a.o. limited dissemination of the law, both among citizens and government officials (Alden Wily 2013). At the same time, it is observed that powerful state and non-state actors sometimes have an interest in maintaining contested claims over land as they are a source of both revenues and of power (Alden Wily 2013; Stahlmann 2016). This is illustrated in the case study on the uncontrolled abuse of power by a local strongman in Behsud (TLO and Stahlmann 2016: Ch.2.5).

While land ownership is the most common form of land tenure in Afghanistan, our findings show that problems with documentation and registration are frequent. Often documentation is lacking or forged, and the system for land registration has a very limited coverage. This makes it difficult for people to claim their ownership when contestations arise. Disrupted lines of ownership caused by conflict-induced displacement and turnover of authorities contribute further to such contestations. Land disputes are therefore omnipresent (Stahlmann 2016).

In both countries, the legal frameworks grant equal rights to men and women. In South Sudan in addition to many non-discrimination clauses (Transitional Constitution 2009: 16), legislation ascribes a positive duty to the state to guarantee that women are represented in "the executive and legislative organs by at least 25 percent" (TC 2009: 16 (4)). Indeed, female leaders are frequently members of A, B and C-courts, who are generally seen as competent by both men and women. Female justice seekers find it easier to

approach female leaders in comparison to male leaders (Braak 2016). In Afghanistan women are entitled to claim their part of the inheritance according to the national inheritance law which is based on *sharia*. In practice this right is hardly realised, as social rules appear to be stronger than legal rules. However, the statutory – and *sharia*-based rights in the Afghan case – should be useful references for practical engagement and could well be one of the 'elements that work'. The women's *shura* in Istalif, described in case A8 is an example of how women can be ensured a place in dispute settlement mechanisms (TLO and Stahlmann 2016: Ch.2.8).

It was especially within South Sudan that people expressed positivism about the changes that the new state would bring to them. It provided a window for the state to promote new ideas about justice and was reflected for instance in a number of court rulings that acknowledged women's rights to land. At the same time, a number of people experience negative consequences of the state-led demarcation process. More recently, the position of the state has been further undermined by political developments and increasing insecurity, as set out in the epilogue (Braak and Minaida 2016).

Normative local realities

In Afghanistan the factor of shame tends to bar women's access to justice. It is only under exceptional circumstances that women are able to overcome this, as illustrated in the reports (Stahlmann and TLO 2016: Ch. 2.6-2.8). In the example of Sabera, a specific configuration of the parties allows her to ask her husband for support in filing a complaint against her younger nephew to demand her inheritance right. Would it not have been a nephew but her brother, most likely, she would not have dared to take such step. In addition, when a woman or a representing male relative takes the step on the path to justice, she runs the risk of encountering a justice provider who does not accept the legal provisions that should protect the woman's position and her inheritance rights. Several respondents in our research mentioned women experiencing a denial of their rights on cultural grounds (TLO and Stahlmann 2016). It results in land being divided unequally among the rightful heirs.

Court records from South Sudan show that of the different courts studied, between 30 and 44 percent of the cases are initiated by women. In the perception of the customary justice providers, women even accounted for more than half of the cases reported.[9] A local chief was cited, saying: "We also give equal rights to the people before the court whether it is a woman or a man. Nowadays we even issue plots to women. We do not follow what our ancestors used to do in the past when women were not entitled to own land" (cited in Braak 2016). This indicates that in South Sudan important changes are taking place in regard to women's rights to land. In comparison to Afghanistan, the position of women in South Sudan is relatively strong.

Generally, in both South Sudan and Afghanistan, conflict and displacement contribute to disruption and contestation of local norms. It makes the heterogeneous landscape of justice even more complex. This makes it difficult for people to know which norms apply in which situation and how justice providers will decide. This situation becomes more worrisome in a context in which state actors are not necessarily providing adequate alternatives.

