



Restorative Justice, Policing and Insurgency: Learning from
Pakistan

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Pakistan state law and Taliban rule of Sharia law are at different ends of a politico-legal spectrum. They share advocacy of one system of law and attraction to eradication of alternatives. Muslahathi Committees in Pakistan are used to explore openness to legal pluralism, to hybrid institutions that allow deliberative democracy to find workable responses to injustice. Formal and traditional systems can and do show mutual respect and check each other. On the basis of purely qualitative evidence, it is argued that Muslahathi Committees are restorative justice programs that sustainably reduce revenge violence, make a contribution to preventing Pakistan from spiraling into civil war and assist a police force with low legitimacy to become somewhat more accountable to local civil society. These contributions are limited but could be more significant with modest investment in human rights and gender awareness training to control abuses and increase accountability. The ruthless, murderous, divisive politics of policing and restorative justice in Pakistan seems a least likely case for deliberative democracy to work. In limited ways it does.

Legal Pluralism and the Pakistan Policing Context

This research is about contests and synergies between state and non-state justice. Legal pluralism is about the idea that different legal systems can coexist in the same social field (Merry 1988: 870). Legal pluralism often bogs down in debates about whether forms of custom should be described as *legal* systems. Our interest is not in that question, but in inductively exploring effects of new forms of legal hybridity. The hybridity in focus is distinctive because it is as much about the police role as the lawyerly role in legal pluralism. While the research embraces conventional concerns of the legal pluralism literature such as legitimacy, its particular focus is on the effects of legal hybrids on the vitality of democracy and on dampening cycles of violence in spaces of extreme violence. What is discovered inductively is something approaching Peter Fitzpatrick's 'integral pluralism' where there is 'mutual constitution':

Custom supports law but law transforms the elements of custom that it appropriates . . . Law, in turn, supports other social forms, but becomes in the process part of the other form (Fitzpatrick 1984 :9 – check page number).

Legal pluralist scholarship teaches that 'Custom used to be treated as the precursor of the law, its evolutionary source' (Moore 1978:13). Yet scholars have long recognized that custom is 'semi-autonomous', constantly competing with and appropriating state law, and vice versa. Justice occurs in many rooms (Galanter 1981). *Muslahathi* Committees explicitly build a room that appropriates some justice resources from an attached police station, other justice resources from customary Jirgas outside, others from private legal practitioners and the judiciary. They are a form of 'directly deliberative polyarchy' (Cohen and Sabel 1997). The interest is less in whether what *Muslahathi* Committees do is called law or regulation. It is in *how* state and non-state justice can coexist to form more democratically rich amalgams that might be effective in reducing violence.

Civic republicans worry whether citizens can have the energy to engage with deliberative democracy across the executive and legislative branches of governance, and the rigor to do so in ways that guard against tyrannies of the majority and other dominations (Pettit 1997, 2012). Pettit concludes that 'contestatory' institutions rather than directly deliberative ones are the fundamental vehicles for delivering freedom as non-domination. Restorative justice theorists, however, have argued that deliberative democracy that engages all stakeholders is more

plausible in the judicial than in the executive or legislative branches of governance (Braithwaite 2002:130-67). This might be especially true with something so important to peoples' daily lives as cycles of revenge killings. Here they are willing to invest time and resources in both deliberation and in creative checks and balances against abuse of power. Indeed, to a degree we empirically find this to be so in rural Pakistan. Hence, restorative justice theory conceives deliberative democracy in the judicial branch as a way of re-engaging citizens who are jaded and cynical about democratic politics (Braithwaite 2002: 130-67), while continuing to place deep reliance on separations of powers as guarantors of freedom as non-domination. Separations of powers are usually semi-autonomous. Judges do not control the budgets provided to the judicial branch, for example. A crucial normative issue for republicans who believe in freedom as non-domination that is checked by separations of powers is whether variegated branches and twigs of governance have enough semi-autonomy to be effective in checking abuses of power by other branches (Braithwaite 2006).

This analysis is based on fieldwork the first author undertook in 2013 and 2003 with the second author in Pakistan (to discuss Jirgas with rural people and visit *Muslahathi* Committees moving out from bases in Peshawar, Quetta, Abbottabad and Islamabad). More fundamentally, it is based on case notes the second author, the most experienced and distinguished restorative justice practitioner in Pakistan, gathered from face to face experience of more than a hundred Jirgas and *Muslahathi* Committee meetings in the decade between 2003 and 2013.

In longer versions of this paper (X 2013) that provide more fieldnote detail, we find value in early debates about whether restorative justice should ever be conducted under police auspices. On the one side, there were advocates who sounded valuable warnings about threats to restorative justice as a transformative movement from civil society in giving over too much leadership to as authoritarian an agency of the state as the police. Perhaps the critics were right that police agencies are inhospitable soil in which to plant reforms that are about empowerment of civil society, that devolve power from the state. Perhaps indigenous critics were right that because of the shocking police history of oppression of indigenous communities, there were profound dangers in restorative justice under police auspices. Yet police leaders who travelled to Wagga Wagga and Canberra to observe the early Australian police-based restorative justice pointed out that it was too narrow a vision of restorative justice reform to see it as about diversion of cases from prosecution. Restorative reforms of police cautioning practices, for handling complaints against the police and much more were worthy of study.

The Pakistan context of policing in a society racked by a Taliban insurgency, with some Al Qaeda participation, is challenging. Crime and violence have increased sharply according to police statistics since the NATO invasion of Afghanistan in 2001 (Fasihuddin 2010:128), particularly in western Pakistan where the incidence of terrorist bombings since 2007 has been as high as anywhere in the world (Chandran 2013:57). An enforcement swamping crisis is part of the context of police interest in engaging the community and its traditions with taking over some of its caseload. We argue from the Pakistan experience that this context may imply a more prominent role for policing in a particular kind of hybrid state-indigenous restorative justice. This conclusion arises from a consideration of the idea that insurgencies like those of different Talibans have often been 'organized rule of law movements'.¹ Actually, there are eight steps to the argument we advance:

¹David Kilkullen used this expression at a lunch in Canberra of a book edited by Wilt Mason to which he contributed (Kilkullen 2011).

1. In rural spaces of many developing societies, there is an ideology of a shift from traditional non-state justice to a justice of state prosecutors and courts. In practice, this often delivers a rule of law vacuum, or slow, corrupt justice that leads rural citizens to long for a return of traditional justice.
 2. Insurgents like the Taliban are assisted in seizing power by filling this rule of law vacuum with speedy justice that re-establishes order in a way that many rural people prefer (at least initially).
 3. Insurgents like the Taliban then consolidate the power they seize in areas under their control and seek to support the seizure of power in further rural domains by killing traditional justice providers (who can be more formidable competitors in rural spaces than state justice providers).
 4. One response is for the state not only to compete with insurgent justice by providing better access to less corrupt justice of its courts, but also by creating state-non-state hybridity that offers state protection to customary justice. Citizen-led reconciliation committees housed inside the walls² of Pakistan police compounds is one interesting approach (*Muslahathi* Committees; *Muslahathi* means reconciliation in Arabic).
 5. Hybridity between state and non-state justice can be designed to cover the human rights weaknesses of one with the strengths of the other. Again, the police station reconciliation committees are used to illustrate this possibility through state-non-state justice linkage. It can also mean more resilient state justice and more resilient traditional justice that are mutually enabling and both more able to compete with the courts of the insurgency.
 6. The hybrid justice of Pakistan's police station reconciliation committees also, we conclude, demonstrably reduce cycles of vengeance killings (which help drive spirals toward civil war).
 7. This reform in Pakistan has experienced well-organized resistance from some elements of the legal profession, human rights and women's NGOs. A reconciliation with these critics is needed that can create space for state-non-state justice hybridity.
8. State-non-state justice hybridity opens a legal pluralist path to judicial branch deliberative democracy that might save democracy from disengagement and despair, while keeping checks and balances of contestatory democracy in good order (Pettit 1997,).

