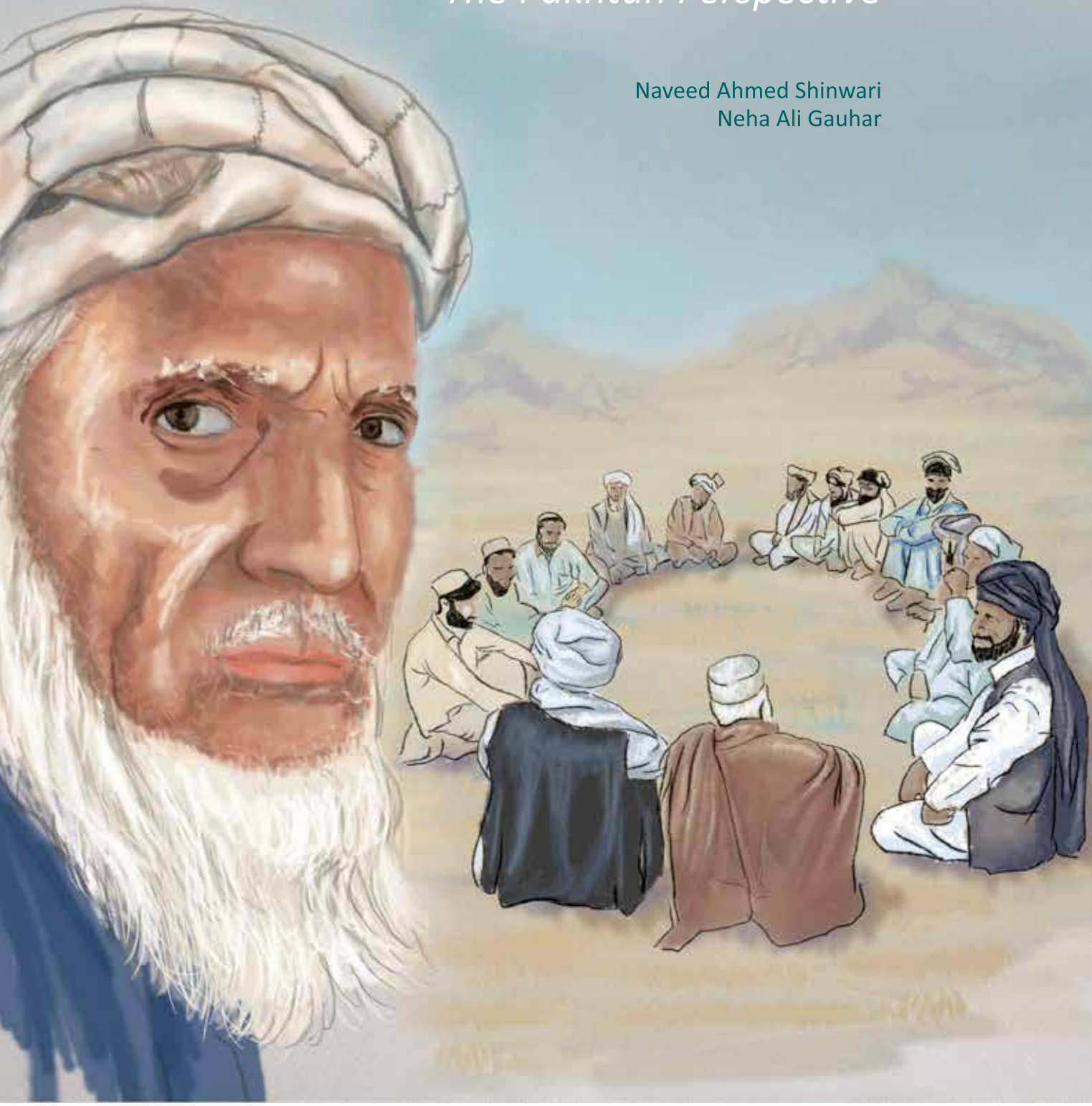




# Understanding Justice Systems of Khyber Pakhtunkhwa, FATA & Balochistan

## *The Pakhtun Perspective*

Naveed Ahmed Shinwari  
Neha Ali Gauhar



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Community Appraisal & Motivation Programme (CAMP)

**Understanding Justice Systems of Khyber Pakhtunkhwa,  
FATA and Balochistan: The Pakhtun Perspective**

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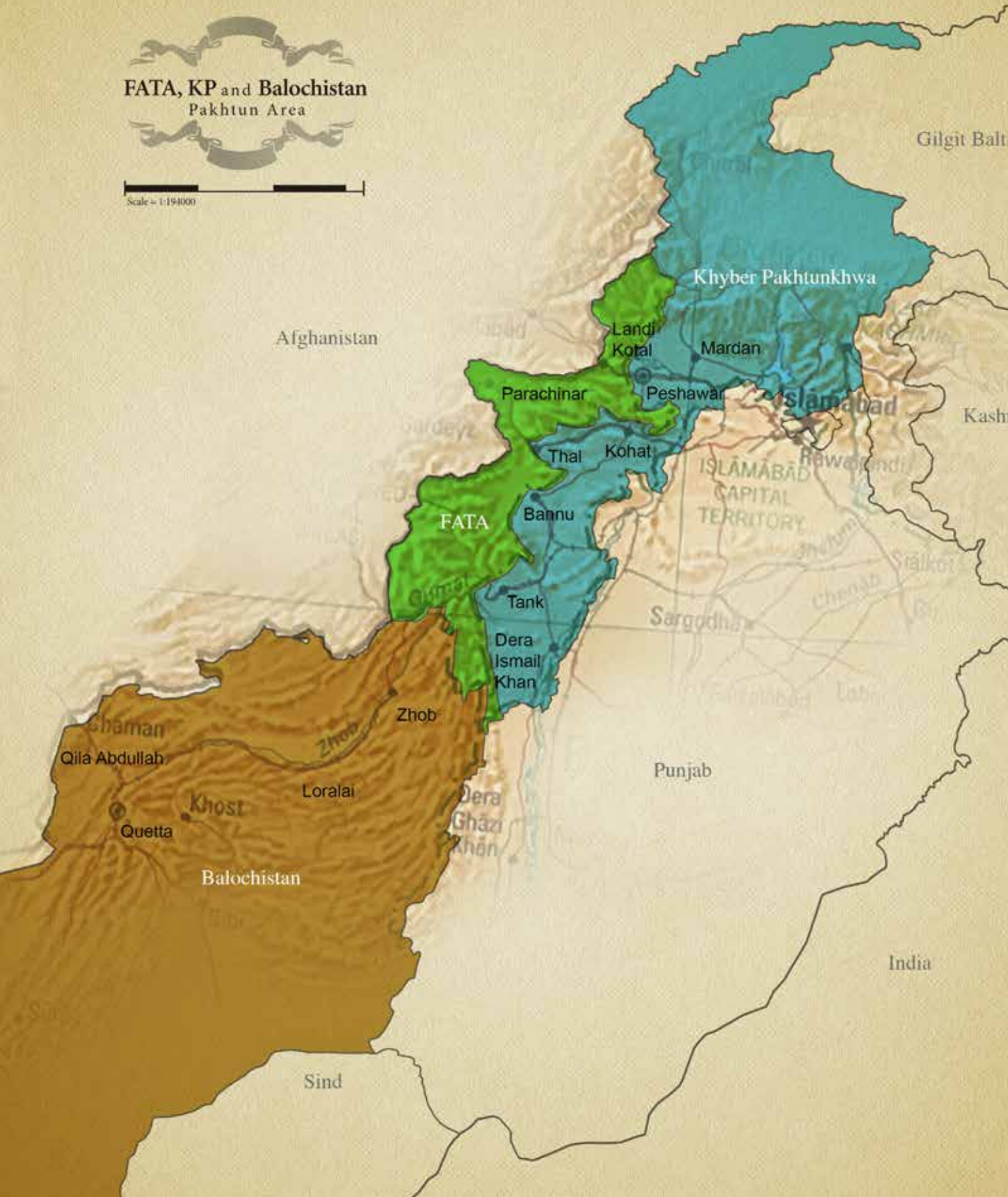


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**FATA, KP and Balochistan**  
Pakhtun Area

Scale = 1:194000



## List of Acronyms

Alternate Dispute Resolution	ADR
Anti-Terrorism Courts	ATC
Awami National Party	ANP
Convention on the Rights of the Child	CRC
Community Appraisal and Motivation Programme	CAMP
Code of Civil Procedure	CPC
District Coordination Officer	DCO
District Police Officer	DPO
FATA Tribunal	FT
Federally Administered Tribal Areas	FATA
Federal Board of Revenue	FBR
Federal <i>Shariat</i> Court	FSC
Focus Group Discussions	FGDs
First Information Report	FIR
Frontier Regions	FRs
Frontier Crimes Regulation	FCR
Government of Pakistan	GoP
Human Rights Commission of Pakistan	HRCP
International Convention for the Elimination of all forms of Racial Discrimination	ICERD
Internally Displaced Persons	IDPs
Key Informant Interviews	KIIs
Khyber Pakhtunkhwa	KP
<i>Musalihati Anjumans</i>	MAAs
National Assembly	NA
National Finance Commission	NFC
<i>Nizam-e-Adl</i> Regulation	NAR
Non-Governmental Organisations	NGOs
North West Frontier Province	NWFP
Pakistan Penal Code	PPC
Political Agent	PA
Peshawar High Court	PHC
Post Crisis Needs Assessment	PCNA
Provincially Administered Tribal Areas	PATA
Supreme Court of Pakistan	SCP
Tehreek-e-Nafaz-e- <i>Shariat</i> -e-Mohammadi	TNSM
Tehreek-e-Taliban Pakistan	TTP
United Nations Development Programme	UNDP



## Preface

Historically, individuals, social groups and societies have disputed with and competed against one another over scarce commodities and resources - land, money, political power, and ideology. In many parts of the world, traditional systems of justice and dispute resolution are being approached to resolve conflicts, and to ensure peace and stability within local societies or tribes. Often those systems are suitable to resolve modern, current conflicts because they satisfy the local cultural and religious sentiments. This aspect, the traditions related to religion and local codes of justice, often make them more successful than the contemporary or modern justice systems. The existing body of literature confirms that the nature and causes of conflicts and the mechanisms for resolving them are deeply rooted in the culture and history of every society; they are in many important ways unique to them.

However, such traditional systems are being criticised for their incongruence with modern justice systems or their tendency to violate some very basic principles of human rights, especially women's and minority rights.

The Pakhtun *Jirga*' is one such traditional or tribal justice system being practiced by the Pakhtun or Pashtun ethnic group that lives in Pakistan and Afghanistan. There are over forty million Pakhtuns living on both sides of the Durand Line in Pakistan and Afghanistan. Pakhtuns inhabit an area of more than 100,000 square miles bisected by the Durand Line since 1893. In Pakistan, Pakhtuns reside in Khyber Pakhtunkhwa, Balochistan and the Federally Administered Tribal Areas (FATA). In addition, Karachi also hosts some 3 to 4 million Pakhtuns who migrated from different parts of the Pakhtun dominated areas of Pakistan.

The subject of this report is the opinion of Pakhtun people living in Khyber Pakhtunkhwa (KP) and Balochistan with regard to the systems of justice in those Provinces. In 2010, similar research was conducted among the Pakhtuns in FATA. In this report, comparisons between these provinces and FATA are presented.

The judicial structure in Pakistan is derived from the Code of Civil Procedure (CPC) 1908 and the West Pakistan Civil Courts Ordinance (II of 1962). However, the formal court system has evolved to meet circumstances demanding changes; one of the latest ones was the addition of the *Nizam-e-Adl* courts as part of the agreement to resolve the conflict in Malakand Division of Khyber Pakhtunkhwa in 2009.

The approach of Pakhtuns is distinct from the Pakistani judicial structure when it comes to accessing justice in those areas where Pakhtunwali, the "ways of the Pakhtun." prevails. To them '*Jirga*' is still the preferred form of informal or parallel justice mechanism. Formally, the *Jirga* is still the mechanism for dispensing justice and resolving conflicts in the FATA under the Frontier Crimes Regulation (FCR). However, *Jirga* is informal, i.e., not codified in Pakistani civil law in other parts of Pakhtun dominated areas of Pakistan.

On the other hand, in Pakistan, it is generally perceived, by the Pakhtun, that the formal justice system does provide a system that is comparable to the *Jirga*. Generally, the Pakistani public lacks confidence in the formal justice system, which has undermined the Rule of Law and contributed to rising violence, including crime, terrorism and human rights abuses. For a majority of Pakistanis, the formal justice system is seen as expensive; has no provision for compensation for victims; is slow and is widely perceived as corrupt, biased and dominated by the rich. These beliefs provide



a conducive environment for the *Jirga* to remain the preferred option over the modern justice system in Pakhtun areas. Hence such a situation has provided a favourable environment for *Jirga* to flourish and remain the only available option for the Pakhtun community.

The findings of CAMP's two research studies on *Jirga* – this one and the one conducted in 2010 on FATA – suggest that underestimating the efficiency and effectiveness of *Jirga* would be a mistake, especially because it plays an essential role in the maintenance of social order and has proved successful in the past. It is inexpensive, speedy and accessible to the poor. It is concluded that traditional approaches to conflict resolution are able to deal with conflict before they spread because of their decentralized and local availability, plus the confidence gained in the cultural context and belief systems.

In developing this understanding, many people have contributed to this report. The compilation of this report would have never been possible without the active involvement and intellectual insight of 2,400 men and women respondents of Khyber Pakhtunkhwa and Balochistan, who are most familiar with the subject. They were extremely helpful in sharing their knowledge of and insight into the institution and dynamics of *Jirga* and the tribal way of life, which have remained a mystery to the outsiders till this day. Their willingness to contribute to this report helped Community Appraisal and Motivation Programme (CAMP) develop a perspective on various aspects of *Jirga*, which is the focus of this report.

I am equally grateful to the key informants and participants from the focused group discussions, who willingly shared their knowledge and experience on the subject, without which it would not have been easy to develop a Pakhtun perspective on the justice system.

The enumerators from Khyber Pakhtunkhwa and Balochistan, male and female, deserve special recognition for their commitment in carrying out the survey in rather difficult conditions and in some remote areas. We are extremely grateful to their contribution.

Neha Ali Gauhar, the deputy researcher and co-author of this report deserves special appreciation for contributing to this report. A

lawyer by training and a Human Rights activist, Neha did a wonderful job in highlighting and comparing the human rights issues in the informal justice system, especially that of women and minorities in the Pakhtun region.

Fareeha Sultan, project manager for CAMP's Rule of Law Programme, deserves special appreciation for coordinating numerous activities and achieving some very ambitious and difficult targets for the project. I appreciate the efforts of Naveed Akhtar, field researcher/consultant, for assisting Riaz-ul-haq, our Senior Manager Research/surveys in coordinating field activities in the field.

I am very grateful to Riaz-ul-haq (Sr. Manager Research), who assisted this research in terms of coordinating field work, organising enumerators trainings, and focused group discussions, supervising and managing the data gathering and data feeding, and, finally, providing me with cleaned data sets. Special thanks to Mariam A. Khan our Director Programme and Meher Khan for their support and proof reading the report. My appreciation goes to Irum Ali Khan and Aezaz Khan for their help in compiling information on the structure of formal justice system in Pakistan and their support in proof reading.

Without the generous financial support of the German Embassy, Islamabad, this research would not have been possible; I am extremely grateful. Special gratitude to Ms. Barbara Voss, First Secretary Political and Mr. Andreas Dauth, Third Secretary Political for their constant support and encouragement.

Finally, Kris Merschrod, deserves recognition for having provided timely and valuable services in editing the report. Kris has been interested in both Pakhtun culture and in my work since we met in Peshawar when he was working on a survey of FATA in 2008. He is a US Sociologist who has been working on development programmes for over 30 years.

All views expressed in this report are solely mine and Neha's, as are any mistakes and errors.

**Naveed Ahmad Shinwari**

Chief Executive (CAMP) and Principal Author

## Executive Summary

This report is an expression of Community Appraisal and Motivation Programme's (CAMP) mission to understand the Pakistani Pakhtun perspective on access to justice and their way of resolving conflict.

This report is based on both qualitative and quantitative data. For the qualitative information, twenty-four focus-group discussions (half male and half female) and sixty key informant interviews were used to gather insights and opinions. Minutes were recorded, analysed and utilised to both write this report and to inform the design of questionnaires. Because the FGDs were used to inform the design of the final survey questionnaire, not all of the questions in the survey were asked or discussed in the focus groups. Background and historical material used in the report came from a review of historical books, newspapers, reports, articles, journals, and the experience of CAMP programmes.

The quantitative part was planned to incorporate the perceptions of 2,400 men and women on different aspects of justice and dispute resolution affecting the life of the people of KP and the Pakhtuns of Balochistan. The statistics were drawn from interviews and included the perceptions of 50.27% men and 49.8% women. The objective was to sample enough adult males and females, urban and rural, to achieve, a 95% confidence level, a 2% confidence interval for their opinion on key issues related to *Jirgas* and the system of justice for the people of KP and Balochistan.

In this report, the anecdotal findings from the qualitative methods is followed by the statistical findings from the quantitative methods. Often the qualitative findings reflect generally held beliefs about the traditional system of justice, but the quantitative findings

show more current opinions weighted by the percentage of the males and females who hold the opinions at the present time.

The report begins with an overview and history of the political and administrative structure of FATA, Khyber Pakhtunkhwa and Balochistan - the Pakhtun areas of Pakistan except for Karachi – where this research was conducted. Understanding of this context is a necessary introduction to the formal court system and its evolution in those same areas. These two historical and descriptive introductory chapters are followed by a chapter on the *Nizam-e-Adl* as an important, modern, perhaps, evolutionary, transition that bridges the traditions of the Pakhtun, *Shariah* Law, formal British based systems, and the result of negotiated conflict resolution. The formation of the *Nizam-e-Adl* system received a great deal of international coverage and generated heated debate within the Pakistani partisan political system. The results of the research are interesting and provide insight that may be useful for judicial reform and the evolution of *Jirga*-like conflict resolution.

After the background, the research begins to meticulously peel back the many layers that form the context of justice. The report begins with a chapter on the knowledge of the people at the community level concerning the formal and informal justice systems and their use. The chapter on awareness is followed by the opinion of the people towards the justice system and the key personalities outside of the immediate community. It is satisfying to know how aware people are of the systems and it is also necessary to understand that level of awareness and the opinions that go with the awareness when considering reforms.

The chapter on the traditional *Jirga* is then



presented, describing this traditional and culturally rooted system, the people's awareness and experience with the system, plus their opinion from perspectives used throughout the report – fairness, access, bias, human rights, and concordance with the Qur'an. A chapter on Fundamental Human Rights is inserted as a reminder of international and modern perspectives before returning to the subject of women's rights and the *Jirga* system as a special chapter.

To bring the *Jirga* and formal justice systems into the present context of conflict, a chapter is devoted to justice and conflict dynamics. This leads the reader to a comparative chapter on the legitimacy of the *Jirga* and formal justice systems from the opinion of the Pakhtun.

The final chapter returns to the *Jirga* and perspective on ways forward toward improving access and the quality of justice.

The findings and surprises are too numerous to cite in an executive summary. Instead, the reader is invited to reflect on the themes above, chapter by chapter, and to ponder the dialectic between the qualitative, commonly held beliefs of both Pakhtun and outsiders, and the quantitative statistics with which we weigh the debate between the male and female Pakhtuns, as they openly shared their opinions about justice and conflict resolution.



# CHAPTER: 1

## The Political and Administrative Structure of FATA, Khyber Pakhtunkhwa and Balochistan



## THE POLITICAL AND ADMINISTRATIVE STRUCTURE OF FATA, KHYBER PAKHTUNKHWA AND BALOCHISTAN

### Introduction

This chapter explains the political and administrative framework of the Federally Administered Tribal Areas of Pakistan (FATA), Khyber Pakhtunkhwa and Balochistan. It includes a historical brief on the Pakhtun belt and a description of various methods of governance in each region. Furthermore, the chapter also examines the applicability of Article 246 and 247 of the Constitution of Pakistan 1973 on FATA and the Provincially Administered Tribal Areas of Pakistan (PATA).

### The structure of FATA Administration

Pakistan's tribal areas comprise of seven agencies and six frontier regions (FRs). They are:

- Khyber Agency
- Bajaur Agency
- Mohmand Agency
- Orakzai Agency
- Kurram Agency
- North Waziristan Agency
- South Waziristan Agency
- FR Peshawar
- FR Kohat
- FR Bannu
- FR Lakki
- FR Tank
- FR D.I Khan

The population of FATA is 3.17 million and its total area is 27,220 square kilometers.<sup>1</sup> The British moved into the area in the second half of the 19<sup>th</sup> century with the aim to keep Czarist Russia away from the British India. The people living in this region used to live in accordance with their own time honoured customs and traditions.<sup>2</sup>

Soon after their ingress into the region, the British realised the need for a framework of laws for a more repressive administration of the area and its people. Consensus was reached that the existing system be codified in order that there will be no deviation from the manner in which the people had lived for centuries.<sup>3</sup> An important aspect of the administrative system devised by the British was that the government would not come into direct confrontation with the tribes on issues that were contentious and divisive. An indirect system of administration was thus created for the FATA region.

To implement the Constitutional provisions described above, the President must be linked to local, tribal structures through the office of the Political Agent (PA).<sup>4</sup> In most Colonial structures where tribal societies existed, the external structure takes

1) Census Report of FATA 1998. <http://www.census.gov.pk/ProvinceRegion.htm> (accessed 29 October 2012)

2) Interview with Rustam Shah Mohmand, former Ambassador to Afghanistan and Political Agent, dated 12 May 2011

3) Interview with Rustam Shah Mohmand, former Ambassador to Afghanistan and Political Agent, dated 12 May 2011

4) Political Agent is a representative of federal bureaucracy. Unlike his counterpart in the settled districts of Pakistan, he was appropriately given this title. The incumbents of this office were drawn from the Indian civil or sometime military service who would have acquired a certain degree of proficiency not only in Pashtu but also in administrative affairs of the area. Only the most outstanding men of very high caliber were posted as political agents. On one hand he was the representative of the Crown, charged with ensuring that the area he administered posed no serious security threats for the government and on the other hand he was an advocate of the tribes vis-à-vis the government

control of the local leadership and hence annexes the tribal structure. The region has a peculiar system of administration. The people are governed through their local chieftains called Malikis and through financial compensation (*Nikath*) controlled by the Federal Government and exercised by a Political Agent. It is this structure that has kept the transition from Colonial to Constitutional times intact. Each sub-division (Tehsil) is headed by its Assistant Political Agent. The PA performs several functions at the same time: he acts as an executive, a judge and a revenue collector. He also heads the Agency Council and oversees development projects while all line departments of the Federal Government come under his authority.

FATA is divided into the administrative categories of 'protected' and 'non-protected' areas. Protected areas are regions under the direct control of the government, while 'non-protected' areas are administered indirectly through local tribes. Protected areas are those areas where government has invested in infrastructure such as roads, hospitals, schools, grid stations, government offices, etc.

### The Political Structure of FATA

The Indian Independence Act of 3 June 1947 abrogated all the special treaties. What was later known as Pakistan opted not to base troops in the FATA region because 200 Malikis, during a *Loya Jirga*, signed an instrument of accession with Mohammad Ali Jinnah, the founder and first Governor-General of Pakistan, in return for continued allowances and subsidies. On 14 August 1947, when Pakistan was created as a sovereign Muslim state, it also recognised the semi-autonomous status of the Pakhtun tribes of FATA and the instrument of accession. The 1956, 1962 and 1973 Constitutions of Pakistan retained the same agreements recognising the special status of the FATA with very few changes.

In Article 1 (c) of the 1973 Constitution of Pakistan, FATA is included as one of the territories of Pakistan and Article 246 (c) stipulates some seven tribal agencies and six frontier regions (FRs) that comprise the FATA. Article 247 prescribes the manner and method of administering FATA and states; that the executive authority of the Federation extends to FATA and that the Governor of the North West Frontier Province of Pakistan (now named Khyber Pakhtunkhwa), as directed by the President of Pakistan, shall administer it.

The other sections of Article 247 state that:

(2) The President may, from time to time, give such directions to the Governor of a Province relating to the whole or any part of a Tribal Area within the Province as he may deem necessary, and the Governor shall, in the exercise of his functions under this Article, comply with such directions.

(3) No Act of Majilis-e- Shoora (Parliament) shall apply to any Federally Administered Tribal Area or to any part thereof unless the President so directs, and no Act of Parliament or a Provincial Assembly shall apply to a Provincially Administered Tribal Areas, or to any part thereof, unless the Governor of the Province in which the Tribal Area is situated, with the approval of President, so directs; and in giving such a direction with respect to any law the President or, as the case may be, the Governor, may direct that the law shall, in its application to a Tribal Area, or to a specified part thereof, have effect subject to such exceptions and modifications as may be specified in the direction.

(4) Notwithstanding anything contained in the Constitution, the President may, with respect to any matter within the legislative competence of and the Governor of a Province, with the prior approval of the President, may with respect to any matter within the legislative competence of the Provincial Assembly make regulations for the peace and good Government of Provincially Administered Tribal Area or any part thereof, situated in the Province.

(5) Notwithstanding anything contained in the Constitution, the President may, with respect to any matter, make regulations for the peace and good Government of a Federally Administered Tribal Area or any part thereof.

(6) The President may, at any time, by Order, direct that the whole or any part of a Tribal Area shall cease to be Tribal Area, and such Order may contain such incidental and consequential provisions as appear to the President to be necessary and proper. Provided that before making any Order under this clause, the President shall ascertain, in such manner, as he considers appropriate, the views of the people of the Tribal Area concerned, as represented in the *Tribal Jirga*.

(7) Neither the Supreme Court nor a High Court shall exercise any jurisdiction under the

Constitution in relation to a Tribal Area, unless Parliament, by law, otherwise provides:

(8) Provided that nothing in this clause shall affect the jurisdiction, which the Supreme Court or a High Court exercised in relation to a Tribal Area immediately before the commencing day.

Most of the civil, criminal, electoral and fiscal laws have only been extended to the 'administered areas' or 'protected areas' of FATA<sup>5</sup> through presidential ordinances; however, no serious efforts have been initiated to properly implement these laws.<sup>6</sup> Besides, as per the constitutional arrangement, the President may, subject to ascertaining the views of the tribal *Jirga*, abolish the status of a given FATA region/Agency and convert it into a settled area.<sup>7</sup> The President may, from time to time, issue directions to his agent, as stipulated in Article 145 of the Constitution. No Act of Parliament or any part thereof is extended to FATA unless the President so directs, while Clause 7 of Article 247 bars the extension of superior courts, including Supreme Court and High Court to FATA unless the Parliament so provides under a law.

The President may make regulations with respect to any matter for the peace and good

governance of FATA or any part thereof. FATA is represented in the Lower (National Assembly) and Upper (Senate) Houses of the Parliament by 12 and 8 members, respectively. However, because the parliament has no jurisdiction over FATA, it is not clear what importance the FATA representatives have. FATA is geographically contiguous with Khyber Pakhtunkhwa; however, it has no representation in the provincial parliament.

On August 12, 2011, the Pakistan People's Party government signed an order which introduced amendments to the FCR, including: A Tribunal was to be reconstituted to serve as an appellate forum with respect to orders passed by Political Agents, although critics have charged that it is staffed by federal bureaucrats and there is still no independent judiciary in FATA;<sup>8</sup> jail inspections were to be conducted by the Tribunal and the Political Agents; the right of bail was extended to every accused; every accused was to be brought before a judicial authority – presumably the Political Agents – within 24 hours; women, children below 16, and elders above 65 years of age, were exempted from the collective responsibility provisions<sup>9</sup> of the FCR; among other reforms. However, Human Rights advocates have countered that the collective responsibility law should have been completely done away

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5) Government property such as offices, hospitals, schools, grid stations, roads, water tube wells, cantonments, market areas, forts, etc. are areas where FCR is applicable. The rest is called 'non-protected areas' where local culture and traditions regulate the local life

6) In-depth interviews with a legal fraternity from FATA – January – March 2011

7) Settled areas or districts are part of Khyber Pakhtunkhwa, which are represented in the provincial and national parliament. All normal laws of Pakistan apply to these areas and the superior judiciary is also fully functional there.

8) Taj, Farhat. 'Analysis: New FATA Reforms – Good but Insufficient', *Daily Times* (August 20, 2011)

9) Section 21 and 22 of FCR 2011 deals with "collective responsibility", they state as: -Section 21) Blockade of hostile or unfriendly tribe. – In the event of any tribe of Federally Administered Tribal Areas or any section of the tribe or any member of the tribe, acting in hostile, subversive or offensive manner towards the State or to any person residing within the settled area of Pakistan, the Political Agent or District Coordination Officer, as the case may be, by an order in writing may direct,– (a) the arrest of hostile members of such tribe wherever they may be, and the attachment of the property both movable and immovable wherever it may be found, belonging to them or any of them; (b) the detention in safe custody of any person so arrested or property so attached; and (c) debar all or any such member of the tribe from access into the settled area of Pakistan by public proclamation: Provided that the above-mentioned actions shall be taken against *PLAREENA* of the accused in the first instance, and if the circumstances so warrant, then any or all of the following actions may be taken by a well-reasoned order in writing against,– (i) the sub-section of the tribe of the accused; (ii) the section of the tribe of the accused; (iii) any other section of the tribe of the accused. Provided further that the confiscation of the property so attached shall be made after public proclamation and holding necessary inquiry: Provided also that women, children less than sixteen years of age persons over sixty-five years of age shall not be arrested and detained under this section

Section 22) Fines on communities accessory to crime.–(1) Where, from the circumstances of any case, there appears to be good reason to believe that the inhabitants of any village, or part of a village, or any of them, have – (a) connived at, or in any way abetted, the commission of any offence; or (b) failed to render any assistance in their power to discover the offenders or to affect their arrest; (c) connived at the escape of, or harbored, any offender or person suspected of having taken part in the commission of any offence; or (d) combined to suppress material evidence of the commission of an offence; the Political Agent or District Coordination Officer, as the case may be, may with the previous sanction of the Commissioner, impose a fine on the inhabitants of such village or part of a village, or any of them as a whole: Provided that women, children less than sixteen years of age and persons over sixty-five years of age shall not be arrested and detained under this section



with because the role of the Political Agent has been retained, “the reforms do not concur with one of the key principles of Human Rights: separation of the judiciary and the executive.”<sup>10</sup>

### The structure of Khyber Pakhtunkhwa administration

The province of Khyber Pakhtunkhwa formally known as NWFP (North West Frontier Province) is comprised of 24 districts with the following ‘settled areas:’

- Abbottabad
- Bannu
- Battagram
- Charsadda
- Dera Ismail Khan
- Hangu
- Haripur
- Kohistan
- Kohat
- Karak
- Lakki Marwat
- Mansehra
- Mardan
- Nowshera
- Swabi
- Peshawar
- Tank

In addition to the settled areas of Khyber Pakhtunkhwa direct administrative control is also over the Provincially Administered Tribal Areas (PATA) of Khyber Pakhtunkhwa which consist of the district of Malakand and parts of the districts of:

- Upper Dir
- Lower Dir
- Chitral
- Swat
- Buner
- Shangla
- Tor-Ghar

The province is spread over a total area of 74,521 square kilometers. According to the most recent census report, the total population of Khyber Pakhtunkhwa is 17.7 million with an annual growth rate of 2.82 percent and a gender ratio of 1.05 men to every woman.<sup>11</sup> In 1998, population of PATA was reported to be 831,000. Predominately Khyber Pakhtunkhwa and PATA is home to Pashtuns, however there is a spectrum of ethnic groups and languages inherent in the region. In addition to Pashtu, Khovar, Hindko, Kohistani, Seraiki, Shina, Torwali, Kashmiri, Kalasha and Kaghani are spoken. Nearly all the inhabitants of the province are Muslim, predominantly Sunni, and minority Shia (including Ismailis), as well as a small population of Shamanists in Chitral.<sup>12</sup>

### The political and administrative structure of Khyber Pakhtunkhwa

With the accession to the new state of Pakistan in 1947, and the extension of civil administration in 1969 in North West Frontier Province (NWFP), now Khyber Pakhtunkhwa, brought an end to the rule of the princely states (small independent states that became a part of Pakistan during the twentieth century). The “Dir, Chitral and Swat (Administration) Regulation” of 1969 transformed the powers of rulers to the Government, simultaneously incorporating previous laws, regulations, orders, procedures and customs in the civil administration.<sup>13</sup> This created a perplexed legal system in the region because tribal codes at times contradicted the law.

