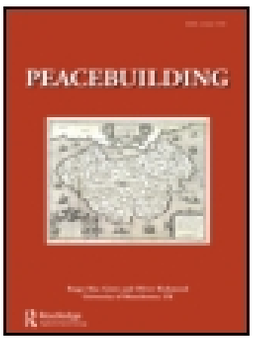

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Statebuilding, legal pluralism, and irregular warfare: assessing the Dutch mission in Kunduz province, Afghanistan

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ABSTRACT

This article focuses on external statebuilding through judicial reform. It contributes to the existing literature on state- and peacebuilding with an analysis of two local realities that affect judicial reform during external statebuilding interventions: legal pluralism and irregular warfare. Using the Dutch Integrated Police-training Mission (IPM) as a case study, it analyses how judicial reform was understood in the Dutch mission in contrast with the perceptions and conduct of Afghan civilians in Kunduz province, Afghanistan. The article shows that the Dutch IPM did not sufficiently consider the decentral and political nature of the dispensation of justice. Furthermore, the IPM's attempts to increase the capacity of the formal justice sector did not change the conduct of commanders and other local actors that resolve disputes in the society at large. The IPM case therefore demonstrates important limitations of an institutionalist approach to statebuilding in environments of legal pluralism and irregular warfare.

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Introduction

In the critical academic literature on peace- and statebuilding, it has become almost a truism that statebuilding strategies in one way or another miss local realities.[1] This 'local turn in peacebuilding', as it is sometimes referred to, follows from scholars in peace and conflict studies that criticise Western bubbles where peace- and statebuilding approaches are negotiated, according to Northern rationalities, with only a few local elites involved.[2] Statebuilding strategies have tended to disregard the strengths of societies in question, their resilience, and their indigenous creative responses to the problems they face.[3] As Richmond and McGinty point out, the local turn has been heavily influenced by 'critical and post-structural theory, postcolonial scholarship and practice, interdisciplinarity, as well as a range of alternative ethnographic, sociological and action-related methodologies'.[4]

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[1]Tobias Debiel and Daniel Lambach, 'How State-Building Strategies Miss Local Realities', *Peace Review* 21, no. 1 (2009): 22–28.

[2]Roger Mac Ginty and Oliver P Richmond, 'The Local Turn in Peace Building: A Critical Agenda for Peace', *Third World Quarterly* 34, no. 5 (2013): 763–64.

[3]Tobias Debiel et al., 'Local State-Building in Afghanistan and Somaliland', *Peace Review* 21, no. 1 (March 2009): 39.

[4]Mac Ginty and Richmond, 'The Local Turn in Peace Building', 763.

This article is situated in the local turn and attempts to expand the literature by looking at two local realities that affect judicial reform during external statebuilding strategies: (1) legal pluralism and (2) the specific nature of irregular warfare. It brings the literature on peace- and statebuilding together with insights from legal anthropology (legal pluralism) and studies on the dynamics of civil war (irregular warfare).[5] The article focuses on judicial reform as a specific sector within the larger external statebuilding intervention in Afghanistan. An empirical case study is conducted on the justice program of the Dutch Integrated Police-training Mission (IPM) in Kunduz province, Afghanistan, between 2011 and 2013. The first aspect that the article analyses is how legal pluralism – the existence of multiple normative and judicial orders that coexist within one socio-political space – affected the justice programmes of the Dutch mission in Kunduz. The second aspect is how irregular warfare affected the dynamics of justice provision in Kunduz and the abilities of the Dutch mission to achieve its goals in the justice sector.

To understand how the Dutch IPM's practices of judicial reform 'landed' in the context of Kunduz province, the article uses a methodological approach that addresses both the Dutch perspective (as part of the international coalition in Afghanistan) and the Afghan population's perspective. What was the IPM's contextual understanding of the Afghan judiciary and how did that shape its practices of judicial reform? How did the Afghan population perceive pathways to access justice institutions and what were the important historical and political dynamics of the dispensation of justice? Where did Dutch and Afghan perspectives contradict each other? The perspectives of the Dutch practitioners are based on in-depth interviews carried out on the German base in Kunduz. The perspectives of the Afghan population are based on interviews that included 'vignettes' about legal disputes that regularly take place in the province.[6] In response to these vignettes about a family dispute and a land dispute, the respondents indicated which forms of dispute resolution they considered most relevant, including more formal and informal practices. The approach is well-suited for the overall objective of this article, which is to highlight local realities that are sometimes 'missed' or 'misjudged' during judicial reform in statebuilding strategies.

Following Lemay-Hébert, the article further makes an analytical difference between the 'institutionalist approach' to statebuilding and the 'legitimacy approach' to statebuilding.[7] The article finds that the Dutch mission mostly used an institutionalist approach and then examines the broader implication of this finding in terms of theory and decision-making. The findings on the Dutch mission highlight the limitations of the institutional approach to statebuilding and underscore the relevance of legitimacy in

[5]Nicolas Lemay-Hébert, 'Statebuilding without Nation-Building? Legitimacy, State Failure and the Limits of the Institutionalist Approach', *Journal of Intervention and Statebuilding* 3, no. 1 (2009): 21–45; Franz von Benda-Beckmann, 'Citizens, Strangers and Indigenous Peoples: Conceptual Politics and Legal Pluralism,' *Law and Anthropology* 9 (1997): 1–42; Stathis N. Kalyvas, 'Promises and Pitfalls of an Emerging Research Program: The Microdynamics of Civil War', in *Order, Conflict, and Violence*, edited by Stathis N. Kalyvas, Ian Shapiro, and Tarek Masoud (New York: Cambridge University Press, 2008): 397–421; and Stathis N. Kalyvas, *The Logic of Violence in Civil War* (New York: Cambridge University Press, 2006).

[6]Christine Barter and Emma Renold, 'The Use of Vignettes in Qualitative Research', *Social Research Update* 25, no. 9 (1999): 1–6. To respect the safety of the respondents, the interviews are anonymized throughout the text. Some details are provided about the positions of respondents in the Dutch mission or on the positions of the Afghan respondents in society.

[7]Lemay-Hébert, 'Statebuilding without Nation-Building?'.

statebuilding strategies. A deeper awareness of the social and political contradictions that are inherent to legal pluralism and irregular warfare during statebuilding interventions is imperative to improve judicial reform.

The article proceeds as follows. It first discusses the theoretical background to this study and the methodological considerations. It then provides a brief history of both resistance against, and acceptance of, the centralisation of the state in Afghanistan. Subsequently, the article analyses the justice sector in Kunduz province with a focus on legal pluralism and irregular warfare. This is followed by an analysis of the assumptions in the Dutch mission. It then brings together the Afghan and Dutch perspectives and highlights the local realities that were 'misjudged'. The final section provides theoretical and empirical conclusions and a few recommendations.

Statebuilding, legal pluralism and irregular warfare

In the literature on peace- and statebuilding, a variety of explanations are presented to account for the failure of external statebuilding interventions to consolidate weak, war-torn or collapsed states.[8] These explanations include commitment problems, moral hazards, security dilemmas, spoilers, a lack of resources and the persistence of opportunistic warlordism.[9] In this article, I focus on a key contradiction in statebuilding interventions that Paris and Sisk identified: the promotion of 'universal' values as a remedy for local problems.[10] Statebuilding strategies encounter incongruencies between the so-called 'universal' values that are predominantly framed in the liberal tradition of individual human rights, democratic governance, and market-oriented economics on the one hand, and context-specific social practices, traditions, and cultural expectations of the host society on the other.[11] In that sense, I see the deficiencies of statebuilding strategies as a problem of legitimacy. To clarify this point on legitimacy, I use Lemay-Hébert's differentiation between the institutionalist approach to statebuilding and the legitimacy approach to statebuilding.

As conceptualised by Lemay-Hébert, there is a difference between the institutionalist approach to statebuilding and the legitimacy approach to statebuilding. Logically, these approaches follow from the underlying conceptualisation of the 'state' and 'state collapse'. If the underlying conception of the 'state' is synonymous with the 'central government', then statebuilding efforts will logically aim to strengthen government institutions. As Lemay-Hébert points out, 'Conceiving of state collapse as

[8]Romain Malejacq, 'Warlords, Intervention, and State Consolidation: A Typology of Political Orders in Weak and Failed States', *Security Studies* 25, no. 1 (2016): 85–110; Roland Paris and Timothy D. Sisk, *The Dilemmas of Statebuilding: Confronting the Contradictions of Postwar Peace Operations* (London: Routledge, 2009).