The structure of this article is to consider in turn each of the above eight steps toward our conclusion. Since it is a paper about state and traditional justice hybrids, in the next section it first briefly summarizes the principal form of customary justice in the regions of Pakistan that border Afghanistan - Baluchistan, Khyber Pukhtoonkhawa, the Provincially Administered Tribal Areas (PATA: Malakand, Swat) and the Federally Administered Tribal Areas (FATA). In both the Pukhtoon belt and the Baluch lands, the Jirga is the principal traditional justice institution. Jirgas have not been crushed in Pakistan to anything like the degree they were in Afghanistan by decades of Soviet and Taliban control. The Soviets saw Jirgas as a local republicanism, a threat to their centralized state control. The Afghan Taliban saw them as a competitor to their Taliban Courts. The Taliban in both Afghanistan and Pakistan seek to shift power from traditional elders to religious leaders (Imams/Mullahs). After putting the Jirga in this context, the essay then works through a section on each of propositions 1-8 above.

Jirga pluralism; *Muslahathi* Committees as Jirga Hybrids

²Police stations in the conflict areas of Pakistan are surrounded by high walls, usually with towers for the placement of machine guns.

When a Jirga is called it is often a large meeting where participants gather in a circle. While there have been places in space and time when female leaders have participated prominently in Jirgas, this is rare. All males of the locality are able to participate. A group who are recognized as unusually respected elders settle the final decision. In the Pukhtoon belt Jirgas are held in the *Hujra*, usually a building that is a kind of community club in a village. Volunteerism is a core principle, though at its worst the Jirga is captured by powerful men who extract exploitative fees from disputants. The Jirga ideal, however, is of leaders who serve the community and are guests of God. So to spurn the decision of a Jirga is to risk the wrath of God.

The spirituality of the Jirga is a mix of Islamic and tribal traditions. The Jirga shares much in common with the pre-Islamic Semitic restorative justice institution, the *Sulha*, which was practiced by Muslims, Jews and Christians in Palestine and across the Middle East (Fasihuddin 2010: 126). Like restorative justice, the Jirga tradition is about solving a problem through the direct participation of parties on different sides of a crime or conflict and then restoring relationships among those parties through reparations and reconciliation. Forgiveness has a more central role, the expectation to forgive is much stronger, in Jirgas than in western restorative justice. During our 2013 fieldwork more than one person said 'You Westerners believe in forgive but don't forget, we believe in forgive and forget'. When fifteen different *Muslahathi* Committee members and disputants from different locales were asked, 'How often do the victims forgive offenders who have committed serious crimes like murder', answers ranged from 'the majority of cases' to 'always', with most saying 80 or 90 per cent of cases. Jirga justice is usually speedy. Most cases are settled in a few days.

One option for parties in conflict is for Jirga members to take *waaq* (power of decision making) from both sides to make a decision. Once *waaq* is taken, the decision made by the Jirga according to custom is binding. The parties traditionally have no right to refuse the decision of the Jirga after *waaq*, though state law gives them that right. In traditional law, disputants have the right to refuse to give *waaq*. Then they are given the option in FATA and some other Pukhtoon tribal areas of whether they want the case to be decided according to Sharia law or *Pukhtoonwali* (customary tribal law). Or they can forget the Jirga if they want and go to the state's courts instead. Or for more minor issues (but not serious ones like murder) they can opt for *Maraka*. With *Maraka*, parties to a conflict select one or two representatives from both sides to resolve an issue 'according to the prevailing traditions and needs of the families' caught up in the conflict (Gohar 2012: 55). Within the Jirga process, disputants are empowered to say that they have lost confidence in the Jirga members as fair or honest or competent. There is an obligation to respond to this by adding new members to the Jirga of the choosing of both sides of the dispute to break the roadblock.

So the Jirga is a more deeply legally pluralist institution than restorative justice or state justice in other parts of the globe. There are many layers to this pluralism. First the parties are asked who they wish to be the decision making members of the Jirga and agree on a composition with the other side. Later they can change this view and add new members. They decide whether their Jirga will be binding or whether they can walk away and ask for another Jirga later. Then they can opt for Sharia Law or customary law (which most do because they do not fully understand Sharia law). Or they can opt for the police station reconciliation committees, or the courts.

The police station reconciliation committees in Pukhtoon areas are less radically pluralist and more a hybrid of Pukhtoon customary law, Sharia law, restorative justice principles and state law in which state law is intended to be a trump in any fundamental matter of rights. Even so, a kind of pluralism operates within that context as well. So a Sikh minority member appearing at a *Muslahathi* Committee can and does argue that while she is supportive of restorative justice principles, of the rights principles in state law and of local Jirga customs that have been accepted by her since birth as relevant to the regulation of her life, she can object to the application of some Sharia principle because she is a Sikh. This is a strength of the police station hybrid; it can give more recognition to Sikh principles of justice than does the law of the Islamic Republic of Pakistan or even of *Pukhtoonwali*.¹ All societies have deep divides over conceptions of justice such as one sees in Pakistan between tribal traditionalists and urban liberal modernists, between Suni and Shia, Sikhs and the Christian minority. The philosophical possibility that legal pluralist justice hybrids open up when people of different faiths disagree in a Jirga or a police station reconciliation committee is precisely that discussed by John Dryzek in advancing the deliberative democratic solutions of ‘discursive representation’ and ‘workable agreements’.

There is however a particular kind of selection that is especially appropriate for deliberating plural conceptions of justice. If different conceptions of justice are backed by different discourses (e.g. market liberalism, capabilities, social liberalism, social democracy, organic conservatism, religions of various sorts), then what is needed in order that each conception may enter fully and fairly into deliberation is discursive representation (Dryzek and Niemeyer 2008). The basic idea of discursive representation is that representatives are chosen by virtue of their capacity to represent a particular discourse (Dryzek 2013).

Concerning how deliberation should produce outcomes, Crocker (2008:325) endorses Sunstein’s (1995) idea of an incompletely theorized agreement.³ This is a staple of deliberative thinking, called by Eriksen (1994) a ‘workable agreement’. The idea of a workable agreement is that participants can agree on a course of action, but not the reasons for it. What distinguishes it from a mere compromise is that participants recognize and accept the legitimacy of the values that they do not share with other participants (Dryzek 2013).

As usual, justice practice proves to be ahead of political theory in the circumstances where the realization of justice is maximally challenging. Pluralized, hybridized Jirgas in the practices of justice institutions operating under the threat of the assassin’s bullet show how workable agreement can be workable. They show how inter-faith dialogue across deeply divided discourses of justice can be practically operative for helping people to live in peace. This is not to suggest that hybrid justice pluralism in Pakistan actually realizes this ideal in

¹ Hybrid space for religion in secular law is controversial. Western societies as similar as New Zealand (whose indigenous people open restorative justice with Christian prayer, with permission from other participants) and Australia (where prayer is discouraged) decide this matter differently. This paper has no standpoint on religion in law beyond guarding against religious domination. We might say, nevertheless, that nearly all state law has European roots in the law of Christendom that preceded state formation. All but a few Muslim societies – including the largest (Indonesia, Pakistan, Bangladesh) – have state law from Christendom rather than Sharia state law. Hindu and Buddhist societies, even fervently Buddhist nationalist states like Sri Lanka, do not have Buddhist law or Hindi law. There is no Taoist, Confucian or animist state law. Even when states purge swearing on bibles, their law remains structurally European, Christian and “secular”.

any widespread way. It does not. Our argument is that it provides an incipient instantiation of this possibility that merits refinement, human rights audit and scholarly analysis and critique. Bold innovations for tackling wicked problems are never born whole. This one certainly is not.