10) Ibid. Pakistan’s military and intelligence establishment, federal civil bureaucrats within FATA, and tribal elites all stand to lose significant powers if the Federal Government were to repeal the FCR altogether, establish regular civil and criminal courts in FATA, and extend the jurisdiction of the Peshawar High Court and Supreme Court of Pakistan to FATA

11) <http://www.khyberpakhtunkhwa.gov.pk/aboutus/Area-Population.php> (accessed 18 October 2012)

12) Post Crisis Need Assessment Khyber Pakhtunkhwa and FATA <http://www.khyberpakhtunkhwa.gov.pk/Departments/PnD/mne/MnE/Download/7.%20PCNA%20Report.pdf> (accessed 29 October 2012)

13) Sultan-i-Rome, 2006, p.267 Administrative System of the Princely State of Swat, Vol. XXXIII. No. 2

In contrast to the system of governance in FATA, Khyber Pakhtunkhwa has been under the rule of the provincial government since Pakistan came into being, with active participation of political parties in elections under the application of the constitution.<sup>14</sup> The parallel systems of administration in Khyber Pakhtunkhwa include two categories of distinct legal and administrative structures. The first category structure includes the settled districts, where the citizens and political parties are entitled to the same rights and liberties as those in the rest of the country.<sup>15</sup> The second category forms the Provincially Administered Tribal Areas (PATA) where the governor extends the laws and rights to the region with the approval of the President, based on the provisions of Article 246 (b) of the Constitution of Pakistan.<sup>16</sup>

The legal framework of Khyber Pakhtunkhwa is identical to the governance structure of the rest of the nation. The Chief Minister, elected as the chief executive of the province, along with a 124-member Provincial Assembly is responsible for the administrative governance of the province. The provincial government is headed by the Governor who is appointed by the federal administration. Khyber Pakhtunkhwa's civil bureaucracy is under the authority of the Chief Secretary who is responsible for the supervision of the various departments headed by departmental secretaries. Policing at the provincial level is in command of the Provincial Police Officer. At district level, the District Coordination Officer (DCO) looks after law and order, with support from the District Police Officer (DPO).<sup>17</sup>

The Local Government Ordinance of 2001 provides the legal framework for the settled districts of the province. However, a new local government system to replace the 2001 system is being discussed by the Provincial Assembly; in the interim period, the DCO is

responsible for functions delegated to local government.<sup>18</sup>

### Provincially Administered Tribal Areas (PATA)

Like FATA, justice administration in PATA of KP was also based on the hierarchy of forums created under the FCR until the FCR was repealed in relation to PATA through the Frontier Crimes Regulation (Repeal) in 1973. After that date many Pakistani laws – including the Code of Criminal Procedure 1898, Code of Civil Procedure, 1908 [CPC], and Evidence Act, 1872 – were extended to the PATA in KP through various statutes, regulations and notifications. Moreover, the jurisdiction of the Supreme Court of Pakistan and the Peshawar High Court were extended to the PATA in KP in 1973 through the Supreme Court and High Court (Extension of Jurisdiction to Certain Tribal Areas) Act, 1973, that received Presidential assent on February 9, 1973. The 1973 Constitution was approved by the National Assembly on April 10, 1973, and as mentioned earlier, Article 247(7) therein provides that neither the SCP nor a High Court shall exercise any jurisdiction in relation to a tribal area, however, the same provision goes on to add that “provided that nothing in this clause shall affect the jurisdiction which the Supreme Court or a High Court exercised in relation to a Tribal Area immediately before the commencing day.” Thus, the SCP and the Peshawar High Court exercise jurisdiction over the PATA of KP.

Further, the PATA Regulations of 1975 [PATA Criminal Laws [Special Provisions) Regulation (CrPC); PATA Civil Procedure (Special Provisions) Regulation; and subsequent amendments of 1976] vested judicial authority in each District's Deputy Commissioners, and empowered *Jirga's* to decide civil and criminal disputes under the supervision of the revenue officer (*tehsildar*). As a result of the Regulations, many of the provisions of

14) Post Crisis Need Assessment Khyber Pakhtunkhwa and FATA <http://www.khyberpakhtunkhwa.gov.pk/Departments/PnD/mne/MnE/Download/7.%20PCNA%20Report.pdf> (accessed 29 October 2012)

15) Governance and Militancy in Pakistan's Khyber Pakhtunkhwa Province, [http://csis.org/files/publication/120119\\_Mehboob\\_KhyberPakhtunkhwa\\_Web.pdf](http://csis.org/files/publication/120119_Mehboob_KhyberPakhtunkhwa_Web.pdf) (accessed on 1 November 2012)

16) Governance and Militancy in Pakistan's Khyber Pakhtunkhwa Province, [http://csis.org/files/publication/120119\\_Mehboob\\_KhyberPakhtunkhwa\\_Web.pdf](http://csis.org/files/publication/120119_Mehboob_KhyberPakhtunkhwa_Web.pdf) (accessed on 1 November 2012)

17) Post Crisis Need Assessment Khyber Pakhtunkhwa and FATA <http://www.khyberpakhtunkhwa.gov.pk/Departments/PnD/mne/MnE/Download/7.%20PCNA%20Report.pdf> (accessed 29 October 2012)

18) Post Crisis Needs Assessment Khyber Pakhtunkhwa and Federally Administrated Tribal Areas , September 2010, <http://www.khyberpakhtunkhwa.gov.pk/Departments/PnD/mne/MnE/Download/7.%20PCNA%20Report.pdf> (accessed of 3 November 2012)

the CPC, CrPC, and the Evidence Act, 1872 were not applicable to dispute settlement by the *Jirga's*, although in some cases analogous provisions referencing those statutes were created under the Regulations. Any appeal against the *Jirga's* decision would be made to the Deputy Commissioner and the provincial Home Secretary. In the late 1980s a petition was submitted in the Peshawar High Court pleading for the abolition of the PATA Regulations. The Peshawar High Court gave its verdict in favour of the petition; the Federal Government then appealed to the SCP which ruled in 1995 that the PATA Regulations were unconstitutional and struck them down, thus vesting judicial authority in regular civil and criminal courts, as well as restoring the full application of the CPC, CrPC, and Qanun-e-Shahadat Order, 1984 (Pakistan's amended evidence law).

However, by the time the SCP declared the PATA Regulations to be ultra vires, the *Tehreek-e-Nafaz-e-Shariat*-e-Mohammadi [TNSM] had already laid down its demand for the imposition of *Shariah* in Malakand Division, which includes the Districts of Buner, Chitral, Lower Dir, Upper Dir, Malakand, Shangla and Swat. Thus, in addition to the aforementioned civil/criminal procedure and evidence laws, the KP Government enacted the PATA (*Nifaz-e-Nizam-e-Shariah*) Regulation, 1994, and accompanying Rules, which made it compulsory for judicial officers (deemed Qazis under the Regulation) of civil and criminal courts in Malakand Division, as well as Kohistan District, to ask for the assistance of Islamic clerics (Muavineen-e-Qazi). The advice of the cleric, however, was not binding on the court. The TNSM objected to this arrangement and as a result the Federal Government promulgated the *Shariah Nizam-e-Adl* Regulation, 1999, which required Qazis to follow the principles of *Shariah*, and to adjudicate all proceedings on its basis, thereby increasing the clerics' influence in the courts. A decade later,

following a protracted conflict between the military and TNSM in Malakand, the provincial Awami National Party acceded to, and President Zardari signed into law, the *Shariah Nizam-e-Adl* Regulation, 2009, which again affirmed the judicial authority of Qazis and the influence of clerics. Moreover, the 2009 Regulation constituted a 'Dar-ul-Qaza' i.e. an "appellate or revisional court" in pursuance of Article 198(4) of the Constitution,<sup>19</sup> and also a 'Dar ul Dar ul Qaza' i.e. a "final appellate and revisional court" in pursuance of Article 183(2) of the Constitution.<sup>20</sup> As a result of the Regulation, the jurisdiction of the SCP and the Peshawar High Court have once again been ousted in relation to the PATA of KP. Indeed, under the 2009 Regulation, the laws which had previously been extended to PATA – including the CrPC, CPC and Qanun-e-Shahadat Order – are deemed to be applicable in PATA, subject to the modifications specified in the 2009 Regulation. The 2009 Regulation applies to all of PATA except the tribal area adjoining Mansehra District and the former state of Amb.

Therefore, the second category sets apart the administrative and political framework of PATA from that of the rest of the country. This distinction is based on the provisions of Article 246(b) of the Constitution of Pakistan, which states that:

"No Act of the provincial assembly can be applied to PATA. The Governor of the respective province has a mandate parallel to that of the President of Pakistan over FATA. PATA includes former princely states, tribal areas, and tribal territories within districts".<sup>21</sup>

The provision of the Constitution explicitly states that the laws of the provincial assembly do not apply to PATA. Khyber Pakhtunkhwa's Chief Minister exercises control over PATA and is represented in the provincial legislature. The Governor of Khyber Pakhtunkhwa can change or extend laws to PATA only with the President's approval. In terms of legal frame-

19) See sec. 2(1)(c) of the 2009 Regulation. Article 198(4) of the Constitution deals with the 'Seat of the High Court' provides that: "Each of the High Courts may have Benches at such other places as the Governor may determine on the advice of the Cabinet and in consultation with the Chief Justice of the High Court." In other words, the *Dar-ul-Qaza* serves as the *de facto* High Court of the PATA in KP

20) See sec. 2(1)(b) of the 2009 Regulation. Article 183(2) of the Constitution deals with the 'Seat of the Supreme Court' and provides that: "The Supreme Court may from time to time sit in such other places as the Chief Justice of Pakistan, with the approval of the President, may appoint. In other words, the *Dar-ul-Dar-ul-Qazi* serves as the *de facto* Supreme Court of the PATA in KP

21) The Constitution of Pakistan 1973 <http://www.pakistani.org/pakistan/constitution/> (accessed on 11 October 2012)

work, Pakistan's Criminal Procedure Code is not applicable to PATA; however, in distinction to FATA, PATA is subject to the jurisdiction of Pakistan's regular court system.<sup>22</sup>

#### The structure of Balochistan administration

Balochistan is divided into 29 districts, the districts in the province are:

- Awaran
- Bolan
- Barkhan
- Chaghi
- Dera-Bugti
- Gawadar
- Jafferabad
- Jhal Magsi
- Qilla Abdullah
- Qilla Saifullah
- Kohlu
- Kharan
- Kalat
- Khuzdar
- Kech
- Lasbela
- Loralai
- Mastung
- Musakhail
- Nushki
- Nasirabad
- Panjgur
- Pishin
- Quetta

- Sibi
- Sherani
- Washuk
- Ziarat
- Zhob

The Province of Balochistan is also divided between settled and unsettled areas, which constitute as the Provincially Administered Tribal Areas (PATA) of Balochistan and consists of the following districts:

- Zhob District,
- Loralai District (excluding Duki Tehsil)
- Dalbandin Tehsil of Chaghi district
- Marri and Bugti tribal territories of Sibi district

With a population of 6.6 million<sup>23</sup> stretched over 147,000 square miles, Balochistan comprises nearly half of the landmass of Pakistan<sup>24</sup>. The province named after the Baloch tribes is the largest but least populated and underdeveloped province of Pakistan. Balochistan consists of a plethora of ethnic groups; the Baloch are a majority in south and east of the province, where as a Pashtun majority is found in the north. The capital of the province, Quetta comprises of a majority of Pashtuns with Baloch, Hazara and Punjabis in the minority. A significant number of Brahui speakers are predominate near the Kalat region of the province, while Persian-speaking Dehwaris also reside in the region and around the Iranian border. Makrani Balochis are found typically living along the coast. Furthermore, Balochistan has now become home to 769,000 Afghans including Pashtuns, Tajiks, and Hazaras. Many Sindhi farmers have also moved to the more arable lands in the east of the province.<sup>25</sup>

#### The political and administrative structure of Balochistan

On June 29, 1947, the *Shahi Jirga* of the British Balochistan along with the elected members

22) Post Crisis Need Assessment Khyber Pakhtunkhwa and FATA <http://www.khyberpakhtunkhwa.gov.pk/Departments/PnD/mne/MnE/Download/7.%20PCNA%20Report.pdf> (accessed 29 October 2012)

23) Census report, <http://www.census.gov.pk/ProvinceRegion.htm> (accessed 29 October 2012)

24) Balochistan in Turmoil, Alok Bansal, Manas publications 2010

25) Conflict and Insecurity in Balochistan: Assessing Strategic Policy Options for Peace and Security, Pakistan Institute for Peace Studies. December 2010

of Quetta municipal body unanimously passed a resolution forming part of Pakistan. Later, on July 18, 1947,<sup>26</sup> when the Independence of India Act was passed by the British Parliament, the resolution was recognised as the choice of the people of British Balochistan.

Balochistan has battled with conflict and insecurity ever since it was fully integrated with Pakistan in 1971. There have been five insurgencies in Balochistan since the creation of Pakistan, which have resulted in more than five thousand deaths among the insurgents and almost three thousand among the Pakistan army.<sup>27</sup> The 1947 partition of the subcontinent left behind two separate nations who chose to adopt the federal structure to deal with conflict in their 'newly carved-out territories'.<sup>28</sup> Balochistan remained "outside the direct administrative jurisdiction of the colonial regime" during the British rule.<sup>29</sup> Consequently the partition triggered the underdeveloped province to lag further behind in progress and continued to be "largely on the margins of the state structure".<sup>30</sup> This divergence was exacerbated by the poor execution of the federal system that centralised power in the province of Punjab. The civil war in Balochistan from 1973-1977 further destabilised the province, which resulted in the loss of nine thousand people by the Pakistan army operation.<sup>31</sup> The most recent resurgence of conflict and insecurity in the province occurred in 2005 and has continued ever since. However, violence in the province escalated when ex-President Musharraf's convoy was attacked in Balochistan in December 2005 and the military launched an operation that led to the killing of Nawab Akbar Khan Bugti, an influential tribal chief.<sup>32</sup> The recurring cycles of violence and bloodshed in Balochistan, contrary to what the media has portrayed,

surpasses the level of violence in Khyber Pakhtunkhwa or the Federally Administered Tribal Agencies.<sup>33</sup>

Today, Balochistan faces militancy, mayhem and an increasingly complex network of political interests that makes it nearly impossible for policymakers to bring peace and stability in the province. The presence of the Quetta *Shura* of the Taliban, the positioning of the Durand Line, the ongoing military operations and inexorable Human Rights violations in the region have led to the existence and the strengthening of militant groups such as the Baloch Liberation Army, Lashkar-e-Jhangvi, Lashkar-e-Taiba. The signing of the 7<sup>th</sup> National Finance Commission (NFC) award, the passage of the 18 Constitutional Amendment, the adoption of a package of reforms and concessions called 'Aghaz-e-Haqooq-e-Balochistan' were significant, but there were failed steps taken by the Government in addressing these longstanding grievances in the region.<sup>34</sup>

Balochistan has a parliamentary form of government, which is similar to the rest of the provinces of Pakistan. The province is headed by the Governor, who is appointed by the President of Pakistan on the advice of the provincial Chief Minister. The Chief Minister, the province's chief executive, is normally the leader of the largest political party or alliance of parties in the provincial assembly. The Provincial Assembly of Balochistan consists of 65 seats of which 4% are reserved for non-Muslims and 16% exclusively for women. The legal framework of Balochistan mirrors that of the rest of the country. The judicial branch of government is carried out by the Balochistan High Court, which is based in Quetta and headed by a Chief Justice.<sup>35</sup>

26) Pildat, Balochistan: Civil and Military Relations, March 2012, <http://www.pildat.org/publications/publication/balochistanconflict/IssuePaperBalochistanConflictCMR.pdf>

27) Balochistan Problems and Solutions, Vision 21 Foundation

28) Adeney, Katharine. and Wyatt, Andrew, 2004. Democracy in South Asia: Getting beyond the Structure-Agency Dichotomy. Political Studies, Vol. 52, pp.1-18

29-30) Waseem, Mohammad, 1994. Politics and the State in Pakistan. Islamabad: National Institute of Historical and Cultural Research

31) Adeney, Katharine. and Wyatt, Andrew, 2004. Democracy in South Asia: Getting beyond the Structure-Agency Dichotomy. Political Studies, Vol. 52, pp.1-18

32-33) Grievances, Rights, and Conflict in Balochistan: Institutional Challenges for the Pakistani State Sameen A. Mohsin Ali and Hassan E. Ansari <http://www.mjpa.umich.edu/uploads/2012/aliansari.pdf>

34) Pildat, Balochistan: Civil and Military Relations, March 2012, <http://www.pildat.org/publications/publication/balochistanconflict/IssuePaperBalochistanConflictCMR.pdf>

35) Government of Balochistan, <http://www.balochistan.gov.pk/> (Accessed 1st December 2012)

### **Conclusion**

The chapter builds a basis for the understanding of the legal and political framework of FATA, Khyber Pakhtunkhwa and Balochistan, which is essential to highlight the role of informal justice systems in the region. Little has been done to clarify and reform the judicial and legal system in FATA and PATA, as

multiple systems of justice provisions exist in the region. It is essential for all actors of the State to take responsibility for addressing the underlying concerns of access to justice and strengthening the linkages between formal and informal justice mechanisms.

## CHAPTER: 2

### The Formal Structure of Courts in Pakistan



# THE FORMAL STRUCTURE OF COURTS IN PAKISTAN

## Introduction

The judicial structure in Pakistan is derived from the Code of Civil Procedure (CPC) 1908<sup>36</sup> and the West Pakistan Civil Courts Ordinance (II of 1962). However, the formal court system has evolved to meet circumstances demanding changes; one of the latest ones was the addition of the *Nizam-e-Adl* courts as part of the conflict resolution in Malakand in 2009.

Under the West Pakistan Civil Court Ordinance 1962, the power for determining the class and jurisdiction of Civil Judges lies with the relevant High Court.<sup>37</sup>

The courts' structure of Pakistan, in descending order, is as follows:

- A. Supreme Court of Pakistan (premier court seated in the federal capital, Islamabad)
- B. Federal *Shariat* Court
- C. High Court(s) of Pakistan (provincial and federal level)
- D. District and Sessions Courts (district level)
- E. Civil Judge/Judicial Magistrate Courts; these deal with purely civil matters except as empowered under Section 30 of the Code of Criminal Procedure (CrPC) 1898, to hear criminal matters.
- F. Special Courts

## Supreme Court of Pakistan (SCP)

The Supreme Court of Pakistan (SCP) is the premier court of the country; it has the final authority in all legal and constitutional matters.<sup>38</sup> It is comprised of a Chief Justice and 16 permanent judges.<sup>39</sup> It has a permanent seat in Islamabad, with Branch Registries in the capital of each province at Lahore, Peshawar, Quetta and Karachi.<sup>40</sup>

Justices of the Supreme Court are supervised by the Supreme Judicial Council, and derive their authority from Articles 176 to Article 191 of the Constitution of the Islamic Republic of Pakistan 1973, which explain the functions and powers of the court.

The Supreme Court has original jurisdiction in disputes involving the federal or provincial governments under Article 184; it will exercise original jurisdiction while enforcing fundamental rights, but only when a question of 'public importance' is involved.<sup>41</sup> Appellate jurisdiction in civil and criminal matters is exercised by the SCP under Article 185, while Article 186 provides scope for advisory jurisdiction while extending advice to government in legal matters.

## Federal *Shariat* Court (FSC) of Pakistan

The Federal *Shariat* Court (FSC) of Pakistan was established under a Presidential order in 1980.<sup>42</sup>

36) Hussain, Faqir (Registrar, Supreme Court of Pakistan) *The Judicial System of Pakistan, Revised* (15th February 2011)

37) *Ibid*

38) PLD 2001, S.C. 607, *Constitution of the Islamic Republic of Pakistan 1973*

39) *Constitution of Islamic Republic of Pakistan 1973, as amended by the Constitution (Eighteenth Amendment) Act 2010* (Mahmood, M, p 601)

40) Hussain, Faqir (Registrar, Supreme Court of Pakistan) *The Judicial System of Pakistan, Revised* (15th February 2011) 41-42) *Ibid*



The rationale for its establishment is to scrutinise all laws within the country in order to ascertain whether they are in line with Islamic values as expressed in the Holy Quran and Sunnah.<sup>43</sup>

The FSC is comprised of 8 Muslim judges including the Chief Justice.<sup>44</sup> Among the judges at least three must be Islamic Scholars/Ulema who are well versed in Islamic law.<sup>45</sup>

The decisions of the FSC are binding on all the High Courts and other subordinate courts.<sup>46</sup> The Supreme Court also has a *Shariat* Appellate Bench which has the power to review decisions of the FSC.<sup>47</sup>

### High Courts of Pakistan

There is one High Court in each province as well as one in the federal capital of Islamabad.<sup>48</sup> They are as follows:

1. Lahore High Court, Lahore, Punjab
2. Sindh High Court, Karachi, Sindh
3. Peshawar High Court, Peshawar, Khyber Pakhtunkhwa
4. Balochistan High Court, Quetta, Balochistan
5. Islamabad (Federal) High Court, Islamabad

The High Courts are the appellate forums for all civil and criminal cases within the territorial limits of each respective province.<sup>49</sup> Articles 192 to 203 of the Constitution of the Islamic Republic of Pakistan 1973 provide for the functions and powers of the High Courts in Pakistan.

Under the Constitution, any particular High Court will exercise both its original and appellate jurisdiction under Article 199 for the enforcement of Fundamental Rights and review of judgments/orders of the subordinate courts in civil and criminal disputes.

### District and Session Courts of Pakistan

The District and Session courts are functional in every district of each province, with civil jurisdiction under West Pakistan Civil Court

Ordinance 1962 and criminal jurisdiction under Code of Criminal Procedure (CrPC) 1898.<sup>50</sup>

In each District headquarter, there are numerous Additional District and Session Judges who usually head the courts. A District and Session Judge has both executive and judicial power all over the district within his jurisdiction.<sup>51</sup>

The Session Court is also a trial court for severe criminal offences such as murder, rape, armed robbery and others where specific amount of gold and/or cash is involved. It also serves as an appellate court for civil suits of lesser value.<sup>52</sup>

All towns and cities of Pakistan now have a separate Additional District court and a Session Judge; they all have equal authority within their respective jurisdiction. When hearing criminal cases, it is known as the Session Court, while adjudicating upon civil cases, it becomes the District Court.<sup>53</sup>

The High Court exercises appellate jurisdiction over the lower courts in each province,<sup>54</sup> and, in turn, the Supreme Court of Pakistan has authority and appellate jurisdiction over the decisions of High Court.<sup>55</sup>

### Civil Judge and Judicial Magistrate Courts (with power of Section 30 of Cr.PC 1898 only in criminal trials)

There are multiple Civil and 'Judicial Magistrates' Courts in every tehsil and district.<sup>56</sup> A Magistrate under the powers of Section 30, Code of Criminal Procedure (CrPC) 1898, has the authority to hear criminal cases, excluding those cases that would involve the death penalty as punishment, for example, attempted murder, banditry, robbery, extortion, etc.<sup>57</sup>

In relation to awarding penalties, the Magistrates' Courts can only award a punishment of up to seven years' imprisonment.<sup>58</sup> Where imprisonment is deemed to be more than seven years, that particular case must then be referred to a higher court.<sup>59</sup> Each Judicial

43) Article 203D, Constitution of Islamic Republic of Pakistan 1973

44) Article 203C, Constitution of Islamic Republic of Pakistan 1973

45) Article 203C, Constitution of Islamic Republic of Pakistan 1973

46) Hussain, Faqir (Registrar, Supreme Court of Pakistan) *The Judicial System of Pakistan*, Revised (15th February 2011) 47-55) Ibid

56) Section 30, Code of Criminal Procedure 1898

57-59) Ibid

Magistrate's Court is also given a jurisdiction, normally covering one or more police stations of any particular locality.<sup>60</sup>

### 'Special Courts' of Pakistan

In addition to the above mentioned courts there are some Special Courts or Tribunals and Boards that deal with 'specialised' cases that require certain expertise for resolution.<sup>61</sup>

These include the banking/consumer courts; anti-corruption, anti-terrorism, and anti-narcotics courts; family courts and special magistrate courts (seated at the District/Session Courts); Labour Relations Courts; Juvenile Courts; numerous tribunals which include the services tribunal, and Income Tax Tribunals; and, the Federal Board of Revenue (FBR).

### *Nizam-e-Adl* in Malakand

One of the most recent additions to the formal courts system in Pakistan has been the *Nizam-e-Adl*. In the case of the *Nizam-e-Adl* we have a special mechanism for justice that came about as part of the negotiations to establish a settlement to the civil war in the Swat valley

that ended in 2009. Malakand has been part of PATA since 2007. It had previously been a Tribal Area known as the "Malakand Protected Area", part of the Malakand Agency of PATA. From 1970 to 2000 the District was part of Malakand Division, and as part of PATA, has the other systems of justice described above. As a means to end the civil war of the mid-2000, the government of Pakistan negotiated a ceasefire by agreeing, in part, to establish *Shariah*-based Courts. In 2009 these Courts were established after legislative approval of the Presidential proposal.

Hence in an area that had been under the regulations and justice systems previously described about PATA a new system came into being. In the following chapters, we describe how *Nizam-e-Adl* functions, and the opinion of Malakand's citizens toward *Nizam-e-Adl* in comparison to the pre-existing systems of justice.

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60) Ibid

61) Hussain, Faqir (Registrar, Supreme Court of Pakistan) *The Judicial System of Pakistan*, Revised (15<sup>th</sup> February 2011)

62) The Hanafi school of thought is derived, from the Qur'an, the authentic narrations of the Prophet (Hadith), Consensus (*Ijma*), and analogical reasoning (*qiyas*), *qiyas* only being applied if direct material cannot be found in the Qur'an or Hadith. It is this last reasoning that makes the Pakistani application considering the beliefs or traditions of the disputants relevant, but also a point of friction with the TNSM



# CHAPTER: 3

## *Nizam-e-Adl* in Malakand



## NIZAM-E-ADL IN MALAKAND

### Introduction

Of the systems of justice described in preceding chapters, all have either evolved from the Pakhtun culture, e.g., *Jirga*, from British jurisprudence, e.g., the Pakistani courts, or from the colonial FCR. In case of the *Nizam-e-Adl* we have a special mechanism for justice that came about as part of the negotiations to establish a settlement to the civil war in the Swat Valley that ended in 2009 and applies only to Malakand in PATA. Malakand has been part of PATA since 2007. It had previously been a tribal area known as the Malakand Protected Area, part of the Malakand Agency of FATA. From 1970 to 2000 Swat was part of Malakand Division, and as part of PATA, Malakand has two, elected MPs in the KP Provincial Assembly.

Malakand has always been a strategic area. During the late 1800s the British tried<sup>63</sup> to push back the controlled area toward the Khyber Pass so that an assumed Czarist advance from Afghanistan could be held back. Malakand is the gateway between the commercial city of Charsadda in KP and the Swat valley. With the resurgence of the Taliban in Pakistan in early 2000s and the resulting civil war of the 2000s between the Pakistani Army and Islamic Militants, the struggle to control Malakand as the gateway to the Swat valley after the siege of Lal Masjid in 2007 required special efforts for a negotiated settlement. In 2008 the party (Awami National Party) that led the KP provincial government led negotiations for a political solution with the Tehreek-e-Nafaz-e-Shariaht-e-Mohammadi (TNSM). It was complicated, but essential, to exchange

their leadership to renounce violence, the central government of Pakistan passed the *Nizam-e-Adl* regulation in 2009, that established the practice of *Shariah* law in Malakand division.

Hence in an area that had been under the regulations and justice systems previously described about PATA, a new system came into being. In this section we will describe how *Nizam-e-Adl* functions and the opinion of Malakand's citizens toward *Nizam-e-Adl* in comparison with the pre-existing systems of justice.

### Structure of the *Nizam-e-Adl*

The *Nizam-e-Adl* consists of three levels: 1) *ilaqa* (local); 2) *zila* (district); and 3) *darul qaza* the highest court, to which appeals from the lower courts can be made. To date, only the highest level (*darul qaza*) has been established. The judges (*Qazi*) at each level are appointed by the government. This, government appointment, apparently was not anticipated by the TNSM because in 2009<sup>64</sup> Sufi Mohammad said "Delegating *Qazis`* powers to judges is not according to *Shariah`*."<sup>65</sup> We want *Qazis* in accordance with *Shariah`*." He said the TNSM wanted to transform the judicial system into Islamic *Shariah* system. "The point is that from early Islamic times the *Qazi* had been appointed by the Islamic rulers from among men of confidence and known to be studied in Islamic jurisprudence, Sufi Mohammad believed that he would have been consulted about appointees. Hence, the appointees would have been stricter. There is another aspect that comes from the scholarly

63) These Malakand wars were described from a decidedly colonial perspective by the then, Lt. Winston Churchill, 1898, *The Story of the Malakand Field Force: An Episode of Frontier War*, Dover Publications

64) Dawn, 3 May 2009 Gohan, Ali

65) The English meaning of this expression is "not according to *Shariah`*."

debate about the term *Ijmā* or the consensus of the Muslim scholars. For some the term refers to the opinion of the community of *Shariah* scholars, for others the term community refers to the whole Muslim community. Therefore, an interesting aspect of the system as practiced in the Malakand context is that these courts do not conform to the local tradition and religious interpretation of *Shariah* law by the disputants rather than an absolute *Shariah* code. It is more in the broader Hanafi<sup>66</sup> school of legal thought. This reminds us of the variation in *Jirga* conclusions from area to area simply because the local interpretation of *Pakhtunwali* varies as does the interpretation of what applies from *Shariah*. In other words, there is a varying jurisprudence, but, in this case, because the *Nizam-e-Adl* began in the context of Malakand in 2009, we can assume that previous *Jirga* and also formal systems of PATA from 1970 onward would temper or influence this system too. Some reports indicated that what the leaders of Tehreek-e-Nafaz-e-Shariat-e-Mohammadi had in mind, e.g. Sufi Muhammad and Muslim Khan, was the application of *Shariah* as practiced and advocated by the Taliban.