Practical barriers to access justice

People in both countries faced several barriers when trying to access justice. Physical distance is one such barrier that was often referred to by both justice providers and seekers in our research. This barrier

9 Braak 2016 provides various explanations for this relatively high level of representation of women and the discrepancy between perceptions of justice providers and actual figures based on the court records. An additional explanation could be that women are more vulnerable and that their rights might be violated more often, urging them also more often to take cases to court.

concerns primarily the state justice sector, with courts not always available within close – and safe – walking distance. Community-based justice providers do not have this disadvantage and are hence seen as more accessible in this regard.

The case study on the mobile court in South Sudan (Braak 2016: Ch.2.7) is a clear illustration that a lack of access to state courts creates a real barrier to the administration of justice; the customary courts have no jurisdiction to deal with criminal cases, only the state's County Court[10] and High Court can deal with these cases. People may be able to travel to the court in Yambio town but they would also need to cover the travel costs of the other parties. If this burden is too high, people will refrain from seeking justice in the first place. Braak (2016: Ch.2.7) shows a positive example of how such burdens can be overcome: instead of waiting for cases to be taken to the High Court in the state capital Yambio, the High Court Judge travelled to one of the more remote towns in WES to attend a number of cases that had been pending due to the limited jurisdiction and capacities of the local courts.

Similar spatial barriers are at stake in Afghanistan, especially in rural areas (Wardak 2016). Accessibility is hampered even more during times of conflict, when travelling is generally one of the most insecure activities to undertake.

Costs that need to be paid to a justice provider for his/her interventions constituted another barrier for people to seek justice. In some instances such costs are formal fees, in other instances costs are more informal. The fear of having to pay excessive amounts of money without being guaranteed a positive outcome led people to refrain from consulting a justice provider at all. Allegations of corruption were frequent in both countries but it is difficult to substantiate such claims. Significant, however, is the widespread feeling among people in Afghanistan that more money needs to be paid to state actors than to non-state actors for the provision of justice (Stahlmann 2016). Based on a review of the existing literature, Wardak (2016: 8) summarises: "low salaries, weak institutional control, and lack of external oversight as key internal causes of corruption in the Afghan justice and judicial system".

A third element that influenced the extent to which people were able to draw their own path to justice was the level of knowledge people had about justice providers, the procedures that they follow and the laws or norms that might be applied in such a situation. Indicative are the words of a female respondent in Afghanistan who admitted:

> I don't know any method of dispute resolution – I just know that the issue should not go outside of the family and must be solved between the families or family members. If the issue goes outside of the family, this is not good. People will become aware of it and they will gossip about it – stating that the family is not united (cited in Stahlmann 2016: 68).

The words of the woman reveal not only how a lack of knowledge about one's legal rights and justice providers hamper access, but also the already mentioned social and psychological barriers to go 'outside the family' with a dispute (TLO and Stahlmann 2016). A similar lack of knowledge about one's legal rights became apparent in several cases from South Sudan (Braak 2016: Ch.2.4 and 2.5).

Once access to a justice provider is ensured, the legal procedures that follow can pose another obstacle. This barrier will be discussed further below. It suffices here to emphasise that obtaining access to a justice provider, does not necessarily ensure sustainable access to justice. Procedural and substantive challenges

10 To a limited extent, see Braak 2016: 2.1.

still lie ahead. Awareness of such challenges, for example slow and cumbersome procedures, sometimes stopped people from seeking an external intervention in the first place.

Procedure and power

Once access to a justice provider is obtained, the question becomes how fair the procedure is going to be. In a considerable number of cases the research found that when a dispute involves parties that stand on an equal basis, administration of justice is often done in a fair manner and there is some legal certainty in the sense that certain rules are predictably being applied. However, when there is an imbalance between the two parties, either because one of them is more powerful, better connected, or wealthier, it becomes less likely that the law is fairly applied. Numerous examples in both country reports testify to this (Braak 2016; Stahlmann 2016). Our cases show the overriding influence of power relations, either between the disputing parties or between one of the disputing party and a more powerful third party, or the relations between disputing parties and the justice provider. Several of the examples from Afghanistan demonstrate that also if disputants go to court, the relatively weaker party is often further disadvantaged. As a result, disputes might linger on and potentially grow bigger and more vehement. In South Sudan the same happened. Respondents testified that powerful individuals sometimes called upon state organs such as the police and armed forces who intimidated and sometimes even arrested people (Braak 2016), thus impacting the judicial process.