³Under incompletely theorized agreement people settle on an agreement, but for philosophically incompatible reasons. Without practical agreement grounded in theoretical disagreement, peace and progress with tolerance are impossible.

Checks and balances of the types familiar to westerners from republican political thought are important for countering abuses of power. Yet it may be that leadership toward more deliberative democracy from within tribal traditions is the way that deep change can occur to the abuses of power that concern us most, such as honour killings. Here is a case study recounted by a Pukhtoon elder to Ali Gohar from the time before honour killings were specifically banned by state law:

One day I passed by the village *Hujra* where there was big gathering. After my greeting and *salaam*, I asked what's going on . . . A man replied *toor* (honor case) is going on to be settled by Jirga. Honor crimes were very rare because the code, *Hujra* and jirga were very strong at that time. Jirga procedure was in progress and the man and woman involved in the adultery were both brought to be killed as per the jirga decision. When the man took a rifle to kill both, the girl asked for her last will to be expressed. But the jirga stopped her as women are not allowed to say anything who had already brought so much shame on the community and *Hujra*. But I being educated and knowledgeable of law and rules asked the Jirga that I am a guest, have no right to interfere in your decision but will because the girl is right by all means, traditionally, religiously and according to law. After a lot of arguments and my stand the jirga allowed the girl to speak. I went close to her and said 'say what do you want; I am with you'. Before speaking anything she asked for a ladder to climb on the rooftop of *Hujra*. This was strange but I requested someone to bring a ladder and put it on the jirga building. The girl climbed on it followed by me. When she reached to the top, she raised her full voice and said: 'Oh, women, girls of this village, don't cry if some man wants to take your honor. My fault is that I cried and called to save my honor safely. Today I am also dying along with the perpetrator because I cried for help.' She then asked me to come down and asked the Jirga to kill her. There was pin drop silence at the *Hujra*; I opened the discussion again inviting jirga to look in depth at what the girl is saying. Discussion started again and at the end it was decided that in such scenario women should be left while only man should be killed. That became law for rest of the area later on.⁴

Pukhtoon and Baluch society are male-dominated. The veil system is an obstacle for women coming forward and actively participating in the decision-making process of the Jirga (Gohar 2012: 54). Oppression by Jirgas has not been uncommon, as in Haripur, June 7, 2011, when a Jirga ordered a middle-aged woman to be dragged out of her home and forced to parade naked on the street as a punishment. Pakistan has not seen Afghanistan's innovation with Women's Jirgas and Women's Shuras as a balance and interlocutor with traditional male dominated Jirgas and Shuras (Braithwaite and Wardak2013; Wardak and Braithwaite 2013). This is an important deficit for Jirgas in Pakistan, not only on rights grounds. The evidence from the micro-sociology of restorative justice conferences is now that the most successful conferences have higher female to male ratios; the turning points of conferences are predominantly a result of emotion work by female participants; though not all females participate in the crucial emotion work that drives this result and of course there is much more to the specificity of the emotion work required for successful restorative justice than simply getting gender balance right (Rossner 2013). A police superintendent interviewed in Baluchistan who had had considerable experience of women participating in both Jirgas and *Muslahathi* Committees said that he found the participation of women often 'softened the hearts of men'. One of the

⁴For a television play in Pushto written by Ali Gohar about this case, see

reasons we explore the *Muslahathi* Committee hybrid in this article is that it may be easier for rights institutions to demand that a justice institution that is a hybrid of indigenous custom and formal justice gradually increase its representation of women. This promise has been realized by *Muslahathi* Committees chaired by women outside the tribal areas, but never in tribal areas. Only a tiny proportion of the *Muslahathi* Committees in tribal areas have any female members.

In many cultural contexts the indigenous response to a proposal that women should be included on a Jirga is that this would not be a Jirga according to tribal tradition. Policy interveners from afar can find it more appropriate to respond by saying ‘Only you can judge what is necessary to retain the integrity of your culture. Just let me say when I was a child there were no female lawyers or police in my home city. In just one generation there are now many. There were also no female politicians, but in that case it was Pakistan who had its first female Prime Minister twenty years before Australia had its first one.’ One UN Women leader in Pakistan argued that being a lead participant in Jirga who the parties nominate as decision-making members is like being a lawyer in that the parties want to be represented by someone who will be effective in understanding their case or representing their side of it. Therefore, programs to train women in how to take leadership in Jirgas and *Muslahathi* Committees, particularly training in key specializations like tribal and state land law, can result in gradually more women being chosen because of their expertise.

Rural rule of law vacuums and the Taliban

The rise of the violent jihadist group, Jamaat-ul-Mujahideen Bangladesh in the 2000s (ICG 2010; South Asian Terrorism Portal 2012) and the Afghan Taliban in Kandahar from 1995 (Braithwaite and Wardak 2013) fit Kilkullen’s interpretation of ‘armed rule of law movements’ seizing power. The Taliban attained power in Kandahar because this was a province where a multitude of armed gangs controlled different parts of the countryside, raping women with impunity, shaking down farmers at one roadblock after another as they attempted to get their produce to markets. The Taliban were popular at first⁵ because they put an end to this, convening Sharia courts that delivered brutal Taliban justice. Kilkullen argues that insurgencies have built rural power bases in this way at least since civil war in ancient Greece (Kilkullen 2011). Throughout human history anarchic rule of law vacuums have attracted the most tyrannous forms of militarized power.

The Swat Valley in North-West Pakistan was like many remote parts of developing societies in that feudal forms of governance lingered much longer than in major cities and their hinterlands. Until 1969 in the Swat Valley justice was delivered by Pukhtoon Jirgas with appeals heard by the court of the feudal lord (*Walai*). This justice had its deficiencies, especially with regard to the rights of women, but it had the virtues of being speedy and was granted legitimacy by citizens. Governance reform in the Swat Valley from 1969 brought justice under the sway of state prosecutors and courts. This investment in statebuilding was hampered by embezzlement of funds provided for justice system development and routinized demands for corrupt payments in return for decisions by officers of the new system. Poor people also could not afford lawyers’ fees. Rural folk could no longer get vital matters

⁵A senior Pakistan police commander who provided four pages of comments on our draft could have been speaking of Afghanistan as well when he said (of Pakistan): ‘Insurgents initial impact of speedy justice was good, and welcomed by the people but later on it disappointed the people as it was brutal and against the *Quran* and *Sunnah*.’

like land disputes settled. This disrupted economic development. When frustrated litigants bribed court officials to get disputes settled in their favour, the other party often retaliated with vigilante violence. The substitution of violence for adjudication created an even more anarchic world even riper for picking by an insurgent group that could promise to restore order and uncorrupted courts. This is what the Pakistan Taliban did in the Swat Valley (Amin 2013:151; Hussain 2013:88-89). As the ICG (2013:5) put it: 'Most accounts of militancy in Swat since 1994 identify public disenchantment with a sluggish justice system as the main catalyst'. A fundamental reason that revenge violence escalated in the Swat Valley to create a climate of disorder was that murder cases that formerly took 10 days to be adjudicated under the justice of the royal court now took 10 years, during which one revenge killing led to another. We must balance the books here by saying that in our research we were also told some stories of Jirgas protecting the most powerful landlords, of Jirgas forcing poor people to pay debts to wealthy businessmen that were accrued fraudulently. The Taliban also built popularity by then stepping in to sanction those landlords through their courts and to waive those fraudulently imposed debts of the poor.