The proceeding of the *Nizam-e-Adl* is initiated by an aggrieved party. The complaint can be filed directly by any citizen. It is not necessary to employ a lawyer, the filing fee is minor, and when the parties are brought before the judge (*Qazi*), the judge uses both *Shariah* law and

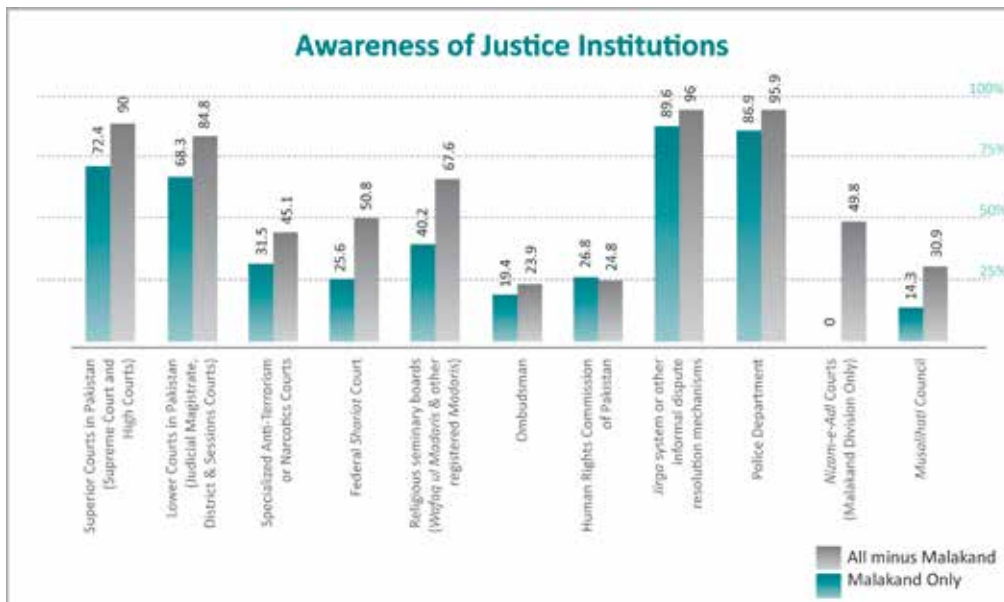
a negotiated settlement between the parties to arrive at a conclusion. This aspect, the negotiated settlement instead of a punishment brought against a “guilty party” and a fine paid to the state is an echo of traditional Pakhtun justice and resolving a dispute rather than the formal system where the state decides the punishment or fine. It is a system of mitigation and conflict resolution.

Another important aspect of the system is that in Pakistan there is a formal study of *Shariah* law among the lawyers. Many have studied both *Shariah* and Pakistani jurisprudence and because they are more urban, as well as schooled in international law and civil rights, the use of traditional punishments, that we have seen above are on the decline such as hand chopping for robbery, stoning to death for adultery etc. Their dispute settlements bring more modern practices into the realm.

#### Survey Data

Given that background we now turn to survey data from the sampled Malakand population comparing their knowledge of, and confidence in, *Nizam-e-Adl* compared with the other systems described earlier in this chapter.

The following figure indicates the percentage of the respondents who are aware of each justice institution.

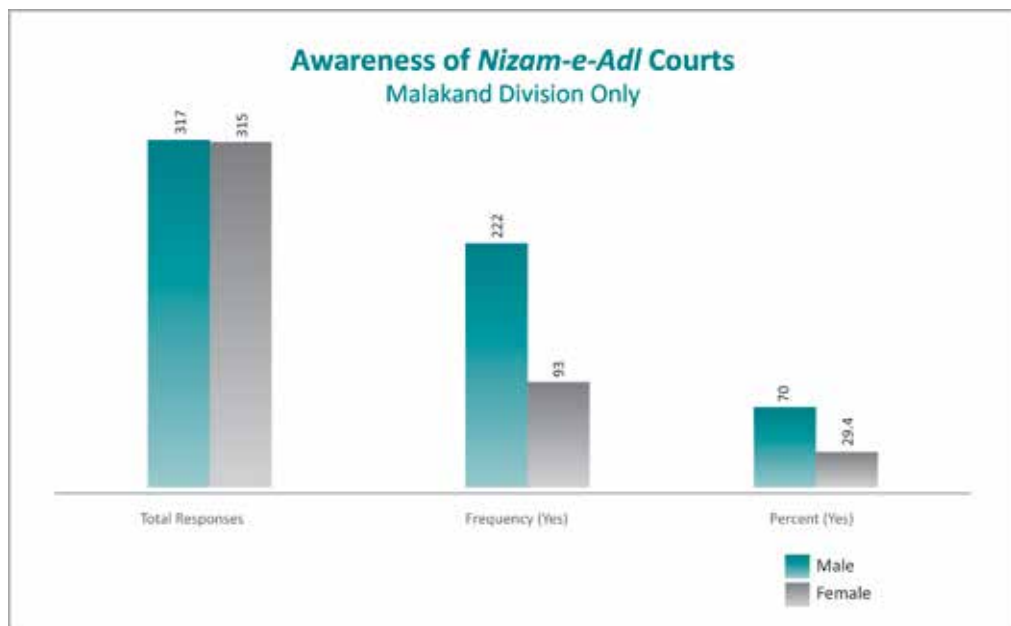


66) It is derived, from the Qur’an, the authentic narrations of the Prophet (Hadith), Consensus (ijma), and analogical reasoning (qiyas), qiyas only being applied if direct material cannot be found in the Qur’an or Hadith. It is this last reasoning that makes the Pakistani application considering the beliefs or traditions of the disputants relevant, but also a point of friction with the TNSM

In general we find that the respondents from Malakand are more aware of the various justice systems than the rest of the sample. This is understandable given that other districts includes more rural districts. Malakand is a commercial center and is close to major cities and has been part of PATA since 1970, much earlier than other PATA districts in the sample. It is interesting that only 49.8% of the respondents in Malakand were aware of the *Nizam-e-Adl* considering all the debate about its establishment. However, when the data is separated by gender it is clear that the males (70%) are more aware than the females (29.4%). This is an important finding for future work in gender awareness and also for managing the data in other responses.

much more than for any other institute mentioned earlier, believed that informal dispute resolution mechanisms are affordable. Since this was a multiple response question, we see that the second opinion of respondents was the quick dispensation of justice, (46.1%; 44.5%). The rest of the opinions, all negative aspects, are single digits. Only 3.4%; 3% believed that informal institutions can be influenced by the powerful, the weaker party thus not receiving due justice.

Surprisingly, only 2.8%; 1.1% respondents thought that informal institutions are 'gender equal'. Informal institutions are known for their gender insensitivity and as a major



### The Character of Justice

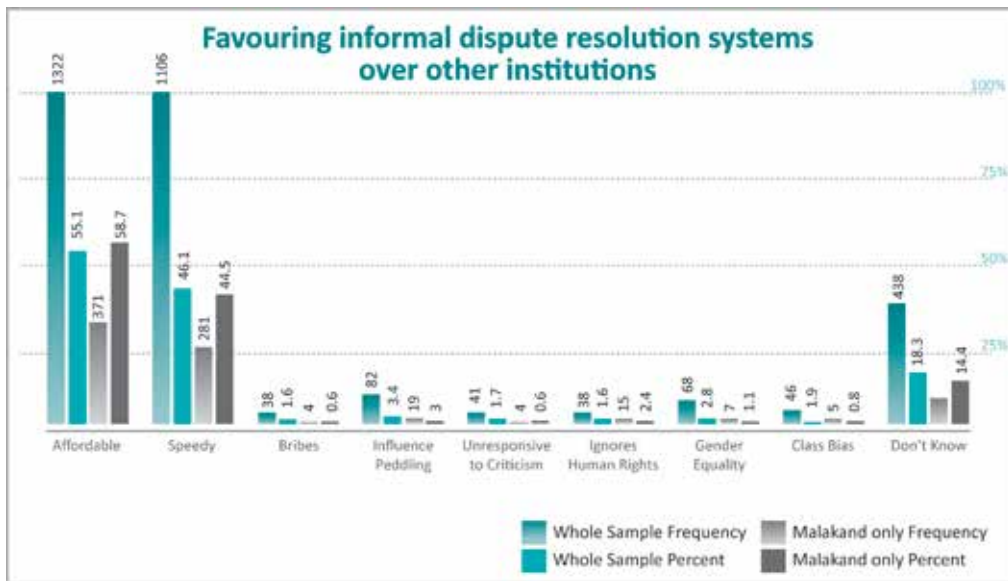
The survey data that follows, compares the opinion of the sample from Malakand with the overall sample. This comparison will reveal interesting similarities as well as differences in the *Jirga* vs. *Nizam-e-Adl* findings. We will present the two samples as “(% all; %Malakand).”

This question lies within a general context and does not only pertain to *Jirga*, but also to other forms of informal dispute resolution systems, such as respected elders or other influential persons within a family or community to play as mediators.

Comparing the responses favouring informal dispute resolution systems over other institutions, we see a very clear difference. The majority, (55.1%; 58.7%) of the respondents,

limitation however, the survey result shows that, overwhelming majority is in a state of denial or do not perceive the gender bias. Furthermore, only 1.6%; 0.6% feared that these informal institutions are influenced by 'bribes', while equal percentage of respondents, 1.6%; 2.4% believed that informal institutions lack the ability to ensure Human Rights standards.

Importantly, in comparison with the other justice institutions where approximately 80% of the sample did not offer an opinion, when it comes to informal systems only 18%; 14.4% did not respond. With this question we do not find an important difference in the responses between the people of Malakand and the Paktuns in general.



**The composition and reputation of members of Nizam-e-Adl**

**What are the criteria for membership in the Nizam-e-Adl? (Malakand Division Only)**

As stated earlier, *Nizam-e-Adl* is a newly established entity in Malakand Division of KP, and therefore, people in Pakistan, in general, do not understand how the system has been implemented. As shown above, approximately half of the Malakand sample is not aware of this system. As with the other major themes of this research we began with focus groups and then used the survey to weigh the findings.

**Male FGDs**

The criteria for a *Nizam-e-Adl Qazi*, that the male respondents shared was quite clear.

Overwhelming majority of the male respondents thought that since *Nizam-e-Adl* is a *Shariah* based justice system therefore *Qazis* should be graduates of well-reputed religious institutions in Islamic law and jurisprudence. However, a few respondents opined that *Qazis* are basically judges of formal courts and are functioning as *Qazis* in *Nizam-e-Adl* even though their formation was not based on *Shariah* law. Therefore, they thought that it does not make any difference whether the case goes before *Nizam-e-Adl* or formal courts.

Another criterion to become a *Qazi*, according to the respondents, is that *Qazis* should be honest and pious. Another group of respondents believed that *Qazis* should have knowledge of local customs so as to deal with

issues of local nature. Some thought that *Qazis* should have worldly education too along with religious education.

Some participants of the FGD believed that rich parties try to buy people so as to get justice according to their own will; therefore the monetary element can always play a role. However, they opined, if a *Qazi* is honest and not greedy then there is less likelihood that *Qazi* would favour the rich. Therefore, respondents thought that *Qazi* should not be a greedy person.

**Female FGDs**

Females also agreed with the males that one has to go through religious education to become a *Qazi*. They believed that *Qazis* should be honest so that people have faith in the judgment they deliver.

**Survey findings**

In the figure below we present two angles: 1) the respondents weighting on one or more credentials for selecting or nominating a member to the *Nizam-e-Adl* and 2) a comparison of that weighting with the weighting that the sample used for members of *Jirgas*. In these statistics we find a major difference when compared to criteria for members of the *Jirga*.

To compare the two systems we have to keep in mind the low rate of responses from women with regard to the *Nizam-e-Adl*; we also have to weigh the responses by first only counting the opinions and then, vertically, the weight of the opinions as a percent of the total opinions offered by *Jirga* or *Nizam-e-Adl*.

In the figure below we first notice that, systematically, more emphasis is placed on formal education (d,e,f) for members of the *Nizam-e-Adl* than the *Jirga*. The second trend is that more emphasis is placed on traditional ascribed and cultural characteristics (a,b,c) for members of *Jirgas* than for members of the *Nizam-e-Adl*. Finally, there is close to the same and high weight placed on piety (g) for both systems and uniformly low weight on political connections (h).

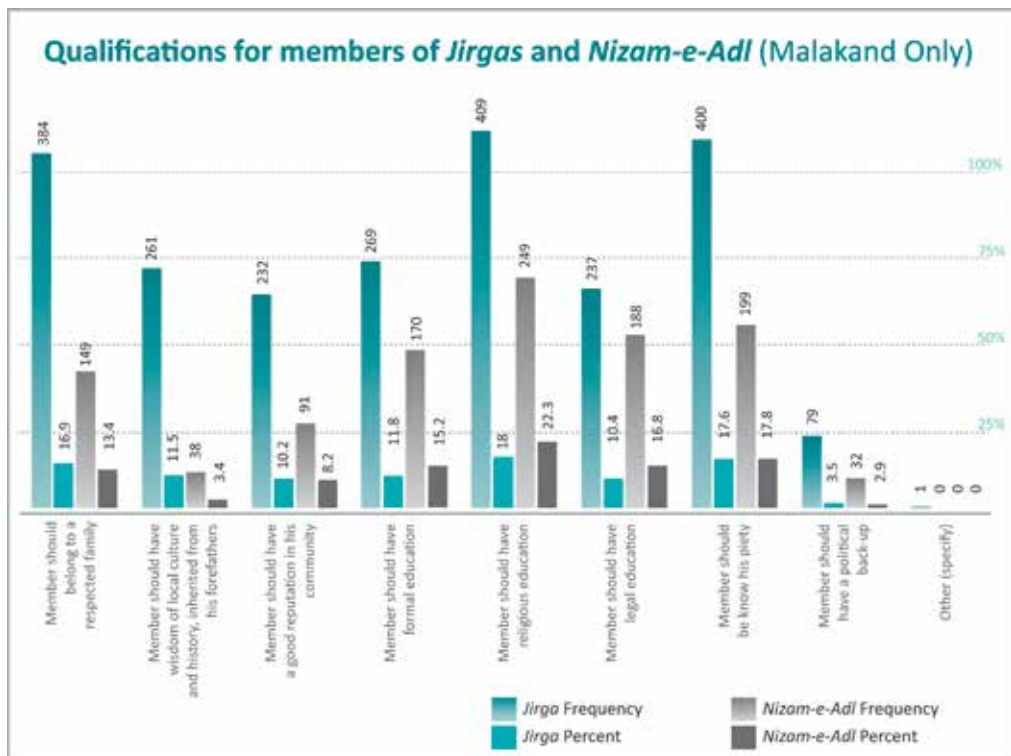
The high ratings for piety and for religious education for members of the *Nizam-e-Adl* is very relevant because the system is based on Hanafi school<sup>67</sup> of *Shariah* Law and the member, who is called *Qazi*, should be graduated from a well-reputed religious educational institution, or, if the member is from the state's judiciary system the they should be well versed in *Shariah* law.

The conclusion is that although there are differences in weights, both systems, in the responses from Malakand, show a close cultural

fit to each other with similar expectations for the members and just more formality to the education for the members of the *Nizam-e-Adl*. Despite the debate in the press about the dire consequences that *Nizam-e-Adl* would bring to justice, in the opinion of the sampled population with some experience in the area where the *Nizam-e-Adl* has been established, the expectation is similar to *Jirga* members.

### Conclusion

This chapter concludes that the system of *Nizam-e-Adl*, in general, is new to the Malakand Division as well as to the people of Pakistan. However, respondents still gave preference to *Jirga* system over the *Nizam-e-Adl* system. Other findings also reveal that Pakhtuns generally respect and prefer their culture and religion both. When it comes to the selection of a *Jirga* member and *Qazi*, Pakhtuns set up a very tough criteria for both, such as having the virtues of piety, wisdom and knowledge of traditions and customs.



67) There are four schools of legal philosophy in Sunni Islam. The Hanafi school is the most widespread in Asia and South Asia. It is derived, from the Qur'an, the authentic narrations of the Prophet (Hadith), Consensus (ijma), and analogical reasoning (qiyas), qiyas only being applied if direct material cannot be found in the Qur'an or Hadith. It is this last reasoning that makes the Pakistani application considering the beliefs or traditions of the disputants relevant, but also a point of friction with the TNSM

## CHAPTER: 4

### Knowledge of Formal and Informal Justice Systems and their use



## KNOWLEDGE OF FORMAL AND INFORMAL JUSTICE SYSTEMS AND THEIR USE

### Introduction

This chapter intends to document how Pakhtuns react when they are faced with conflict or dispute, both on a personal level as well as at the family levels. Besides, this chapter will also provide information on respondents' perception of the types of issues that instigate conflicts.

### Presence of formal and informal justice systems

We begin by documenting the respondents' awareness of the formal and informal institutions in their communities, and then investigate the types of issues they approach these institutions for.

### Male FGDs

Male respondents were asked what type of justice systems exist in their area. This is factual information and might not be different than the survey data. It is a known fact that *Jirga* exists in each village or community and is repre-

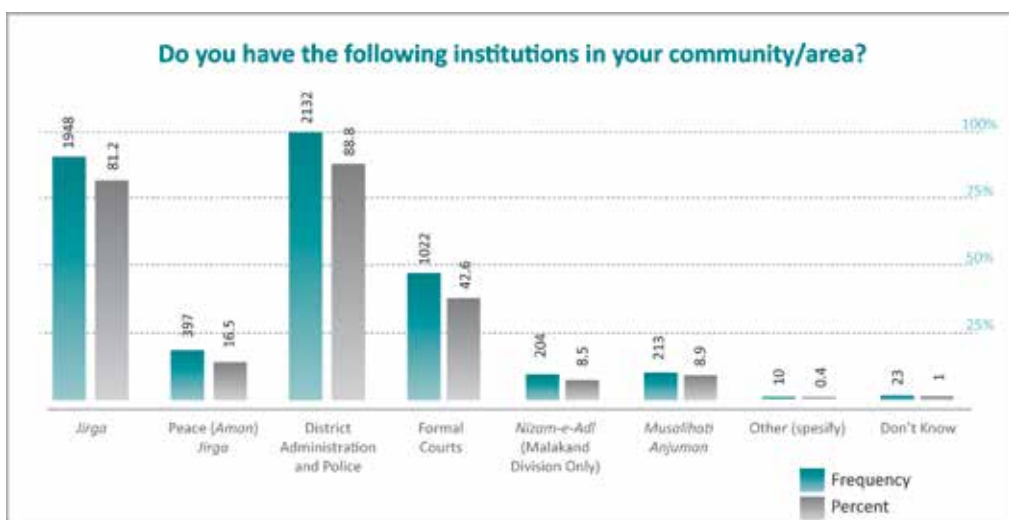
sented by local elders, therefore the majority of the groups identified the *Jirga* system, followed by district administration and police. Nonetheless, respondents also identified formal courts.

FGDs organised in districts of D.I.Khan, Loralai and Quetta identified *Musalihati* Councils along with *Jirga*, followed by formal courts and local administration and police. *Musalihati* Councils were set-up in these districts during the time when the Local Government Ordinance was implemented in Pakistan in 2001.

Respondents of district Swat and Lower Dir FGDs identified *Nizam-e-Adl* and Peace *Jirgas*.

### Female FGDs

Female respondents were not quite sure of exact terms of various informal and formal justice systems; however they were aware of *Jirga*, police, and formal courts systems. Some women respon-



dents from Swat district identified *Nizam-e-Adl* while districts of Loralai and Quetta informed that *Musalihati* Councils exist in their areas.

### Survey findings

The initial question in the survey was used to identify the presence of justice systems in the community of the interviewees. The figure below shows the responses.

Not surprisingly, more than four-fifths of the sample identified ‘District Administration and police’ and ‘local *Jirga*’ - 88.8% and 81.2% respectively – as being present in their communities. Formal courts were the third major institution identified by 42.6% respondents.

Other systems, new and specific to certain districts were, logically, less known to the whole population sampled. For example, the ‘*Peace Jirga*’, which is newly established in parts of Malakand Division, was identified by only 16.5% of the respondents, followed by the ‘*Musalihati Anjuman*’ identified by 8.9% and *Nizam-e-Adl* that are specific to Malakand as the result of the 2009 peace agreement 8.5%.

### Contacting institutions in case of a dispute

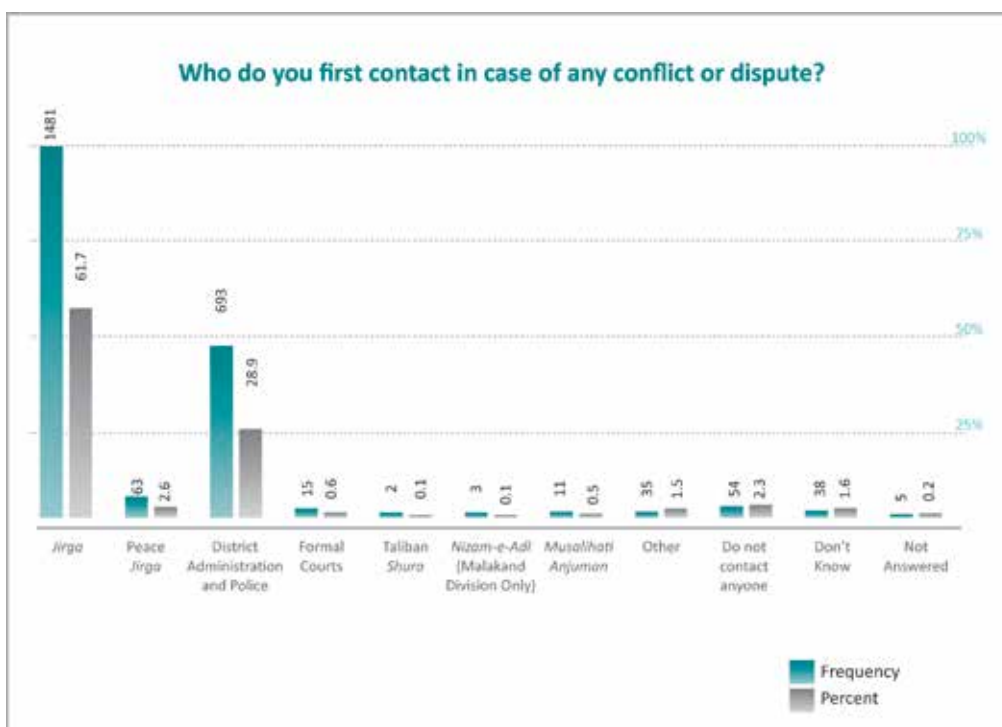
After determining the presence of various formal and informal dispute resolution systems, the next question was intended to

document which dispute resolution mechanism respondents contact first in case of any general dispute.

### Male FGDs

Generally, when there is a dispute, people try to avoid lengthy legal proceedings in Pakhtun dominated districts of Balochistan and KP. The majority shared that in minor disputes, disputants usually approach local elders to form a *Jirga* to resolve it peacefully. However, in complex cases, such as murders, or attempt of murder, or family disputes, people usually register First Information Reports (FIRs) and ultimately approach the formal court system. Nonetheless, respondents opined, in all such complex cases disputants ultimately approach police stations to pressurise the opponent to help them to come to terms for out of court settlements. Some of the respondents from districts of D.I. Khan, Loralai, and Quetta, informed the survey that *Musalihati* Councils were set up by the government to coordinate with the local police and solve disputes of a petty nature.

Respondents from Swat district were asked specifically about *Nizam-e-Adl* courts, and it was surprising to note that most of them were not very satisfied and shared that such courts are not fully functional while they still rely on local *Jirga* as last option. The *Nizam-e-Adl* are



treated extensively in the chapter “Informal Justice Systems and *Shariah*-Based Systems.”

### Female FGDs

Female respondents informed the survey team that their male members generally approached local elders to form a *Jirga* in case of a dispute. They opined that instead of wasting money on lawyers’ fees and time in courts, the majority of female respondents believed that it is better to resolve issues with the help of local elders and religious leaders who have the wisdom to come up with solutions that are in accordance with local culture and religion.

Some female respondents identified *Musalihati* Councils as the place where women can get compensation. They thought that *Musalihati* Councils were the best forum, under the current circumstances for women to represent their cases.

As shown in the figure below, 61.7%, identified ‘*local Jirga*’ as the most often consulted

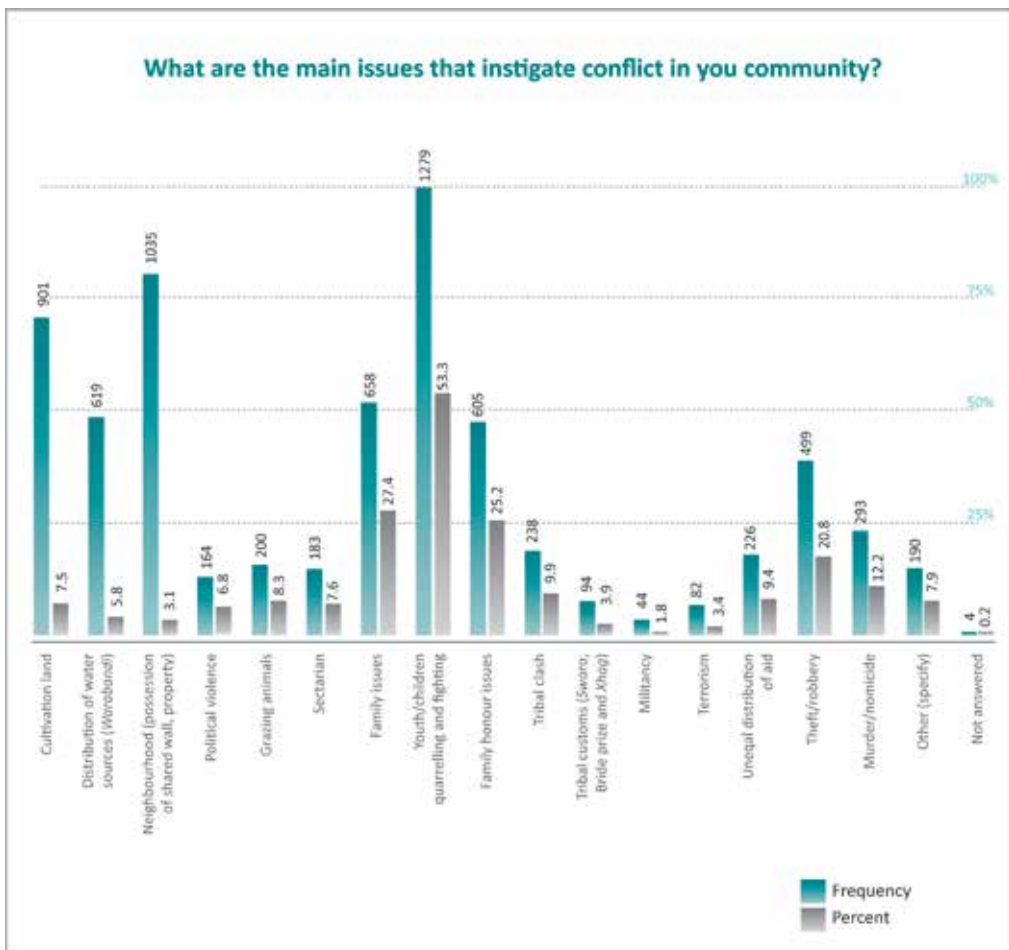
institution for resolving a dispute, while 28.9% of the respondents identified the ‘District Administration and police’. Generally, disputants or litigants contact both in order to put pressure on the party to come to terms. However, it has been observed that the majority of the cases are resolved through mediation by local *Jirgas*. It has also been observed that police officials, keeping in view the cultural context as well as their experience of dealing with cases of a complex nature, encourage disputants to resolve their issues through a *Jirga*. Ultimately, in majority of the cases, the solution is found through *Jirgas*, mediation, or out of court settlement.

### Types of conflicts

The next area of interest for this research was the types of conflicts encountered in the Pakhtun areas.

### Male FGDs

The types of disputes identified included: land, shared walls, water distribution for irri-



gation, pathways, shared trees/woods, hills, livestock, etc. Also included were petty disputes over children quarrelling-very common in Pakhtun areas. Major disputes identified were murders and honour killing.

#### Female FGDs

Female respondents also identified similar issues, which lead to conflict, but added disputes over women, family assets distribution among heirs, and honour killings in Pakhtun communities across KP and Balochistan. Respondents also informed that recently, boys take photos of girls on mobile phones and this leads to conflict that, in some cases led to boys being killed or injured by the girls' family members.

Female respondents noted that when girls and women of their areas worked in NGOs, it was considered bad (an honour issue) and, in some cases, led to disputes among families, as villagers do not like local girls working in NGOs. Female respondents opined that in such cases girls working in NGOs do not get good marriage proposals.

#### Survey findings with regard to types of disputes

The survey intended to document the major issues that generally instigate conflicts in communities. Through a multiple-choice question 2400 respondents were provided with a list of probable issues that could lead to conflicts. 17 options along with an open ended 'other' were provided to respondents to identify one or more issues in the list. The responses in the figure below revealed the extent and the frequency of issues that lead to conflict within the community.

According to the data, more than half, 53.3%, are of the opinion that people fight over issues of youth/children quarrelling within communities. This is exactly what the general perception is about people fighting with each other on children's petty issues. These quarrels can lead to violent family feuds lasting for years and decades if not timely prevented and resolved.

Another major issue cited by 43.1% of the respondents was related to shared property such as possession of shared wall or property, *Hujra*, etc. In rural Pakhtun areas this is a common issue and people get into fights with each other on a shared wall, a *Hujra* and on shared residential piece of land, etc. Usually, elders of community intervene and try to avoid any violent conflict.

Pakhtun communities are mainly involved in agricultural activities and when it comes to

land we see disputes that can lead to violent conflicts. As a common problem, 'land cultivation' is third on the list identified by 37.5% respondents. Again this issue is generally either prevented or resolved by village elders through a *Jirga*; hardly ever does either party file a case against the opponent in a police station.

Family issues such as forced marriages, divorce, child custody, shared property, etc. were identified by more than a quarter of respondents (27.4%). These are common practices within Pakhtun society that lead to conflicts. In the rural part of KP and Balochistan the distribution of water is also related to agricultural activity and was identified by a 25.8% as a potential area of conflict.

The family honour issue is identified by a quarter (25.2%) of respondents. However, it is important to mention here that all issues listed in the figure are seen by the Pakhtun society as issues of honour. Quarrelling on a petty issue, such as children's fights, becomes an issue of family honour and prestige when elders intervene. Therefore, those issues identified above should also be assumed to be honour issues. However, the issue of honour killing, although not very common, takes place not only in the Pakhtun community, but also in other provinces and among other ethnic groups in Pakistan.

Theft/robbery in Pakhtun areas is common but not of great significance as compared to issues discussed above. Some 20.8% respondents identified theft/robbery as an issue that instigates conflict. Theft/robbery is followed by 'murder/homicide' identified by 12.2% of respondents. However, issues cited above sometime lead to murder(s) and become complex issues. Therefore, all these issues are inter-connected and influence each other.

Since the entire Pakhtun community is inter-connected, similar issues can and have led to tribal clashes. However, the latest survey was conducted in districts of both provinces that are administered as 'settled districts' and therefore the tribal bond is not as strong as it is in FATA. Nonetheless, a considerable number of respondents, 9.9% identified 'tribal clashes' as one of the issues, which instigate conflicts.