[9]Barry R. Posen, 'The Security Dilemma and Ethnic Conflict', *Survival* 35, no. 1 (1993): 27–47; Alan J. Kuperman, 'The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans', *International Studies Quarterly* 52, no. 1 (2008): 49–80; Stephen John Stedman, 'Spoiler Problems in Peace Processes', *International Security* 22, no. 2 (1997): 5–53; Roland Paris, *At War's End: Building Peace after Civil Conflict* (Cambridge, U.K.: Cambridge University Press, 2004); Severine Autesserre, *Peaceland: Conflict Resolution and the Everyday Politics of International Intervention* (New York: Cambridge University Press, 2014); and Malejacq, 'Warlords, Intervention, and State Consolidation', 85–110.

[10]Roland Paris and Timothy D. Sisk, *Managing Contradictions: The Inherent Dilemmas of Postwar Statebuilding* (New York: IPA Publications, 2007), 4.

[11]Paris and Sisk, 4.

a breakdown of government institutions, as institutionalists will contend, allows one to identify failed or failing states according to institutional strength'.[12]

The institutionalist approach then assumes that reconstructing the state can be done by targeting specific institutions of the state apparatus without necessarily engaging the socio-political cohesion of 'society' in general. Statebuilding in that sense becomes a more scientific, technical, and administrative process, which tends to neglect the inherent political dimension.[13] Concerns over stability and regulation are then mainly discussed in the narrow technical and apolitical sense.[14] The legitimacy approach accepts the institutionalist focus on the security apparatus and state institutions as a critical step in statebuilding processes, but the legitimacy approach draws explicit attention to the state's underlying legitimacy.[15] State collapse, is in terms of the legitimacy approach, the consequence of not only institutional collapse but also the collapse of the legitimacy of central authority.[16]

Because this article focuses on the justice sector, it is necessary to explore what the distinction between these two approaches to statebuilding entails in the justice sector and the specific policies of judicial reform. For the justice sector, the institutionalist approach logically focuses on central government institutions such as a functioning formal justice system with courthouses, judges, lawyers, and an appropriate codification of centralised state laws. Following the legitimacy approach, judicial reform should also target the socio-political cohesion of 'society' more broadly. This is where the literature on 'legal pluralism' becomes relevant because it goes beyond central state justice institutions and looks at the broader society in which disputes may be solved outside of the formal justice system.

Legal pluralism can be defined as 'the existence of multiple normative and judicial orders that co-exist within one socio-political space'.[17] Or, as Griffiths puts it, 'it is when in a social field more than one source of "law" and more than one "legal order", is observable, that the social order of that field can be said to exhibit legal pluralism'.[18] Within the discipline of legal anthropology, several studies have focused on socio-legal clashes within one geographical area – where formal bureaucracies encounter indigenous ethnic, tribal, institutional, or religious norms.[19] Anthropological studies in the twentieth century focused on overlapping normative systems created during processes of colonisation, but legal pluralism has become a central theme in non-colonial societies too. As Merry notes, 'legal pluralism is a central theme in the reconceptualisation of the law/society relation'.[20]

[12]Lemay-Hébert, 'Statebuilding without Nation-Building?' 25.
[13]Lemay-Hébert, 27.
[14]David C. Chandler, *Empire in Denial: The Politics of State-Building* (London: Pluto, 2006), 5–6; James Ferguson, *The Anti-Politics Machine: 'Development', Depoliticization and Bureaucratic Power in Lesotho* (Minneapolis: University of Minnesota Press, 1990); Philipp Münch, 'Local Afghan Power Structures and the International Military Intervention' (Kabul: Afghanistan Analyst Network, 2013).
[15]Lemay-Hébert, 'Statebuilding without Nation-Building?', 24.
[16]Lemay-Hébert, 28.
[17]von Benda-Beckmann, 'Citizens, Strangers and Indigenous Peoples', 1.
[18]John Griffiths, 'What Is Legal Pluralism?' *The Journal of Legal Pluralism and Unofficial Law* 18, no. 24 (1986): 38.
[19]Paul Schiff Berman, 'The New Legal Pluralism', *Annual Review of Law and Social Science* 5 (2009): 225–42; Filip Reyntjens, 'Legal Pluralism and Hybrid Governance: Bridging Two Research Lines: Legal Pluralism and Hybrid Governance', *Development and Change* 47, no. 2 (2016): 346–66.
[20]Sally Merry, 'Legal Pluralism', *Law & Society Review* 22, no. 5 (1988): 869.

For legal pluralists, it has been a challenging task to break through the legal-centric ideology of the law.[21] As Reyntjes explains, 'legal pluralism is resisted by both states and the international (aid) community mainly on account of the purported supremacy of the state and of the universality of human rights'.[22] From a practical and normative view, these concerns are understandable. The first problem, however, is that a neglect of legal pluralism potentially leads to the neglect of empirical facts and therefore to 'missed' local realities on the ground.[23] Second, as Woodman rightfully notes, it is a misconception that social change can and should only be produced by state law.[24] Such an assumption is based on an unrealistic optimism about the effect of a rationally acting state bureaucracy.[25] In that sense, legal pluralists in the specific context of the justice sector have expressed similar criticisms as some authors in the critical peacebuilding literature by highlighting the need to move beyond state centrism.[26]

A third strand of literature that is relevant for the context of Kunduz province is the dynamics of civil war and, more specifically, irregular warfare. Kalyvas has referred to wars without a front – such as the armed conflict in Afghanistan – as irregular warfare, 'the twin processes of segmentation and fragmentation of sovereignty'.[27] Segmentation refers to 'the division of territory into zones that are monopolistically controlled by rival actors, while fragmentation refers to the division of territory into zones where the rivals' sovereignty overlaps'.[28] In other words, these civil wars are political contexts in which the use of violence produces both order (segmentation) and disorder (fragmentation). The government, militias, the Taliban, and other armed groups each possess the means to use force throughout significant areas of the Afghanistan.

Early theorists on insurgency and counterinsurgency like Galula shared the insight that the population presents an opportunity for insurgents to gain the upper hand against the government.[29] If the insurgent 'manages to dissociate the population from the counterinsurgent, to control it physically, to get active support, he will win the war because, in the final analysis, the exercise of political power depends on the tacit or explicit agreement of the population or, at worst, on its submissiveness'.[30] To achieve this goal, armed groups deploy a variety of instruments, ranging from political persuasion and the provision of public and private goods, all the way to coercion.[31]

Especially in a country wracked by several decades of war, the capacity to offer stability in a region is attractive to civilian populations.[32] Hence, particularly during irregular warfare, there is a strategic usefulness to building a solid administration of justice to further

[21]Berman, 'The New Legal Pluralism', 228–229.
[22]Reyntjens, 'Legal Pluralism and Hybrid Governance', 352.
[23]Reyntjens, 353.
[24]G. Woodman, 'The Development "Problem" of Legal Pluralism. An Analysis and Steps towards Solutions', in *Legal Pluralism and Development. Scholars and Practitioners in Dialogue*, eds. Brian Tamanaha, Caroline Sage and Micheal Woolcock (New York: Cambridge University Press, 2012), 131.
[25]Woodman, 130–31.
[26]Reyntjens, 'Legal Pluralism and Hybrid Governance'; Volker Boege, M. Anne Brown, and Kevin P. Clements, 'Hybrid Political Orders, Not Fragile States,' *Peace Review* 21, no. 1 (2009): 13–21.
[27]Kalyvas, 'Promises and Pitfalls of an Emerging Research Program', 405.
[28]Kalyvas, 405–6.
[29]David Galula, *Counterinsurgency Warfare: Theory and Practice* (London: Frederick A Praeger, 1964).
[30]Galula, 4.
[31]Niels Terpstra and Georg Frerks, 'Rebel Governance and Legitimacy: Understanding the Impact of Rebel Legitimation on Civilian Compliance with the LTTE Rule', *Civil Wars* 19, no. 3 (2017): 279–307.
[32]Kalyvas, 'Promises and Pitfalls of an Emerging Research Program', 405–6.

consolidate territorial control. Both the state and anti-state may use the provision of justice to 'outgovern' competitors.[33] As Giustozzi explains, governing is not just about offering better services to the public; it is also about the efficient and effective utilisation of coercion, a basic ingredient of the art of government.[34] This is what the insurgency uses its Taliban judges for: to exert its authority and to create social order.[35] With the Taliban's historical focus on their interpretation of sharia, the justice sector is certainly an area of contested legitimacy.[36] The provision of justice in the context of irregular warfare becomes inherently political and not a 'technical' bureaucratic endeavour.