Jirga Hybrids in Response to assassination of Jirga leaders

In FATA where Pakistan borders Afghanistan, the Pakistan Taliban consolidated their power in areas under their control and sought to support the seizure of power in new rural domains by assassinating more than 700 *maliks* who convene and lead Jirgas. Jirgas are large public gatherings; any big gathering in an area resisting surrender to full Taliban control is a magnet for suicide bombers. Hence, Talibanisation in Pakistan, as in Afghanistan, has sought to attack the authority of traditional village Jirgas

One good response is for the state to compete with insurgent justice by providing better access to less corrupt justice of its courts. A complementary possibility is to create state-non-state justice hybridity that offers state protection and encouragement to traditional justice. This means setting out to increase both access to the justice of the courts and access to traditional justice as a more legitimate response package to a rule of law vacuum than militant-led courts. This reform ideal is of a state justice that enables access to traditional justice and a traditional justice that enables access to state justice. It also means rethinking traditional justice as a check and balance on brutal and corrupted elements of state justice and state justice as a check and balance on brutal and corrupted elements of traditional justice (Forsyth 2011). Finally it means asking the simple question of what is actually working around here to give people some protection from violence.

A unique hybrid emerged in Pakistan as a follow-up by the head of the Khyber Pukhtoonkhawa province Police, Malik Naveed Khan, to his attendance at a United Nations Training Workshop on Restorative Justice in Japan in 2002. He followed up by organizing a conference on restorative justice of leading justice thinkers from across Pakistan, with heavy representation from the tribal regions. In 2008 (following some preliminary experimentation in 2006-7) these conversations blossomed into a unique criminal justice innovation under the stewardship of Malik Naveed Khan, who for a decade was chief of the 53,000-strong provincial Police.

After an initial pilot in seven districts of Khyber Pukhtoonkhawa, the program spread to Baluchistan and in more limited ways in Punjab (24 police stations) and Sindh. *Muslahathi* Committees in these other provinces did not lean on Jirga traditions but on traditional justice institutions indigenous to those provinces, notably *Punchayat*, *Fasilo* and *Kacheri*

The United Nations Development Programme's 'Gender Justice through *Muslahathi Anjuman*' project had been active in three of the pilot districts since 2006. This program also included Jirga dispute resolution of a restorative kind. Its objectives were:

- To provide women victims of violence an alternative mechanism to obtain gender justice;
- To build the capacity of *Muslahathi Anjuman* for dispensing gender-responsive justice;
- To enhance public engagement with utilization of the services of *Muslahathi Anjuman*; and,
- To promote women's awareness of their legal rights and men's active participation in ending gender based violence.⁶

In addition:

Women Councillors' Associations were to be facilitated to monitor the implementation of all Project [*Muslahathi* Committee] activities with regard to access to, participation in, and results of mediation for women (Bhatti, Bakhsh and Khan 2010: 6).

These aspects of the Program were not sustained. The WCA and the UNDP program (which achieved comparatively modest throughput – 647 cases resolved between 2006 and 2009 (Fasihuddin 2010:142) - at high cost) ceased to function when the local government system was suspended by the Federal and Provincial governments. Moreover, while many women were trained in restorative justice principles by Just Peace International, none of these women became *Muslahathi* Committee leaders in the pilot areas, though women do participate in Committees on a 'needs basis'. District Police Officers can be criticized for failing to nominate women onto the Committees and failing to stand firm against male members who objected, as can the decision to leave all power on this in the hands of the District Police Officer (Fasihuddin 2010:133). Usually they appoint eight male leaders. Another failure in terms of the original pilot design was an intent to have the Provincial Human Rights Department engaged with monitoring the committees (similar to the accountability envisaged by Wardak (2006) and the UNDP in Afghanistan). This did not happen. In general, however, the Asia Foundation evaluation of the *Muslahathi* Committees was extremely favourable across other evaluation criteria, notwithstanding the fact that it had to operate in an environment where there were many suicide bombings, car bombs, rocket firings, gunmen putting the project at risk, and millions of refugees and Internally Displaced Persons in the province. Record-keeping had its failings (see also Fasihuddin 2010 whose discusses willful misrepresentation of statistics for the 2008 year), but

⁶http://www.gjtmap.org/reports_documents/faq.pdf. Accessed March 16, 2010

improved during the life of the pilot. A purpose-built room solely for the *Muslahathi* Committee was constructed inside the walls of each police station. In particular, the Asia Foundation evaluation concluded:

The mediation process was found to be very fluent, inclusive, respectful of the parties, empathic to the vulnerable, marginalized and the weak, and far more preferred than its counterparts (Courts, *Jirga* and radical avenues) (Bhatti, Bakhsh and Khan 2010: 13).

MCs [*Muslahathi* Committees] are also seen as evolved and reformed forms of traditional *Jirga*. It is therefore important to keep that organic link alive . . . Two fundamental differences between MCs and *Jirga* are that the latter do not have direct voices of the weak (women & vulnerable, in particular); and two, there are power dynamics of *Jirga*. It is recommended that a brochure should be developed highlighting the cultural and traditional richness of *Jirga* which MCs have imbibed and legal and rights based concerns which MCs ensure but *Jirga* are likely to ignore (Bhatti, Bakhsh and Khan 2010: 18).

The Asia Foundation evaluation recommended scaling up *Muslahathi* Committees to the entire province. This happened to the extent of more than 100 police stations in almost all Districts and it spread in substantial ways to other provinces. Police statistics for *Muslahathi* Committees in Khyber Pukhtoonkhawa Province indicate receipt of 14,539 criminal complaints in 2012, of which 13,699 were resolved by the Committees, with 840 referred to court and 7,314 civil cases were dealt with by the Committees, though 603 of them were referred on to court. This is actually a sharp fall since a peak in the year after Malik Naveed Khan retired, when 24,459 criminal matters and 10,324 civil complaints were received by the *Muslahathi* Committees in Khyber Pukhtoonkhawa. We have not been able to obtain statistics from other provinces. Bearing in mind normal levels of failure to record all cases handled informally by Committee members, this is a huge restorative justice hybrid by any international standard. We encountered cynicism about these police-promulgated statistics, however. It may be that some or many police commanders inflate the recorded throughput of cases to make their district look good in meeting program ambitions.

Land disputes are the most common civil conflicts dealt with according to these statistics, with business disputes (for example over unpaid debts that threaten violence in revenge) also common. Criminal matters are more or less equally divided between violent and property offences. Publicity for the program says it deals with only minor offences. In fact it has dealt with many multi-million land disputes and frauds, hundreds of murders, though reconciliations in serious criminal matters are referred to court for approval. In this respect the massive recorded throughput of cases invites criticism of the police for allowing the program to spread its tentacles well beyond the minor offences initially intended.

Hybridity and checks and balances on rights

State and non-state justice can be put in creative interaction to cover the human rights weaknesses of one with the strengths of the other. State-non-state justice linkage can also mean more resilient state justice and more resilient traditional justice. Both are thus more able to effectively compete with the courts of the insurgency. The promise of this possibility

is evident in the early history of the police station reconciliation committees. Consider the criticism of traditional Pukhtoon Jirgas that in the past they frequently gave a young woman as a bride (*Swara*) in compensation and as a bridge to peace between warring families or clans. If *Swara* is proposed on a *Muslahathi* committee, the police officer who is always present was trained to assert their role as an agent of the rule of law to say that *Swara* is forbidden under both state law and Sharia law. It is therefore unequivocally out of order for the *Muslahathi* Committee. The problem is that the initial training of police officers who specialize in attending occurred six years ago and there has been no funding for this in recent years. So the gap between promise and reality with this check and balance is probably widening. The members of the *Muslahathi* Committee are mostly more powerful men than the police representative. Police officers must therefore be trained to be assertive in defending all the rights provided for in the law, assured that in defending the rights in Pakistan law that they will be backed up by police superiors who are more powerful than the *Muslahathi* Committee members. The problem that would worry western restorative justice advocates of police empowerment to check abuses of traditional justice in this way is that they might use it to insist on more punitive responses than are settled in the circle, in particular more jail time. This they are not trained to do. Rarely would they be so culturally foolish as to assert themselves in this way against the will of the elders. So this is not a significant problem in the Pakistan tribal context. Actually, it is not even a major problem with police that attend restorative justice conferences in New Zealand, Australia and Canada.