When power relations cannot be mobilised to influence the judicial procedure, there is still the possibility for people to resort to extra-legal payments. Bribery and corruption were often deplored by people on the losing side and used as an explanation for their unfavourable outcome. Although it is difficult to establish to what extent these phenomena exist accusations were too common to refute them as non-relevant. Some respondents even openly admitted having made extra-legal payments to justice providers to influence the ruling.

A third procedural obstacle is the general lack of reliable documentation. Disputes about land usually evolve around contested ownership but when no ownership documents exist, or when different parties base their claims on competing documents, it becomes difficult for a justice provider to establish which claims to accept. Few justice providers themselves are used to keeping track of their hearings and verdicts. This implies that in cases of referral or appeal, efforts are needed to trace what has happened prior. So for instance when the High Court Judge of WES descended to one of the communities to take up pending cases, he frequently had to start the investigation anew since no or incomplete records existed of what had happened (Braak 2016: Ch.2.7).

Linkages between providers

Various sources in our literature reviews state that in both South Sudan and Afghanistan most disputes are settled without recourse to state-administered justice institutions (Wardak 2016; Braak and Jacobs 2016). Yet, the state usually remains the ultimate authority that can be referred to and statutory legal frameworks apply – in theory at least – to most non-state institutions as well. This is less the case for the former civil-war commander in Afghanistan who operates even outside 'the shadow of the law' and seems to refer and cooperate with state officials primarily to back up and strengthen his own position.

In the Afghan context, it has often been argued that the linkages between the different justice providers need to be established within a clearly defined legal framework which prescribes referral of certain cases between various providers (Wardak et al. 2007; Wardak 2016). Stahlmann however points at the risk of courts referring cases back to non-state authorities against the will of one of the disputing parties. This may particularly endanger access to justice for women as it supports local power-holders that are bound by norms of patriarchal tradition rather than the equal rights laid down in law. It would make it also more

difficult for such parties to appeal their case again as the state would have closed the door to its judicial hierarchy by referring the case back (Stahlmann 2016). It is suggested that this risk could be mitigated by installing an internal oversight mechanism as part of the hybrid model (Wardak et al. 2007).

According to the legislation in place in South Sudan, customary and statutory authorities are already part of the same judiciary and there is certainly room for cooperation, but linkages and roles are not very clearly defined. Our data show that linkages between the different (levels of) authorities exist. How these linkages are employed in practice, depends on the personal attitudes and relations of office-holders. Assistance from the higher levels to the lower levels is provided on a rather ad hoc basis, as the court visit of the high court judge to a more remote town in his county underlines (Braak 2016: Ch.2.7). Several of the traditional authorities expressed their wish to receive more technical assistance and to learn from the statutory judges.

Constructive personal connections among customary and statutory authorities could be fostered and strengthened. Although these authorities in South Sudan are part of the same judiciary they do not work in an integrated manner towards a mutual goal. In practice there are many misunderstandings and prejudices. To improve this situation the president of the high court may use his legal power of exercising administrative review over the judiciary in the state. The high court could do more to exercise that power, and in particular advise and assist the customary courts. Particularly relevant actors within customary courts to engage with may be the courts' clerks. They are often the only persons at these courts who can read and write, and may be best equipped to study materials provided by the state or outside actors. What is more, the work of court clerks is vitally important for the workings of the appellate mechanism. Outside support could seek to facilitate constructive linkages among various justice providers. Previous trainings that were conducted in this field often had a rather normative focus on human rights. Traditional authorities often expressed reservations about such trainings, and indicated that they would rather receive technical guidance and training, and learn from the statutory judges.