'Unequal distribution of aid was identified by 9.4% of respondents. In recent times, Malakand Division of KP province has been through full-fledged and targeted military operations against hard core militants. There were more than 2 million IDPs who fled to

other districts of KP. This man-made catastrophe was followed by historic flooding disaster of 2010 when more than 20% population of Pakistan was affected in all four provinces and FATA. In both emergencies the government of Pakistan and the world contributed generously and timely to help people recover their lives and livelihoods. The Government of Pakistan and national and International NGOs helped IDPs with health services, food aid, shelter, protection, etc. During the distribution of aid, there were several unpleasant incidents where people were injured or killed. Furthermore, affected people also complained that aid was not distributed equally, leading to violence.

Another set of issues were identified by respondents, including 'grazing animals' (8.3%) followed by 'sectarian violence' (7.6%), and 'political violence' (6.8%). The Afghanistan conflict has had a direct bearing on issues of sectarian and political violence. During this time, small arms were infiltrated into Pakistani society, which led to various forms of lethal conflicts. Nevertheless, some areas of FATA have been well known for their weapon manufacturing industry.

There is a denial within male dominated Pakhtun community that tribal customs, such as *Swara*, bride price and *Khag* are practiced

anymore. However, there have been cases reported in the media and therefore the survey intended to document how respondents perceive these issues. 3.9% identified that these issues are prevalent and could instigate conflicts, which is still a considerable number and can be taken seriously.

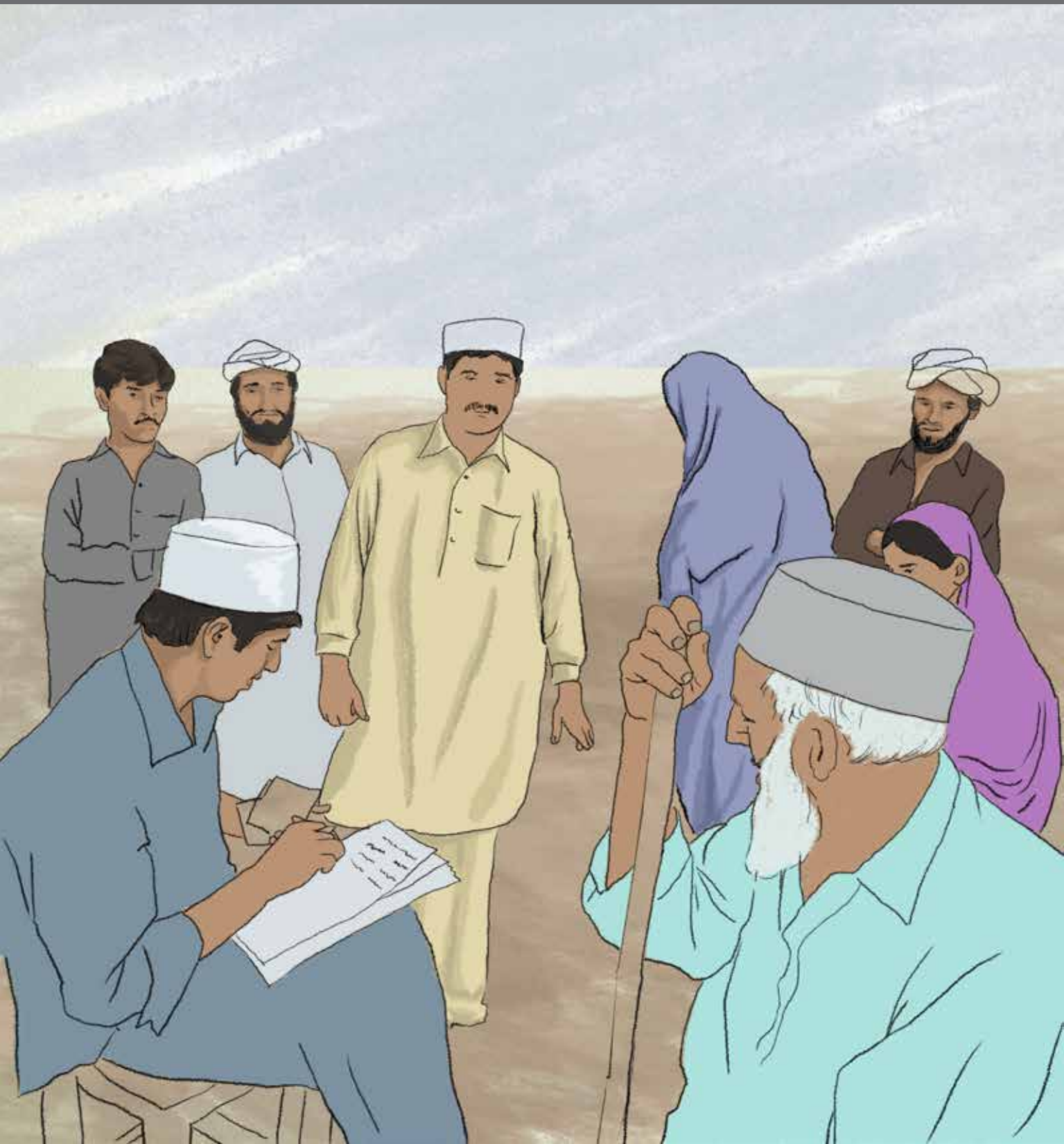
Finally, only 3.4% respondents identified 'terrorism' followed by 'militancy' chosen by 1.8% respondents. This is surprising, as the entire Pakistani society is faced with the issue of terrorism while rural communities of Pakhtun areas are facing the brunt of militancy. It could be that people cannot react to these issues, as they seem to be beyond their control and that people are at the receiving end.

### **Conclusion**

Data for this chapter reveals that Pakhtun men and women have more knowledge of the existence of district administration and police in their areas, followed by traditional *Jirga* system while in terms of a first contact, they prefer *Jirga* over district administration and police depending on the complexity of the dispute. This reflects that Pakhtuns have more trust in *Jirga* than the district administration and police.

## CHAPTER: 5

### Pakhtun awareness and opinion of the institutions and actors in KP and Balochistan



## PAKHTUN AWARENESS AND OPINION OF THE INSTITUTIONS AND ACTORS IN KP AND BALOCHISTAN

### Introduction

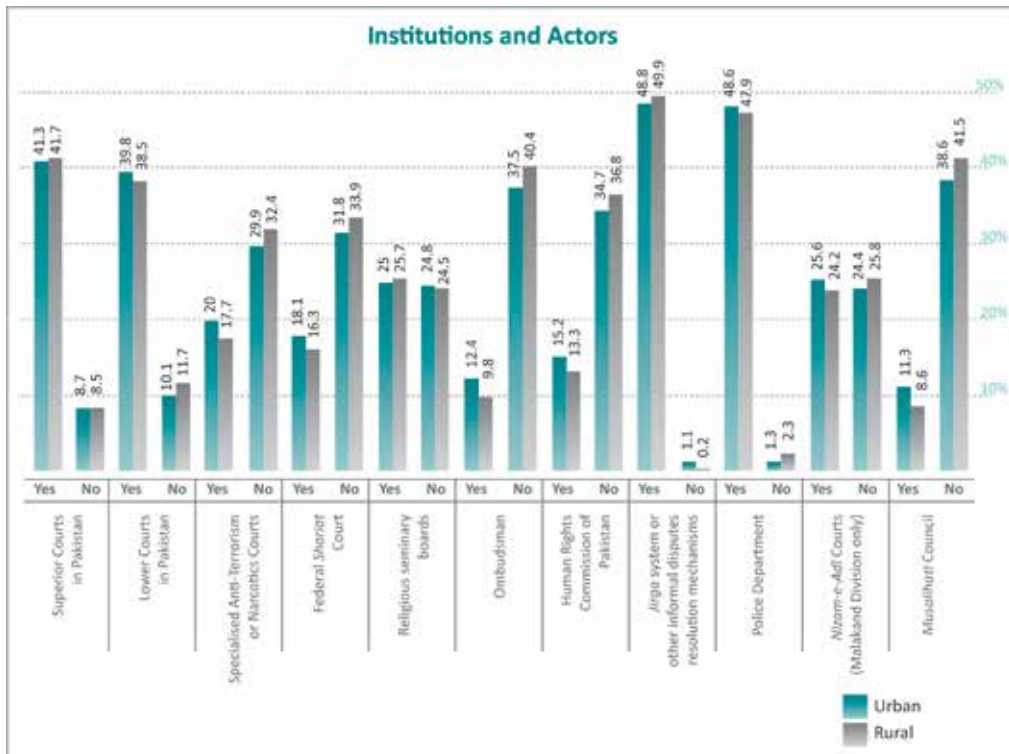
In Pakistan people have access to various services that they can turn to for legal needs. In urban areas most people tend to approach the state's legal system, but in rural areas it has been observed that people are inclined towards informal or traditional justice systems. As will be described, there are several reasons that explain why rural population of Pakistan usually access this informal, traditional ways for resolving disputes; it perceives the formal legal system to be distant from it, expensive, corrupt and time consuming. It is not due to a major lack of awareness of formal systems

in rural areas, when compared with the urban areas, as shown in the following figure:

### Awareness of institutions and actors

In this figure, our concern is not the level of interest, but difference in perception of rural and urban population. With the exception of the Ombudsman and the *Musalihat* *Anjuman*, the percentage difference between rural and urban responses is minor, that is, the level of awareness about the institutions is similar in both rural and urban areas.

The following figures summarise the overall



level of awareness by institution:

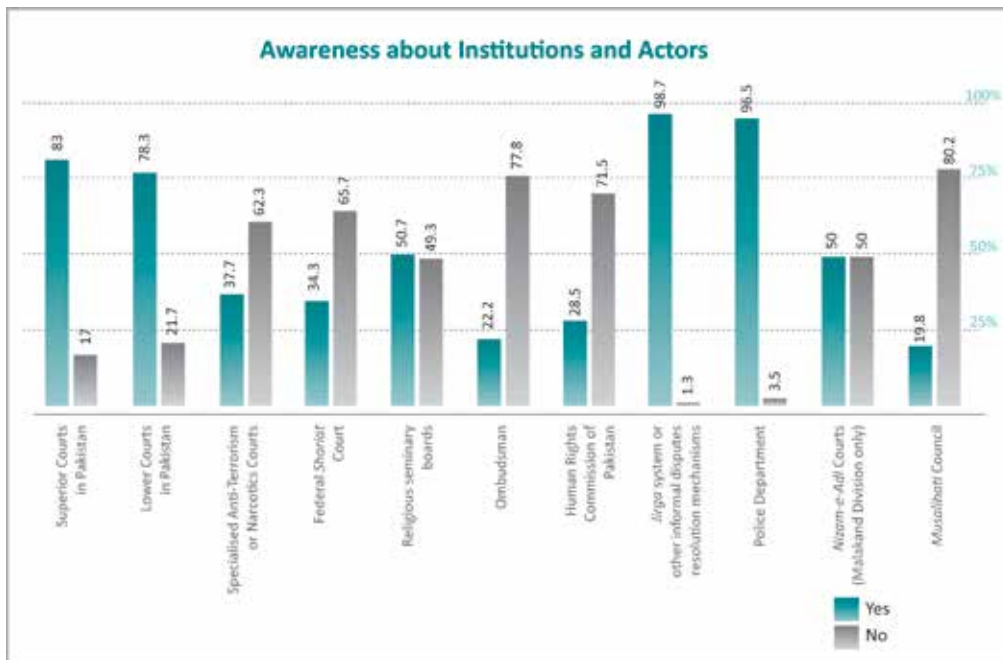
The figure below identifies the level of awareness of the respondents regarding various formal and informal institutions dispensing justice and ensuring the rule of law in Pakistan. A brief introduction of each institution/actor is given below so as to inform the reader of the background.

**Superior Courts in Pakistan (Provincial High Courts, Supreme Court of Pakistan)**

After cross tabulation of province-wise data, we see that the level of response is identical in KP, 82.9% respondents knew about the superior courts and 83.4% of the respondents from Balochistan were aware of the superior courts.

**Lower Courts in Pakistan (Judicial Magistrates, District and Session Courts)**

As people in Pakistan have to deal with various levels of disputes – criminal and civil –, the data shows that the level of awareness of Pakhtun respondents in both Balochistan and KP provinces



The British created the general criminal courts in the sub-continent under the CrPC of 1898. When asked about courts in Pakistan, a distinction was made between general courts – which have jurisdiction over a broad range of civil and criminal matters and specialised courts which deal with specific issues such as terrorism etc. The respondents’ awareness of general courts is discussed here, and their awareness of specialised courts is addressed in the following question. Following the quantitative analysis, the question is further triangulated with data gathered through KIIs and FGDs.

Looking at the results for this question, eight out of ten (83%) respondents, claimed that they were aware of the existence of superior courts in Pakistan. But less than one-fifth of the respondents in both KP (17.1%) and Balochistan (16.6%) were not aware of the formal court set-up by the Government of Pakistan.

of Lower Courts is high. More than three-quarters of respondents, 78.3%, from both provinces were aware of the Lower Courts in Pakistan, while only 21.7% were not aware about the existence of Lower Courts.

In both KP and Balochistan, respondents’ level of awareness of the Lower Courts is similar – in KP 78.6% said they knew about Lower Courts in Pakistan and 76.5% in Balochistan were aware about these institutions.

Comparing the present data with the FATA survey of 2010, we see considerable differences in opinion. Please note that in the 2010 survey respondents were asked about the existence of Lower and Superior Courts in one question. In response to this question, the awareness level among FATA residents is by far lower than KP and Balochistan when it comes to formal courts, including Lower Courts, High Courts and Supreme Court of Pakistan. The 2010 data

from FATA on the same question shows that more than half (53.47%) confirmed that they were aware of the formal court of Pakistan; less than half (46.53%) of the sample were totally unaware. This finding is understandable because there are no formal courts in FATA and the Supreme Court of Pakistan does not have jurisdiction there.

### Specialised Anti-Terrorism or Narcotics Courts

The Government of Pakistan created Specialised Anti-Terrorism courts (ATCs) through the 1997 Anti-Terrorist Act, amended on 24 October 1998 by the Anti-Terrorism [Amendment] Ordinance. Special Courts (Control of Narcotics Substances) were constituted under the Control of Narcotics Substances Act, 1997. Specialised ATCs deal with offences punishable under the Anti-Terrorism Act, and specialised Narcotics Courts deal with offences punishable under the Control of Narcotic Substances Act 1997.

The respondents were asked whether they were aware of, or had heard about Specialised Anti-terrorism or the Narcotics Courts of Pakistan. Unsurprisingly, the level of awareness of respondents on Specialised Anti-Terrorism or Narcotics Courts was low. Just over one-third (37.7%) of the respondents were aware of these courts while two-third (62.3%) had no knowledge about these courts.

After province-wise cross-tabulation, the data reveals that although in Balochistan 42.4% of the respondents were aware of the existence of these special courts, and in KP 36.7% respondents were aware, the difference is not statistically significant.<sup>68</sup>

Comparing the data with the 2010 survey in FATA, fewer people than in KP and Balochistan, 26.4%, were aware about the Specialised Anti-terrorist Courts of Pakistan. Lack of awareness is mainly because these courts have no jurisdiction over the FATA region.

### Federal Shariat Court (FSC)

The Federal *Shariat* Court (FSC) was established by the President's Order No.1 of 1980 as incorporated into the Constitution of Pakistan of 1973 under chapter 3A. The FSC has the

power to review existing legislation in order to determine whether it complies with the principles of Islam, i.e. *Qur'an & Sunnah*. The FSC can respond to Pakistani citizen's complaints about suspect laws or it can exercise its *suo moto* powers. Although the FSC is approached by people in certain cases related to *Shariah* but a considerable proportion of cases are brought to trial in other formal courts of Pakistan, starting from Lower Courts. It also has appellate jurisdiction with respect to convictions for offences under the Hudood Ordinances.<sup>69</sup>

Two-thirds (65.7%) of respondents were totally unaware of the FSC; while only one-third (34.3%) of the sample had knowledge about its existence. Looking at province-wise data, the difference in responses is insignificant.

In the 2010 FATA survey, only 29.60% were aware of the Federal *Shariat* Courts of Pakistan. Lack of awareness is mainly because these courts have no jurisdiction over FATA region.

### Religious seminary boards (e.g. *Wafaq ul Madaris* and other registered *Madaris*)

*Wafaq ul Madaris Al-Arabia* of Pakistan was founded in 1957 in West Pakistan. It is the largest federation of Islamic *Madaris* in the world. Religious clerics who sit on these boards often provide opinion on family law issues based on Islamic law principles. The '*Madaris* certificates' they issue can be brought to a general court to support one's claim. Some other recognised religious seminaries are *Wafaq/Tanzeem ul Madaris/Rabit ul Madaris*, *Tanzeem-ul-Madaris Alhe Sunnat*, *Wafaq-ul-Madaris Al-Arabia*, *Wafaq-ul-Madaris Al-Salfia*, and *Rabita-ul-Madaris Al Islamia*. There are thousands of *Madaris* operating in Pakistan, most of them under the management of the above-mentioned organisations.

Male and female respondents from both provinces were asked whether they were aware of the above-mentioned religious seminary boards. Half of the respondents (50.7%) knew about the *Wafaq ul Madaris* and other registered *Madaris* boards.

After cross-tabulation by province, the data reveals that the level of awareness in KP regarding

68) The margin of error for Balochistan is 4.7 and in KP is 2.2. If we calculate for Balochistan  $42.4 - 4.7 = 37.7$  and for KP  $36.7 + 2.2 = 38.9$ , the confidence intervals overlap.

69) The Hudood Ordinances were established in 1979 under the military rule of Muhammad Zia-ul-Haq during the Islamization effort. The intent was to enforce and apply the law against practices prohibited under *Shariah* law such as the consumption of alcohol, extramarital sex, theft and so forth. The reason for change was that some of the punishments metted out were violations of human rights and also cruel and also biased against women. This ordinance was lifted in 2006 when the Women's Protection Bill was passed.

religious seminary boards is higher than in Balochistan province. 53% of the respondents in KP were aware and only 40% respondents in Balochistan were aware. It is important to mention here that most *Madaris* were set-up in FATA, close to KP, and KP itself where more people could get to know about the existence of these institutions.

Comparing this data with the 2010 survey report on FATA, the same number of respondents, 50.6%, was aware of the religious seminary boards. Thousands of *Madaris*, registered and un-registered were set-up in Pakistan, including FATA, to provide free religious education, especially during the Soviet-Afghanistan crisis of 1979-89. The main reason was poverty as the majority could not afford to bear the cost of modern education and therefore, sent their children to religious institutions where education, food and accommodation were provided free of cost.

**Federal Ombudsman**

In 1983, the office of the Federal Ombudsman was established under the Wafaqi Mohtasib (Ombudsman) Order, (WMOO) 1983. The Ombudsman is an independent institution, established under WMOO, to provide speedy relief to the general public in case somebody has suffered ‘maladministration’ at the hands of a Federal Government Agency.

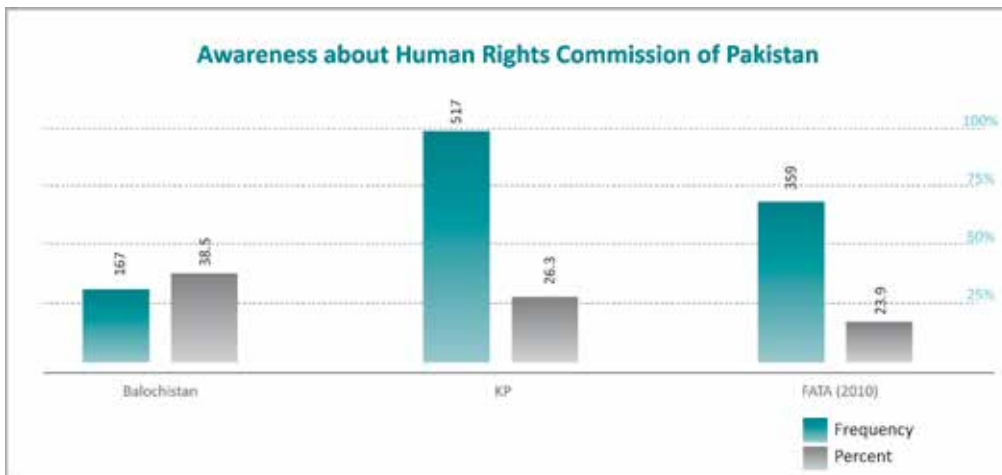
When 2,400 respondents were asked about their awareness on the existence of the Federal Ombudsman, only 22.2% answered in the affirmative. Comparing the data with the 2010 survey report on FATA with KP and Balochistan in 2012, almost the same number of respondents, 21.5%, was aware about the Federal Ombudsman of Pakistan. Lack of awareness is mainly because people in Pakistan have little to do with Federal Ombudsman.

**Human Rights Commission of Pakistan (HRCP)**

The Human Rights Commission of Pakistan (HRCP) was set up in 1987 by some prominent human right activists. It is not associated or affiliated with the government or any political party. It is mandated to spread awareness of human rights among the people, mobilise public opinion, collect information and disseminate knowledge about human rights abuses, and to monitor and defend human rights in Pakistan. HRCP also operates a “Complaint Cell” where individuals can call to lodge a complaint. HRCP has branches all over the country, including some in FATA and Frontier Regions.

The survey intended to ascertain the level of awareness amongst respondents on the existence of the HRCP in Pakistan. More than one-quarter (28.2%) was aware of the HRCP while the rest showed their lack of knowledge. Being a non-government institution, the response level is encouraging because the majority in Pakistan is illiterate and has little access to sources of information. Furthermore, the term NGO or CSO is also alien to the general masses in the rural areas of Pakistan. This finding is a great success for the HRCP because it shows that it has enabled itself to be recognised and known to an important proportion of the society in Pakistan.

The provincial data of the survey reveals that the respondents from Balochistan are more aware than KP about HRCP as an institution. This may be because HRCP had several fact-finding missions to Balochistan on missing persons, and advocacy seminars/conferences on its situation, amongst others HRCP has generated this debate with considerable success, which has been recognised by local leadership in Balochistan, especially by Baloch leaders.



The data in the figure below shows that more respondents (38.5%) in Balochistan knew about HRCP compared to KP (26.3%). The 2010 survey report on FATA shows that only 23.9% of FATA interviewees were aware of the HRCP. This shows a perception gap between the provinces and supports the argument that HRCP has had more focus on Balochistan compared to KP and FATA.

#### **Jirga system or other informal dispute resolution mechanisms**

The purpose of this research is to confirm whether the respondents were aware of informal dispute resolution mechanisms.

The data for both provinces is astonishing, an overwhelming 98.7% was aware of the non-formal or traditional dispute resolution mechanisms (100% in Balochistan and 98.4% in KP). This does not, in any way, suggest that 98.7% people access such institutions; this only shows that the majority of people are aware of the existence of such institutions. In rural societies there are a considerable number of people who have never heard of formal courts and other entities while they are very much aware that informal dispute resolution mechanisms existed in their respective areas.

#### **Police Department(s)**

The police administrative structure and functions were laid down in the Police Act of 1861 in Khyber Pakhtunkhwa (formerly known as NWFP). 'Frontier Police' is under Police Service of Pakistan. The police derives its powers of arrest, investigation, and search from the CrPC of 1898. Furthermore, the Pakistani authorities under the Government of India Act 1935 adopted pre-independence laws. Crimes are reported to the police, who then register a First Information Report [FIR]. Police authorities are responsible for maintaining public order, investigating crimes, and arresting offenders. In KP the Provincial Police system consists of 73,000 employees. The Police Department in Balochistan is called 'Balochistan Police' which was formed in 1946. There, the Provincial Police consists of 46,018 employees with its headquarters in Quetta City.

Both the Police Act of 1861 and Criminal Procedure Code 1898 were not extended to the FATA region. The *Khasadar* and Levies force are responsible for the internal security or police actions in the protected areas of FATA.

Because the police has a network of stations in urban and rural areas of Pakistan and has

tried to cover almost every part of the country except FATA, it was obvious that overwhelming majority would know about it. Some 96.5% respondents knew about the police department. Another fact is that patrolling by the police also makes them visible.

#### **Nizam-e-Adl Courts (Malakand Division only)**

*Shariah Nizam-e-Adl* Regulation (NAR) 2009 was signed into law on April 13, 2009 by the President of Pakistan; effective backdated i.e. March 15, 2009. This Regulation was extended to Provincially Administered Tribal Areas (PATA) of Khyber Pakhtunkhwa excluding Tribal Areas attached to District Mansehra and earlier state of Amb. This Regulation was signed as 'Swat Peace Accord' between the Government of Pakistan and the *Tehrik-e-Nafaz-e-Shariat-e-Mohammadi* (TNSM) of Swat valley. According to this regulation *Shariah* courts were to be established and *Shariah* laws will be enacted in Swat. This regulation is very similar to the *Nifaz-e-Shariah* Regulation 1994 and the *Shariah Nizam-e-Adl* Regulation 1999.

The ANP led provincial government in KP (2008 – 2013) was heavily criticised by the civil society, international and national media and various political parties in Pakistan. MQM was very vocal and fully rejected the ANP government's policy for entering this agreement with TNSM, a small group of armed people enforcing their ideas on a larger population. There was a global uproar too, which put the ANP government in a very awkward situation. However, the deal between ANP and TNSM did not last long, because the latter could not convince TTP Swat chapter to disarm and reintegrate into society. On the other hand, it was not possible for TTP to lay down their weapons, because local communities, under the obligations of Pakhtunwali, would not forgive the blood shed of their loved ones and would surely opt for the old Pakhtun tradition of '*Badal*' (revenge).

The breach of agreement with TTP was followed by military operations in 2009, which dismantled the TTP infrastructure in Swat and other adjoining districts, forcing a historic influx of more than two million people to Peshawar and other districts of KP. Despite the breach of agreement, the ANP government kept its promise and continued with *Nizam-e-Adl* regulation of 2009.

This question was asked only in the selected districts of Malakand division. The data shows that only half of the respondents were aware of this institution (50%). It is slightly surprising as the issue of justice was a long awaited



commitment that the State of Pakistan made in 1969 – the time when all princely states were merged into the mainland of Pakistan, including Swat. However, the fact that half of the respondents still do not know of this condition is a striking revelation.

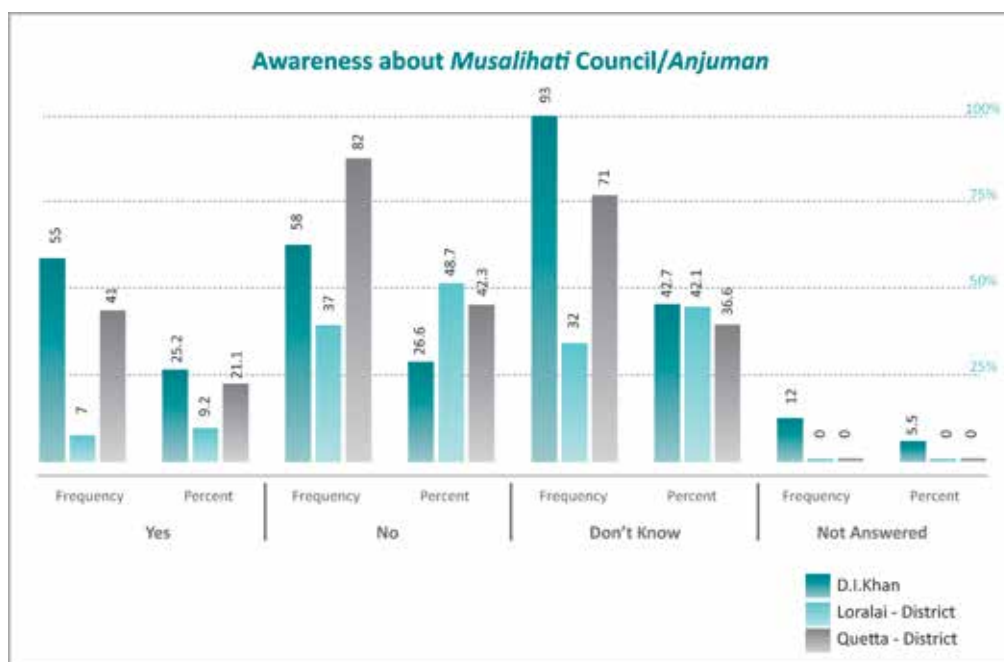
### Musalihati Council/Anjuman (MAs)

*Musalihati* Councils or *Anjuman* are Alternative Dispute Resolution (ADR) mechanisms for mediation and the settlement of disputes, established under Local Government Ordinance 2001 notified by the Provincial Governments.

olution; and more than 19,844 stakeholders were trained on gender sensitisation, legal literacy, monitoring, ADR, computer skills and record keeping/reporting.<sup>70</sup>

The *Musalihati* Councils are concentrated in three districts; one in KP and two in Balochistan. The figure below shows the responses by the interviewees in those districts regarding awareness of the Councils.

Overall we find that a third (35.4%) of the respondents did not know or chose not to an-



These councils were set-up in 22 districts of Pakistan with the objective of building cooperation among the judiciary, police and *Musalihati Anjuman* for dispensation of justice to promote legal rights of women and the role of men in ending violence.

UNDP and Government of Pakistan are jointly implementing a project on Gender Justice through the *Musalihati Anjuman* Project (GJT-MAP) in selected districts of Pakistan. According to UNDP, 1,115 MA's have been operationalised in twenty-two districts of Pakistan. Out of a total of 19,391 disputes received so far by MAs, 15,095 (78%) disputes have been amicably resolved. 330 District & Session Judges, Additional District Judges, Civil Judges and Senior Civil Judges and 20 District Attorneys have been trained in Alternate Dispute Res-

swer and that another third (30.2%) were not aware of the council system. There is a fluctuation in the level of awareness among districts, but the conclusion is that this system has not received the coverage or promotion needed to reach the general population.

### OPINIONS ON THE EFFECTIVENESS OF INSTITUTIONS

This section documents the perception of respondents about the effectiveness of formal justice systems. The dimensions of effectiveness when seeking justice include: speed, affordability, the room for corruption, and the treatment of women. The question: *What is your opinion/perception of the following institutions and actors?*– Codes: Affordable (01) Speedy (02) Bribes (03) Influence Peddling (04) Unresponsive to Criticism (05) Ignores Human Rights (06)

70) UNDP Pakistan, <http://undp.org.pk/gender-justice-through-musalihat-anjuman-gjtmap.html> (accessed 2 January 2013)

Gender Equality (07) Class Bias (8) Don't know (99). (Multiple-choice question). The findings are presented below as per institution.