Methodology

The empirical material used throughout the article is based on fieldwork carried out in Kunduz province carried out in 2013 and additional fieldwork in Kabul in 2016. The analysis of the Dutch IPM is based on interviews held by the author at the German military compound close to Kunduz city, the Provincial Reconstruction Team (PRT),[37] and on a review of the relevant Dutch policy documents. The PRT is where the Dutch military, the Dutch police trainers, and diplomats were stationed from 2011 until 2013. The selection of respondents at the PRT was purposive: I interviewed policemen and diplomats who worked in political and rule-of-law advisory functions. It has to be noted that the IPM staff made a pre-selection of respondents who would be available when I was there. In total, seven in-depth interviews were conducted with IPM workers on the nature of the mission, the security situation, and judicial reform. In early 2016, ten analysts residing in Kabul and Kunduz were interviewed to establish a better first-hand account of the changes that had occurred in Kunduz province after 2013, particularly surrounding the fall of Kunduz city to the Taliban.

The data collection among residents in Kunduz province was carried out in four types of zones of territorial control: predominantly government-controlled territory; predominantly *arbakai*-controlled territory[38]; predominantly Taliban-controlled territory; and 'contested' territory.[39] The data were collected in both urban and rural areas of the province. The sampling was purposive at the village level to include both men and women.[40] Some respondents in specific positions relevant to this research were also

[33]Antonio Giustozzi, 'Hearts, Minds, and the Barrel of a Gun: The Taliban's Shadow Government', *Prism: A Journal of the Center for Complex Operations* 3, no. 2 (2012): 71–80.
[34]Giustozzi, 72.
[35]Interview code: KI 2016–09; Giustozzi, 'Hearts, Minds, and the Barrel of a Gun'.
[36]Florian Weigand, 'Afghanistan's Taliban – Legitimate Jihadists or Coercive Extremists?' *Journal of Intervention and Statebuilding* 11, no. 3 (2017): 359–81; and Antonio Giustozzi and Adam Baczko, 'The Politics of the Taliban's Shadow Judiciary, 2003–2013', *Central Asian Affairs* 1, no. 2 (2014): 199–224.
[37]Provincial Reconstruction Teams (PRTs) consist of military officers, diplomats, and reconstruction experts, working together to support reconstruction efforts in unstable states such as Afghanistan or Iraq.
[38]Interpretations of the term *arbakai* vary considerably throughout Afghanistan. In most cases, the separation between local commander-led groups, tribal militias, and ex-combatants is not clear-cut. They are understood here as semi-official, local self-proclaimed security forces that often function as de facto tribal militias. Since 2011, there have been attempts to recruit these *arbakai* militias into the Afghan Local Police (ALP). See: Toon Dirkx, 'The Unintended Consequences of US Support on Militia Governance in Kunduz Province, Afghanistan', *Civil Wars* 19, no. 3 (2017): 377–401.
[39]The word 'predominantly' is carefully chosen here because the dataset collected for the *arbakai* case study in the same villages shows that there are still other political actors that – although not necessarily substantially – influence the configurations of power in those areas.
[40]As expected, this worked out for all the areas, except unfortunately for those under the control of the Taliban, in which only men could be consulted.

interviewed, including peace council members, local elders, and a number of local commanders. In total, ninety-nine respondents were interviewed on the basis of a structured questionnaire with open-ended questions. The interviews among the Afghan respondents in Kunduz were carried out by a team of researchers of the Afghan organisation Cooperation for Peace and Unity (CPAU). The researchers worked in teams of two women and two men. The selected respondents cooperated with the research voluntarily. It should be noted that the transcripts were translated into English by the interpreters, which created a layer of interpretation where certain nuances may have got lost. Where possible, the findings have been triangulated against other sources of data.

Given the limitations of doing field research in a war-affected area, where politically sensitive questions may be difficult to ask, and given the objective of this study to explore local realities, the design of the questionnaire was built around locally recognisable vignettes. The content of the vignettes was chosen on the basis of the following parameters: locally recognisable; regularly taking place; simple; acceptable. One vignette concerned a common family dispute, and another concerned a common land dispute, both tailored to the context of Kunduz province. First, this type of research instrument is useful in exploring sensitive topics that participants might otherwise find difficult to discuss.[41] The purpose is to de-personalise the question, making a response more likely. Providing comments on a story is a less personal way of communication than talking about direct experience and may be viewed by participants as less threatening. Vignettes offer respondents greater control over the interaction by enabling them to determine at what stage, if at all, they can introduce their own experiences to illuminate their abstract responses.[42] Second, congruent with the objective of this study to highlight local realities, this methodology enables respondents to indicate which form of formalised or informal dispute resolution mechanism they deem relevant in case of a dispute. This elicits local realities of legal pluralism that otherwise might be missed, in not only policy but also social research.

A brief history of centralisation in Afghanistan

The Dutch mission did not enter a historical vacuum once it started in 2011. It can be situated within the history of other attempts to centralise state laws throughout Afghanistan. For the purpose of this paper, it is only possible to give a very brief historical overview that is certainly not meant to be complete. It is, however, important to underscore that the tendency to centralise laws has a longer history of accommodation and resistance. The history therefore indicates that the social, political, and legal objectives the Dutch mission envisaged might have been quite ambitious in the first place.

Contrary to nations where state power has consolidated and moved all other contenders to the margins of the state, the power of local strongmen, institutions, and networks in Afghanistan has increased and decreased over time.[43] Particularly in the periphery of the country, inhabitants have historically remained beyond the bounds of

[41]Barter and Renold, 'The Use of Vignettes in Qualitative Research', 1–6.
[42]Barter and Renold, 1–6.
[43]Thomas Barfield, 'Culture and Custom in Nation-Building: Law in Afghanistan', *Maine Law Review* 60 (2008): 347–74; Thomas Barfield, *Afghanistan: A Cultural and Political History* (Princeton and Oxford: Princeton University Press, 2010); and Malejacq, 'Warlords, Intervention, and State Consolidation', 85–110.

state control and therefore run their own affairs.[44] Historically, the judiciary systems of Afghanistan are generally comprised of three elements: (1) state legal codes, (2) Islamic religious law (sharia), and (3) local customary law.[45] Particularly in the periphery of Afghanistan, customary laws and religious laws are known to create social order in and between different communities because the inhabitants have largely remained outside of state control. The legitimacy was therefore not necessarily located at the level of the central government, but attributed to a variety of governance actors at different levels of society.

For more than a century, various Afghan rulers had tried to implement centralised judicial institutions.[46] Different segments of Afghan society welcomed and resisted the implementation of centralised institutions, but overall, the centralised formal court system faced a lack of legitimacy.[47] Whenever local power or certain traditions became threatened by outside influence, the implementers encountered problems. Although the content of laws exported from the centre into the periphery varied considerably in different periods, the resistance against these tendencies had similarities. A clear example is King Amanullah Khan's attempt in the 1920s to modernise the Afghan legal system, including family law and women's issues.[48] Afghanistan's first constitution was passed by King Amanullah Khan in 1923.[49] Resistance against new legal codes emerged.[50] Another example of strong resistance was against the communist party that had taken power in 1978. The communists issued decrees on radical land reforms, equality for women, and changes in marriage payments.[51] These provoked resistance outside of Kabul, and especially in this period, localised sharia courts became more popular because of their resistance against law enforcement in the Afghan state.[52] Additionally, the Taliban regime faced resistance from various parts of the country in its attempt to implement a centrally defined code of sharia law throughout Afghanistan from 1996 until 2001.