It should be emphasised that linkages between justice providers do not necessarily come from above, but are also made in practice by justice seekers who actively consult different justice providers and who shop between the different fora that are seen to be able to respond to their concerns (Von Benda-Beckmann 1981; Coburn 2015). Such choices are often based on very ad-hoc and pragmatic decisions (see also Leonardi, Santschi, and Isser 2010).

Role of individuals

The functioning of a certain justice provider, the way in which this provider is perceived, and the possibilities to enforce a judgement depend considerably on the characteristics of the individual working at a particular institution (Lipsky 1980). To be able to get an understanding of how justice works for people, we ultimately need to look at the individuals that constitute these justice providers. As several case studies demonstrate, they generally have multiple identities and interests which one needs to understand to get a full picture of the justice providers and the decisions taken (see also Frödin 2012). This seems to apply even more so in the insecure settings of our study in which institutions are less stable and personalised connections are more important. Strengthening the capacity of 'good' individual justice providers would have a positive impact on the justice that is available to people.

The findings show examples of positive roles that can be taken up by justice providers. In the case of South Sudan, the high court judge of Western Equatoria State provided justice for several women in establishing their rights to land. He also visited remote counties in his state to decide on criminal cases that had been pending for a long time (Braak 2016: Ch.2.7). There were certainly some snags to his trip, but the positive element was that he brought justice closer to the people and made the state's judiciary

visible to them. In Afghanistan, we have seen the example of Hassina. She managed to set up a women's *shura* despite opposition in the community and she raises awareness about women's rights, both among women and men (TLO and Stahlmann 2016: Ch.2.8).

Both the case of Hassina and the case of Judge Kaya show the value of individuals who believe that something can be changed for the better in the way in which justice is being provided to citizens. In doing so, they not only change the state of justice, but also the perceptions people have about these justice providers. Their achievements strengthen the social contract between citizens and the state.

Besides Hassina and Judge Kaya, the research distinguished other individuals who played facilitating roles for justice seekers. Their role was sometimes rather informal and is therefore not always greatly acknowledged. Yet their initiatives were of help for justice seekers in navigating their way through the legal landscape and in claiming their rights. They include 'paralegals' who are often connected to human rights NGOs as well as legal professionals such as the real estate agent who played a role in the land dispute described in case A 3 (TLO and Stahlmann 2016: Ch.2.3). In many instances their roles have been positive. However, the malpractice by the real estate agent in one of our cases demonstrates that without proper monitoring such third party individuals can also play a negative role, contribute to more inequality between two parties, or become complicit in trespass and abuse. In principle, a real estate agent's unique expertise could be mobilised to solve land disputes, but a close watch at the individual's characteristics is required. To empower justice seekers those actors who have earned the reputation of being trustworthy and supportive to relatively disadvantaged parties would need to be identified.

Enforcement

Enforcement is often the final litmus test of the effectiveness and legitimacy of a legal system. Our findings clearly show that the lack of enforcement of decisions is a major problem. This applies to many of the justice providers, state and non-state, in both countries. Even if courts and semi-judicial bodies produce good legal remedies, problems of enforcement are rampant. The women who took their land disputes up to the High Court in South Sudan met with well-founded and reasonable verdicts, but none of the justice providers that were consulted was able to adequately enforce the decision (Braak 2016). Such events undermine the legitimacy of otherwise relatively well-functioning justice providers.