**Provincial Police Authorities and their local representatives (e.g. S.H.O, D.S.P, etc.)**

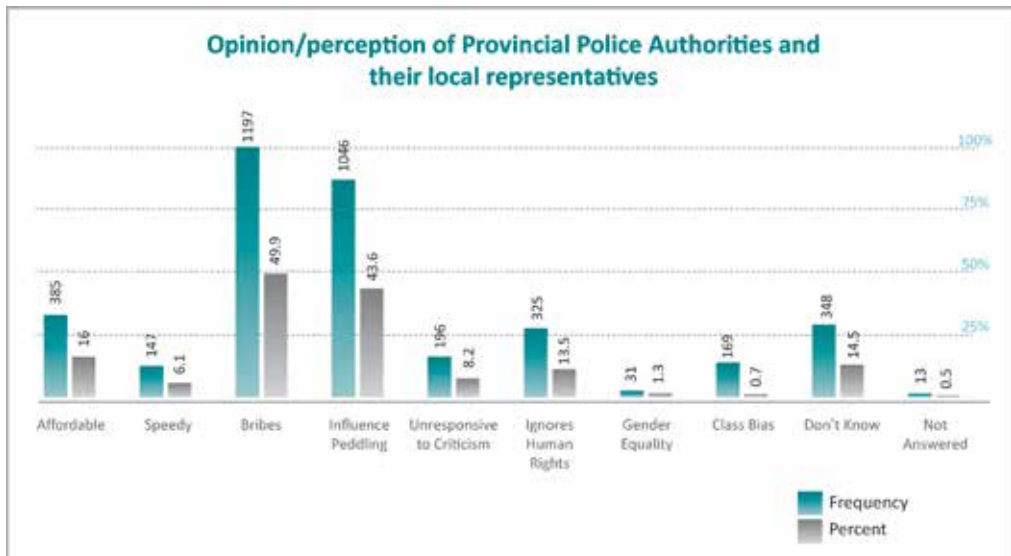
The first institution tested under various options through this question was provincial police authorities and their representatives. It is commonly perceived that the majority in Pakistan do not like the police system and have developed ill feelings for it due to numerous reasons, the most prominent is corruption.

Overall, the survey results show a negative view of respondents towards the police in general. Almost half of the respondents, 49.9%, believe that police authorities take 'bribes', followed by 43.6% respondents who opined that the police authorities are involved in 'influence peddling'. These two major aspects have overshadowed the other negative opinions towards police authorities, e.g., only 13.5% respondents opined that the police 'ignore Human Rights.' There are many media reports criticising the police for mishandling people they interact with. This is followed by 'unresponsive to criticism', 8.2%, and 'class bias', 7%. Only 16% of respondents thought that dealing with police authorities is 'affordable'. This involves a heavy cost of bribes and other expenses, which poor people cannot afford generally.

inal Procedure Code 1898 are not extended to FATA, while *Khasadar* and Levies force take care of the internal security in 27% protected areas of FATA. The FATA respondents' views of the police system are also very unfavourable who might never welcome this institution in their area. The 1,500 FATA respondents in 2010 survey were asked in a qualified manner to share their perceptions or opinions of provincial police authorities and their local representatives. 41.8% opined that provincial police authorities take bribes for their services, while 35.3% did not know much about the provincial police authorities. 7.3% believed that the police department is always under immense pressure from its superiors and representative governments, thus allowing for most of the cases to go un-settled, and criminals or offenders to get away. Around 5.5% believed that the police department at times violates human rights while dealing with cases and 2.2% believed that the police department is unresponsive to criticism.

Only 3.6% believed that the police department is affordable and should be extended to FATA. 2.6% believed that the police department is quick in settling cases. 1.1% said that the police department is 'class biased' and always favours the rich and influential.

Overall, the above data shows that the respondents do not have a favourable view of the provincial police authorities.



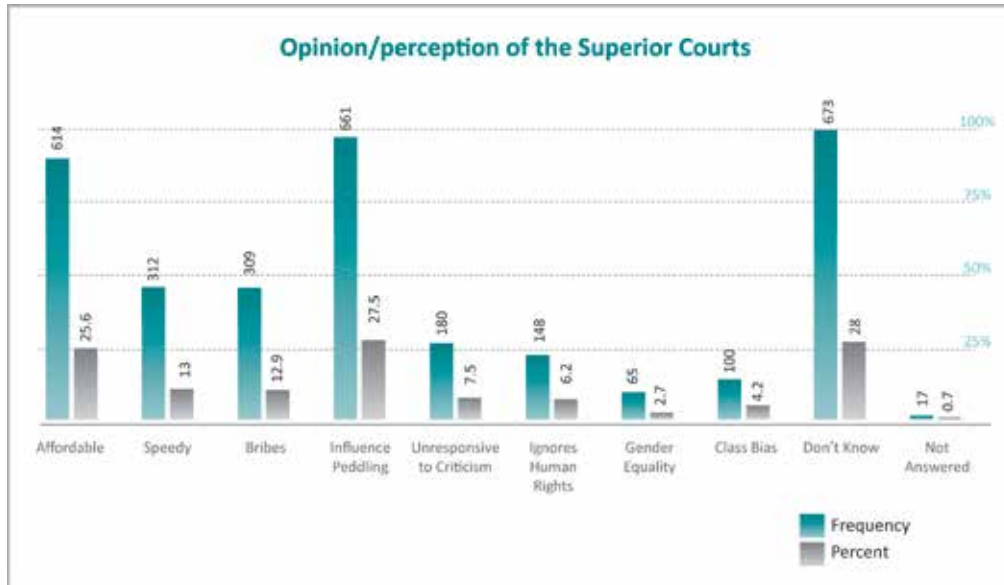
Now we compare this data with the 2010 FATA Survey report by examining how the respondents from FATA felt about the police authorities and their representatives. For the readers information, both the Police Act of 1861 and Crim-

**Superior Courts in Pakistan (Supreme Court of Pakistan and provincial High Courts)**

In recent years the Superior Judiciary, under the Chief Justice of Pakistan Ifthikhar Muhammad Chaudhry, who stood up against the

President General Pervez Musharraf in 2007, has gained considerable respect nationally and globally. The Chief Justice's *suo moto* actions on several issues of national interest have also made him and the superior judiciary popular amongst the masses.

system is slow in dispensing justice. The data shows that only 8.1% respondents believed that the lower court system is speedy in delivering justice. It is quite a small number of respondents, as compared to informal dispute resolution system (46%).



However, despite the recent fame of the Chief Justice, the survey data shows that more than a quarter of respondents believed that the 'superior judiciary' is prone to 'influence peddling' followed by 25.6% respondents who thought that superior judiciary is 'affordable'. About 13% opined that the superior judiciary is speedy, keeping in view hundreds of thousands of pending cases. More than one quarter of the sample did not share their opinion. The other aspects related to superior judiciary are negligible and can be seen in the figure.

#### Lower Courts in Pakistan (Judicial Magistrate, District & Sessions Courts)

Generally, Lower Courts in Pakistan have little credibility due to many of the same reasons cited about the Higher Courts. Accordingly as we will show, people tend to find easy and cheap solutions to solve their problems in a timely manner. The data reveals that one-third of the respondents, 33.2%, believed that Lower Courts are prone to 'influence peddling' and 16.3% pointed to 'bribes' as another negative aspect of these courts.

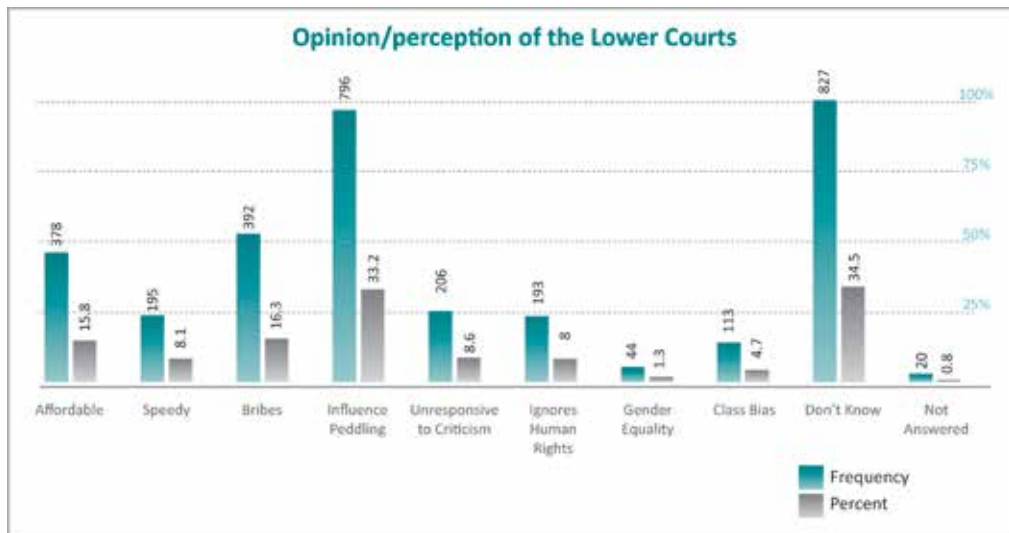
Only 15.8% respondents believed that Lower Courts are 'affordable' followed by 8.6% who thought that Lower Courts are 'unresponsive to criticism'. It is also believed that the formal

Just 4.7% respondents thought that Lower Courts are 'class biased' in comparison with what the media has reported so far. It is generally believed that the court system prefers and supports the rich class while ignoring those who could not afford to pay high fees demanded by majority of lawyers.

Comparing the 2010 survey data from FATA (the question in 2010 was not separated into the Superior Courts and the Lower Courts), the responses are not very surprising or different. Out of 1,500 respondents, 40.5% said that they did not know the functions of the courts. 14.4% believed that officials and judges take bribes when deciding a case in general courts, and 14% believed that general courts can be influenced by the powerful, so the weaker party does not receive due justice. Only 3.2% believed that general courts are unresponsive to any criticism and 4.5% believed that general courts ignore human rights when deciding a case.

However, 13.4% still believed that general courts are affordable, and 7.5% opined in a qualified manner that general courts are quick in dispensing justice to the people.

Analysing the above results, one can clearly see that respondents from KP, Balochistan and



FATA do not have a favourable view of the general courts in Pakistan.

#### Specialised Anti-Terrorism or Narcotics Courts

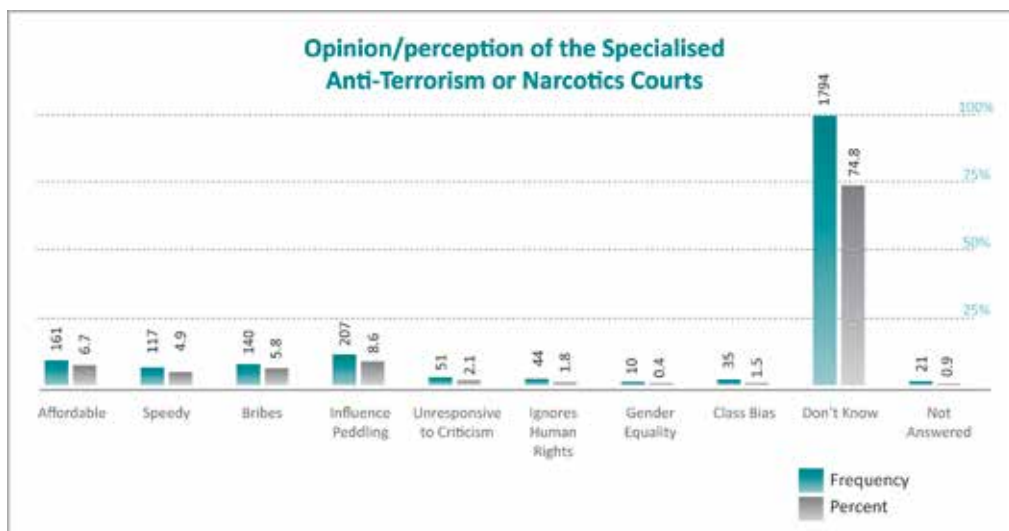
Specialised Anti-Terrorism or Narcotics Courts have been introduced in the previous section. Keeping in consideration the nature and scope of such courts, it is not surprising to see that three quarters (74.8%) of the sample did not know about the existence of such courts. Out of the remaining one quarter, higher number of respondents, 8.6%, believed that the 'influence peddling' element is seen in these courts while only 6.7% believed that these courts are affordable. The element of 'bribes' was identified by only 5.8% and only 4.9% thought that these courts do not expedite cases fairly.

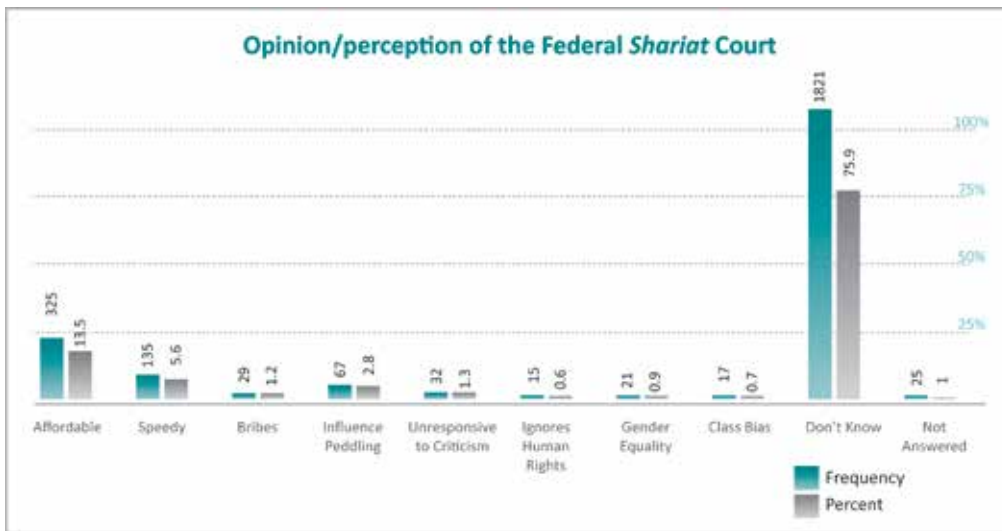
More than half of the respondents, 59.6%, could not form an opinion, as they did not

know much about these specialised courts. Only 9.3% believed that these courts can be influenced by the powerful in order to obtain favourable results. Some 6.7% believed that these courts do not consider human rights when deciding a case, while 6.1% opined that the officials of these courts take bribes and favour cases. Only 5% believed that these courts are unresponsive to any criticism.

6.3% believed that these courts are affordable and 4.6% opined that they are quicker in deciding cases.

Overall, the opinion of respondents in relation to these courts is not very favourable. The same sentiments were also echoed in the qualitative assessment. Very few voices were in favour of these courts and even fewer believed that the named courts consider all elements of





globalisation, international human rights standards and gender sensitivities.

#### Federal Shariat Court (FSC)

The respondents' level of understanding of the justice systems in general was gauged in the previous section; it is assumed that since 95% of population in Pakistan is Muslim, they would have an idea of *Shariah* Courts. However, the majority do not know about the Federal *Shariat* Court located in Islamabad; three quarters of the respondents (75.9%) did not have an opinion. Nevertheless 13.5% believed that the FSC is 'affordable'. There were also some negative opinions about this court. The figure shows self-explanatory results for other options, but, in general the surveyed population was not aware of the FSC.

The following text is a comparison of KP and

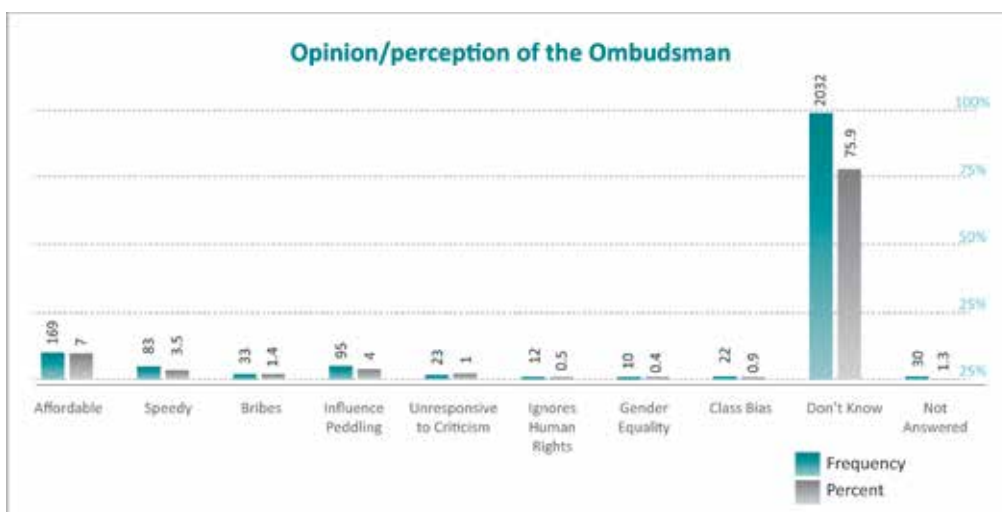
Balochistan data gathered from 1,500 respondents through a survey in FATA on *Jirga*.

Although the Federal *Shariat* Courts do not exist in FATA, only 59.1% of respondents, did not have an opinion compared with 75.9% who did not know in KP and Balochistan. 14.9% believed that Federal *Shariat* Court is affordable for under privileged, and 7% believed that it is quick in dispensing justice to the people.

There were also some negative views about the FSC; 8.3% believed that powerful people can influence it, while 3.3% believed that this court is unresponsive to any criticism. 3.1% opined in a qualified manner that FSC officials receive bribes.

#### Ombudsman

The majority in Pakistan have little knowledge of the Office of Ombudsman and its mandate;



however the survey aimed to document the exact perception of the Pakhtuns in KP and Balochistan. As per the figure 86.0% could not offer an opinion because they did not know about the function of the Office of the Ombudsman.

Only 7% of respondents believed that Office of the Ombudsman is affordable for the people who access it, while only 4% were of the opinion that this Office can be influenced by the powerful, thus denying the weaker party due justice. 3.5% opined that this Office is slow in providing services to the applicants. Respondents did ponder upon other functions but the results are negligibly low.

During the FGDs with various age and gender groups from FATA, it was clear that the majority, especially illiterate and less educated respondents, were ignorant of these offices and therefore could not form opinions of their own.

#### Human Rights Commission of Pakistan (HRCP)

Most of the respondents in the focus-group discussions, including men and women, young and old, did not have a clear idea of the HRCP's role in their areas. Very few people, including those with a higher education and better access to information, knew very little about the institution.

HRCP could opine that it is 'affordable'. HRCP usually takes up cases of high importance where gross violations of human rights have occurred and do not charge aggrieved parties.

When comparing responses by gender in the figure below, we find that the majority of both males (75.2%) and females (85.6%) do not know enough about the HRCP to offer an opinion.

The conclusion is that very few men and women are aware of this commission and because of the small proportion of responses it would not be sound to draw further conclusions.

#### Informal Dispute Resolution Mechanisms

This question lies within a general context and does not only pertain to *Jirga*, but also to other forms of informal dispute resolution systems, such as respected elders or other influential persons within a family or community who act as mediators.

The first observation from the figure below in comparison with the previous questions is that the proportion of respondents who did not know is low (18.3%), and in this regard the difference between men and women is minor.

Comparing the responses favouring informal dispute resolution systems over other institutions,

What is your opinion/perception of the Human Rights Commission of Pakistan?	Gender of the Respondents		
	Male % (Sample Size 1205)	Female % (Sample Size 1195)	Overall % (Sample Size 2400)
Affordable	13.1	4.7	8.9
Speedy	4	2.8	3.4
Bribes	1.2	0.8	1
Influence Peddling	3.9	1.6	2.8
Unresponsive to Criticism	2.2	1.3	1.8
Ignores Human Rights	0.6	1.8	1.2
Gender Equality	3.2	1.4	2.3
Class Bias	1.2	0.7	0.9
Don't know	75.2	85.6	80.4

In the previous section, more than one-quarter of the respondents were aware of the existence of HRCP and that is mainly, if not entirely, due to its sincere insight on the issue of missing persons from Balochistan. However in response to this question respondents seem to be quite confused when it came to having an opinion about the functions of HRCP. Overall, eight out of ten respondents (80.4%) did not have an opinion. Only 8.9%, who knew about

we also see a very clear difference. Overall, the majority (55.1%) of respondents, much more than for any other institute mentioned earlier, believed that the informal dispute resolution mechanisms are affordable. We do not have an explanation for the fact that males, more so than females, believe this to be true. Since this was a multiple response question, we see that the second opinion of respondents was the quick dispensation of justice, 46.1%. The rest of

What is your opinion/perception of the informal dispute resolution mechanism?	Gender of the Respondents		
	Male % (Sample Size 1205)	Female % (Sample Size 1195)	Overall % (Sample Size 2400)
Affordable	60.2	49.9	55.1
Speedy	44	48.2	46.1
Bribes	1.3	1.8	1.6
Influence Peddling	3.4	3.4	3.4
Unresponsive to Criticism	2.3	1.1	1.7
Ignores Human Rights	1.2	1.9	1.6
Gender Equality	4.6	1	2.8
Class Bias	2.2	1.7	1.9
Don't know	17.7	18.8	18.3

the opinions, all negative aspects, are in single digits. Only 3.4% believed that informal institutions can be influenced by the powerful.

Surprisingly, only 2.8% of the respondents thought that informal institutions are 'gender equal'. Informal institutions are known for their gender insensitivity and as a major limitation however, the survey result shows that, an overwhelming majority are in a state of denial or do not perceive the known gender bias. Furthermore, only 1.6% feared that these informal institutions are influenced by 'bribes', while an equal percentage of respondents, 1.6%, believed that informal institutions lack the ability to ensure Human Rights standards.

From the 2010 survey data gathered from 1,500 respondents through a survey in FATA on *Jirga* we can compare the KP and Balochistan data on the first two characteristics (affordabil-

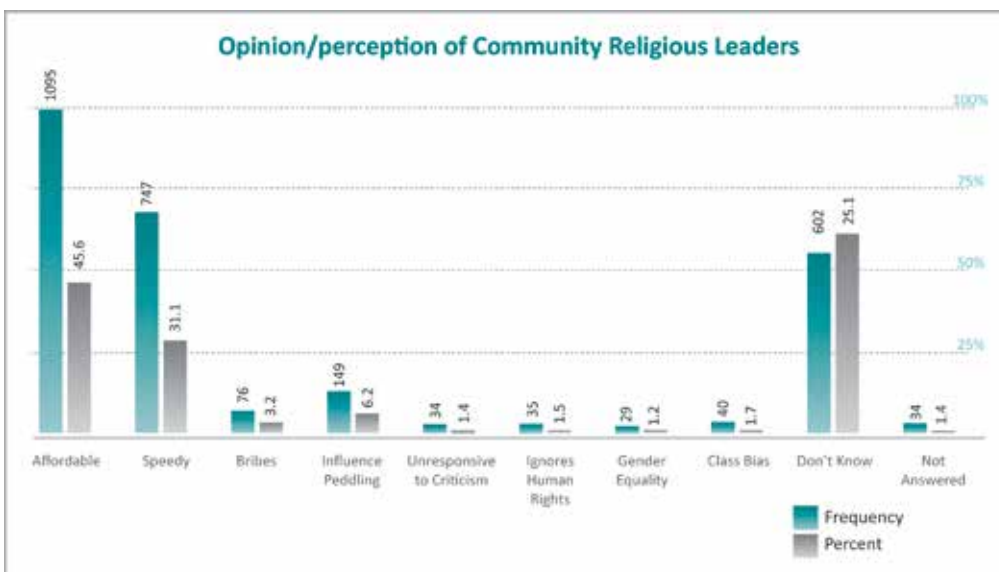
ity and speed). There is a difference; in FATA

43.3% of respondents, compared with 55% above, believed that informal dispute resolution mechanisms are affordable.

#### Religious leaders in the community

Religious leaders are well respected within the communities across Pakhtun residing areas of Pakistan. People consult them for their petty issues and family matters, and the media reports that such religious leaders resolve some complex matters such as cases of robbery/ theft, murders, honour killing, etc. In some cases, it has been observed that verdicts issued by these religious leaders have violated the norms of Human Rights.

Looking at the data below, we see that a higher number of respondents, 45.6%, believed that resolving disputes by involving religious leaders



is an affordable way, while 31.1% thought it is quicker than other institutions. One-quarter of the sample could not comment, as they did not know the answer.

The data for FATA clearly reveals that majority of respondents identified the positive aspects of the institution while negative aspects were negligible. Over half of the respondents (55.9%) mentioned that the services of a religious leader in the community could be acquired without much cost, as they are accessible and affordable for all. This is quite a high number, even higher than that for informal dispute resolution systems.

**Nizam-e-Adl (Malakand Division Only)**

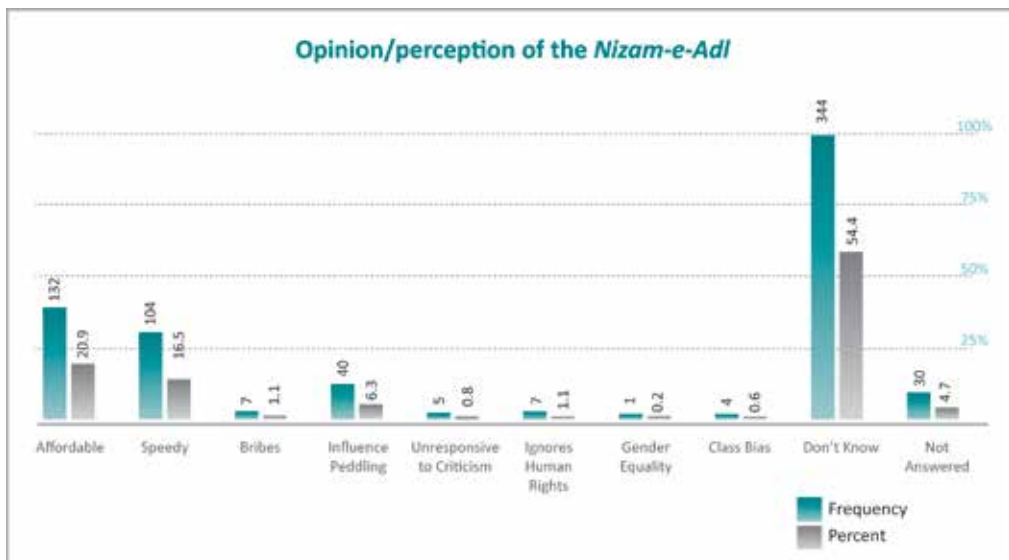
*Nizam-e-Adl* is specific to Malakand division, as stated earlier. It is a newly established or

aware of this institution. Another subsequent question, aimed at finding out how respondents felt about various functions and aspects of this institution.

*Data of three sample districts where MAs operate (Quetta, Loralai, D.I. Khan)*

Again, as shown in the figure below, the majority (87.3%) did not know or could not answer the opinion question, as they did not know the answer. As far as commenting on positive aspects of this institution, only 5.7% and 6.8% respondents thought that this institution is affordable and decided cases quickly, respectively. Other negative aspects are extremely low and are not worth analysing.

*Data of three sample districts where MA operates (Quetta, Loralai, D.I. Khan)*



half-established institution and has yet to start functioning. Nonetheless, a significant number of respondents, 20.9%, still believed that this institution is affordable while 16.5% thought it is quick in dispensing justice to the common man. A high number of respondents identified positive aspects while negative aspects are negligible. However, more than half, 59.1%, could not share their opinion as they either did not know the answer or did not respond.

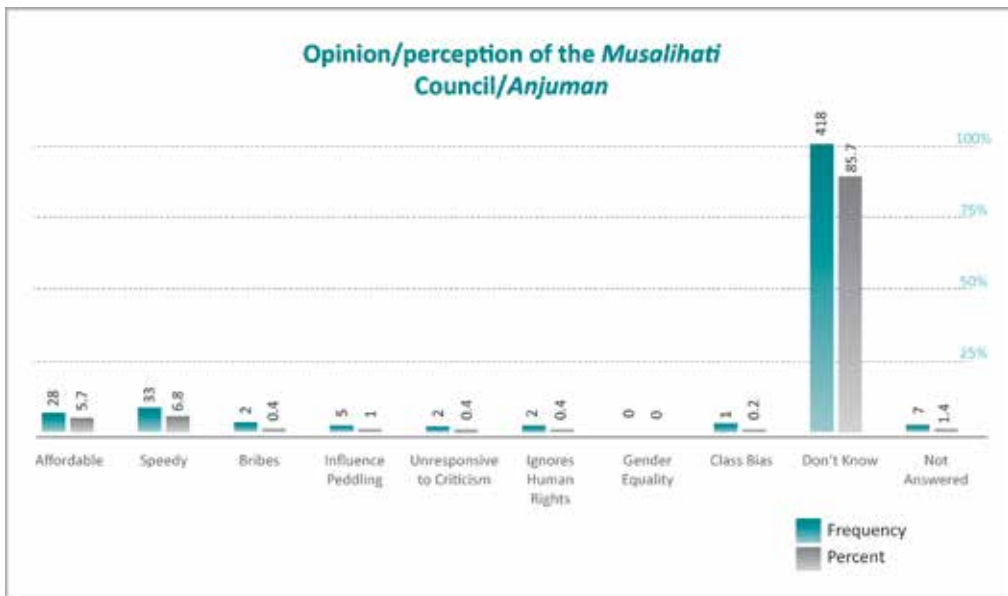
**Musalihati Council**

As stated earlier, *Musalihati* Councils were established in 2001 in selected districts of Pakistan. Therefore, as analysed in the previous section, the overwhelming majority (8.2%) of the sample in those three districts was un-

**Taliban Shura**

Talibanisation in Pakistan is not an old phenomenon. Following the end of the Taliban regime in Afghanistan, the USA forced Pakistan to guard its borders with Afghanistan and to help hunt Al Qaeda, foreign fighters, and Afghan Taliban in Pakistan, more specifically in FATA.

In reaction, the world saw the evolution of various Pakistani Taliban factions and other militant groups – the most damaging is the *Tehrek-e-Taliban* Pakistan (TTP) which is fighting Pakistani security forces and attacking civilians. Pakistani Taliban began their activities in early 2004 when they dispensed quick and free justice to the masses in FATA through a *Shura*. However, later on, TTP started executing people without a



proper trial against all human rights norms and the law of the land. Since such activities took place in pockets of FATA and PATA, therefore its influence is confined to certain areas.

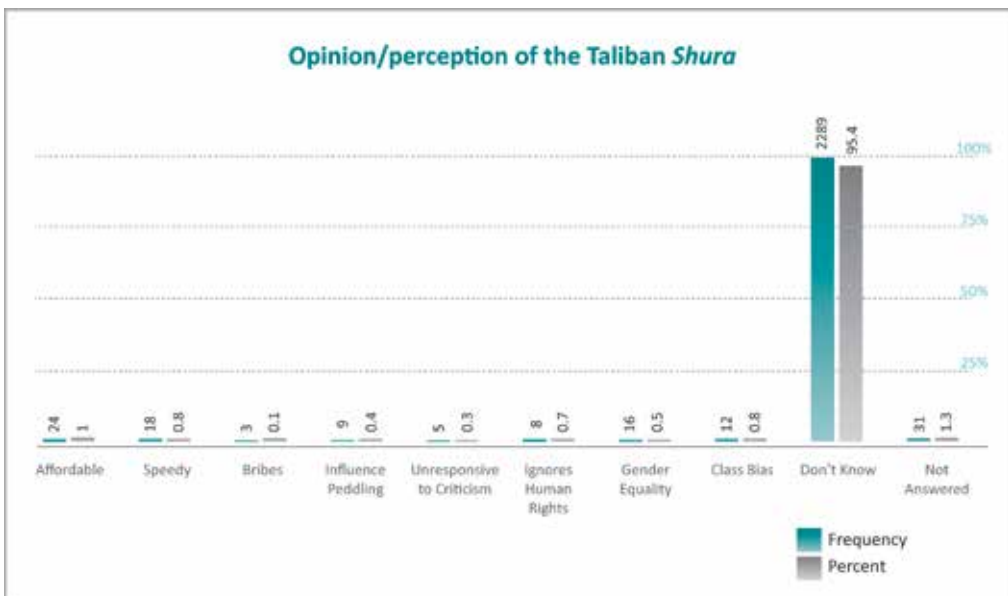
The Taliban *Shura* was under practice in some parts of the survey area, specifically, in remote areas where security was weak. Nevertheless, the question was asked to observe perceptions of people about the Taliban and *Shura* and their extent. In the figure below we note, that 96.7% of the interviewees did not know or did not answer.