After the United States and its allies ousted the Taliban regime in 2001, the international coalition started seeking a legal solution for the new Afghan state and its execution of governance. Once a new government was installed in Kabul, the international community revived the formal Afghan legal system. International advisers regarded the absence of a clearly defined formal legal system a clear testimony of Afghanistan being a failed state needing immediate reconstruction.[53] In the first years of the intervention, the existence of informal justice bodies was seen by international consultants as unfortunate and yet another sign of failed statehood.[54] A new constitution was adopted in 2004, and in theory, this

[44]Barfield, 'Culture and Custom in Nation-Building', 354.
[45]Barfield, 351.
[46]Barfield, 349.
[47]Thomas Barfield, Neamatollah Nojumi, and J. Alexander Thier, 'The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan' (Washington D.C.: United States Institute of Peace [USIP], 2006), 21.
[48]Barfield, *Afghanistan: A Cultural and Political History*, 188–89.
[49]Sarah Han, 'Legal Aid in Afghanistan: Context, Challenges and the Future' (Kabul: Afghanistan Analyst Network, 2012): 2.
[50]Barfield, *Afghanistan: A Cultural and Political History*, 190–91; Jan R. Böhnke, Jan Koehler, and Christoph M. Zürcher, 'State Formation as It Happens: Insights from a Repeated Cross-Sectional Study in Afghanistan, 2007–2015', *Conflict, Security & Development* 17, no. 2 (2017): 4.
[51]Barfield, 'Culture and Custom in Nation-Building', 349.
[52]Barfield, 364.
[53]Barfield, 349–50.
[54]Barfield, 349–50.

constitution turned Afghanistan into a centralised state.[55] The president received legal powers to appoint provincial and district governors, police commanders, and many other officials without much consultation.[56] It was assumed that the prevailing informal governance and judicial systems would slowly disappear once the central formal system would expand its capacities, a notion that still surfaced in some of the interviews I held with IPM workers in 2013, but proved to be contradicted by the plural realities on the ground. Hence, the attempt of the Dutch mission to improve the capacities of a formal law system in Kunduz did not enter into a historical vacuum.

The justice sector in Kunduz province

Legal pluralism

A first local reality that should be highlighted about the context of Kunduz province is the existence of legal pluralism. At the time the Dutch mission arrived in Kunduz, the provision of justice was carried out by a variety of formal and informal actors, including the state justice system, militias, the insurgency, s*huras/jirgas*[57] of local elders, and religious leaders.[58] The districts investigated in Kunduz province clearly showed characteristics of legal pluralism, as did many other parts of Afghanistan.[59] In this fragmented socio-political space, different legal orders overlapped and intertwined: state laws as well as customary legal practice.[60]

As in most parts of Afghanistan, the population of Kunduz province relied regularly on informal justice mechanisms.[61] The *shuras/jirgas* in Kunduz were widely used and socially accepted, mainly for civil cases, but for criminal cases too.[62] These councils

[55]Böhnke, Koehler, and Zürcher, 'State Formation as It Happens', 4.
[56]Böhnke, Koehler, and Zürcher, 4.
[57]The term *jirga* is understood here as an institution that has historically resolved political, social, economic, cultural, judicial and religious conflicts by making authoritative decisions. *Jirga* is 'the product of Pashtun tribal society and operates according to the dictates of the *Pashtunwali*, an inclusive code of conduct guiding all aspects of Pashtun behavior and often superseding the dictates of both Islam and the central government' (Carter and Connor 1989: 7). For the origins of the term, see also Ali Wardak 'Jirga – A Traditional Mechanism of Conflict Resolution in Afghanistan', 2003. According to Carter and Connor (1989: 9), a *shura* is a 'group of individuals which meets only in response to a specific need in order to decide how to meet the need. In most cases, this need is to resolve a conflict between individuals, families, groups of families, or whole tribes.' For elaboration on these terms, see Noah Coburn, 'Informal Justice and the International Community in Afghanistan', (Washington DC: United States Institute of Peace [USIP], 2013); and Lynn Carter and Kerry Connor, 'A Preliminary Investigation of Contemporary Afghan Councils' (Peshawar: Agency Coordinating Body for Afghan Relief [ACBAR], 1989).
[58]MPIL, 'Provincial Needs Assessment: Criminal Justice in Kunduz Province: 2012–2013 Version' (Heidelberg: Max Planck Institute for Comparative Public Law and International Law [MPIL], 2013); and MPIL, 'Provincial Needs Assessment: Criminal Justice in Kunduz Province' (Heidelberg: Max Planck Institute for Comparative Public Law and International Law [MPIL], 2011).
[59]Noah Coburn, 'Informal Justice and the International Community in Afghanistan', (Washington DC: United States Institute of Peace [USIP], 2013); Jan Koehler, 'Social Order within and beyond the Shadow of Hierarchy. Governance Patterns in Afghanistan,' SFB-Governance Working Papers Series (Berlin: Freie Universität, 2012); and Wardak, 'Jirga – A Traditional Mechanism of Conflict Resolution in Afghanistan'.
[60]MPIL, 'Provincial Needs Assessment: Criminal Justice in Kunduz Province: 2012–2013 Version.'
[61]Jennifer Murtazashvili, 'A Tired Cliché: Why We Should Stop Worrying about Ungoverned Spaces and Embrace Self-Governance', *Journal of International Affairs* 71, no. 2 (2018): 11–29; Torunn Wimpelmann, 'Nexuses of Knowledge and Power in Afghanistan: The Rise and Fall of the Informal Justice Assemblage', *Central Asian Survey* 32, no. 3 (2013): 406–22; Noah Coburn, 'Informal Justice and the International Community in Afghanistan',; and MPIL, 'Provincial Needs Assessment: Criminal Justice in Kunduz Province'.
[62]MPIL, 'Provincial Needs Assessment: Criminal Justice in Kunduz Province'; MPIL, 'Provincial Needs Assessment: Criminal Justice in Kunduz Province: 2012–2013 Version'; and IWA, 'Corruption and Justice Delivery in Kunduz Province of Afghanistan' (Kabul: Integrity Watch Afghanistan, 2018).

were sometimes more permanent and sometimes formed ad hoc around a particular issue.[63] Informal bodies such as *shuras/jirgas* could, together with the disputants, come to an agreement over the terms of the resolution.[64] The main reasons for the use of informal justice that can be identified in the interviews and literature on Kunduz province are (1) the widespread corruption in the formal sector, (2) the proximity of informal bodies of justice, (3) the local religious and cultural norms followed by the elders and the local councils, and (4) the shame it may bring upon the family to take certain family disputes outside of the intimate private sphere or the social sphere of the community.[65]

A majority of the interviewed inhabitants of Kunduz province in 2013 regarded *shuras/jirgas*, elders, and religious leaders as best capable of offering solutions that maintained and/or restored community harmony, particularly in comparison to the formal justice system. For example, a Turkmen farmer in *arbakai*-controlled territory in Qal-e Zal district and a Pashtun shepherd in government-controlled territory in Qal-e Zal district both noted that the elders of their village were 'credible people' who could solve cases such as land disputes or family disputes.[66] An Aimaq housewife from Alia Bad district noted that the elders were able to solve problems in accordance with the 'custom and tradition of the village'.[67] A Turkmen council member in Qal-e Zal district explained, 'the issue is referred to the village elders because they are selected by the people; they are trustful people who speak the truth'.[68] Integrity Watch Afghanistan (IWA) stated in a report on Kunduz province, '*shura* decisions are undertaken by elders of the community and are based on the norms of the community, and thus highly accepted'.[69] Correspondingly, the Max Planck Institute reported on Kunduz province that '*shuras* have the reputation of caring more about equity than legal distinctions, which are not understood by the clients'.[70] The report also states that in the *shuras* and *jirgas*, there is often a lack of understanding about 'the Afghan Constitution, statutory law and binding international law [that] does lead to severe violations of fundamental and human rights'.[71]

Resolutions on the basis of customary law aim to provide solutions in which social harmony between families or communities is re-established.[72] By reference to customary law or particular religious values, the elders are capable of offering a resolution that is socially, though not in a formal legal sense, relatively inevitable and incontestable.[73] A 45-year-old farmer from Alia Bad noted that the decision of the elders in land or family disputes is 'important and almost all people accept it'.[74] The interview data further indicates that a majority of the respondents perceived an effective solution that

[63]MPIL, 'Provincial Needs Assessment: Criminal Justice in Kunduz Province: 2012–2013 Version'; Coburn, 'Informal Justice and the International Community in Afghanistan', 11.
[64]Barfield, 'Culture and Custom in Nation-Building'; Coburn, 'Informal Justice and the International Community in Afghanistan'.
[65]MPIL, 'Provincial Needs Assessment: Criminal Justice in Kunduz Province: 2012–2013 Version,' 28–30; IWA, 'Corruption and Justice Delivery in Kunduz Province of Afghanistan', 15–22; and MPIL, 'Provincial Needs Assessment: Criminal Justice in Kunduz Province'.
[66]Com. Int. code: M05, 4 June 2013, Qal-e Zal district; M06, 4 June 2013, Qal-e Zal district.
[67]Com. Int. code: H18, 5 June 2013, Ali Bad district.
[68]Com. Int. code: M07, 4 June 2018, Qal-e Zal district.
[69]IWA, 'Corruption and Justice Delivery in Kunduz Province of Afghanistan', 22.
[70]MPIL, 'Provincial Needs Assessment: Criminal Justice in Kunduz Province: 2012–2013 Version', 29.
[71]MPIL, 29.
[72]Barfield, 'Culture and Custom in Nation-Building', 348–55.
[73]Coburn, 'Informal Justice and the International Community in Afghanistan', 16.
[74]Com. Int. code: H11, 6 June 2013, Alia Bad district.

restored community harmony as most important. That observation will be elaborated on in the next section about irregular warfare.