In contrast, in the case of the former warlord in Afghanistan who is leading the SEMWI *shura* to settle disputes, respondents especially admired his capacity to exercise control, and get his decisions enforced. This became very clear in the following dispute described in the report. After the verdict by the SEMWI *shura* on a land dispute, two state representatives were tasked to go to the area and divide the orchards and farm land among the disputing parties. Yet, the two state officials were expelled from the land by some of the involved family members. A phone call by the former warlord to another commander ensured that the verdict could eventually be executed. It is the enforcement capacity with weapon-based power that contributes to the respect this authority has in the community. Most people care less about the fact that accountability is largely lacking in his case. It is well illustrated by the words of a *malik*: "Deeply rooted or sensitive disputes need someone influential to work with the disputant sides to make them agree to accept a certain solution to resolve their problems, and the *shura* provides such an environment" (cited in TLO and Stahlmann 2016: 30).

Role of external interventions

In the districts and counties where our research was conducted, the international community did not have a strong, direct presence. But its efforts to influence the local administration of justice have been manifold – support to rule of law programming, funding for rebuilding the judicial infrastructure, training of judges, advice about legislation.

In the Afghan context, some of the respondents expressed their disagreement with the international community's reliance on former war criminals to govern the country, and it can indeed be argued that the focus on short-term stability has gone at the detriment of a climate of justice with long-term aims (Stahlmann 2016). Despite all investments that have been made, neither South Sudan, nor Afghanistan have achieved this stability, let alone a robust rule of law environment.

Despite all good intentions and a certain degree of appreciation, in both countries more than a few people showed their reluctance to accept interventions that are imposed from outside. In South Sudan, people would sometimes refer to 'those of human rights' as people trying to impose ideas about justice that contradict or ignore local norms, especially in relation to witchcraft (Braak 2016: Ch.2.8). In Afghanistan non-state justice providers discredited state institutions by arguing that their modes of governing are 'Western', 'alien', and 'non-Islamic'. Whether this is indeed the case or not is irrelevant, as such labels suffice to convince citizens that these institutions do not deserve legitimacy (Stahlmann 2016).

On the positive side, our research found examples of institutions that had improved their functioning with international support. An obvious point of concern here is whether such institutions are able to survive in the longer term without support. A compelling example is that of the County Land Authority in Yambio (WES). The plan was that after the phasing out of donor funding, the county government would take over. Unfortunately, that has not happened and CLA staff have (at the time of our research) worked for months on end without receiving a salary. This leaves a well-functioning institution vulnerable to forms of corruption or simply to terminating its operations. The challenge here would be to either get the government to fund such institutions, or design it in such a way that it can create its own responsible and sustainable sources of revenue without charging excessively high fees (Braak 2016: Ch.2.3).

The women's *shura* in Istalif was a home-grown institution, not dependent on financial means from outside. In an earlier time, though, the female leader of this *shura* had received professional support from an international donor, and this was certainly beneficial for the way in which she was able to function (TLO and Stahlmann 2016: Ch.2.8).

4. Concluding remarks

Despite the limitations mentioned in the introduction the research has produced many important insights and provides a good basis for further research, notably with regard to the South Sudan cases, and suggestions for programming. The latter are elaborated in another document (Cordaid 2016). Having presented and analysed the main findings of this project, we here end with some concluding remarks about the main topics that we have explored. Obviously, they are related to our findings at specific field sites: the relatively peaceful Western Equatoria State in South Sudan and the districts of Istalif and Behsud in Afghanistan, with additional findings from Bamyan, based on earlier research carried out by Stahlmann. Our findings hence should not be taken as representative for the countries as a whole.

Justice concerns

In both South Sudan and Afghanistan property disputes are omnipresent. The context of insecurity has a significant impact on prevalence and nature of land disputes. Conflict-induced displacement increases pressure on the land and thus the potential for disputes. In addition, displacement leads to patterns of interruption in ownership claims. Upon return, people often have major difficulties claiming their land back. A lack of uncontested ownership documents worsens their situations, and their cases often suffer from local political ruptures – authorities have meanwhile been substituted and power constellations have shifted. Land disputes are common everywhere across the globe, but our findings show that in a context of insecurity they become more complicated and deserve special attention.