There could be numerous reasons for the low response rate, but the most probable reason is

that the sampled area, especially the elimination of areas where security was a problem, did not overlap with Taliban *Shura* presence.

### Conclusion

This chapter discussed two main issues – awareness and opinion about the institutions which are dispensing and implementing justice in Pakhtun areas of Khyber Pakhtunkhwa and Pakhtun areas of Balochistan. The quantitative data reveals, which is validated by the quantitative data as well, that Pakhtuns are equally aware of the *Jirga* institution and of district administration and police. *Jirga* is contacted by Pakhtuns by choice for resolving their issues while interaction with district adminis-



tration and police is by law, which they cannot avoid, even if they wish to do so. This is linked to the Pakhtuns' opinion of formal and informal justice system and institutions responsible to ensure law and order. The survey result show that Pakhtuns value the *Jirga* systems due to its quick dispensation of justice, affordability, accessibility and less likelihood of being influenced. However, Pakhtun respon-

dents also show a clear state of denial when it comes to inclusiveness, rights compliance and class biasness. Very few respondents accepted the reality that *Jirga* is gender and class biased and that it violates some basic rights. On the other hand, Pakhtun respondents shared their lack of trust in other formal and informal institutions dispensing justice.

## CHAPTER: 6

### The *Jirga*



# THE *JIRGA*

## Introduction

This chapter deals with the mechanism of *Jirga* and its importance for the people of FATA. A historical review and detailed definition of *Jirga* system is provided for understanding it in present times. Comparative studies about the legal frameworks of different types of *Jirga* are included in this chapter. The functions and organisation of FCR *Jirga*, *Olas* *Jirga* and Loya/Grand *Jirga* is also an important subject of this chapter. The information includes the perception of people regarding the existing legal system in FATA, KP and Balochistan's Pakhtun areas so that an analytical view of the *Jirga* in different contexts can be obtained.

In FATA, the judicial system enshrined in the FCR of 1901 has been described as a hybrid of colonial-era legal frameworks and traditional customs and norms to which executive direction was added.<sup>71</sup> Because of its repressive set of rules that violate basic Human Rights such as freedom from collective punishment, the Frontier Crimes Regulation 1901 (FCR) is regarded as a 'Black Law' or 'Draconian Law' when judged by present-day international Human Rights standards and principles. Nevertheless, it is the only system of justice in place in FATA today. The FCR will be elaborated upon in the coming chapters. The FATA's *Jirga* system has become institutionalised in the present Constitution of Pakistan under FCR. In order to implement the FCR, the British Colonial rule included a system of administration, that is, a system by which the Governor-General of India, through the Chief

Commissioner for the Punjab, engaged the local Pakhtun leaders through a 'Political Officer' who dealt with the *Maliks* and *Lungi* holders of the tribes. The British Colonial structure was similar to the present constitutional structure and the parallels are described below.

## Defining *Jirga*

Historically, individuals, social groups and societies have disputed and competed against one another over scarce commodities and resources - land, money, political power, and ideology.<sup>72</sup> In many parts of the world, traditional ways of justice or locally integrated conflict transformation or resolution institutions are being approached to resolve conflicts and to ensure peace and stability within local societies or tribes. Such institutions are often suitable in circumstances in which they operate because they satisfy the local cultural and religious sentiments. Such circumstances often make them more successful than contemporary or modern justice systems. The existing body of literature confirms that the nature and causes of conflicts and mechanisms for resolving them are deeply rooted in the culture and history of every society; they are, in many important ways, unique to each culture.

According to the Pakhtu Descriptive Dictionary (1978: 1272), *Jirga* is an original Pakhtu word that, in its common usage, refers to the gathering of a few or a large number of people; it also means consultation according to this source.<sup>73</sup>

71) Testing FCR on the Touchstone of the Constitution" by Dr. Faqir Hussain, October 2004

72) Wardak, A. (2002) '*Jirga*: Power and Traditional Conflict Resolution in Afghanistan' in Law After Ground Zero, Edited by John Strawson, London: Cavendish

Note: The Pashtun/Pakhtun *Jirga* system is almost the same on both sides of the Afghan-Pakistan border.

73) Ali Wardak (2002) '*Jirga*: Power and Traditional Conflict Resolution in Afghanistan' in Law After Ground Zero, Edited by John Strawson, London: Cavendish

However, in its operation, *Jirga* refers to a tribal/local institution of decision-making and dispute settlement that incorporates the prevalent local customary law, institutional rituals, headed by a body of village elders whose collective decisions about the resolution of a dispute (or local problem) is binding (socially and morally) on all parties involved.<sup>74</sup> According to James W. Spain:

*A Jirga in its simplest form is merely an assembly..... Practically all community business, both public and private, is subject to its jurisdiction. In its operation, it is probably the closest thing to Athenian democracy that has existed since original. It exercises executive, judicial and legislative functions, and yet frequently acts as an instrument for arbitration and conciliation.*<sup>75</sup>

Mumtaz A Bangash, a professor at the Area Study Center, University of Peshawar, and a resident of Kurram Agency of FATA, describes *Jirga* in this way:

*The Jirga system ensures maximum participation of the people in administering justice and makes sure that justice is manifestly done. It also provides the umbrella of safety and security to the weaker sections of the tribal people from the mighty one.*<sup>76</sup>

The traditional *Jirga* deals with varying issues in the Pakhtun inhabited areas including conflicts involving land and property, inheritance, alleged violation of 'honour' and intra-inter-tribal killings, cases related to business and properties, etc.<sup>77</sup>

*Jirga* or community-based traditional mediation usually leads to a deep sense of satisfaction, fairness, and ability to move on for both the parties.<sup>78</sup> Pakhtuns, as well as non-Pakhtuns in Afghanistan have preferred *Jirga* to formal justice according to recent research because it is conducted by respected elders with established social status with a reputation for piety and fairness and because it emphasises the compensation of victims and the reintegration of offenders into the community<sup>79</sup>. Also, *Jirga* dispenses speedy justice and is more transparent, trusted and accessible compared to the state justice system.<sup>80</sup> Furthermore, during the *Jirga* process, elders reach decisions in accordance with accepted local traditions and values (customary practices) that are deeply ingrained in the collective conscience of the village/tribe.<sup>81</sup> Often obscured by the quasi-judicial role of the *Jirga* its main function is to peacefully settle disputes rather than to adjudicate or pass a sentence.<sup>82</sup>

The Pakhtun community generally prefers *Jirga* as a means to resolve criminal and civil disputes and mediate tribal or sectarian conflicts.<sup>83</sup> However, they do actually have the choice to, alternatively, bring a case before a state court and in some areas they can even choose to refer to a court of the Taliban or any other group.<sup>84</sup> This "forum shopping" in reality indicates that there is competition between traditional, fundamentalist, and state oriented forms of conflict resolution. Only the state promises (but not necessarily succeeds) to uphold Human Rights.<sup>85</sup> If one wants to prevent the fundamentalist approach from further gaining acceptance in parts of the population, then the offer of state justice to the citizens must be carefully evaluated for improvement.<sup>86</sup>

74) Ali Wardak (2006) 'Structures of Authority and Local Dispute Settlement in Afghanistan' in *Conflicts and Conflict Resolution in Middle Eastern Societies: Between Tradition and Modernity*, Edited by Hans-Jörg Albrecht et al, Berlin: Duncker & Humblot

75) James W Spain, *People of the Khyber: The Pathans of Pakistan* (New York: Praeger, 1962)

76) Mumtaz A Bangash, "Speedy Justice of Elders"

77) Several KIIs, survey data and FGDs with male and female respondents for this study.

78) Interview with Nawab Ayaz Khan Jomezai, Quetta, 30 April 2012

79) Ali Wardak (with Daud Saba, and Halima Kazem) (2007) *Bridging Modernity and Tradition: the Rule of Law and the Search for Justice*, Afghanistan National Human Development Report, UNDP/CPHD, Kabul, Afghanistan.

80) Ali Wardak (with Daud Saba, and Halima Kazem) (2007) *Bridging Modernity and Tradition: the Rule of Law and the Search for Justice*, Afghanistan National Human Development Report, UNDP/CPHD, Kabul, Afghanistan.

81) Ali Wardak, (2004) 'Building a Post-War Justice System in Afghanistan', *Journal of Crime, Law and Social Change*, Vol. 41 (pp 319 – 341)

82) Banerjee, *Pathan Unarmed*, Paperback SAR Press, 2000

83) Interview with Nawab Ayaz Khan Jomezai, Quetta, 30 April 2012

84) Interview with Nawab Ayaz Khan Jomezai, Quetta, 30 April 2012

85) Interview with Mr. Tariq Javaid, Additional Inspector General Police of KP, Peshawar, 16 April 2012

86) Interview with Zubaida Noor, Women Rights activist, Noor Education Trust, Peshawar, 17 April 2012

### **Jirga and its types in different contexts**

*Jirga* in practice is an informal, traditional dispute resolution system in Pakhtun populated areas of Afghanistan and Pakistan. FATA is the only region where the *Jirga* is institutionalised formally under the FCR.

This part of the report will present an analysis of data indicating which system is preferred by the population in the Pakhtun areas surveyed.

### **Sarkari or FCR Jirga and its proceedings**

In the first chapter we have elaborated on the administrative and constitutional status of FATA under the FCR. The *Sarkari Jirga* is provided in the FCR and although a brief description is provided here the reader is referred to “Understanding *Jirga*: Legality and Legitimacy in Pakistan’s Federally Administered Tribal Areas (2011).”<sup>87</sup>

*Sarkari*<sup>88</sup> *Jirga* refers to a *Jirga* sponsored by the government, more specifically by the political administration led by a Political Agent or his subordinates. It deals with all criminal and civil cases in the administered areas of any particular Agency or Frontier Region (FR). The Political Agent acts as a District Magistrate and administers the laws.

The political administration nominates two or more *Jirga* members depending on the complexity and importance of a case. This is done with the consent of disputing parties. Hassan M. Yousafzai and Ali Gohar elaborated the components and process of the *Sarkari Jirga* in their book “Towards Understanding Pukhtoon *Jirga*.”<sup>89</sup>

- A government representative
- A case registered by one of the parties or cognisance of a situation by the government
- Written referral of the case to the *Jirga* nominated by the government official
- Recording of statements of the parties by the *Jirga*
- Visits to the disputed sites by the *Jirga* members

- Recording of further evidence by the *Jirga* members
- Presentation of recommendations to the government agent
- Consideration, approval, or disapproval of the recommendations
- Reference back to the same *Jirga* for reconsideration in light of new facts
- Announcement of the verdict
- Right of parties to appeal
- Implementation of the verdict

The political administrator has the authority to enforce such decisions through its *Khasadar* or levies force. In all cases, the decision of *Jirga* members is unanimous. However, in case a party is not satisfied with the verdict, it can approach the appellate tribunal of the Commissioner and revision proceedings can be initiated in the court of the Home and Tribal Affairs Secretary or Secretary FATA.<sup>90</sup>

### **Olasi Jirga – The Traditional Pakhtun Jirga**

The concept of holding a *Jirga* by the people in FATA, KP and Balochistan’s Pakhtun areas is an ancient cultural tradition. In FATA, in non-protected areas (73% area), people assemble and invoke *Jirgas* to settle their criminal and civil disputes.<sup>91</sup> These *Olasi Jirga* sessions are informal *Jirgas* in the sense that they do not have government support or patronage. But they are informal in nature from the State judicial perspective. Nevertheless, they are a respected process among the people. *Olasi Jirga* is an assembly of elders or respected members representing each household of a certain village or community.<sup>92</sup> If the dispute is between sub-tribes or tribes, or among villages, will be resolved accordingly in those tribes or villages.

The *Olasi Jirga* process can be initiated by one of the aggrieved parties – usually the weaker of the parties who believes that an offense has been committed against him, his family, village or his tribe. The aggrieved goes to a respected elder, an elder known as a *Jirgamaar* who enjoys respect from all parties. The *Jirgamaar*

87) Available at [www.camp.org.pk](http://www.camp.org.pk)

88) *Sarkari* is an Urdu word which means official

89) “Towards Understanding Pukhtoon *Jirga*: An indigenous way of peacebuilding and more...” by Hassan M. Yousafzai & Ali Gohar published by Just Peace International, June 2005

90) Interviews with tribal elders of FCR *Jirga*, March-April 2012

91) Interviews with key informants of FATA, KP and Balochistan, March-April 2012

92) Interviews with key informants of FATA, KP and Balochistan, March-April 2012

listens to the case and tries to convince both parties to submit to the *Olasi Jirga* process. This submission is similar to a “binding arbitration” with the additional weight of the Pakhtun culture. That is, if parties to a *Jirga* do not accept the decision, then they may be shunned by the community and the force (in case of violence) of arms may be used against them. Nevertheless, the cultural purpose of the *Jirga* is to reduce tension and avoid violence that may break up a family or community.

When a dispute of a violent nature or potential arises, elders approach both parties and set up a *Tigah*<sup>93</sup> to prevent the situation from aggravating further.<sup>94</sup> The monetary value of *Tigah* could be either money or weapons.<sup>95</sup> *Tigah* is usually maintained for a certain time period and then followed by proper constitution of a *Jirga*. The *Jirga* then takes time to collect evidence, analyse the evidence, talk to both parties and villagers, takes *Waak*<sup>96</sup> from the parties involved.<sup>97</sup>

The *Jirga* members may take time or hold as many sessions with parties as they deem necessary to reach a decision.<sup>98</sup> Again, Hassan M. Yousafzai and Ali Gohar elaborate the components of *Olasi Jirga* in their book “Towards Understanding Pukhtoon *Jirga*”<sup>99</sup>

An *Olasi Jirga* can:

- Hold as many sessions as needed
- Undertake any issue of interest or concern to the community
- Announce any interim decisions
- Make new rules for the tribe, relating to grazing rights, water rights, etc.
- Call for other ideas
- Invite volunteers as a workforce
- Raise taxes for community work

- Go as a delegation, send delegation to parties
- Send delegations to the neighbouring tribe

Decisions made by the *Olasi Jirga* are rarely challenged, as it is perceived to be more credible than the *Sarkari Jirga* and has legitimacy within communities. This statement will be supported by findings from the perception survey and FGDs.

### **Loya or Grand Jirga**

Although *Loya Jirga* has not taken place in FATA, Afghanistan has convened this form of *Jirga* for centuries. In the Afghan political culture, *Loya Jirga* means a ‘grand assembly of tribal and political leaders, religious scholars, elders and others who assemble periodically in order to discuss important national issues and to reach collective decisions.’<sup>100</sup> The issues that a *Loya Jirga* focuses on are usually of vital national interest such as the selection of a new ruler, declaration of war, the adoption of peace treaties or a new constitution, and decisions on vital regional and international issues affecting Afghanistan. The most well-known form of this *Jirga* in the history of Pakhtun was the 1747 *Loya Jirga* in Kandahar which crowned Ahmed Shah Durrani as their first king of the Pakhtun. Some have described him as the pioneer king of modern Afghanistan.<sup>101</sup> However, the crowning was pre-Durand and pre-colonial India (1858-1947); indeed, it was Durrani who united the tribes of the Kandahar region with the tribes to the north and east around Jalalabad and Peshawar and then went on to conquer as far east as present day Delhi incorporating Sikh and Mughul leaders into the empire. This empire, also referred to as the ‘Durrani Federation’, collapsed from over extension and changes in family leadership capability

93) *Tigah* is a Pakhtu word, which means ‘stone’. The meaning of *Tigah* is entering into a ceasefire between the conflicting parties for a certain timeframe until the *Jirga* settles a dispute

94) Interviews with *Jirga* elders in FATA, KP and Balochistan, March-April 2012

95) Ibid

96) *Waak* is a Pakhtu word which means taking authority from the disputants. That is the disputant agree to cease and desist and put their trust into the hands of the *Jirga* or *Jirgamaar* before the *Jirga* is convened

97) In-depth interviews with elders – January to March 2011

98) Interviews with *Jirga* members from FATA, KP and Balochistan, March-April 2012

99) “Towards Understanding Pukhtoon *Jirga*: An indigenous way of peacebuilding and more.....” by Hassan M. Yousafzai & Ali Gohar published by Just Peace International, June 2005

100) Wardak, A. (2002) ‘*Jirga*: Power and Traditional Conflict Resolution in Afghanistan’ in *Law After Ground Zero*, Edited by John Strawson, London: Cavendish

101) Wardak, A. (2002) ‘*Jirga*: Power and Traditional Conflict Resolution in Afghanistan’ in *Law After Ground Zero*, Edited by John Strawson, London: Cavendish

from generation to generation by the early 1800s before the British arrived in India.<sup>102</sup>

More recently, examples of Loya *Jirgas* in Afghanistan include the 2002 Emergency Loya *Jirga* and the Constitutional Loya *Jirga* in 2003. The latter decided upon the Post-Taliban Constitution of Afghanistan.<sup>103</sup>

With the historical and descriptive background in mind this research posed questions in FGDs and in the sample survey. The objective is to understand how the *Jirga* as a system of justice, is perceived by Pakhtun men and women. We will first present the focus group discussions and follow with the survey data in order to put weight to the general opinions gathered in focus groups.

#### How do *Jirgas* convene their proceedings?

Usually *Jirga* proceedings take place in open areas, such as *Hujra*, playground or open field and mosques, etc. They are of a bigger nature or of higher importance; however, small *Jirgas* take place inside homes for resolving petty family issues, such as divorce, family property issues, child custody, etc.

they convene the *Jirga* in an open space – such as a field in a village, *Hujra*, or mosque.

Furthermore, respondents confirmed that in such *Jirga* proceedings, all parties involved in the dispute should be present. Some of the respondents did not have a very clear idea and could not share their experience.

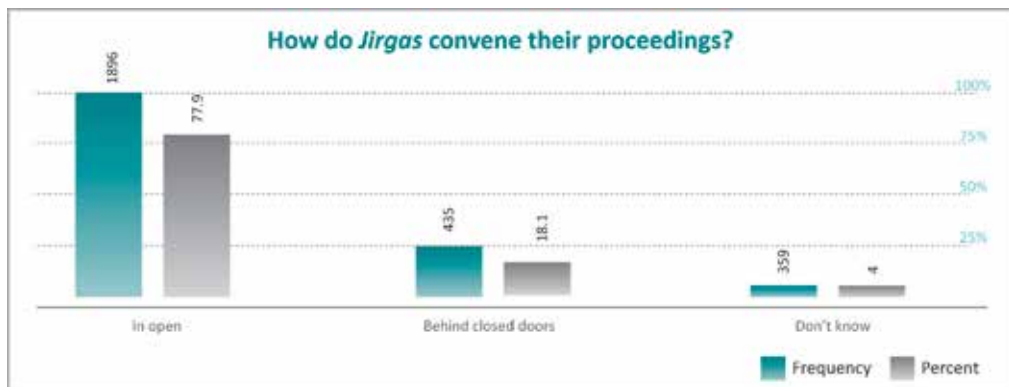
#### Female FGDs

Women respondents were also requested to share their knowledge on this topic. Their information was not different from male respondents, as we know women of Pakhtun society usually receive this information from their male family members.

#### Survey Findings

The data also reinforced the fact that *Jirga* proceedings take place in the open, confirmed by more than three quarter, 77.9%, of respondents. Only 18% respondents informed that *Jirga* proceedings take place behind closed doors.

4% respondents could not share their experience.



#### Male FGDs

Respondents were asked to share how *Jirga* proceedings are convened. The majority shared that it depends on the complexity or nature of a dispute. If it is a minor issue then *Jirga* members usually conduct proceedings inside a room. However, if a major issue arises where the entire community's interest is involved, then such *Jirga* proceedings take place in the open. Respondents added that initially *Jirga* members and parties negotiate and mediate behind closed doors as facilitated by the *Jirgamaar*. When they need to either consult the community or take a decision,

#### Are both parties to the dispute always present at the hearing?

The survey posed another basic question to ascertain whether both disputing parties are always present at the proceedings. An overwhelming majority, 87.4%, confirmed that both parties attend *Jirga* proceedings while only 9.8% informed that it is unlikely that both parties attend *Jirga* proceedings.

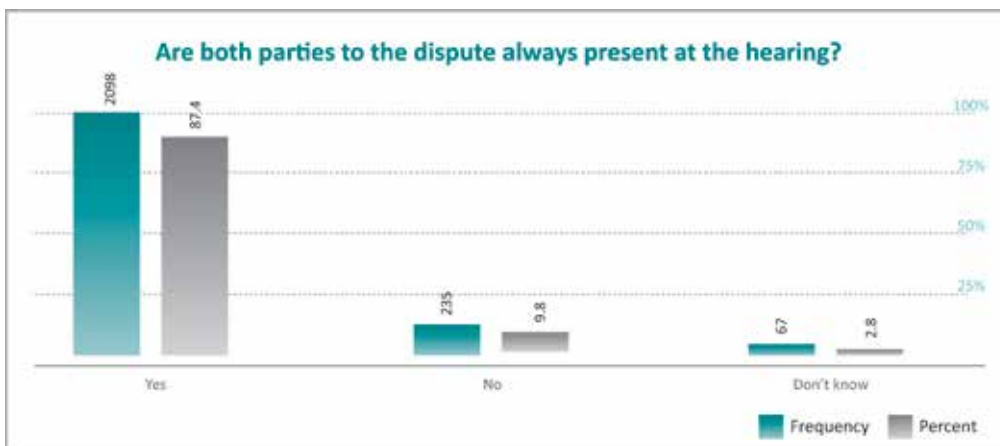
#### Composition of *Jirgas*

##### Male FGDs

With regard to the composition of *Jirga* and

102) [http://en.wikipedia.org/wiki/Durrani\\_Empire](http://en.wikipedia.org/wiki/Durrani_Empire) has a brief history of the Duranni empire (Accessed 17 November)

103) Wardak, A. (2002) '*Jirga: Power and Traditional Conflict Resolution in Afghanistan*' in *Law After Ground Zero*, Edited by John Strawson, London: Cavendish.



its membership, the FGDs respondents were asked to share their knowledge. The majority of the respondents was quite clear and shared that community elders are generally part of *Jirga* institution. Most *Jirga* members, according to the respondents, are rich and influential people. Some of the *Jirga* members are associated with political parties or have been part of the provincial assemblies or national Parliament. Some of the respondents opined that local imams or mullahs also participate as *Jirga* members. Religious leaders are usually consulted for their religious wisdom especially when a party to the dispute is interested in the *Shariah* aspects of the dispute rather than local *Riwaj*.

#### Female FGDs

Despite of the fact that women are not part of the *Jirga* system, they were familiar with the composition of the *Jirga*, even though such information, as mentioned earlier, usually comes from male family members. Women respondents thought that local elders, including Khans (landowners), Imams, councilors, or political leaders, are part of *Jirga* process. Furthermore, they confirmed that there has not been a woman *Jirga* member so far in their knowledge. However, a few women respondents informed that they had participated in the decision-making of *Jirgas* that took place inside homes and discussed matters related to family issues, such as inheritance, child custody, etc., but they had not participated in multi-family, community or tribal disputes.

The research attempted to obtain factual information about the composition of members of an informal justice system or *Jirga*. However, there were no hard and fast rules for this from the FGDs and, therefore, we turn to the perception survey to tabulate the respondents answers to this question. A multiple-choice

question was asked, keeping in view the nature of the question.

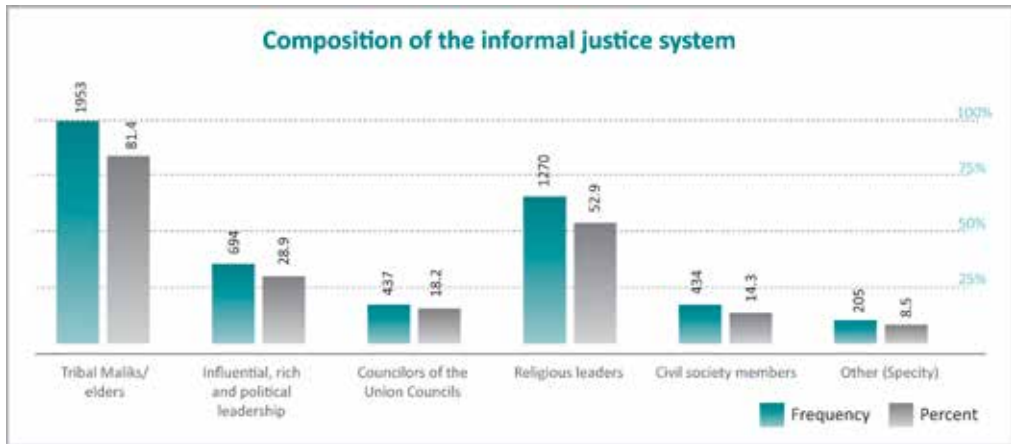
#### Survey Findings

Looking at the multiple responses from the survey in the figure below, an overwhelming majority, 81.4%, confirmed that *Jirga* is composed of 'tribal Maliks/elders' and, in addition, 52% identified religious leaders as members of *Jirgas*. Actually, the membership of both – tribal Maliks/elders and religious leaders – shows how *Riwaj* (local customs) and *Shariah* work together when resolving disputes. *Jirgas* are made up of respected elders and leaders from all walks of tribal life.

Some 28.9% shared that *Jirga* is composed of influential, rich and political leaders. This is very true and tribal Maliks or other elders could also be rich or have political stature which makes them influential. There are a few religious political parties who have their grassroots leadership in FATA, which could also include either a Malik or political leader but would be performing religious duties as well.

Due to establishment of *Musalihati* Councils under the Local Government Ordinance, councilors of union councils were also mandated to mediate and resolve petty disputes among conflicting parties within their areas of jurisdiction. According to the data, 18.2% of respondents shared that councilors also take part in the *Jirga* process.

As one of the options of the survey, 14.3% of respondents identified civil society members as being involved in resolving disputes and also being part of *Jirga* process. Civil Society, especially NGOs, are active in remote and rural areas through their development projects and they are faced with different issues related to community disputes. Therefore, they have also learned the art of mediation in their own way



through different capacity building programmes being funded by international donors.

### Have you attended *Jirga* proceedings?

People in Pakhtun populated areas of Pakistan come across big or small issues and somehow every family experienced *Jirga* in some form. Although, not all members of the Pakhtun family necessarily take part in *Jirga* proceedings. However, they do have knowledge about the traditional system. This section begins with a very basic question asked of the respondents about whether they have ever attended any *Jirga* proceedings.

### Survey Findings

Despite of the belief that only men participated in *Jirgas*, the following data indicates that women do participate in the proceedings. The data in the figure below shows that half of the men and approximately 2% of women participated in *Jirgas*.

The next question reveals how they participated in *Jirgas*.

### If yes, in which capacity?

Those respondents who confirmed that they had participated in a *Jirga* were asked a sub-

Have you attended these proceedings?	Balochistan		KP	
	Male	Female	Male	Female
Yes	53.4	2.4	57.6	1.9
No	46.5	97.6	42.4	98.1
<b>Total Cases</b>	<b>217</b>	<b>217</b>	<b>988</b>	<b>978</b>

### Male FGDs

Because of the belief that in *Jirga* proceedings only male members of the community take part this question was asked only of male respondents of FGDs. The response was mixed. Some of the respondents shared that they attended *Jirga* proceedings as spectator while others confirmed that they attended *Jirga* in the capacity of a *Jirga* member and were part of the decision-making process. Quite a large group of respondents shared that they attended *Jirga* proceedings as parties to a dispute. The disputes were of various nature and majority of disputes mentioned by the respondents were minor issues.

The participation in *Jirgas* bodes well for the opinions that we sought about the process of *Jirgas*.

sequent, multiple-choice question, as to the capacity in which they attended *Jirga* proceedings. This is shown in the figure below broken down by gender.

24 of the 1,195 women sampled had attended *Jirga* proceedings. The following figure shows in what capacity the men and women participated in *Jirgas*. Because the type of *Jirga* was not specified it is not possible to determine if the participation of women included more than family-level *Jirgas*, such as community-level dispute resolution, but it is important to note that they were as likely to be disputants and observers whereas men were much more likely to be observers (52.9%) than disputants (15.5%) and 30% had served on *Jirgas*. It is important to keep in mind that the responses of 24 women cannot be gen-

Response in % of only the interviewees who indicated that they had participated in a <i>Jirga</i>	Gender of Respondents	
	Male (n=856)	Female (n=24)
As a <i>Jirga</i> member	30.1	45.8
As a Government official	1.2	0
As a disputant	15.5	12.5
As an observer	52.9	41.7
Others (specify)	0.2	0

eralised. Nevertheless, it is understandable because we know that in family matters, such as domestic violence, child custody issues, divorce cases, etc., that women elders do participate in the decision-making. In addition, some women do attend *Jirga* proceedings inside homes as observers.

### Who attends the *Jirga* Process?

#### Male and female FGDs

The respondents in all female and male FGDs were asked the same question. The majority thought that all parties to the dispute attended such proceedings generally. In addition every *Jirga* has mediators or *Jirgamaars* who are supposed to convene *Jirga* proceedings. Some respondents opined that it was also dependent on the nature of a dispute, which ensures participation of individuals. They believed that matters related to public interest usually have a larger audience while civil matters have smaller groups, usually consisting of disputants, close family members, and elders making up the *Jirga* members.

#### Survey Findings

The survey data reinforces the general findings of the FGDs as shown in the following figure.

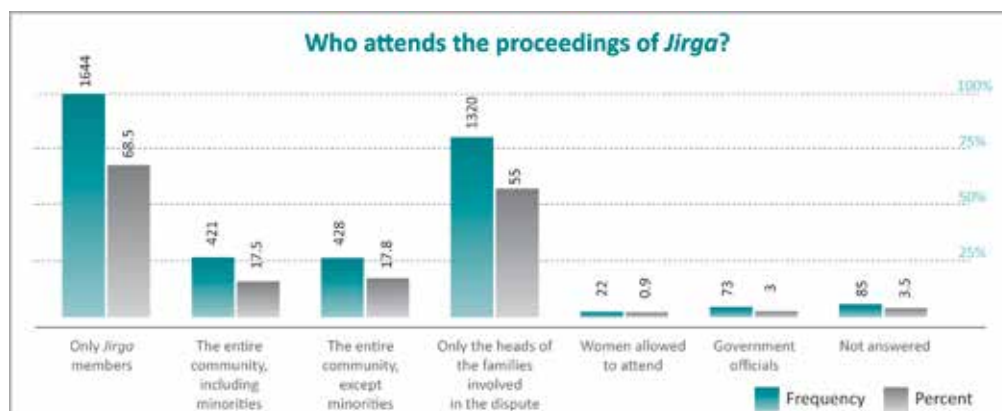
A clear cut majority, 68.5%, confirmed that only *Jirga* members attended *Jirga* proceedings while 55% shared that only heads of families involved in the dispute attended the proceedings. 17.8% think that the entire community attends the *Jirga* proceedings, except minorities. However, 17.5% believed that the entire communities attended *Jirga* proceedings, including minorities. 3% respondents shared that government officials also attended *Jirga* proceedings.

Interestingly, 0.9% informed the survey that women also attended *Jirga* proceedings. Since the survey was conducted in settled districts, including districts where poverty level is low, the education ratio is higher and female literacy rate is encouraging, therefore it is possible that women had attended *Jirga* proceedings as parties to the dispute, depending on the nature of the dispute however, we do not have any example where women could sit in a *Jirga* and watch the proceedings. This reinforces the analysis above from the responses of the 24 women who stated that they had participated in *Jirgas*.