Following the remarks by Richmond and MacGinty on the meaning of 'local' in scholarship on peace- and statebuilding, the intention of this article is not to romanticise all things local.[75] Local actors can just be as exclusive and violent as international actors. Local mechanisms consist of their own power relations and hierarchies, and 'local' does not equal legitimate. This holds true for the informal justice mechanisms, too.[76] As the Max Planck Institute noted in 2013, the *shuras* and *jirgas* in Kunduz were known to be 'discriminatory on the basis of class, gender and money'.[77] That the various formal and informal justice providers were prone to interference by powerful groups or individuals was partly a result of the irregular warfare that continued in Kunduz province. This will be elaborated on in the next section.

For this section, it is important to note that legal pluralism has been an empirical reality in Kunduz province, regardless of claims about the normative desirability of it. Customary and religious norms and legal codes are significant in the resolution of disputes. Family matters are preferred to be solved in the intimate sphere of the community and not by outside institutions. There are also expectations about the restoration of community harmony.

Irregular warfare and the justice sector

Next to the contemporary history of legal pluralism, a second local reality that the Dutch IPM faced was irregular warfare. Though the Taliban was pushed back from some of its main strongholds at the beginning of the IPM in mid-2011, there continued to be various armed (state and non-state) actors that controlled parts of Kunduz province during and after the mission.[78] Violent clashes between different groups were regularly taking place. The situation reflected what Kalyvas referred to as 'irregular warfare'.[79] During irregular warfare, there is a strategic military usefulness to building a solid administration of justice to further consolidate territorial control. A system of order and control may give people a sense of security, stability, and continuity.[80] This is a general observation in the literature on insurgency and counterinsurgency[81] as well as a more recent strand of literature on rebel governance.[82] Therefore, the provision of

[75]Mac Ginty and Richmond, 'The Local Turn in Peace Building', 770.
[76]Wimpelmann, 'Nexuses of Knowledge and Power in Afghanistan'.
[77]MPIL, 'Provincial Needs Assessment: Criminal Justice in Kunduz Province: 2012–2013 Version', 30.
[78]Dirkx, 'The Unintended Consequences of US Support on Militia Governance in Kunduz Province, Afghanistan'; Münch, 'Local Afghan Power Structures and the International Military Intervention'.
[79]Kalyvas, 'Promises and Pitfalls of an Emerging Research Program', 405.
[80]Ana Arjona, *Rebelocracy: Social Order in the Colombian Civil War* (New York: Cambridge University Press, 2016): 55–8; and David Kilcullen, 'Deiokes and the Taliban: Local Governance, Bottom-up State Formation and the Rule of Law in Counter-Insurgency', *The Rule of Law in Afghanistan*, 2011, 35–45.
[81]David Kilcullen, 'Counter-Insurgency Redux', *Survival* 48, no. 4 (2006): 111–130.
[82]Isabelle Duyvesteyn et al., 'Reconsidering Rebel Governance,' in *African Frontiers: Insurgency, Governance and Peacebuilding in Postcolonial States* (Farnham: Ashgate, 2015), 31–40; Nelson Kasfir, Georg Frerks, and Niels Terpstra, 'Introduction: Armed Groups and Multi-Layered Governance,' *Civil Wars* 19, no. 3 (3 July 2017): 257–78; Zachariah Cherian Mampilly, *Rebel Rulers: Insurgent Governance and Civilian Life during War* (Ithaca and London: Cornell University Press, 2011); and Niels Terpstra and Georg Frerks, 'Governance Practices and Symbolism: Public Authority and de Facto Sovereignty in "Tigerland"', *Modern Asian Studies* 52, no. 3 (2018): 1001–42.

justice is strategically linked to the military struggle between the government and Taliban insurgency.

The empirical data collected in 2013 among the civilians living in Kunduz province indicates that the effective resolution of disputes is regarded a priority. Respondents noted that unresolved disputes pose significant security risks. For example, a shopkeeper in Qal-e Zal explained in reference to the vignette of a land dispute: 'If the land is grabbed (…) and the land is not returned, then it would have dangerous outcomes. This would result in insecurity for the whole village'.[83] With regards to the same vignette, a 55-year-old farmer noted, 'If the case is not solved quickly, then gradually the situation goes towards more insecurity, it will get worse and life-threatening for everyone'.[84] In other words, timely resolutions and preventative action are especially important to avoid instability and insecurity.

Despite the fact that local actors such the *shuras* and *jirgas* of elders and religious leaders may be able to resolve disputes according to custom, tradition, and/or religion as established in the previous section, they often have limited coercive capacity to enforce a verdict. If a disputant resists the verdict, the elders rely on other actors for enforcement. A shopkeeper in *arbakai*-controlled territory stated that the *jirga* will call in the commander of the village:

> He [the disputant] will go to the elder of the village with the legal document of his land and ask the elder to come to a verdict over this case. The elder will usually call up the *jirga* to convene and will try to give the land right to the correct person. If the other disputant would not accept the decision taken by the *jirga*, then one of the members in the *jirga* will call the commander of the village to enforce their decision.[85]

As a 65-year-old elder in a Taliban-controlled village in Alia Bad argued, his power of implementation is limited and depends on the will of Taliban commanders. In response to the vignette of a family dispute, he noted, 'First we will advise him to (…) not beat his wife, if he does not accept our decision then we will refer this case to the Taliban'.[86] An elder from Alia Bad district stated that it would be difficult for him to implement a verdict that would be disadvantageous to a more powerful or richer disputant. He said,

> In our village, if someone takes the land of another person, he will not return it very easily. We will call them to the *jirga* and ask both of them for their official land documents. If the person has force or money behind him, then it is difficult for a poor person to sit with him in the *jirga* because everyone is afraid of him.[87]

In other words, it will be difficult for the elder, the *jirga*, or *shura*, to implement verdicts without coercive enforcement provided by other political actors in the area. With the growing influence and independence of local commanders over the past decades, the implementation of verdicts offered by elders and *shuras/jirgas* are to a larger degree dependent on the final decisions made by commanders that are not necessarily embedded in the communities.[88]

[83]Com. Int. code: R07 – 5 June 2013, Qal-e Zal district.
[84]Com. Int. code: R01 – 13 June 2013, Alia Bad district.
[85]Com. Int. code: T08, 5 June 2013, Qal-e Zal district.
[86]Com. Int. code: T23, 6 June 2013, Alia Bad district.
[87]Com. Int. code: T18, 4 June 2013, Alia Bad district.
[88]Coburn, 'Informal Justice and the International Community in Afghanistan', 18–19; Antonio Giustozzi, *Empires of Mud: The Neo-Taliban Insurgency in Afghanistan 2002–2007* (New York: Columbia University Press, 2009).

In Kunduz province, armed groups are known to operate with a level of impunity, whether it is the *arbakai*, the Afghan Local Police (ALP),[89] Taliban commanders, or other armed groups.[90] The evidence collected during the interviews among inhabitants of Kunduz also indicates a situation of impunity with regards to local armed groups. A 45-year-old farmer in a Taliban-controlled territory stated, 'Today, no one can grab the rights of others. Of course, anti-government groups and Taliban are the exception. They do grab others' rights'.[91] A respondent from an *arbakai*-controlled area in Qal-e Zal district stated, 'Powerful people must be driven from the area and elders should not let them create problems for others'.[92] A member of the local development council noted that *arbakai* commander Nabi Gechi 'takes decisions without any formal justice process. No one can say anything, because the people are afraid of him'.[93] If the elders do not have the support of the local commander, they seem to be empty-handed if the verdict is not accepted.