What the police representative is trained to do in circumstances where there is evidence from either side of disquiet at the outcome is to remind the parties of their right to contest the decision of the *Muslahathi* Committee in the courts if they feel it is unjust. Again, renewed training of police officers is required to promote this kind of assertiveness on behalf of rights of access to the justice of the courts. Mind, not all the burden of checking and balancing on these rights matters rests with the police. Disputants are rarely supported by their own lawyers before Committees even on matters as serious as murder. However, it is common/usual for one of the members appointed by the District Police Officer to be a senior local representative of the legal profession. For example, when we visited the Abbottabad *Muslahathi* Committee both the President of the local Bar Association and another senior Bar Association office bearer were members. They were extremely sympathetic to the work of their committee, even though their association had been opposed initially. They saw it as helping restore credibility to the rule of law in their community. Abbottabad was where Osama bin Laden was killed and one of the 2002 Bali bombers captured in 2011. Legal notables also have a commercial interest in picking up some work when decisions are contested by the courts or sent for ratification by the court. More simply, in a hybrid rule of law institution they are listened to attentively both as respected elders but also as experts who contribute legal knowledge about human rights thresholds that must not be crossed. Another outsider who is there to check the rule of law in civil cases is the *Patwari*, who attends on a needs basis. The *Patwari* is a civil servant expert on land law and taxation and generally knowledgeable on civil and business law. So we can conceive the *Patwari* as a horizontal check on the police officer failing to stand alone to meet his rule of law responsibilities, and the police officer as a check on the *Patwari*.

One quite important accountability that exists with *Muslahathi* Committees, but not Jirgas, is a requirement to create an official record of what was agreed in each case, reasoning for it in serious cases, accounting for monies paid in, and whether follow-up occurred. This is available to all members of the community on a register, at least

in the well-managed Committees. Recording is particularly important to women's groups for family law cases to assist with keeping track of men who marry and divorce women in different locales. Women's access to the records is difficult in practical terms in many districts, however. Afghanistan's experience with recording such informal justice case outcomes shows the same reluctance as in Pakistan to create public records of private family matters (Wardak and Braithwaite 2013). Unlike this empirical experience from Pakistan, Afghanistan research reports resistance to record informally settled land disputes to avoid taxes, but most fundamentally to avoid the large bribes that normally must be paid to a judge to issue a land title order (Gaston et al 2013: 3,21; Wardak and Braithwaite 2013).

Slogans are also painted on the walls of *Muslahathi* Committee offices advocating respect for human rights, something that is not part of traditional Jirgas. Of course, however, these limited measures backed by limited training (Fasihuddin 2010) have often allowed *Muslahathi* Committees to perpetrate abuses of human rights even worse than those of the Pakistan courts. Committee members mostly keep silent on the issue of honor killing, which is common in Pakistan, failing their rights obligations. In Khyber Pukhtoonkhawa, honor killing is considered a family matter. Most honor crimes are not even reported to the police as family members and close relatives are involved. If a case is tried, perpetrators are mostly acquitted; courts defer to processes of family reconciliation. Similarly in elopement cases, *Muslahathi* Committees shy away from interfering, especially in rural areas due to the strong Pukhtoon code and fear of falling into enmity with the parties. This is an area where *Muslahathi* Committees and Jirgas come under heavy criticism from human rights activists.

Muslahathi Committees are institutions of deliberative justice in a local community. The deliberative democratic ideal goes beyond the notion of top-down checks and balances to the idea that state actors are also checked by citizens (Dryzek 2013; Braithwaite 2006). The problem with top-down accountability is that institutions like police forces are fish that rot from the head down. Arranging guardians in a hierarchy does not solve the 'Who guards the guardians?' problem. An $n+1$ th order guardian is no solution to the corruption of an n th order guardian as soon as the $n+1$ th order guardian is corrupted. Deliberative accountability responds to this challenge by organizing accountability in a circle where deliberative checks operate every which way upon all organizational and individual actors involved. At times *Muslahathi* Committees have operated as an effective check on abuse of police power. In some cases the elders in the Committee have walked out on their District Police Officer because his police were shaking complainants down. Sometimes in small ways like demanding payment for fuel if they are to go out in a police vehicle to investigate a matter; in other cases in big ways. This created political problems for these police commanders that they had lost the confidence of a large group of the most respected leaders in their community.

Police Chief Malik Naveed Khan and political party leader Imran Khan have been supporters of the *Muslahathi* Committee because they see it as one of a suite of paths to community control over what is called 'Thana culture' in the Pakistan police – discrimination against the poor and women, torture, brutality and corruption – leading to terror of the police among the vulnerable. The ambition, so far realized in only small ways, is that *Muslahathi* Committees might civilize and civilianize the police by bringing civil society, human rights NGOs and

lawyers into police stations when they are concerned about particular cases. Elders appointed to Committees usually have formidable local respect; when they raise concerns to senior police about how individuals are being treated, they tend to be listened to. In this sense, the Committee functions like a de facto Community Visitors Program that we see in the regulatory architecture of some prisons systems, in nursing home regulation and other institutions capable of coercion behind closed doors.

It would be a mistake to see *Muslahathi* Committees as always having richer checks against abuse of power than traditional Jirgas. Consider domestic violence. A strength of the traditional Jirga as an institution based in the *Hujra* in the midst of the village (as opposed to behind the walls of the police station) is that neighbours are required according to the Pusktoon code to enter a home from which they hear hitting or screaming. If necessary they remove the assailant from the house. This creates a communal din heard at the *Hujra*, or at least quickly reported to elders socializing in the *Hujra* at any time of day or evening. Elders bring men to the *Hujra* to tame and cool their emotions and listen to their story. Similarly women at home are approached by other women who listen to their stories. Female elders then share the woman's story from the scene with Jirga members who discuss the matter and sometimes ask the man, the woman and the elders who intervened all to attend the Jirga. If the elders are not satisfied, they go back to the woman to listen to her one-on-one or through elderly women. They may then sanction responsible parties, extract guarantees and agreement on what will be the consequence of breach of the guarantees, or send the case to the courts. Women may be advised to take refuge in the home of an elder. In other words, the *Hujra* permits proximity in space and time to check domestic violence that is audible to villagers but not from behind police station walls.

Most common types of women's victimization, such as these two from Ali Gohar's files, could be resolved just as well by a Jirga or a *Muslahathi* Committee:

A woman complained about sexual harassment by her supervisor. According to her organization the evidence was unable to prove her allegation. She was advised by activists to pursue the case in court and promised legal and moral support. This backfired when her alleged perpetrator sued her for a huge sum. Now she was alone to fight the battle and attend to her official duties in another city. Her opponent was financially and socially in a far better position and she felt very vulnerable. During the height of despair she was guided to an ADR specialist who contacted the elders of the village to which the man belonged. The elders not only persuaded the accused man to take back his case but also took sureties from the man that ensured his distance from her. The elders also provided their surety to the woman that in case of any threat the sureties would be paid to her and she would also be provided with all support that is mandatory under the code of *Pukhtoonwali*. This includes financial support, guarding her, standing by her and ensuring justice to her. In Pukhtoon society due to the shame factor the whole village ensures the word and sureties provided by their elders. More than six months has passed and the woman is pursuing her career without fear.