#### What are the criteria for membership in the *Jirga* system?

#### Characteristics and Composition of *Jirgas*

In this section of the chapter we explore the



characteristics that people believe members of *Jirgas* should have and the confidence in *Jirga* members.

### Male FGDs

When male respondents were asked what should be the criteria or qualities for a person to become a *Jirga* member or *Jirgamaar* or *Jirgab-aaz*, a number of qualities were identified by the respondents. They thought that a *Jirga* member should be well versed with local *Riwaj* and his village history; be straight forward in conveying his view point no matter how the people feel; be pious and well versed with Islamic teachings; and should be honest and trust worthy. Apart from these qualities, some of the respondents identified other traits, which a *Jirga* member should have before becoming eligible. Some respondents thought that a *Jirga* member should also have worldly education along with religious education. Besides, some suggested that a *Jirga* member should also have some awareness of formal legal system to avoid any violation of law or fundamental rights enshrined in the Constitution. Furthermore, some of the respondents conveyed that a *Jirga* member should be polite, intelligent, hospitable, righteous and well trained in *Hujra* manners.

### Female FGDs

Female respondents were also given the opportunity to share their thoughts on the membership criteria for *Jirga*. A higher number of respondents thought that *Jirga* members should be well versed with *Hujra* manners so as to respect everyone's point of view. Another group of respondents thought that *Jirga* members should be educated so that they can decide cases in light of new knowledge and so that both parties have faith in the *Jirga* members' wisdom. Another group of respondents thought that honesty should be the main characteristic of a *Jirga* member, which would give confidence to both parties. Some of the respondents believed that a *Jirga* member should be polite in negotiating with the parties to the dispute and treat both parties equally without any discrimination on the basis of wealth, family background, or any other reason.

It seems that common Pakhtun men and women have a good sense of justice where they want to see a perfect individual making decisions for them. If we could find such a gentleman (*Jirgamaar*) to convene *Jirga* proceedings and members of the *Jirga* were to have all of these qualities, then people will receive proper justice. It is clear that the people

do expect justice to be done and to be seen.

From the FGDs described above a number of reasons were stated for *Jirga* composition. Those reasons or qualifications became the options for the respondents to choose from. The following figure shows the weighting of the multiple responses, i.e., respondents were able to pick more than one characteristic that was desired in participants in a *Jirga*.

### Survey Findings

We see traditional values in these responses – please refer to the first column of percentages; the differences in gender will follow. Membership belonging to a respected family shows the importance of ascribed status in the community (71.4%), in another form that was echoed in “having a good reputation in the community (45.4%) and wisdom of culture and forefathers” (43.6%). Other, non-ascribed characteristics referred to education, but note that religious education (57.2%) stands above “formal” (41.9%) and actual “legal education” (26.4%). We see the combined weight of culture and religion when it comes to *Jirga* membership characteristics that are summarised in “piety” (61.8%). In Pakhtun *Jirga* process *Riwaj* (customs) or *Shariah* or a combination of both are applied. Therefore, it is of considerable importance that a *Jirga* member should be well versed in these characteristics as shown in the survey data. “Political back up” (7.3%) shows the clear separation of justice from the political sphere.

When the responses are partitioned by gender a slightly different image is revealed. Please refer to the last two columns “percent by gender” in the figure below. Coming from a respected family still holds and the difference is minor, but collectively females attached much less importance to all of the education characteristics. Nevertheless, religious education was indicated more frequently (52.6%) than the other categories. Again, piety (55.1%) was rated second only to being from a respected family (69.6%). What is puzzling, and reveals that females are not so traditional as males is that, in spite of not emphasising education to the degree that males do, they do not emphasise the inheritance of wisdom and culture from forefathers to the degree that men do.

Experience shows that *Jirga* members are mostly not schooled who have learned through experience and inherited knowledge and wisdom from their forefathers. However, in recent times people in rural communities have realised the need for education, and, as we have



What are the criteria for membership in the <i>Jirga</i> system?	Frequency	Percent	Percent by Gender	
	Whole Sample		Male	Female
Member should belong to a respected family	1713	71.4	73.1	69.6
Member should have wisdom of local culture and history, inherited from his forefathers	1047	43.6	49	38.2
Member should have a good reputation in his community	1090	45.4	54.2	36.6
Member should have formal education	1006	41.9	48.7	35.1
Member should have religious education	1373	57.2	61.7	52.6
Member should have legal education	634	26.4	32.4	20.4
Member should be known for his piety	1483	61.8	68.4	55.1
Member should have a political back-up	175	7.3	9.6	4.9
Other (specify)	14	0.6	0.4	0.8
Don't Know	176	7.3	6.4	8.3

seen in the figure above, males, more than females believe that with new knowledge the *Jirga* could be influenced and Human Rights violations could be avoided. This we see in three responses where respondents have pointed out that *Jirga* members should have formal, religious or legal education.

The options expressed are all-positive and show the esteem with which *Jirga* members are held. Education is important, more so in the opinion of men than women. The positive attitude towards education, as a quality for members of *Jirgas* would bode well for education in society in general. The lower esteem for “legal education” compared to other education, especially religious education, may imply that the interviewees separate *Jirga* from the court system. Perhaps, if the process of *Jirga* were part of formal education, or taught as a jurisprudence in *Shariah* law, legal knowledge would be held in higher esteem. In the case of *Nizam-e-Adl* courts we look into this perspective too because the aspect of education is important for the appointment of formal judges, i.e., with legal education. In this system the use of local tradition apparently gained local esteem, and it may indicate a hybrid system that *Jirga* could evolve into.

#### Do disputants pay fee to the *Jirga* members when their disputes are resolved through *Jirga*?

One of the concerns in justice systems is the cost, perceived honesty, or possibility of influence on the outcome of the process. Traditionally the *Jirga* is contrasted with formal justice systems by

the absence of paid representatives. Nevertheless, there is hearsay that fees may be involved.

#### Male and Female FGDs

Most FGD participants confirmed that *Jirga* members or *Jirgamaars* do not take any fee, however, respondents shared that *Jirgamaars* are provided with food and transport services as a gesture of hospitality. Those who thought that *Jirga* members do take a fee or bribe however could not confirm rates or fees; these responses seem speculative. Nonetheless, when they indicated that *Jirga* members do take some money, it is in the form of *Machalka*<sup>104</sup> money, etc. that the *Jirgamaar* holds to assure compliance with the process. Hence those funds are not of a financial benefit to the person holding the money.

We now turn to the results of the survey and they are quite surprising, because although the FGD implied that *Jirga* members may take money from the disputants, survey results show a different picture.

#### Survey Findings

Through a direct and single response question, respondents were asked whether disputants pay a fee to *Jirga* members. As shown in the figure below, three quarters of respondents (75.3%) said that disputants do not pay a fee to *Jirga* members. Only 4.4% said they do, but one-fifth of respondents (20.3%) said they did not know.

To delve into the 106 (4.4%) cases where respondents said that payment was made for

*Jirga* services a follow on, open-ended question was asked.

#### **If yes, Please specify amount**

The range of the responses in the figure below show a wide range of monetary amounts.

Immediately one notices that 70.8% of the 5.4% who said that payments were made, could not make a guess or did not know of an amount. The conclusion is that although there may be or may have been cases, the general rule is that fees are not charged by members of *Jirgas*.

Often, in tribal affairs, non-monetary compensation is used for obligations. Other than a fee, however, *Jirga* members could be obliged through other means. To look into this area of a cost for conducting a *Jirga* or going to a *Jirga* to resolve a dispute an additional question was posed.

#### **How do *Jirga* members receive compensation for their services?**

The following figure provides several options to the respondents and unsurprisingly, the majority, 52.1%, again reconfirmed that *Jirga* members do not take any compensation for their services. One-fifth of the sample, 21.2%, did not know and could not share their opinion.

17.1% believe that *Jirga* members are compensated with travel and food allowances, understandable and justifiable expenses that disputants have to cover. This comes under hospitality and not a fee or bribe.

10.9% opined that a fee should be paid in the shape of a gift rather than cash while only 3% thought that such fees should be paid as widely accepted and agreed amounts. Only 2% believed that such fees are bribes and disputants usually do so to turn the case in their favour.

#### ***The conduct of the Jirga***

##### **How are *Jirga* decisions usually taken?**

*Jirga* decisions are based on consensus, as explained in the introductory chapter of this study. After extensive mediation and evidence gathering, parties to the dispute give consent to the *Jirga* elders before decisions are announced.

#### **Male FGDs**

The male FGDs agreed that *Jirga* decisions are reached through consensus. They added that before announcing a decision, *Jirgamaars* take the disputants in confidence through what is called “power of attorney” in formal jurisprudence before announcing a decision. After gaining a consensus from both the parties, *Jirga* decisions are announced, that should be acceptable to both disputants. Respondents added that the decision of a *Jirga* is considered as the final word and is respected by all.

However, some respondents informed that sometimes *Jirga* decisions are imposed on disputants and any of the disputants might disagree, especially in cases related to women and children.

#### **Female FGDs**

Female respondents provided opinions similar to that of the male FGDs. This may be because women usually receive information about *Jirgas* from their male family members. A few female respondents were pessimistic and shared the opinion that women’s voices are rarely heard and that decisions usually favour the male section of Pakhtun society.

#### **Survey Findings**

In order to put the FGD opinions into perspective, that, is proportional opinion from the population, the question about how *Jirga* decisions are usually taken was asked in the survey.

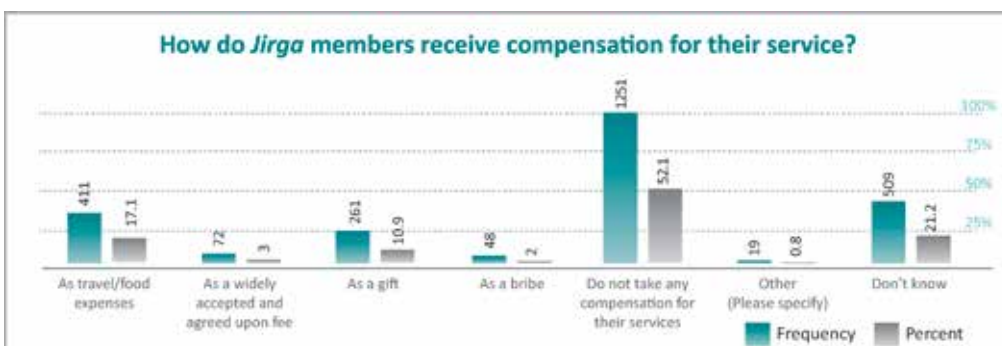
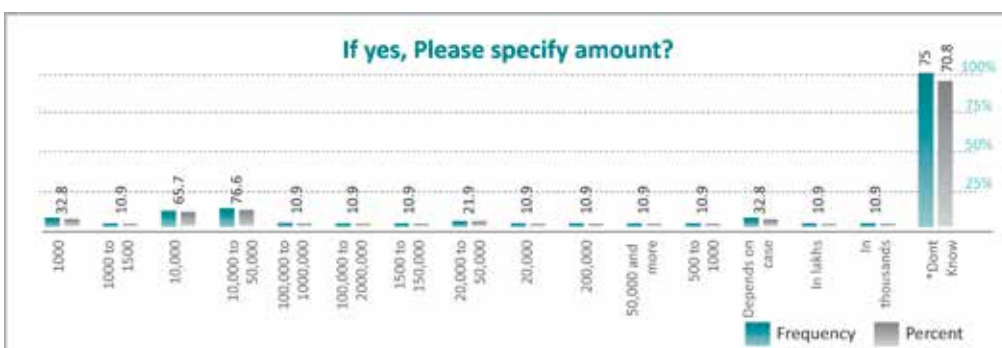
Out of 2,400 respondents from both provinces of Pakistan, an overwhelming majority of 87.6% thought that *Jirga* decisions are based on consensus. Only 1.8% informed the survey that *Jirga* decisions are taken through voting. Again we see some lack of opinion on the part of women compared with men, but not as frequently as with other questions.

#### **What procedures/rules are applied to resolve conflict/dispute through the *Jirga*?**

As described in the background chapter, *Riwaj* and Islamic law or *Shariah* references are used to decide disputes. The FGDs and the survey data shed some light on the balance.

#### **Male FGDs**

Before convening *Jirga* proceedings, *Jirga* members seek permission of both parties whether *Shariah* or local *Riwaj* or customs should be adopted to reach to a decision. This survey also



How are Jirga decisions usually taken?	Balochistan		KP		Overall
	Male	Female	Male	Female	
Consensus	97.2	89.4	88.6	84.2	87.6
Voting	2.3	1.4	2.2	1.4	1.8
Do Not Know	0.5	9.2	9.2	14.4	10.5
<b>Total</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

intended to seek respondents' opinion on which procedures or rules are applied to resolve a dispute through a Jirga. Responses to this question were mixed. Some respondents thought that Riwaj should be respected and adopted when Jirga decisions are taken. They added that their local Riwaj is according to Islam, which makes it easy for the Jirga members to mix both.

Another group argued that since Jirga is a local custom therefore local customs should be

encouraged. However, they added, in certain cases where there is a need for religion to play its part, then Shariah should be interpreted to reach a decision. Some respondents favoured the use of both – interpreting local customs and Shariah.

Some argued that Jirga elders carry historical knowledge of Riwaj while they are not very well versed with Shariah and therefore they are not authorised to interpret Shariah.

What procedures/rules are applied to resolve conflict/dispute through the <i>Jirga</i> ?	Balochistan		KP		Overall
	Male	Female	Male	Female	
Tribal Law	23.0	80.2	26.7	21.6	29.1
Islamic Law	22.6	4.1	17.9	23.3	19.3
Combination of Both	54.4	15.7	49.7	53.6	48.6
Do Not Know	0.0	0.0	5.7	1.5	3
<b>Total</b>	100	100	100	100	<b>100.0</b>

### Female FGDs

The female respondents confirmed that *Jirga* decisions are taken in accordance with *Shariah* while some confirmed that it's a combination of *Shariah* and *Riwaj*. There was a group of females that argued that *Jirga* decisions are reached in accordance with local customs.

### Survey Findings

The survey was used to gather the perception and weigh the respondents' opinion on this issue. The survey results for this question shows that a greater proportion of respondents, 48.6%, thought that in *Jirga* procedures a combination of both *Riwaj* and *Shariah* are applied to resolve a conflict or dispute, while 29.1% believed that only *Riwaj* is applied and 19.3% believed that only Islamic law or *Shariah* is used to resolve a conflict. However, in the case of Balochistan there is a very large gender difference with 80.2% of the women stating that tribal law is used as the basis while 23% of the men in Balochistan, similar to men and women in KP, believe that tribal law is the basis for decisions. We are hard pressed to explain the difference in gender in Balochistan except that women may be less in contact with the system and, hence, believe that *Riwaj* is applied.

This shows that the *Jirga* takes into account both *Shariah* and *Riwaj*.

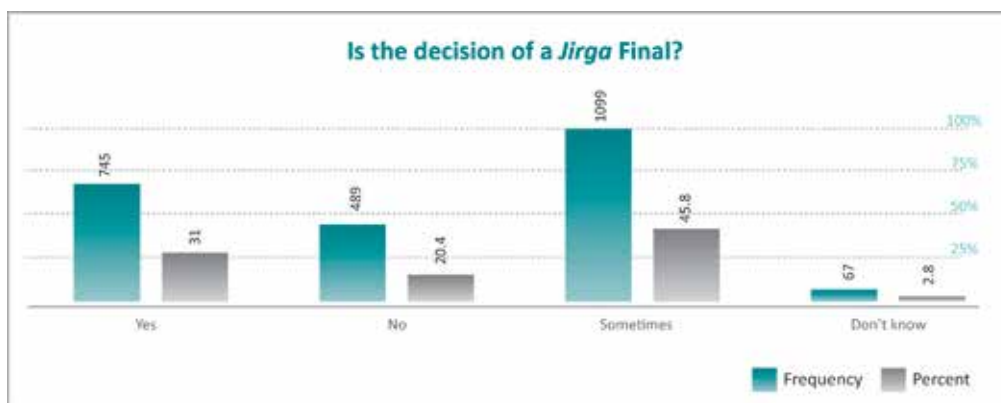
### Is the decision of a *Jirga* final?

There is some ambiguity on this. *Jirga* all over Pakhtun belt, including Balochistan, KP and FATA, is similar as an institution in Pakhtun tradition however; the process varies from place to place and from tribe to tribe. For instance, *Jirga* decisions are strictly followed in FATA but in KP and Balochistan parties might follow decisions voluntarily. However, this volunteerism has hidden community pressure and if anyone does not obey the decision of a *Jirga*, the party could be either expelled from that particular community or the community could declare a social boycott and shun the person or his family, depending on the nature and magnitude of a decision/case. In these cases a Pakhtun family might sacrifice material belongings, or submit to the ritual of asking to be forgiven, but a family would never imagine leaving its village/community or being shunned. However, there are several instances where one or both the parties disagreed with *Jirga* decisions and then went on to access other forms of justice. The data reflects a split of opinion and shows confusion.

The following figure shows the responses to the question of finality of the *Jirga* decision,

### Appeal against *Jirga* decisions

Only 20.4% of the responses above indicated that the decision a *Jirga* is final. Discussion in the FGDs about this subject reveals new aspects which are



useful for understanding the *Jirga* process and that may be useful for justice reforms.

### Male FGDs

In all male FGDs in KP and Balochistan, the majority confirmed that because *Jirga* decisions are reached through consensus, they are final and no party usually approaches another entity. However, a few respondents pointed out that in certain cases, either party may not be satisfied and therefore may request another *Jirga* formation or the approach formal justice system. This usually happens when there is a dispute between a rich and a poor party, respondents added, and therefore the poor party develops such feelings against the rich party and feels that the latter is favoured because of wealth and influence. In such cases the poor party requests the local community to form another *Jirga* or in case they do not have a faith in the *Jirga* anymore they can approach the formal courts.

### Female FGDs

The majority of female respondents were also very clear and confident that *Jirga* decisions are final and accepted by both the parties. They confirmed that to their knowledge no such appeal

to appeal for formation of another *Jirga* or can lodge a formal request in court to get justice.

Although this question was not asked of interviewees in FATA, it is considered rare for appeals to be made. Nevertheless, the question was asked in Balochistan and KP to see if either party can lodge an appeal to the community and request for another *Jirga* to be formed. The following figure, broken down by gender shows that appeals are recognised, but it is far from conclusive.

### Survey Findings

According to the majority of respondents; 56.4%, an appeal could be lodged against a *Jirga* decision while 21.8% still believe that it cannot be. A considerable number of respondents, 21.8%, were not sure about their responses. Again we find that many more women opt for the opinion 'do not know' than do men.

### Is there any higher authority/superior court/tribunal to which you can appeal against a *Jirga* decision?

Appeals against a *Jirga* cannot be lodged in a any formal court, as in Pakistan's settled districts *Jirga*

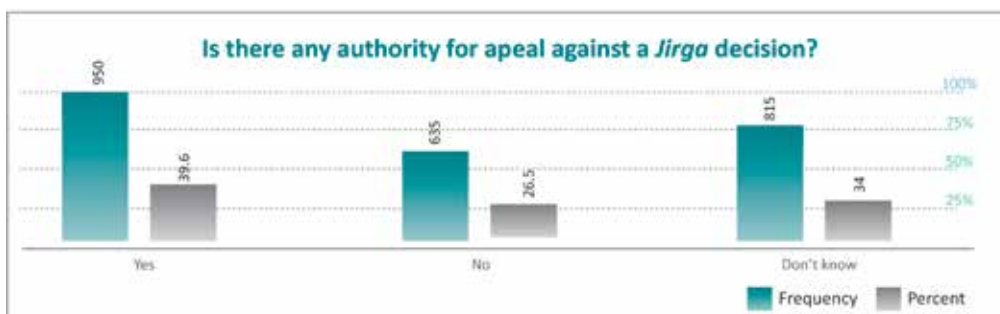
Is there any higher authority/superior court/tribunal to which you can appeal against a <i>Jirga</i> decision?	Balochistan		KP		Overall
	Male	Female	Male	Female	
Yes	51.61	44.24	56.88	59.71	56.4
No	39.17	23.04	25.30	14.11	21.8
Do Not Know	9.22	32.72	17.81	26.18	21.8
<b>Total</b>	100	100	100	100	100

was lodged against a *Jirga* decision. However, there were few respondents who feared that in cases where women's issues are involved, the *Jirga* tends to violate certain women's rights and therefore female victims, if allowed by the men, have had to lodge a request to a formal court.

Therefore, it is confirmed that there may be odd situations where the aggrieved party has the right

or any other form of informal dispute resolution is not recognised and the judiciary discourages this practice strongly.

However, the survey intended to compare facts with perception. The results are confusing, and not clear-cut response is recorded. A higher number of respondents, 39.6%, believed that an appeal against *Jirga* decisions could be



lodged in formal courts, while more than one quarter of respondents, 26.5% believed the opposite. More than one-third of respondents, 34%, did not know.

**Comparisons between types of Justice Systems**

This part of the chapter begins a transition into a comparative analysis of the *Jirga* with other systems, specifically the *Musalihati Anjuman*, and the *Nizam-e-Adl*.

**Are members of the following systems elected/selected/nominated by the community?**

Three (*Jirga*, *Nizam-e-Adl* - Malakand Division Only, *Musalihati* Councils) systems were listed and various options were provided to the respondents.

**Jirga system:**

**Male and Female FGDs**

Members or mediators of *Jirga* are usually local nofigures who have inherited this status from their forefathers. In the research we did not come across cases where the community, through a ballot or show of hands elected a *Jirga* member or *Jirgamaars*. Almost all respondents of the male and Female FGDs confirmed that *Jirga* members inherit their status from their fathers and parties to disputes nominate or select them for resolving a dispute.

Responses show confusion - One fifth (21.8%) believed that *Jirga* members are elected, 22.8% believed that conflicting parties could nominate *Jirga* members or *Jirgamaars* for resolving their disputes and one-third of respondents (32.5%) believed that *Jirga* members are selected. A considerable number of respondents did not share their opinion. This is quite surprising and shows that respondents were not very clear about how

*Jirga* members become part of the *Jirga* process.

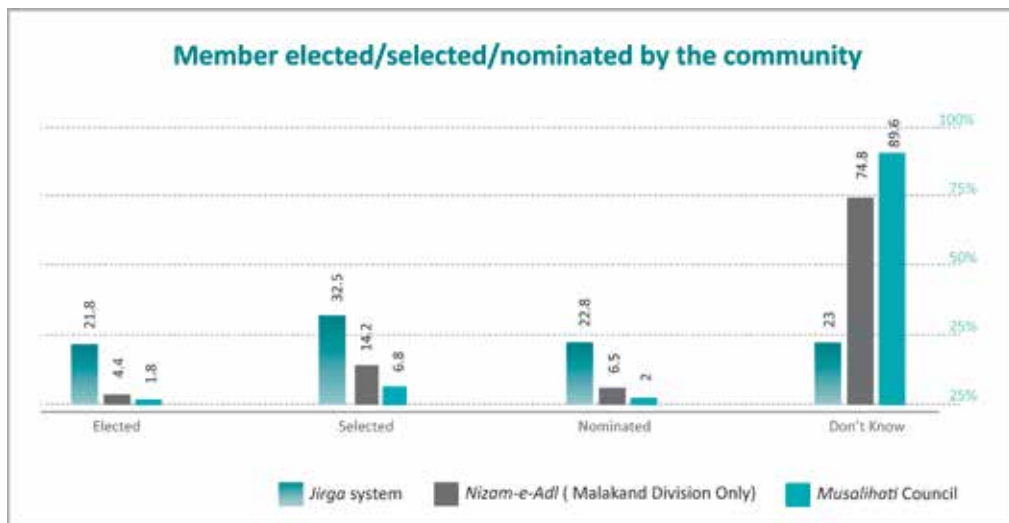
**Nizam-e-Adl:** Under the *Nizam-e-Adl* system, Qazies are being selected or recruited by the government itself rather than posted through election.

**Male and Female FGDs**

Because *Nizam-e-Adl* was introduced only in Malakand Division, this question was asked from male and female respondents there. Very few respondents offered an opinion on selection of the Qazi, while the majority was clueless. Some shared that Qazis are posted by the government who are government employees.

The data in the figure above shows that only 4.4% believed that Qazis of *Nizam-e-Adl* were elected while 14.2% respondents believed that Qazis are selected. Some 6.5% thought that Qazis are nominated. Close to three quarters of respondents did not know showing that the *Nizam-e-Adl* regulation has not been sufficiently promoted or explained to the population.

**Musalihati Councils:** As per the figure above, surprisingly, very few respondents, 1.8%, shared that members of *Musalihati* Councils are elected while 6.8% of respondents believed that members are selected. Some 2% thought that members of *Musalihati* Councils are nominated. Factual information differs from perception. In fact, *Musalihati* Councils were set up as part of the local bodies system, and the local government selects all members of the *Musalihati Anjuman*. As will be shown in the next chapter, the number of districts sampled was too small to be useful for studying this type of justice system because it is scattered and not widespread.



## CHAPTER: 7

### State of Fundamental Rights in the Pakhtun Belt



## STATE OF FUNDAMENTAL RIGHTS IN THE PAKHTUN BELT

### Introduction

This chapter analyses the state of Fundamental Rights of the vulnerable segment of the Pakhtun society, which includes women, children and minorities, and its interrelation with mechanisms of justice. It gains the Pakhtun perception regarding International Human Rights, rights protected by the Constitution of Pakistan and Islam and its interrelation with the informal justice system.

The national legal framework of Pakistan or the 'formal' legal system is not the sole regulatory law governing the lives of people belonging to diverse segments of the society in Pakistan. Therefore, the survey addresses the interplay between international law and the constitutional provisions that recognise and protect the rights of indigenous groups in Pakhtun society, the governance structures that implement the laws formulated at the provincial level,<sup>105</sup> and the local customs and institutions that ultimately decide the code of conduct in the region.

### The Status of International Law in Pakistan

Traditionally national law governs the domestic aspects of government, whereas international law primarily deals with the relations between States. However, this is no longer true. Human Rights, for example, are a cross-cutting issue: If a State is bound to respect and protect Human Rights through international law, then this automatically creates a relationship between the State and individuals who are within its jurisdiction. Therefore, the legal relationship

between international law and national law is interdependent. This relationship becomes particularly relevant where there is a conflict of obligations, i.e. when the content of national law and a rule of international law contradict one another, or, if in national law, a specific right is not conferred to an individual, it is a right that the State must provide under international obligations.<sup>106</sup>

The legal status of international law in Pakistan is such that international law is only legally binding and enforceable if it is incorporated into national law through legislation.<sup>107</sup> Therefore, the State fulfils its international Human Rights obligations by passing national laws on certain topics. For example, Pakistan adopted the *Juvenile Justice System Ordinance, 2000*, to better protect the rights of children as is demanded by the *Child Rights Convention (CRC)*. However, even where Pakistan has not provided for national legislation to transform international law into domestic law, it may be noted that Pakistani courts do try to implement international law provided that it is not in conflict with the Constitution of Pakistan or statutory law.<sup>108</sup> Nevertheless, generally speaking, only where international law has been incorporated into national law will a claim derived from international law be justifiable before a Pakistani court.

On the other hand, in the international context, it must be noted that a State violating international law which is binding upon it can

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105) Shaheen Sardar Ali, Javaid Rehman 'Indigenous Peoples and Ethnic Minorities of Pakistan, Constitutional and Legal Perspectives', Rutledge, 08-Jun-2001, p. 3

106) Malcolm N Shaw, *International Law* (6th Ed. Cambridge University Press, Cambridge 2008) p. 133

107) *Société Générale de Surveillance v Pakistan* [2002], Appeal to Supreme Court, Civil Appeal Nos 459, 460 [2002 SCMR 1694] [Paragrahs 23-24].

108) Ms. Shehla Zia & Others v WAPDA [1994], Supreme Court of Pakistan [PLD 1994 SC 693] [para. 9]; Faqir Hussain, 'Seizure, Confiscation and Asset Recovery' (Background Paper) 2 (accessed on 13 December 2011 at <http://www.oecd.org/dataoecd/21/4/35167365.pdf>).

never justify this neglect of international law.<sup>109</sup> If that were to be the case, every State could easily undermine international law. Such non-adherence of treaty obligations would amount to a breach of international law which could result in counter actions by other States' parties to the treaty under consideration.

To ascertain the opinion of the Pakhtuns and to gain an understanding of their perceived relation of the justice systems under study with regard to international Human Rights standards, the following questions were asked of all 2,400 interviewees and also raised during FGDs:

**Do you agree/disagree that the *Jirga* process is at times in conflict with International Human Rights Standards?**

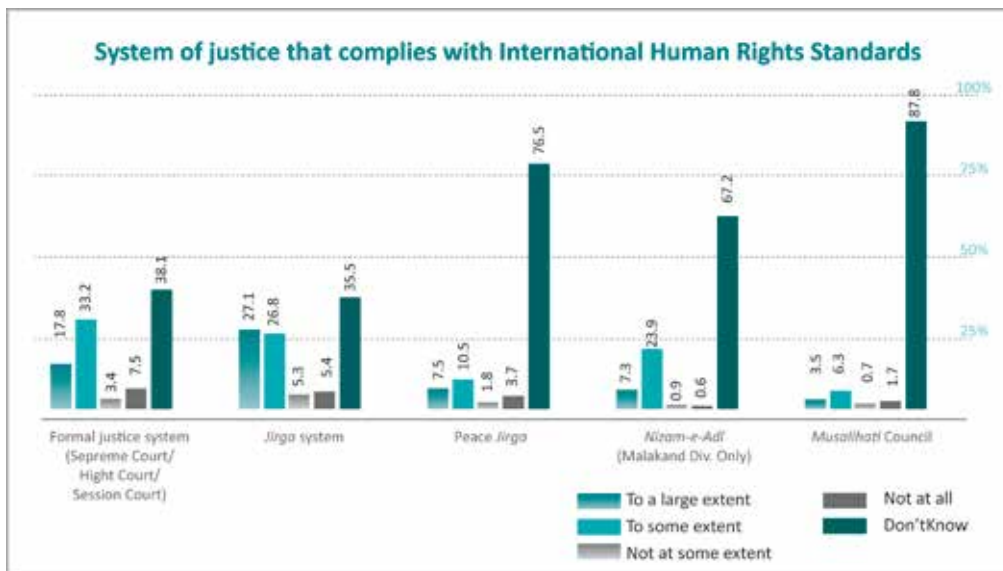
**Female FGDs**

Despite the global perception of the traditional *Jirga* system violating fundamental Human Rights of the vulnerable in the Pakhtun belt, a majority of the respondents in FATA, Khyber Pakhtunkhwa and Balochistan were of the opinion that the *Jirga* decisions were in conformity with international Human Rights standards. A participant explained that she has never witnessed or heard of an occasion where the rights of the underprivileged or marginalised were infringed by the *Jirga*. She believed that the *Jirga* makes judgments and resolves

complex cases based on the notions of equality and fairness. Another respondent justified the actions of the *Jirga* by stating that *Jirga* decisions are also respected if they are in conformity with the principles of *Shariah* even if they are in conflict with international Human Rights standards. Conversely, several participants disagreed with this statement on the basis that certain traditional customs (*Riwaj*) used by the *Jirga* for justice, such as *Swara*, disregard international Human Rights when dealing with the rights of women. However, she further clarified that the custom of *Swara*, is almost non-existent in today's Pakhtun society.