During and after the Dutch mission, Taliban judges were operating in Kunduz province.[94] According to a report by The Liaison Office (TLO), the Taliban had set up its shadow judiciary, ran by local *mullahs* and Taliban judges.[95] Some local *shuras* were also reported to be under the influence of the Taliban.[96] According to a study by Ali in the district of Dasht-e Archi, locals tend to take their cases to the Taliban court because the cases are generally 'adjudicated faster, without corruption and with satisfactory outcomes'.[97] In areas that were under the control of the Taliban at the time, the enforcement of the Taliban court ruling was generally guaranteed, in contrast with a verdict given by the state judicial system.[98] A state judge from Kunduz province reportedly confirmed that the local population chose to turn to the Taliban because they hoped to have their conflicts 'resolved quickly and efficiently without having to bribe court officials'.[99] Giustozzi also claimed that 'there is a certain appreciation of the people for Taliban judges because they are able to solve disputes quickly and effectively'.[100]

The actor in possession of territorial control is most likely to have a final say over the justice outcome because that commander is able to enforce verdicts that are not accepted. A 59-year-old Tajik elder from an area of contested territorial control noted in response to the land dispute vignette, 'If he had a good relationship with powerful

[89]The ALP was a militia program to train and incorporate militias into the Afghan security apparatus led by the United States. Several reports show the abusive behavior of these semi-official police forces, who operate with impunity. See, for example, Dirkx, 'The Unintended Consequences of US Support on Militia Governance in Kunduz Province, Afghanistan,' 377–401; and Jonathan Goodhand and Aziz Hakimi, 'Counterinsurgency, Local Militias, and Statebuilding in Afghanistan', (Washington DC: United States Institute of Peace [USIP], 2014).

[90]Rachel Reid et al., '*Just Don't Call It a Militia': Impunity, Militias, and the Afghan Local Police* (Human Rights Watch, 2011); Dirkx, 'The Unintended Consequences of US Support on Militia Governance in Kunduz Province, Afghanistan', 377–401.

[91]Com. Int. code: R04, 6 June 2013, Alia Bad district.

[92]Com. Int. code: M03, 5 June 2013, Qal-e Zal district.

[93]Com. Int. code: R10, 5 June 2013, Qal-e Zal district.

[94]TLO, 'Provincial Assessment Kunduz' (Kabul: TLO, May 2010) 112; IWA, 'Corruption and Justice Delivery in Kunduz Province of Afghanistan', 14–15.

[95]TLO, 'Provincial Assessment Kunduz', 138.

[96]MPIL, 'Provincial Needs Assessment: Criminal Justice in Kunduz Province', 22.

[97]Obaid Ali, 'One Land, Two Rules (3): Delivering Public Services in Insurgency-Affected Dasht-e Archi District in Kunduz Province' (Kabul: Afghanistan Analyst Network, 2019): 11.

[98]TLO, 'Provincial Assessment Kunduz', 138.

[99]TLO, 138.

[100]Giustozzi during a presentation on the report: Antonio Giustozzi, Claudio Franco, and Adam Baczko, 'Shadow Justice: How the Taliban Run Their Judiciary' (Kabul: Integrity Watch Afghanistan, 2013). On 11 April 2013, Kabul, Afghanistan.

people in the government, like a Minister, a Provincial Governor, a District Governor, or a security commander, he would get his land back very easily'.[101] There thus seem to be incentives for community members to approach powerful functionaries and local commanders that possess territorial control in their village. Good connections to the Taliban or *arbakai* commander may be advantageous for resolving disputes. The formal system has limited capacity to implement verdicts against a disputant who lives in the territories of, and possesses good connections to, Taliban or *arbakai*. Ultimately, it is the local commander of those areas who 'outgoverns' the governmental institutions.

What becomes clear within this context of legal pluralism and irregular warfare is the political and versatile nature of justice dynamics. Neither the state nor the militias or the Taliban had consolidated its power throughout the territories of the province. Sovereignty was fragmented as different power brokers influenced the control over territory and the dispensation of justice throughout the province. Within this contentious and complex network of legal and political orders, the Dutch IPM had to try to achieve its goals. In line with the theoretical discussion earlier in this article, the empirical situation of irregular warfare presents a context in which the justice sector is certainly an area of contested legitimacy. Therefore, the provision of justice in the context of irregular warfare is an inherently political and not 'technical' bureaucratic endeavour. The next section inquires how the Dutch mission perceived the context and its mandate to implement judicial reform in the province.

The integrated police-training mission in Kunduz

In the timeframe of 2011–2014, the priority of the International Security Assistance Force (ISAF) in Afghanistan became to continue to improve the capacity and capabilities of the Afghan state and to gradually *transition* from an internationally led security force to a fully capable Afghan-led security apparatus by the end of 2014.[102] The objective of the IPM was situated in this policy of transition and aimed to make a contribution by increasing the capacity and capabilities of the Afghan security and justice institutions in Kunduz province by the training of the Afghan Uniformed Police (AUP) and by a variety of judicial reform programs.[103] In the justice sector, the IPM mainly aimed to improve the quality of the Afghan formal justice system and the awareness and acceptance of the Afghan judicial system in Kunduz province.[104] Below, I present a number of reoccurring themes identified during the analysis of the interviews with police trainers and political and rule-of-law advisors in the Dutch mission. Each theme starts with a (perceived) problem in the justice sector and continues with the intended solution.

Identified problems and solutions

First, according to the IPM workers, there was a lack of staff quality and quantity in the formal justice sector in Kunduz province. As a Dutch advisor on the PRT explained,

[101]Com. Int. code: R05, 6 June 2013, Alia Bad.
[102]See, for example, https://www.nato.int/cps/en/natohq/topics_69366.htm (Accessed on 2 May 2017).
[103]*Artikel 100 Brief*, 7; Comprehensive Mission Design (CMD) for Integrated Police training Mission in Afghanistan (HoA approved CMD-extract 07–07-2011).
[104]Comprehensive Mission Design (CMD) for Integrated Police training Mission in Afghanistan (HoA approved CMD-extract 07–07-2011).

'there were courthouses and lawyers, but their capacity was very minimal'.[105] This had to be countered through training and/or mentoring policemen, prosecutors, lawyers, judges and *huqooq*[106] workers, and by building a better judicial infrastructure. Furthermore, by organising meetings between and by mentoring the different actors in the justice chain, cooperation in the whole formal justice chain was aimed to be improved. The *Artikel 100 Brief*[107] of 7 January 2013 to the Dutch Parliament states in that regard, 'Strengthening civil police and the judicial chain aims to strengthen the rule of law, through which the safety of the Afghan population (…) will increase'.[108] This reflects the assumption that improving the quantity and quality of the police and the judicial sector would increase the capacities of the state to govern its territory and provide security and justice to the population.

A second problem identified by the Dutch IPM workers in Kunduz before the mission started was referred to as a lack of legal awareness: the Afghan population and those working in the judicial sector were not sufficiently aware of formal laws and basic rights as defined by the central state. One of the advisors stated, for example, 'So if you talk about legal awareness, that was non-existent in the rural areas of Kunduz before the mission started. The local population was not aware of the Afghan laws'.[109] The intended solutions were radio projects, theatre, legal awareness projects in schools, handing out instruction leaflets, and the mentoring of local councils. One of the advisors stated, 'by the use of radio programmes and theatre, work has been done to improve the awareness of Afghan legislation, so that idea is developing in the minds of the people, I believe'.[110] The motivation behind these efforts seems that awareness of Afghan state law and formal institutions would increase the reach of the Afghan state beyond its district centres. As another advisor noted, improving the rule of law in Kunduz required a 'change of mentality'.[111] Most IPM workers emphasised that improving the legal awareness among the population would increase the use of formal institutions. Legal awareness was only in reference to state laws, not religious or customary legal codes.

A third problem that the Dutch identified was an informal justice sector that worked outside the boundaries of Afghan state law and Human Rights treaties. In this context, Dutch respondents referred in particular to local elders, *shuras/jirgas*, and the *huqooq*

[105]IPM Int. code: PRT04, 9 May 2013, location: German-led PRT in Kunduz. Original Dutch statement: 'Er waren rechtbanken en er waren advocaten, maar de capaciteit was zeer minimaal'.

[106]*Huqooq* literally means 'the rights of an individual under the law'. The *huqooq* offices in Kunduz are Civil Law Offices. These are administered by the Ministry of Justice and resolve civil disputes. They refer their cases either to the formal courts or to informal justice providers. See: Seth Peavey, 'CPAU Strategic Conflict Analysis Kunduz Province' (Kabul: CPAU, 2013), http://www.cpau.org.af/images/CPAU%20Strategic%20Conflict%20Analysis%20-%20Kunduz.pdf (Accessed on 2 February 2017).