A woman was married by her parents to a husband in Punjab who posed as a bachelor although he was 55, while the parents of the woman told their daughter he was 25. After marriage she was shocked when she came to know that her husband was an old man already married with 5 children. She could not understand the language of her husband and his family. He started beating her almost every day for non-cooperation with his family members and with him. After some time, she was allowed to visit her parents. She approached the Women's Facilitation Centre Swabi for support to resolve her problem. The WFC team constituted a Jirga of local elders. The Jirga members negotiated a divorce since the woman was deceived and did not want to continue the marriage. The husband told the Jirga that at the time of marriage the father of the bride had taken money for the marriage. If that money were returned he would accept divorce. The father of the woman told the Jirga that he had spent that money on dowry that was still in the custody of the husband. After lengthy negotiations the divorce was agreed. Now the woman lives happily with her parents. WFC staff conduct regular visits to her.

Reducing cycles of revenge violence

The hybrid justice of Pakistan's police station reconciliation committees reduce cycles of vengeance killings, which are drivers of descent into civil war. Revenge is honorable and mandated in Pukhtoon culture. This is communicated in ancient proverbs:

A Pukhtoon never forsakes revenge.

A stone of Pukhtoon (enmity) does not rot in water.

If a Pukhtoon takes his revenge after a hundred years, it is still too soon.

Pukhtoon differs from western cultures in the way shame operates. Shame is particularly acute for victims of crime and must be cancelled through revenge. The cultural belief is that shame persists for victims until it is equalized through revenge (Gohar 2012: 106-7). The shame of one victim in a society brings dishonor upon the whole tribe. Revenge (*Badal*) is viewed as a way of achieving justice; '[*Badal*] is not a privilege but a right and duty of a Pukhtoon' (Yousufzai and Gohar 2012: 36). Culturally approved alternatives to revenge that are honourable are therefore important; the most important of these is the Jirga.

Here are some case studies of traditional Jirgas ending cycles of revenge or the risk of future renewed cycles from our research notes:

Both authors attended a Jirga at Sher Garh, Mardan District just south of the Swat Valley. Jirga members told us how in 2006 they had to deal with enmity between two villages in which 13 people were killed, seven in one village, six in the other. The villages were deserted. The Jirga appealed to them for peace and asked each to provide money on the table in the Jirga. Normally more blood money

would be paid in from the side who had lost only six. But the side that lost seven suggested equal amounts as a sign of respect for the elders. If one side resumed violence, the money would be forfeited to support projects in the community or for cases in which the poor needed financial help to be reconciled. Because murder allegations were before the courts, they asked the judge for permission to reconcile the feud. The judge granted permission and the feud was brought to an end. This Jirga had dealt with 80 murder cases in the memory of those present, all reconciled either with the murderer being released from prison or without the murderer being sent to prison.

In a village of District Swabi, five people were killed after taunting by women to take revenge for a brother and nephew killed in old enmities. This kind of taunting is a common Pukhtoon scenario in prompting men to jump in to kill. Two accused were arrested after ten years of looking for them. The Session Court, High Court, and Supreme Court all affirmed the death penalty. A mercy petition was rejected by the president of Pakistan and a date fixed for execution. People started to visit to farewell the men. Meanwhile the Jirga started efforts to save them. After day and night struggle for more than a week, the Jirga reconciled the parties through *Khuan Baha* (blood money) to the victim's family. A total of 7.5 million rupees, 1.5 per victim was decided. Such a huge sum was a big problem. The Jirga freed up money by selling some properties owned by the accused. The rest they contributed on their own (from the pockets of the Jirga members or the parties). The Jirga sent a letter to the President and Interior Ministry. The two condemned were released within a week. After reconciliation the victims pardoned the murderers again and took 5 million only. The money given by the Jirga members was refunded in installments within three years. The families now celebrate good and bad events together as one community (from Ali Gohar research files).

Story of a Hindu Doctor from Batagram: When Taliban in Swat were very active, I received a phone call from Taliban asking for pre-kidnapping ransom. First I took it as a joke and avoided the caller but then I started receiving calls more frequently and the caller started demanding Rs 7 million. Later my relatives and friends also started receiving calls from the same caller so as to convince me that they meant business. . . I informed the elders of the Jirga about the issue. The Jirga of the areas was called in which all influential people from different tribes participated. A decision was taken that if something happened to me, the Jirga would act on my behalf not only to protect me but also to take revenge as per the prevailing custom and traditions of the Pukhtoon code. They also announced a warning to Taliban that if the caller was from their side, they were ready for any sort of encounter as the Jirga would not allow Taliban influence in Batagram area in any form and by any means. The Jirga also sent a message to the government agency to protect me and my family and provide me immediate security. Media was invited by the Jirga to highlight the issue and the decision of Jirga was announced and publicized in the media. Along with the security agencies, local Jirga also took upon themselves to share the burden of guarding my home, business office and other movable and immovable property. This gave a strong message to the people who were threatening me on phone. The phone calls stopped immediately and I am feeling safe now (Just Peace International 2012: 58-9).

Now we consider some case studies from our field notes of hybrid *Muslahathi* Committees stopping vicious circles of violence (see X (2013) for more cases):

The Havelian *Muslahathi* Committee dealt with a case that they believed involved great risk of escalation because men were being taunted for being so weak to allow the other party to take their land without fighting for it. The land was extremely valuable (more than one billion rupees) and the disputes surrounding it had been before the courts for 60 years. On three occasions the parties had been to the Supreme Court over the land. In four meetings spread over one month the *Muslahathi* Committee settled this as a priority dispute because they believed it could lead to serious violence. One of the parties got more of the land than the other. But both parties were pleased to have it settled without losing the lives of family members.

The cycle of violence that was being settled on the day we visited the Havelian *Muslahathi* Committee in 2013 involved a dispute over money. In order to recover what a family believed had been misappropriated from them, they stole a truck belonging to the other family. This was avenged by an attack in which the person who stole the truck was murdered. The murderer had been in prison awaiting trial for five months. For two and a half years the village Jirga had been attempting unsuccessfully to settle this dispute. They had found it too hot to handle. So the parties agreed to try the *Muslahathi* Committee. The committee negotiated with them on possible lines of a restorative settlement for many meetings over four months. Finally they had taken *Waaq* and the parties assured us that a firm framework of agreement was in place. So much so that the media were in attendance to take photographs and interview the parties about the terms of an agreement that would end a feud the community was concerned could spin out of control. The Committee members were confident that because of the risk of violence the case posed, the murderer awaiting trial would be released on the order of the court with charges dropped. This was common. In fact we also met that day the parties to another case involving a cycle of violence in which two had been killed and one seriously injured over rights to collect money at a bus stand. A payment from one family of R 22,000 had been already agreed in this case. Again there was a recommendation that a man who had already served two years prison for murder would be released, which had been accepted by the court. They visited each other's homes after they reconciled and broke bread.

This was a recent case described to us by the Mirpur *Muslahathi* Committee in 2013. There were two tribes who had a claim over land that was being used by a famous public school. There was a fight over who were the true owners. Ten to 15 people were injured in the battle with six suffering bullet wounds. This was a great danger to public health and safety. After an incident between tribes like this, any member of a tribe is justified and honour bound in the eyes of the community to kill a suitable person from the other tribe. The Committee successfully resolved the conflict. The violence between the two tribes has ended and the school had certainty in its planning.