Land disputes that we came across can roughly be divided in three different categories, each with its own particularities. Firstly, there is the category of disputes between parties which are more or less at an equal footing such as family members who dispute about the division of land upon inheritance. At first instance, people usually prefer to solve such disputes internally, but when this does not work, they resort to one of the justice providers available in their vicinity, including district courts.

Secondly, our research found a large number of disputes that involve people with different levels of power. If one party is more powerful, or is able to mobilise powerful connections, it becomes much more difficult for the other party to defend or claim his or her rights. In many instances, the less powerful party in a dispute was a woman. Especially in Afghanistan it is hardly possible for women to claim their rights vis-à-vis a man: not only are men seen to be far more powerful, it is also considered shameful for a woman and her relatives to claim her rights in a public manner. In South Sudan, it is easier for women to take such cases to court and our research came across several examples of women who actually did so.

A third, more specific category of land disputes was noted in South Sudan where a process of state-led formalisation of land tenure has occurred. This formalisation policy entails allocation of one-size plots to main possessors and dispossession of its other possessors without actually compensating them. This has caused major dissatisfaction and many disputes. Disputes between states and citizens have their own dynamics, and are more difficult to address through the available justice providers.

Engagements with state and non-state actors

In theory there is in both countries a wide range of options available for people who are in need of justice. We have described a number of them in the introduction. In practice, for most people the number of options is more limited.

Once people conclude that a dispute cannot be solved in a satisfactory manner within the family or through mutual negotiation, people at first usually go to justice providers that are relatively easy to access.

Most accessible are clearly the customary and community leaders; the A-, B- and C-courts in South Sudan; the *shura* and *jirga* in Afghanistan. Such authorities have a presence within the communities and are initially expected to provide quick and affordable justice.

In Afghanistan people explained their preference for non-state actors not only by referring to costs and accessibility, but also by referring to the limited trust they had in the justice provided by the state. It contributes to a stronger position for non-state actors. Yet, this allows somebody like a former civil-war commander in Istalif to exercise power without rendering accountability. The checks-and-balances that have a place, at least in theory, within the state's justice system, do not apply to such non-state justice actors. In some cases control is exercised from above, by higher politicians only, in other cases it might not take place at all. Examples of individual disputes show that in certain cases disputants do not see this as a problem. Yet, when a disputant does not belong to the political or ethnic 'constituency' of such commander, this becomes problematic indeed.

Despite various negative remarks about the functioning of state actors, we nevertheless find that a considerable number of people resort to state actors when seeking justice; sometimes this is done only after earlier interventions have failed, in other instances people go to state actors directly.

Adequacy of responses

In chapter 3 we have analysed a number of factors and the extent to which they contribute to the adequacy of responses that are provided by justice actors. We have shown that the state-based frameworks of justice are, to a large extent, adequate in providing equitable rights to land for men and women. In practice however, social norms prevailing both in communities and in the institutional environment, notably in Afghanistan, prevent women from claiming their rights. Access to justice is further hindered by financial limitations, spatial distance and lack of documentation. It emphasises that 'having a right' does not always suffice to be able to 'claim your right'.

Looking at the adequacy of responses, our research observes important differences in disputing processes, depending on the relations between the actors involved. Disputes that involve two parties who are at an equal footing are generally solved quite adequately in both Afghanistan and South Sudan, and by both state and non-state actors. But many disputes involve parties that have different levels of power, or different connections with other, more powerful actors. In such disputes, unfortunately justice actors tend to favour the more powerful party. Some examples presented in the case reports provide positive exceptions to this, most notably the women in SS 1 whose rights were acknowledged up to the level of the High Court, and some of the cases that were dealt with by the County Land Authority (in contrast to some of their other cases) (Braak 2016: Ch.2.3).

In both countries some of the costs involved are formal but many of our respondents also complained about extra-legal payments that they were supposed to make to get an adequate response. Accusations of corruption and bribery were common. In Afghanistan this was seen as a problem especially in regard to the state actors.