[107]According to the Dutch Constitution 'the Government shall inform the States General in advance if the armed forces are to be deployed or made available to maintain or promote the international legal order. This shall include the provision of humanitarian aid in the event of armed conflict' (Dutch Constitution, art. 100). The government shall inform the parliament with a so-called *Artikel 100 Brief* in which the reasons for deployment are explained.

[108]*Artikel 100 Brief* to the Dutch Parliament. Original Dutch statement: 'De versterking van de civiele politie en de justitiële keten beoogt de Afghaanse rechtsstaat te versterken, waardoor de veiligheid van de Afghaanse bevolking (…) zal toenemen'.

[109]IPM Int. code: PRT04, 9 May 2013, location: German-led PRT. Original Dutch statement: 'Dus als je het hebt over bewustzijn in rurale gebieden voordat de missie begon, dan was die er niet. De lokale bevolking was niet op de hoogte van Afghaanse wetten'.

[110]IPM Int. code: PRT04, 9 May 2013, location: German-led PRT. Original Dutch statement: 'Door middel van radio-programma's en theaterstukken wordt er gewerkt aan bewustwording van Afghaanse wetgeving, dus dat idee ontwikkeld zich wel in de hoofden van mensen naar mijn inzicht.'

[111]IPM Int. code: PRT05, 10 May 2013, location: German-led PRT. Original Dutch statement: 'Het verbeteren van de Rule of Law vraag om een mentaliteitsverandering.'

offices. These justice providers were considered to offer verdicts that deviated from the official basic rights of the Afghan citizens. Informal justice was accepted to some extent, but only if it offered justice outcomes that did not contradict Afghan state law and the human rights treaties that Afghanistan had ratified. For example, one of the advisors noted,

> A point of concern is legal certainty. If they [elders or shura members] sit down under a tree and they claim to have reached a consensus, but we notice that someone has become the victim of that, we do condemn that. Those are usually the vulnerable groups: women, girls and children.[112]

Similarly, the *Artikel 100 Brief* to the Dutch parliament states,

> Informal justice is generally executed on the basis of customary law and sharia. Those mechanisms are vulnerable to unlawful influence and the people involved are usually insufficiently aware of internationally recognized basic rights. The lack of knowledge on the Afghan Constitution, Afghan state law and international law in the informal justice system leads to violations of fundamental rights, especially for children and women, and in criminal cases.[113]

The proposed solution was to install better monitoring over informal justice mechanisms, in particular the mentoring and education of *huqooq* employees, because these offices were considered the bridge between formal and informal justice.[114] Further, offering juridical advise to local councils, including peace councils, was considered an effective solution to this problem.[115] One of the advisors noted that the population would be allowed to use informal justice providers, but it had to come under the monitoring of state law to create a more transparent and accountable judicial system.[116] This would improve the rule of law and make the state more capable of governing its territory.[117] From that perspective, the state's legal code was considered superior to local religious or customary laws. In that sense, the IPM was driven by a liberal vision based on the International Human Rights agenda and the externally introduced Afghan Constitution.

The restrictions of the civilian mandate

Following its mandate, the Dutch involvement in Kunduz focused exclusively on 'reconstruction' and not on combat operations.[118] As one of the Dutch police trainers noted, it was not in their mandate to become involved in changing provincial power

[112]IPM Int. code: PRT04, 9 May 2013, location: German-led PRT. Original Dutch statement: 'Een punt van aandacht is de rechtszekerheid. Als ze dan onder een boom hebben gezeten en zeggen we hebben consensus bereikt, maar wij zien dat iemand de dupe is dan keuren we dat niet goed. Dat zijn dan de zwakkere groepen: vrouwen, meisjes, kinderen.'
[113]*Artikel 100 Brief* to the Dutch Parliament. Original Dutch statement: 'Informele rechtspraak geschiedt over het algemeen op basis van gewoonterecht en de sharia. Dergelijke mechanismen zijn kwetsbaar voor oneigenlijke beïnvloeding en betrokkenen zijn veelal onvoldoende op de hoogte van internationaal erkende basisrechten. Het gebrek aan kennis van de Afghaanse Grondwet, het Afghaanse recht en internationaal recht binnen het informele systeem leidt tot schendingen van fundamentele rechten, vooral als het gaat om vrouwen en kinderen en in zaken over criminaliteit'.
[114]*Artikel 100 Brief*, 8; IPM Int. code: PRT04, 9 May 2013, location: German-led PRT.
[115]*Artikel 100 Brief*, 3; IPM Int. code: PRT04, 9 May 2013, location: German-led PRT.
[116]IPM Int. code: PRT07, 11 May 2013, location: German-led PRT.
[117]IPM Int. code: PRT07, 11 May 2013, location: German-led PRT.
[118]Georg Frerks and Niels Terpstra, 'Assessing the Dutch Integrated Police-Training Mission in Kunduz Province, Afghanistan, 2011–2013', in *Expeditionary Police Advising and Militarization*, eds. Donald Stoker and Edward Westermann (Solihull: Helion & Company, 2018), 242–66.

structures.[119] Their intelligence agents seemed to have a rough idea of 'who is who' in terms of the relevant powerbrokers, but the IPM workers were not allowed to engage in any form of 'politics' with pro- or anti- government militia leaders, for example.[120] That is partly why Münch concludes that the 'local power structures in (…) Kunduz fluctuated but as a whole remained largely unchanged over the course of the intervention',[121] referring to the timeframe of German involvement between 2001 and 2013. The most important exception to this was the United States, which became involved in fighting around 2009 to push back the Taliban's upsurge at the time. In the short term, this action was relatively successful, combined with the recruitment of pro-government militias, but it faced serious drawbacks in the long term.[122]

IPM workers saw it as their task to confine their work to the official Afghan counterparts they were assigned to. As one of the police trainers emphasised,

> There are several warlords in the province. (…) We do not have to deal with these groups. There are larger systems of power at play, but we just take that as a given. We do not have to deal with that. The Dutch do not support the militias of the ALP for example, if we would, we would lose track of what we are doing.[123]

In other words, the IPM workers wanted to stick to what they knew, and they had to follow the mandate that was provided on the basis of the decision-making process in the Dutch Parliament.[124] The authority that Taliban judges derived from religious legal codes, for example, was not acknowledged in any of the interviews with the IPM staff.

Local realities 'misjudged'

The IPM misjudged two specific *local realities* that significantly affected the prospects of *judicial reform*: (1) legal pluralism and the (2) the specific nature of irregular warfare. Below, I discuss these two realities in relation to the Dutch mission.

Centralisation and legal certainty vs. legal pluralism

The IPM's objectives to centralise and implement formal laws throughout the province contrasted with the traditional role of local leaders and customary institutions. The introduction of a liberal top-down process of centrally defined laws was challenged by the existence of legal pluralism. The Afghan respondents did not necessarily see the expansion of the formal legal system as a step forward in the rule of law, particularly not because that system remained plagued with corruption. The history of resistance

[119]IPM Int. code: PRT 01, 8 May 2013, location: German-led PRT.
[120]IPM Int. code: PRT 05, 10 May 2013, location: German-led PRT. See also: Münch, 'Local Afghan Power Structures and the International Military Intervention'.
[121]Münch, 1.
[122]Dirkx, 'The Unintended Consequences of US Support on Militia Governance in Kunduz Province, Afghanistan'; and Goodhand and Hakimi, 'Counterinsurgency, Local Militias, and Statebuilding in Afghanistan'.
[123]IPM Int. code: PRT 01, 8 May 2013, location: German-led PRT. Original Dutch statement: Verschillende warlords zijn actief in de provincie. (…) Wij hebben in principe niks te maken met andere groepen. Er zijn andere krachten in het spel, maar dat is een gegeven. Daar hebben in principe niks mee te maken. Nederland ondersteunt geen ALP, anders zie je door de bomen het bos niet meer.
[124]IPM Int. code: PRT 05, 10 May 2013, location: German-led PRT.

against central government interference in local affairs continued, with the IPM seen as a part of that centralising tendency.

The IPM workers also assumed that the state's formal legal code was superior to informal justice practice. The formal institutions that the Dutch IPM supported were not embedded in the customs and traditions of many of the villages in Kunduz like the *shuras* and *jirgas* were. Though the Dutch IPM seemed to acknowledge that the implementation of justice in Kunduz required a type of 'hybrid approach', it continued to reason from a state-centric perspective. Its perspective on the informal institutions confined itself to embedding these institutions into the framework of Afghan state law and international conventions. It thus underestimated the traction of customary legal codes that contradicted legal codes of the state.