Cases like these, which are common as one moves from locale to locale, constitute a credible qualitative case that reconciliation committees of both kinds reduce violence capable of snatching many lives. Other cases described elsewhere X (2013) that saw large scale fighting and burning of houses show how dangerous cycles of violence were ended through the wisdom of *Muslahathi* Committee members. This evidence of violence reduction is not as credible as a randomized controlled trial, a kind of research that would be quite an accomplishment in a conflict zone where the Taliban operate! Yet in a tribal society where feuds escalate repeatedly among men who are routinely armed and crack shots, there is persuasiveness in this recurrent evidence of cases of terminating cycles where killing leads to more killing, where crime against women leads to murder to restore honour, cycling in turn to revenge killing. This kind of evidence is apiece with the English historical evidence that the institutionalization of courts in England made a large contribution to the massive drop in homicide rates after the fifteenth century. The historical record from Medieval England is of a land where revenge killings were rife, blood feuds endemic, where a road accident could spiral to revenge killing. Tort law arrived to provide an alternative honourable path in adjudication and compensation to revenge killing. (Cooney 1997). It is worth noting here that early modern courts were in many ways more like contemporary Jirga than like contemporary English courts. Until the nineteenth century English local courts were gatherings with a more participatory, noisy and a less professionalized and formalized character than today's courts. So were rural courts in the United States as depicted in saloon courtroom scenes of the Hollywood western.

While many police are cynical about restorative justice, our interviews with police reinforced the interpretation that *Muslahathi* Committees can interrupt spirals of violence. One commander said that in cases like fighting between tribes, 'we in the police used to just go in and arrest people'. In contrast, he said the *Muslahathi* Committee would apply Pukhtoon principles of parachute diplomacy, dropping in as peacemakers between the two fighting groups, attempting to restore calm by offering to organize medical care, transit to hospital for the injured, offering to mediate. In a sense these village elders were teaching younger police about their own traditions of peacemaking in the process. At this point, a *Muslahathi* Committee member who was present said 'We do, we have more patience. We cool down their emotions, listen, then dig out the root causes. Then the solution is easy when that is done patiently.' The younger man, the senior police officer, nodded agreement.

In the tribal areas of Pakistan, courts do not work well in ending cycles of vengeance compared to participatory justice which can be effective because the justice solution is agreed to, owned, by victims who feel shame for not having taken revenge. In a participatory Jirga, their need for honour, for taking control of the dishonor that has been done to their family, is acknowledged. Tribal Pakistanis tend to feel angry when their conflict is stolen from them (Christie 1977) by the courts. So it is standard advice to the young in tribal areas to stay away from the entrance to prisons after 4 pm. That is the hour prisoners who have completed their sentence are released. Gunning down unarmed prisoners at the moment of discharge is common. This is one reason the courts almost always agree to decisions of *Muslahathi* Committees to ask for release of prisoners as part of their reconciliation agreement, including in cases of murderers who admit the crime to the Committee. Most judges recognize that they do not have the capacity to deal with the root causes of a conflict, nor to accomplish reconciliation in the way Jirga-based approaches such as the *Muslahathi* Committee can.

There is compelling evidence from randomized controlled trials that Western restorative justice reduces the desire for vengeance among victims, thus reducing future crimes (Sherman and Strang 2011; Braithwaite 2002: 47). In conditions of an honour and revenge culture, these effects may be much more dramatic. Among the reasons an institution like the *Muslahathi* Committee can be effective in calming revenge is that it can draw upon a variety of deeply institutionalized anti-revenge norms that are part of the Jirga tradition. One is the *Kanrai* or *Teega*, a ceasefire/truce ritual (Gohar 2012: 67). This is about ‘parachute diplomacy’. Peacemaking Jirga members with white flags go between the fighting parties, even under heavy fire, often accompanied by women. These women attend with heavy symbolism, either without veils or carrying the Holy Koran in their hands. The *Teega* is represented by the laying down of a stone to solidify truce. Another relevant ancient institution is of the *Asthazai* or diplomat. Diplomats are given safe passage during a conflict. They carry messages between communities in conflict, learning traditions of language use that defuse tension and prepare the soil for further communication. Western historians tell us that institutionalized diplomacy is a Renaissance invention that spread from Venice (Mattingly 1955).

Nanawaty is perhaps the most important of the ancient institutions for averting revenge. *Nanawaty* involves a combination of a repentance ritual and asylum. It means walking to the home of someone wronged with an attitude of humility, sorrow and apology, ‘giving space to the other person to respond with “grace”, so precious to Pukhto’ (Yousufzai and Gohar 2012: 32). If *Nanawaty* is granted, the perpetrator gets asylum from revenge by the whole community, at least temporarily while mediation of restitution, public apology and restoration of honour for both sides proceeds. Finally Puktoon tradition provides for scaling up local Jirgas to a Grand Jirga or Loya Jirga when conflict wracks an entire region. For example, when all the tribal agencies of FATA get together to settle a big issue it is called a ‘Tribal Loya Jirga’.

As one sees in many parts of the globe, warlike cultures that put a strong emphasis on avenging honour are often also cultures gifted at peacemaking, providing institutionalized channels for peace. Bacha Khan is the most famous Pukhtoon peacemaker, leading a pre-Gandhian nonviolent struggle against British colonialism from 1910 that helped inspire Gandhi. His philosophy was to see both violent and the nonviolent strands in his culture, as in all cultures, and then strengthen the nonviolent ones:

Is not the Pukhtoon amenable to love and reason? He will go with you to hell if you can win his heart, but you cannot force him even to go to heaven. Such is the power of love over the Pukhtoon (Bacha Khan quoted in Gohar 2012:141).

Bacha Khan developed principles to which his followers swore allegiance, including:

I promise to refrain from violence and from taking revenge.
I promise to forgive those who oppress me or treat me with cruelty.
I promise to refrain from taking part in feuds and quarrels and from creating enmity.
I promise to devote at least two hours a day to social work [volunteerism that makes Jirgas work; Gohar 2012: 142].

Tribal Baluchistan suffers from both Taliban and Baluch nationalist insurgencies and from conflict between these insurgencies. One point informants

made about Baluch independence fighters in the mountains was that a large proportion of them are there to avenge a relative killed or “disappeared” by the state. Responsiveness to Baluch culture therefore requires not only a top-down peace that addresses root causes like expropriation of Baluch resources and discrimination against Baluch; it also requires local *Jirgas* in which representatives of the state listen, pay blood money and apologise for killing specific relatives so that the individual fighter can honourably hand in his weapon and commit to peace. Another traditional justice road to peace not yet taken.

Legitimacy challenges

At a meeting with a large western rule of law donor in Pakistan, we argued how unusual *Muslahathi* Committees had been in operating years after funding shut down. They survived totally on volunteer labour of the Committees and of Just Peace Initiatives (who continue to provide unpaid assistance to Committees). Committee members pay their own fuel and telephone bills for their volunteer work and for the food after cases are resolved. As we have illustrated, it is also common for members to assist poorer perpetrators to pay recompense to their victims. One case involved IDPs who lost everything after fleeing fighting between the army and Taliban in the Swat Valley. The local *Jirga* hosted more than a hundred IDPs in the *Hujra* and local homes. In one of these overcrowded situations, people living in the ceiling of a home were peering into the adjacent home, invading the privacy of women. Violence erupted. Homes were burnt down. *Muslahathi* Committee members provided building materials to Swat Valley IDPs who could not pay for them to rebuild a house they had destroyed. They also joined the perpetrators in the building work and encouraged community members from all sides to assist. We were told of other cases where this had happened. So our argument to the aid official was that this had been aid with unusual sustainability as a result of volunteerism. She emphasized that there were problems, nevertheless, from the absence of continuing investment in human rights and gender rights training for participants in the process.