After a decision is made by a justice actor, the next step should be its enforcement. In our research the enforcement phase has turned out to be highly problematic for almost all justice actors, non-state as well as state, with the exception of those who can resort to the use of force. It therefore constitutes a serious concern. In Afghanistan people perceive community-based mechanisms as less able to enforce decisions and this leads them to turn to state courts, or to powerful individuals that are not held accountable through the traditional mechanisms of the regular community-based fora. In South Sudan, problems

with enforcement were noted in regard to all justice providers, especially when the party who lost, was powerful.

The importance of enforcement has been noted in other studies as well. Research on legal pluralism and land disputes in Ghana found that litigants often chose to bring their case to statutory courts because they felt that the state system is better equipped than customary systems to both make impartial, authoritative decisions and to enforce compliance with judgements (Crook 2005). Research on the state-based religious courts in Indonesia found that women were discouraged from bringing certain claims to this court because they knew from other peoples' experiences that court judgements on child support were not enforced (Van Huis 2015). These two studies indicate that justice seekers' faith in a particular justice provider is shaped by their anticipation of the effectiveness of the enforcement mechanisms.

Altogether, our findings underline that the extent to which a justice response can be seen as adequate is determined by both the adequate decision *and* its enforcement. If one of the two is hampered, the response will not be considered satisfactory. The choice for a certain justice actor therefore depends on people's expectations about both the decision that will be taken, and the ability of the justice actor to enforce this decision.

Elements that work or that could work

Looking at the 'elements that work' or that *could* work, we found some positive examples of justice providers who were well able to respond to the needs of citizens: a powerful woman who sets up a women's *shura* in Afghanistan, or a high court judge in South Sudan who decides to descend to one of the more remote areas under his jurisdiction to administer justice (Braak 2016: Ch.2.7). And although the real estate agent in case A 3 (TLO and Stahlmann 2016: Ch.2.3) did not play a positive role in the example provided, there is certainly potential for such land tenure experts to contribute. Improving complete 'systems of justice provision' is obviously a big thing to realise, and beginning at the level of individuals who may play significant roles in either state or non-state institutions would be a good start and probably more feasible and realistic.

We also see that conditions in the society at large play an important role not only in the prevalence of disputes, but also in the opportunities that are available for people to seek justice. Proper legislation gets weight only if this legislation is accepted by the people concerned as just. If a society accepts women to go to court, women can find support in legislation. And again, social change can be supported by assisting individuals with progressive conceptions of justice within that society, such as the female leader of a *shura*.

In both South Sudan and Afghanistan, processes are going on to strengthen linkages between state and non-state justice providers. In South Sudan, steps have been taken by incorporating the customary courts within statutory justice through different pieces of legislation. Further incorporation can help to increase check-and-balances, but also to make referral easier and more self-evident, and possibly give more weight to a decision that has been made. In Afghanistan, such a hybrid model is not (yet) in place, but it has been advocated for a number of years and might be realised in the future (Wardak et al. 2007; Wardak 2016). It should be noted however that for such linkages to be effective, they will need to exist not only on paper but also be supported in practice. Certain risks to such connections should also be noted, though; it was emphasised by some of the respondents in Afghanistan who experienced referral to other justice providers as a rejection and as a way of having to pay once again for an uncertain outcome.

International efforts

Looking at the role of international assistance, it is clear that decades of investments in Afghanistan have contributed to a better equipped system of state justice; in terms of physical infrastructure, capacity of judges and of availability of legislation (Stahlmann 2016; Wardak 2016). It is also clear however that despite all these investments a robust rule of law environment has not yet emerged and that certain actors continue to use and abuse their power to impose their justice, often at the detriment of the more powerless.

In South Sudan, international efforts to build the justice sector are of more recent date and have been wide-ranging. Yet, they pose important questions about continuity. The international support provided to the County Land Authority has undeniably been instrumental in the functioning of the CLA. The question remains, however, to what extent the CLA will prove to be sustainable in the longer run without such international support, and what will happen with the successful Land Disputes Committee.

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