'Neutral' training and advisory vs. irregular warfare

In the political contestation in Kunduz, the government (supported by international coalition forces), militias (supported by the United States), and the insurgency have been making claims to sovereignty by various means.[125] Through the use of military means, international coalition forces have become a part of irregular warfare throughout Afghanistan. Although some of the interveners in Kunduz attempted to position themselves as 'neutral', 'apolitical' mentors, it is clear that the statebuilding exercise has politically favoured the side of the Afghan government and certain militias that were deemed useful in the fight against the Taliban insurgency.[126]

Within the IPM mandate, it was assumed that the Dutch could reach their objectives without considering the power of armed groups that operate their own versions of justice systems. The analysis above showed that, particularly in those areas where the government control was contested, low, or absent, effective provision of justice could only be provided by non-state actors or delivered with their connivance/approval or enforcement. Training formal lawyers and prosecutors did not provide a solution to the lack of territorial control and did not change the perceptions and conduct of those civilians living outside (and even inside) of government-controlled territory. Following its strictly civilian mandate, the IPM refrained from attempting to change the local power structures in the province. Furthermore, there was a limited awareness of the consequences that irregular warfare entailed for the justice sector.

An institutionalist approach

The IPM mostly reflected an 'institutionalist approach to statebuilding', as defined by Lemay-Hébert.[127] The focus of the IPM was predominantly on central government institutions like a functioning formal justice system with courthouses, judges, and lawyers, and appropriate implementation of centralised state laws. The general reasoning was from a state-centric perspective. Their perspective on informal justice remained limited to an attempt to imbed these institutions into the legal framework of the Afghan

[125]Koehler, 'Social Order within and beyond the Shadow of Hierarchy. Governance Patterns in Afghanistan', 6–24.
[126]Münch, 'Local Afghan Power Structures and the International Military Intervention'; and Dirkx, 'The Unintended Consequences of US Support on Militia Governance in Kunduz Province, Afghanistan'.
[127]Lemay-Hébert, 'Statebuilding without Nation-Building?'.

state. It largely underestimated the legitimacy of customary legal norms and cultural expectations, and overestimated the reach and legitimacy of channelling their efforts throughout the formal justice system.

Conclusion

Statebuilding strategies certainly miss, and in some instances misjudge, local realities. This article expanded the existing literature on peace- and statebuilding by looking at two specific local realities that affect judicial reform during external statebuilding interventions. Theoretically, the article brought together three strands of literature: the literature on peace- and statebuilding, legal anthropology (legal pluralism), and the dynamics of civil war (irregular warfare).

First, the article showed how insights from the literature on legal pluralism can enrich our understanding of a specific sector in peace- and statebuilding: the justice sector. The analytical direction of the literature on legal pluralism supports the identification of a specific 'missed' or 'misjudged' local reality, underscoring the misperception in international development that social change can only or primarily be produced by state bureaucracies and state law. In the justice sector, it helps the analysis to go beyond state institutions, state law, and the universality of human rights to uncover an empirical reality that may remain hidden from the perspective of state-centricity and legal certainty. The analysis reveals the existence of multiple normative and judicial orders that may co-exist within one socio-political space. Scholars in legal pluralism have expressed similar criticisms as those expressed by the critical peacebuilding literature, but specifically for the justice sector.

In case studies on Kunduz province, some of the IPM's objectives in the formal justice sector have been found to contrast with the empirical realities of legal pluralism. IPM workers assumed that a formal legal code would be superior to informal justice practice. Improving the capacity of the formal justice sector was a priority from the Dutch perspective. This did not necessarily resonate at the local level. In particular, family matters were preferred to be solved in the intimate sphere of the community and not by outside institutions. The formal institutions that the Dutch IPM supported were less used and less socially accepted than the *shuras* and *jirgas* were. The general reasoning continued to be from a state-centric perspective, and programmes on informal institutions were confined to an embedding of these informal institutions into the legal framework of the Afghan state.

Second, the specific nature of irregular warfare during certain statebuilding interventions highlights the military and political nature of justice provision in a context like Afghanistan. For states and insurgents alike, there is a strategic usefulness to building a solid administration of justice to establish order and civilian collaboration and to consolidate territorial control. Where territorial control is contested, an institutionalist approach to statebuilding has a limited effect on territories outside of government control. The actor in possession of territorial control is most likely to have a final say over the justice outcome because that commander possesses the ability to enforce verdicts. Hence, the formal system has limited capacity to implement verdicts against a disputant who lives in contested or Taliban-controlled territory. Ultimately, it is the local commander of a specific area who 'outgoverns' governmental institutions. The

provision of justice in the context of irregular warfare is an inherently military and political endeavour and certainly not a 'technical' bureaucratic pursuit.

The IPM was confronted with the consequences of irregular warfare. The IPM's assumption was that the mission's objectives could be reached without engagement in the power structures in the province. Because of the strictly civilian mandate, the IPM did not engage with armed opposition groups and militias. However, in areas where the government control was low or absent, the effective provision of justice can realistically only be enforced by local commanders. The training of lawyers and prosecutors, therefore, did not provide an effective solution in a setting where the government lacked territorial control and where the legitimacy of the justice sector was contested by an active Taliban judiciary. As this article has shown, these two local realities of legal pluralism and irregular warfare were perhaps not entirely missed from the IPM's perspective, but they were certainly misjudged.

Taking the IPM as an example of external judicial reform in Afghanistan, the article indicated how the Dutch focus on institution and capacity building in the formal justice sector missed the opportunity to tailor its practices to the context of legal pluralism and irregular warfare. The Dutch IPM reflected an 'institutionalist approach to statebuilding' because the focus was predominantly on central government institutions in the formal justice sector and the implementation of centralised state laws. The IPM case therefore demonstrates an important limitation of the institutionalist approach to statebuilding if it is carried out in environments of legal pluralism and irregular warfare: attempts to increase capacity in the formal institutionalised sector do not necessarily change the conduct of local power brokers who seek to resolve disputes in practice.

Implications and recommendations

What are the implications of these findings? Effective judicial reform, as an essential element in external statebuilding, lies not only in the increased capacity of state institutions but also in the ability of external actors to generate support for the operation among the local population inside and outside of government-controlled territory. Popular support for the government seems essential for a successful and sustainable statebuilding process, including the 'right to rule', as Holsti put it.[128] However, the effective use of coercion is another ingredient of social order and enables the enforcement of justice outcomes. A genuine understanding of governance in the local setting therefore needs to coincide with policies tailored to the judicial landscape and the type of warfare taking place. The success of statebuilding interventions lies more in its international ability and willingness to fully acknowledge the local context and to adjust its policies accordingly. This requires a reflection on the history of state formation, a fundamental consideration of contrasting norms and values between international actors and the society being intervened in, and the political awareness and willingness to move beyond technicalities and state centrism.

In the case of the IPM, the political decision makers would have needed a better historical notion of what it means to centralise laws in Afghanistan and where resistance against it is rooted. Second, a better contextual understanding of how religious

[128]Kalevi Jaakko Holsti, *The State, War, and the State of War* (Cambridge Univ Press, 1996).

laws and customary legal codes are entrenched in the daily lives of Afghan civilians and local councils was needed. Third, a better contextual understanding of the important power brokers in Kunduz province was needed and an acknowledgement that the strategies of those actors affected the political dispensation of justice. An inquiry into these three elements would ultimately have determined the contextual opportunities and obstacles keeping the mission from reaching its objectives.

Finally, the findings of this study highlighted two general consequences for future decision-making. First, a normative aspect of decision-making may continue to create problems. This goes back to a key contradiction in statebuilding interventions that Paris and Sisk identified as '"universal" values [that] are promoted as a remedy for local problems'.[129] What if the 'universal' values of a statebuilding mission framed in the liberal tradition do not align with certain social practices, traditions, and cultural expectations of the host society? Decision makers should genuinely consider the possibility that a contribution to some missions has no prospect of success without greater flexibility in the norms and values the missions implicitly or explicitly promote. Second, decision makers would be naive to assume that a technical and bureaucratic approach to judicial reform would protect their mission against the interests of local power brokers. In some cases, reforms are resisted precisely because they can threaten the legitimacy and interests of local power brokers, regardless of how 'neutral' or 'universal' these reforms are framed to be.

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[129]Paris and Sisk, 'Managing Contradictions: The Inherent Dilemmas of Postwar Statebuilding', 4.