The aid official’s response was to agree that she had visited *Muslahathi* Committees and was impressed with what they were accomplishing, but that opposition from rights groups was part of what made renewed support a challenge. The International Crisis Group (2009) in its Pakistan reports also consistently opposes support for institutions of justice with a traditional *Jirga* character, arguing that investment should be directed to formal state justice. Then she said that another obstacle was opposition to the *Muslahathi* Committees from the legal profession. At that point we said that our interviews revealed a great deal of such fervent opposition but also large pockets of *pro bono* support from Pakistani lawyers (especially in tribal areas) who believed the Committees were strengthening justice delivery and preventing violence in their communities. Was not much of the opposition driven by the fact that the legal profession is an interest group that seeks rents from western aid, indeed that embezzles rule of law assistance on a regular basis? There was agreement on all these things but insistence that the legal profession nevertheless constitutes a formidable legitimacy threat to the *Muslahathi* Committees. Moreover, as we have documented, the legal and human rights critics can tell some troubling stories of abuses at the hands of Committee

decisions (while glossing over stories of abuse of power by state justice initiatives).

Another structural problem with the legitimacy of something like the *Muslahathi* Committees is that in small towns and rural villages support is strong. But visit the law school of metropolitan universities and opposition is vociferous. These legitimacy problems became more profound when the Sindh High Court in April 2004 declared *Jirga* (*Faislio* in Sindh) unlawful in Sindh and unconstitutional, finding that the

Jirga system is not a creation of the Constitution or law. . . Functions which are exclusively to be performed by the Courts of law are being performed by the *Jirgas* thereby usurping the power of the Courts ---*Jirgas* as such are a parallel judicial system which by themselves are unlawful and illegal and are not protected by any law' (Shazia vs Station House Officer 2004).

Legitimacy problems grew with the initiator of the program being accused, though not charged, with demanding corrupt payments by a defendant in a corruption case involving arms sales to the Pakistan police. There is also competition and critique of the *Muslahathi* Program from within the Pakistan police. The longer version of this paper (X, 2013) documents formidably inaccurate attacks on the *Muslahathi* Program for corruption and embezzlement of Australian government funds that the Australian Federal Police deemed unworthy of formal investigation, though they reopened the matter for consideration when we sent them a draft of our paper. In interest-group contests for monopoly over local justice, the police corruption card can be played with unbounded extravagance in societies where police corruption is normal and expected.

One basis for opposition of some police leaders is the fact that the *Muslahathi* Committees are dealing with thousands of civil cases on matters like land and business disputes that are not regarded as police matters (Fasihuddin 2010: 133). A counter-argument is that this civil dispute resolution is critical crime prevention work because civil disputes spiral into violence and feuds in a revenge culture. *Muslahathi* Committees manifest a pre-Peelian conception of police as a generalist regulatory institution not confined to criminal breaches. They are police institutions that regulate any conflict that might induce deep feelings of injustice and anger in the community (Dinnen and Braithwaite 2009). *Muslahathi* Committees deal with business and land conflicts, regulation of gambling, water conflicts, environmental disputes, disputes over roadways, consumer protection matters, and the whole gamut of civil regulatory concerns.

One approach to these legitimacy challenges in the context of a ruthless criminal justice politics is for donors to support the preservation and protection of traditional Jirga justice in rural tribal Pakistan where traditional justice practitioners are targeted by militants, rather than joining forces with militants to help crush them (see Wardak and Braithwaite 2013). And to orient and condition that support toward women brave enough to participate in Jirgas and to human rights training and legal checks on rights abuses by Jirgas (see Wardak's (2006) analysis to this effect for Afghanistan). Finally, where local Jirgas decide that they would like the option of taking some of their Jirga-style deliberation into a hybrid state-non-state reconciliation committee inside the walls of a police station that might be funded on the basis of this choice by local civil society. So legitimacy challenges might be softened by channeling funding to alternative dispute resolution in civil society, with civil society deciding whether some of it should go to a civil-society-police restorative justice hybrid. Lawyers interviewed in 2013 frequently responded to that suggestion by arguing that ADR under the control of the legal profession, staffed by law graduates, was the better approach. Court-facilitated ADR under the provisions of the Small Claims and Minor Offences Court Ordinance, 2002 was favored because of the statutory footing of this program. This top-down ADR works by courts referring cases to a list of retired judges and lawyers who are paid but untrained in restorative justice (though some may have received some ADR training in the western lawyerly tradition). In conflict zones where people are targeted for assassination because of their justice politics, it is even more difficult than in the west to separate an assessment of the effectiveness of restorative justice from responsiveness to the politics and legitimacy of justice.

Conclusion

An impressive thing about *Muslahathi* Committees is the volunteerism that has sustained the fruits of a modest donor investment of approximately \$90,000 years after it was spent. Volunteers continue to be motivated by the social status of being selected as a suitable elder to be a Committee member and by the feeling that they are making a contribution to reducing violence in their community. It is a remarkable thing that one of the largest restorative justice programs (restorative justice hybrids) in the world has no public funding apart from the salary of the police officer who attends. A senior policeman who saw great positives in the program, nevertheless issued this caution:

[*Muslahathi* Committees are] said to be cost effective but most of the time both parties have to organize grand feasts and at times gifts are offered to the members costing much to get a decision. Women related matters get due importance and justice is done to them. Political interference cannot be overlooked in these committees. There could also be vested interest and chances of corruption cannot be ignored. Police self-projection is another point to be considered as it may take all the credit of the reconciliation done by the *Muslahathi* Committee.

Case throughput has declined from its 2011 peak and in 2013 the program shows signs of struggling from under-investment in training and monitoring. Particularly needed is training of women elders and their proactive placement on *Muslahathi* Committees. Pukhtoon and Baluch rural republicanism flourished long before Jefferson and the French revolution; it has been more resistant so far to feminist politics than the United States and France. There is

nothing inherently permanent about that.

Another huge limitation on the potential of *Muslahathi* Committees to make a contribution to peacebuilding is that the most dangerous rural areas of Pakistan border Afghanistan and are militarized in ways that crush women's empowerment. There are no police stations (though new initiatives are starting *Muslahathi* Committees in some of these areas); the military are responsible for policing, working with tribal militias armed with automatic weapons that are a police of sorts. The many reasons why it is unwise for soldiers to take over community policing functions in places like Iraq, Libya, Syria and Pakistan are not the topic of this article. In the context of FATA, PATA and Baluchistan, however, we point out that another good reason to put police rather than soldiers into front-line community policing work is that police stations can support and protect the work of Jirgas behind their walls in the areas where their peacebuilding impact is most needed.

It has been shown that rule of law vacuums attract terrible tyrannies. Western rule of law models provide an incomplete answer for how to combat them. A saving grace is that eastern deliberative democracy in the judicial branch of governance shows more promise than deliberative democracy in the executive or legislative branches. It has long been an eastern practice in advance of western democratic theory. For centuries it has allowed reconciliation that tribal parties see as workable win-win agreements. These prevent the spread of revenge from family to family, village to village. They end the blood feuds that create the conditions of anarchy and violence that have allowed the Taliban (and civil war) to expand. In Pakistan's tribal areas state law defers to non-state justice to end blood feuds because Jirga hybrids are better at it. They can also be better at reconciling incompatible Islamic and Sikh justice claims through forging workable agreements. They can create a space where a young woman can challenge her execution for 'adultery'. And they can be better at beginning to open wider spaces for legal pluralist deliberative democracy. Legal pluralist flexible hybridity is the relevant strength in all of this. It is also the weakness unless responsive hybrids are checked by inflexible rights constraints in formal law, feminist politics, and more.

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