**Male FGDs**

In contrast to female respondents, there was a mix of opinions voiced by the male respondents from Balochistan. Nearly half of the participants explicitly confirmed that the *Jirga* violates fundamental Human Rights particularly with regard to disputes involving women and children. Criticising the traditional *Riwaj*, a respondent explained that there have been occasions when three year old girls have been given to settle blood-feuds. Furthermore, a participant gave an example of the *Jirgas* held by the Taliban in Swat, under which local people were subjected to inhumane and degrading punishments. In contrast, the majority of participants in Khyber Pakhtunkhwa disagreed with this notion and asserted that



109) While this rule is explicitly stipulated with regard to international treaty law in Article 27 of the Vienna Convention on the Law of Treaties, this rule is also valid for states which are not party to the Vienna Convention as this norm is also part of international customary law (see Mark E Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (Martinus Nijhoff Publishers, Leiden 2009) 374 et seq), which is why it is also binding on Pakistan.

System of justice that complies with International Human Rights						
Response	To a large extent	To some extent	Not at some extent	Not at all	Don't Know	Total
Formal justice system (Supreme Court/High Court/Session Court)	17.8	33.2	3.4	7.5	38.1	100.0
<i>Jirga</i> system	27.1	26.8	5.3	5.4	35.5	100.0
Peace <i>Jirga</i>	7.5	10.5	1.8	3.7	76.5	100.0
<i>Nizam-e-Adl</i> (Malakand Division Only)	7.3	23.9	0.9	0.6	67.2	100.0
<i>Musalihati</i> Council	3.5	6.3	0.7	1.7	87.8	100.0

generally tribal elders make their decisions in light of *Shariah*; therefore if a decision is in conformity with principles of Islam, then it also upholds and protects the Human Rights of the aggrieved. A respondent, distinguishing the Pakhtun *Jirga* from other national traditional justice mechanisms such as the *Panchayat* in Punjab, explained that the *Jirga* protects the general welfare of the society and therefore it can never defy or be in conflict with international Human Rights standards.

#### Which of the following systems of justice are in compliance with International Human Rights (IHRs) standards?

The data in the following figure demonstrates that the majority of the respondents view the *Jirga* system as an instrument of justice dispensation that complies with IHRs standards as compared to other formal and informal justice systems.

53.9% of the respondents believed that *Jirga* system acts in accordance with International Human Rights standards in dispute resolution; only 10.9% of the respondents opposed that notion. Whereas 35.5% of respondents could not answer the question, which shows the lack of awareness and knowledge regarding Human Rights and protection guaranteed by international law.

According to the survey, 51% of the respondents agreed that the formal judicial system complies with International Human Rights. While only 10.9% had a negative perception of the formal justice system, 38.1% of respondents did not offer an opinion due to lack of understanding of the legal system's function. Almost one-third of respondents (31.2%) agreed that *Nizam-e-Adl* provides justice according to international standards while only 1.5% disagreed with the notion.

However, 67.2% were unable to answer, because *Nizam-e-Adl* only applies to the Malakand division. Chapter 4 has a section which will specifically analyse the *Nizam-e-Adl* in Malakand.

Only 18% believed that the Peace *Jirga* complies with international Human Rights standards during its proceedings, whereas just 5.5% believe that the Peace *Jirga* does not come up to International Human Rights standards. Most of the respondents, 76.5%, could not express their opinion, as the scope and practice of Peace *Jirgas* are restricted to certain areas and people.

Finally, only 9.8% of respondents were of the opinion that the *Musalihati* Council makes decisions in conformity with international Human Rights standards while only 2.4% have a negative perception. An overwhelming majority, 87.8%, was unaware of this institution of alternate dispute resolution; this may be attributed to the fact that the institution of *Musalihati* Council is relatively new as compared to the *Jirga* which has strong historical significance.

These results portray the relative importance of the *Jirga* among justice systems in the Pakhtun belt when compared to International Human Rights agreements as understood by the sampled population.

#### The Constitution of Pakistan 1973

Fundamental Rights are defined as the preservation of certain indispensable basic Human Rights to be protected against State interference. The inclusion of Fundamental Rights in Pakistan's Constitution enunciates the obligation to protect these inalienable entitlements or "rights", which are inviolable under all conditions.<sup>110</sup> Article 8(2) protects the sanctity of the Constitution by prohibiting the legislature

110) The Constitution of Pakistan 1973 <http://www.pakistan.org/pakistan/constitution/> (accessed on 11 October 2012)

to enact laws that curtail Fundamental Rights and is immune from executive actions.<sup>111</sup>

Articles 8-28 of Pakistan's Constitution provide 'every citizen' their inherent and Fundamental Rights and lays down standard regulatory norms to protect and promote these substantive rights. The FATA – and PATA as well – are considered part of the territory of Pakistan by virtue of Article 1 of the Constitution.<sup>112</sup> As such, their inhabitants are subject to the Constitution so long as they qualify as 'citizens' under Pakistani citizenship law.<sup>113</sup> Moreover, it goes without saying that non-citizens within the state's territorial jurisdiction, and under its sovereign authority, are also subject to Pakistani law, including the Constitution. Indeed, executive and legislative branches of the GoP have never expressly excluded the residents of the tribal areas from the ambit of Fundamental Rights protection guaranteed under the Constitution, and both the Supreme Court of Pakistan [SCP] as well as the Peshawar High Court affirmed that residents of the tribal areas enjoy all such Fundamental Rights under the Constitution.<sup>114</sup> However, a major caveat that must be borne in mind is that Fundamental Rights cannot at present be enforced by residents of FATA or PATA of KP if the right is violated within the respective tribal areas, regardless of whether they are citizens or aliens.

However, in Pakistan's constitutional and legislative sphere, the disinclination to address ethnic diversity has created a vacuum in ensuring legal protection and entitlement of Fundamental Rights for tribal societies. The 'bill of rights' applicable to all citizens of Pakistan, discriminates against the persons from the FATA by excluding them from its legal sanctuary as seen in Article 247 of the Constitution which proclaims that the

institutions guaranteeing Fundamental Rights and ensuring legal remedies are not extended to the tribal areas. The Constitution further provides that the executive legal authority over FATA rests with the President. The law legislated by the Parliament only applies to the FATA after the approval of President, allowing the President to formulate exceptions and modifications to the law.<sup>115</sup> This anomaly deprives persons belonging to FATA from the Fundamental Rights envisaged by the Constitution because these rights are safeguarded and enforced primarily by the judiciary yet the inhabitants of FATA are denied access to the State's justice mechanisms.<sup>116</sup>

Rather than being granted the rights and privileges as equal citizens of Pakistan, the PATA have a separate legal status. Under Article 247, the executive authority of the Federation extends also to the PATA of KP and Balochistan. This provision empowered the President to administer it through the Governor of the KP. Furthermore, Acts of the Parliament or the Provincial Assembly would apply to the region only if the President, at his discretion, so directed. The KP Governor has the right to make regulations, with the approval of the President, for "peace and good government" of the region.<sup>117</sup> Being an integral part of the State, this region is governed by special laws and not by the ordinary national legal framework of the country. Therefore, any legislation enacted by Parliament to safeguard the Fundamental Rights of citizens of Pakistan, such as the recent "Anti Women Practices Act 2011" will be extended to the tribal region if only it is so directed by the President.

Therefore, people residing in the FATA and PATA are not legally entitled to three distinct categories of rights: 1) right to due process that protects against abuses of the legal system

111) Ibid

112) The PATA is not expressly mentioned in Article 1. However, all of the tribal areas which constitute FATA & PATA are named in Article 246 of the Constitution.

113) For an analogous ruling with respect to residents of what used to be known as the Northern Areas, i.e. Azad Jammu & Kashmir & Gilgit-Baltistan, see: *Al-Jehad Trust through Habibul Wahab Al-Khairi v. Federation of Pakistan through Secretary, Ministry of Kashmir Affairs, Islamabad and 3 others* [1990 SCMR 1379].

114) *Murad Ali v. Assistant Political Agent, Landi Kotal and 2 others* [2009 YLR 2497 (Pesh)]; *Ch. Manzoor Elahi v. Federation of Pakistan etc.* [PLD 1975 SC 66]. [hereinafter Elahi].

115) Abdul Malik Khan, *The Dispensation of Justice in Federally Administered Tribal Areas (FATA) of Pakistan: Its Application and Analysis*, [http://www.asc-centralasia.edu.pk/Issue\\_62/08-THE\\_DISPENSATION\\_OF\\_JUSTICE\\_IN\\_THE\\_FEDERALLY\\_ADMINISTERED.html](http://www.asc-centralasia.edu.pk/Issue_62/08-THE_DISPENSATION_OF_JUSTICE_IN_THE_FEDERALLY_ADMINISTERED.html), Research Journal of Area Study Centre, University of Peshawar.

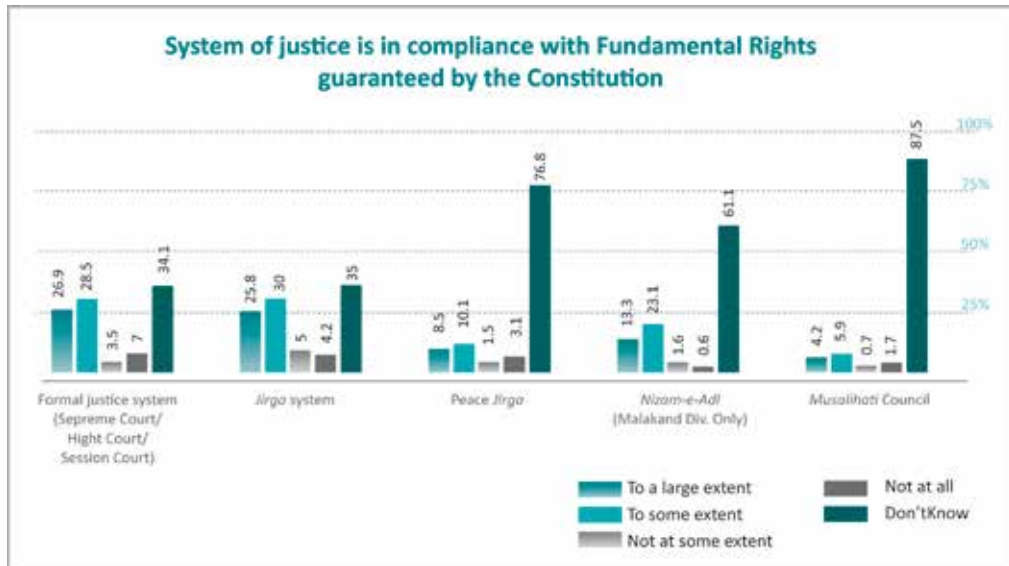
116) *The Constitution of Pakistan 1973* <http://www.pakistani.org/pakistan/constitution/> (accessed on 11 October 2012)

117) Ibid

such as detention or imprisonment without trial, secret trials, retrospective or excessive punishments, and double punishment for the same crime; 2) right of liberty that protects freedoms in areas such as belief, expression, association, assembly, movement, business and profession are safeguarded; and 3) the Constitution grants the right of equality that guarantees equal citizenship, equality before the law and non-discrimination.

36.4% of respondents supported *Nizam-e-Adl's* role in safeguarding the Fundamental Rights provided in the Constitution, while only 2.5% disagreed with the notion. An overwhelming majority, 61.1% were unable to answer, again as *Nizam-e-Adl* is only extended to the Malakand division.

Only less than a quarter of the respondents, 18.6%, believed that the *Peace Jirga* complies



The survey examined the perception of the respondents regarding the role of the various justice dispensation mechanisms in protecting the Fundamental Rights guaranteed by the Constitution.

In order to assess the opinion of the sampled population with regard to the Fundamental Rights enshrined in the Constitution of Pakistan 1973 that guarantees citizens their inherent rights, the question asked was:

**Which of the following systems of justice are in compliance with Fundamental Rights guaranteed by the Constitution?**

The data illustrated that the majority respondents, 55.8% believed that the *Jirga* system and the formal justice system, 55.5%, comply with the rights provided in the Constitution. Only 9.2% and 10.5% of the respondents disagreed with this statement respectively. Furthermore, approximately one third of the respondents could not share their perception due to the lack of awareness regarding Fundamental Rights guaranteed by the Constitution.

with Fundamental Rights guaranteed by the Constitution, whereas just 4.6% opposed this statement. Majority of the respondents, 76.8% did not answer, as *Peace Jirgas* are not held frequently in this region.

10.1% of respondents believed that the *Musalihat* Council makes decisions in conformity with international Human Rights standards while only 2.4% have a negative perception. However, majority of the respondents, 87.8%, were unaware of this institution of alternate dispute resolution; this may be again due to the recent formation of *Musalihat* Council (in 2001) compared to other historical mechanisms of dispute resolution. The survey sample was not able to capture a useful representation of respondents for obtaining data on the *Musalihat* Council because these councils are too few and too scattered.

**Fundamental Rights in the Constitution and Jirga**

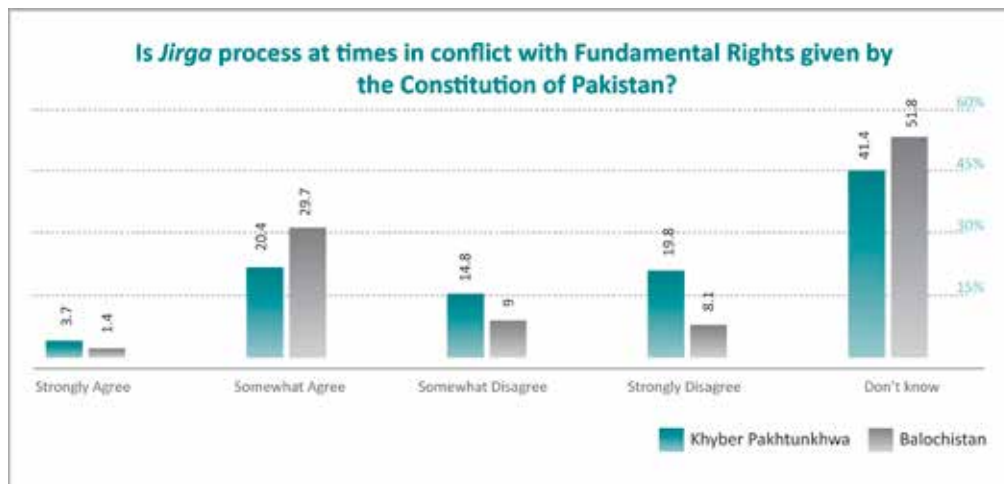
Concerns are raised internationally and nationally regarding the *Jirga's* weak implementation of Fundamental Rights as guaranteed by the

Constitution. Some respondents, 25.4%, agreed that this traditional system is at times in conflict with Fundamental Rights enshrined in the Constitution; including 3.3% who 'strongly agree' and 22.1% who 'somewhat agree'. Whereas 31.4% of the respondents believe that the *Jirga* process is in conformity with the rights protected by the Constitution; including 17.7% who 'strongly disagree' and 13.7% who 'somewhat disagree'. Analysis of the data by provinces illustrated that 24.1% of the respondents in KP and 31.1% in Balochistan agreed with the notion. Conversely, 34.6% of the respondents in KP

their decisions are solely based on the notions of *Pakhtunwali* and principles of *Shariah*.

#### Male FGDs

There was a slight discrepancy in the responses of the male and female participants. While nearly all were of the opinion that *Jirga* decisions are based on the notion of fairness and justice, therefore, they uphold the Fundamental Rights enshrined in Constitution of Pakistan. In support of this argument, a respondent stated that if this was not the case, then the government would have investigated and taken



and 17.1% in Balochistan did not agree with this statement.

#### Female FGDs

Nearly all participants concurred with the notion that the *Jirga* process made decisions in conformity with Fundamental Rights protected by the Constitution; "The *Jirga* takes into account all fundamental and legal rights when resolving local disputes".<sup>118</sup> A participant further elaborated that since the Constitution of Pakistan and domestic legislation is based on the principles of *Shariah* and customs; therefore the *Jirga* is bound to make decisions which uphold the rights guaranteed by the Constitution. A number of participants acknowledged that the traditional justice system at times defied the principles of the Constitution. A participant defending the traditional justice dispensing system, reasoned that certain decisions of the *Jirga* were in conflict with the Constitution as majority of the *Jirga* elders are not aware of the principles of the Constitution, therefore

steps to ban the *Jirga* in the Pakhtun region. To guard the sanctity of the traditional justice system, a respondent explained that the tribal elders resolve disputes in accordance to their perceptive of justice in the best interests of the parties involved and disregard any constitution, law or government. Nevertheless, several participants accepted that certain traditions protected by the *Jirga* system were in conflict with the rights guaranteed by the Constitution, such as the their right of inheritance, which is denied to women in the Pakhtun society. Furthermore, honour crimes, such as honour killing and *Swara* have been banned by the Constitution and the judiciary ; however, these unjust social practices subsist and are still used by the *Jirga* to resolve disputes.

**Do you agree/disagree that the *Jirga* process is at times in conflict with Fundamental Rights given by Islam?**

**Fundamental Rights in Islam as Practiced in *Jirgas***

118) Swat female interview FGD

**Do you agree/disagree that the *Jirga* process is at times in conflict with Fundamental Rights given by the Constitution of Pakistan?**

Response	Gender of the Respondents		
	Male	Female	Total
Strongly Agree	37	41	78
Somewhat Agree	356	174	530
Somewhat Disagree	196	133	329
Strongly Disagree	285	140	425
Don't know	331	707	1038
<b>Total</b>	<b>1205</b>	<b>1195</b>	<b>2400</b>

The Human Rights given by the Quran and Sunnah is considered as supreme law in the Islamic world and is the basis of the Fundamental Rights enshrined in Pakistan's Constitution. As a principle, Islamic law does not discriminate among humans on the basis of gender, colour, race and ethnicity and therefore at times it comes into conflict with the tribal code.

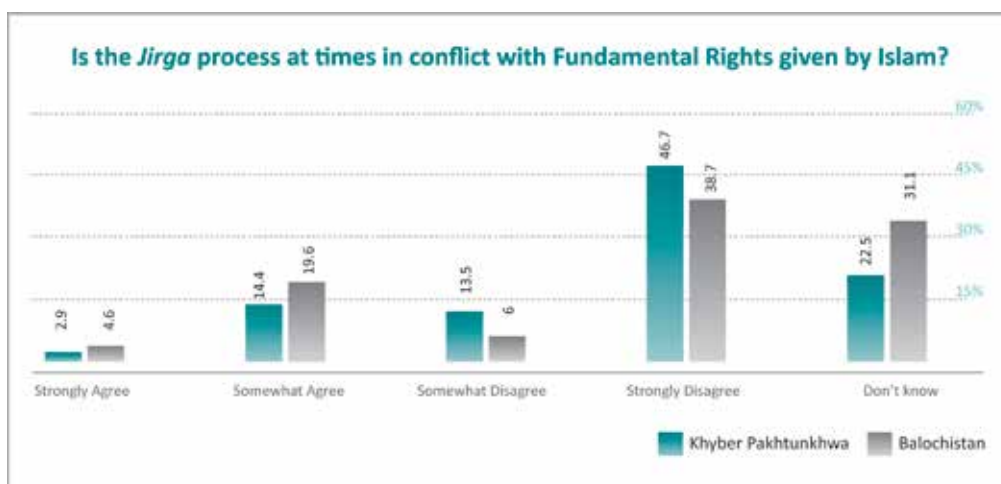
Scholars when faced with complex disputes to ensure that their decisions are taken in the light of Islam and principles of *Shariah*. Conversely, a handful of the participants agreed that in certain cases, the *Jirga* fails to comply with principles of *Shariah*. For example, in contrast to the Pakhtun culture and *Jirga*, Islam gives women the freedom to marry of their choice.

**Female FGDs**

The majority of the female respondents believed that the decisions made by the *Jirga* were in conformity with the Fundamental Rights protected in Islam. A participant from Swat explained that the essence of Islam lies in the heart of the *Jirga*; as it is commenced by taking Allah's name (through the recitation of the Holy Quran) and also ends by taking Allah's name (through a group prayer for everlasting peace and harmony amongst the disputants). Tribal elders are very conscious of making decisions that adhere to the ideology of Islam, since they understand the weight of the responsibility on their shoulders to make just and equifigure decisions. According to another respondent, tribal elders seek the guidance of Islamic

**Male FGDs**

Unpredictably, male respondents were more open in their views in contrast to the female respondents. There was an apparent divide in the views of the participants; several believed that even though tribal elders make decisions staying within the circle of *Pakhtunwali*, they rarely oppose principles of Islam. In support of this argument, a respondent explained that *Jirga* decisions are made by righteous and honest elders of the society, who are well versed in the teachings of Quran and the *Shariah*. It was identified that the conflict between local traditions and religion typically emerges in cases concerning women, especially when dealing with disputes which involve female inheritance and honour. Conventionally, women are denied



Do you agree/disagree that the <i>Jirga</i> process is at times in conflict with rights given in Islam?			
Response	Gender of the Respondents		
	Male	Female	Total
Strongly Agree	32	45	77
Somewhat Agree	190	178	368
Somewhat Disagree	169	122	291
Strongly Disagree	618	468	1086
Don't know	196	382	578
<b>Total</b>	<b>1205</b>	<b>1195</b>	<b>2400</b>

their legal and religious share of inheritance in the Pakhtun belt which defies Islamic principles. Also, Islam and state law clearly prohibits the notorious custom of *Swara*, which is used by the tribal *Jirgas* to resolve complex honour crimes and blood disputes.

#### Survey Data

The survey results present a different view. In both KP and Balochistan, 60 % of the respondents disagreed or strongly disagreed with the notion that the *Jirga* contradicts the principles of Islam. In Balochistan, a slightly higher percentage of respondents agreed that *Jirga* conflicts with Islamic rights.

#### The rights of Children, Women and Minorities in the context of the *Jirga*

It has been commented throughout this chapter that in literature there are disadvantaged sub-populations when submitting to or involved in the process of *Jirgas*. In this section, we will review three such sub-populations.

#### Rights of Children and the *Jirga* System

Violations of the rights of children are prevalent in Pakistan, especially in the Pakhtun belt. Therefore, the survey aimed to gather the perception of the local population regarding the *Jirga's* role in mitigating disputes that involve children. According to the Society for the Protection of the Rights of the Child (SPARC) report, 1,216 cases of child sexual abuse were documented in the country in the first six months of 2011. Out of those cases, 125 boys and girls were sexually abused after abduction and 55 were murdered after sexual assault.<sup>119</sup> Children are frequently victims of mental and physical abuse in the region, child custody cases are decided without taking into consideration the best

interests of the child and often children have become victims of the harsh decisions in the tribal justice system, such as *Swara* and collective punishments. Furthermore, female children are forced into early marriages, as under the tribal custom of *Walwar* (demand of money from the bridegroom's family equal to that of the bride's 'head') young girls (below the age of 18) are given preference over their sons and are worth more money to the girl's family.

#### International Law

##### The Convention on the Rights of the Child (CRC)

The ratification of the Convention on the Rights of the Child (CRC) on December 12, 1990, marked a significant milestone in the efforts to protect the fundamental Human Rights of the children of Pakistan. This convention is the first international instrument that safeguards the civil, cultural, economic, political and social rights of children. Moreover, Pakistan no longer holds any reservations to this Convention. The CRC imposes binding obligations on the government of Pakistan to respect and ensure the rights of Pakistani children. Several imperative provisions include:

##### Substantial Provisions

**Article 1** of the CRC defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

**Article 2** binds the State to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other

119) The State of Pakistan's Children 2010 <http://www.pakistantoday.com.pk/2011/04/2010-a-tough-year-for-children-in-pakistan/>(accessed 2nd August 2012)

opinion, national, ethnic or social origin, property, disability, birth or other status<sup>120</sup>. Thus, this Convention applies to every Pakhtun and non-Pakhtun child in Pakistan.

**Article 3** states that in all activities concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.<sup>121</sup> Therefore, the State is obligated to monitor the decisions of the *Jirga*, to ensure that the rights of children involved in this conflict resolution mechanism are not violated by the decisions of the tribal elders.

**Article 9** compels the State to ensure that the child is not separated from his/her parents against their will, except if the law determines that it is in the best interest of the child.<sup>122</sup> Therefore, the custom of *Swara* and the giving of daughters away without their consent to resolve an enmity is also strictly prohibited by international law.

**Article 12** obliges the State to provide a child capable of forming his or her own views the right to express those views freely in all matters affecting the child, in particular in any judicial and administrative proceedings affecting the child, and to give due weight to the views of the child.<sup>123</sup> This provision entitles the child (female and male) to be heard in the *Jirga* process and the State should ensure that the *Jirgamaars* take into consideration the best interests of the child.

### Monitoring

The CRC is the only Convention of the ones described in this report that provides neither for a State-to-State nor for an individual complaint procedure. Only State reports may be considered by the CRC Committee – another Committee of 18 independent members. Article 44(1)

of the CRC obliges States Parties to report to the Committee within two years after acceding to the treaty and thereafter every five years. The reporting guidelines established by the Committee<sup>124</sup> follow the well-known format and demand both a common core and a treaty-specific document. The Committee convenes three times a year in Geneva.

### The Constitution of Pakistan and domestic laws

Lawmaking bodies have stressed for the importance of safeguarding the rights of child by enacting legal provisions over time. This is apparent by Articles 25(3) & 26 (2) of the Constitution of Pakistan, which empowers the State to make special provisions for the protection of women and children. Several Acts have also been passed by the Parliament to achieve this, which include:

**Child Marriage Restraint Act 1929**, which extends to the whole of Pakistan and applies to all citizens of Pakistan. According to the law, any man above 18 and below the age of 21 marrying a child will be punished with a fine. Whereas, any man above the age of 21 contacting a marriage with a child will be imprisoned by the court of law.<sup>125</sup>

**Child Offenders Act 1995** was a significant step taken by the GoP, to introduce uniform legislation addressing the protection of the rights of children involved in criminal legislation that was applicable to the whole country. After the ratification of the United Nations Convention on the Rights of Child in November 1990, the State was legally bound to comply with the requirements of the Convention and introduce changes to Pakistan's domestic legislation to make it compatible with international law. This act is applicable to the whole of Pakistan and the first instance where special laws dealing with child offenders are extended to Balochistan and KP. The Child Offenders Act protects the rights of children

120) The convention on the Rights of child, 1990, <http://www2.ohchr.org/english/law/crc.htm>. (accessed 27 August 2012)

121) The convention on the Rights of child, 1990, <http://www2.ohchr.org/english/law/crc.htm>. (accessed 27 August 2012)

122) The convention on the Rights of child, 1990, <http://www2.ohchr.org/english/law/crc.htm>. (accessed 12 September 2012)

123) The convention on the Rights of child, 1990, <http://www2.ohchr.org/english/law/crc.htm>. (accessed 12 September 2012)

124) <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.58.Rev.2.doc> (accessed on 17 December 2011). (accessed 12th September 2012)

125) 'Laws Relating To Children with Juvenile Justice System Ordinance, 2000 and Juvenile Justice Rules, 2001', M. Ilyas Khan, Advocate, Pakistan Law House 2004.



involved in criminal litigation, their rehabilitation in society and re-organizes the Juvenile Court structure.<sup>126</sup>

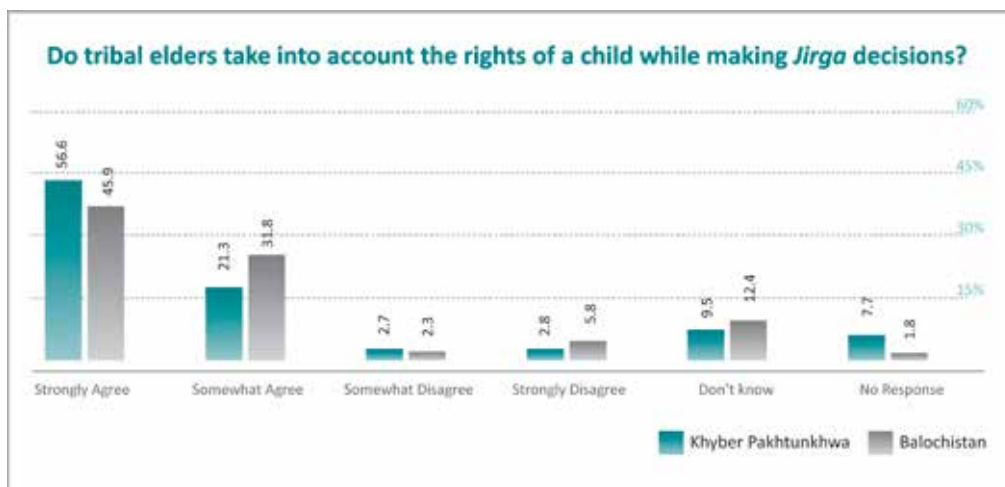
**Prevention of Anti-Women Practices (Criminal La Amendment) Act 2011**, banned the custom of *Swara* ( Section 310 PPC) and enhances punishment for the offence of murders carried out in the name of honour, e.g., honour killing.<sup>127</sup>

In reference to the legal obligations stated above, there has been concern regarding the infringement of the right of survival and development of children in the Pakhtun areas of Pakistan. The extremely perilous conditions can be attributed to

The survey inquired regarding the role of the *Jirga* as a guardian of the rights of children.

**Do you agree/disagree with the statement, that tribal elders take into account the rights of a child while making *Jirga* decisions?**

The results depicted that an overwhelming majority of the respondents, 77.8% believed that the *Jirga* takes into account the rights of a child while resolving disputes (54.6% ‘strongly agree’ and 23.2% ‘somewhat agree’). While only 6% of the respondents disagreed with the notion, including 3.3% who ‘strongly disagree’ and 2.7% who ‘somewhat disagree’. There was not much disparity between the views of the



the prevailing militancy in the region, population displacements, and poor health and sanitation facilities, severe malnutrition<sup>128</sup>; concurrently, the widespread crime of honour killing and practice of heinous traditions such as *Swara* are affecting children of the region.

respondents in the provinces - 77.9% in KP and 77.7% in Balochistan supported the notion. Whereas, similarly 5.5% in Khyber Pakhtunkhwa and 8.1% in Balochistan believed that the *Jirga* does not safeguard the rights of children.

Do you agree/disagree with the statement, that tribal elders take into account the rights of a child while making <i>Jirga</i> decisions?			
Response	Gender of the Respondents		
	Male	Female	Total
Strongly Agree	747	564	1311
Somewhat Agree	244	313	557
Somewhat Disagree	40	24	64
Strongly Disagree	51	29	80
Don't know	89	151	240
No Response	34	114	148
<b>Total</b>	<b>1205</b>	<b>1195</b>	<b>2400</b>

126) Laws Relating To Children with Juvenile Justice System Ordinance, 2000 and Juvenile Justice Rules, 2001', M. Ilyas Khan, Advocate, Pakistan Law House 2004.

127) [http://www.na.gov.pk/uploads/documents/1302061757\\_301.pdf](http://www.na.gov.pk/uploads/documents/1302061757_301.pdf) (accessed 2nd September 2012)

128) The State of Pakistan's Children 2009, SPARC (Society for the Protection of the rights of The Child)

The results illustrate the growing legitimacy of the *Jirga* system in the region.

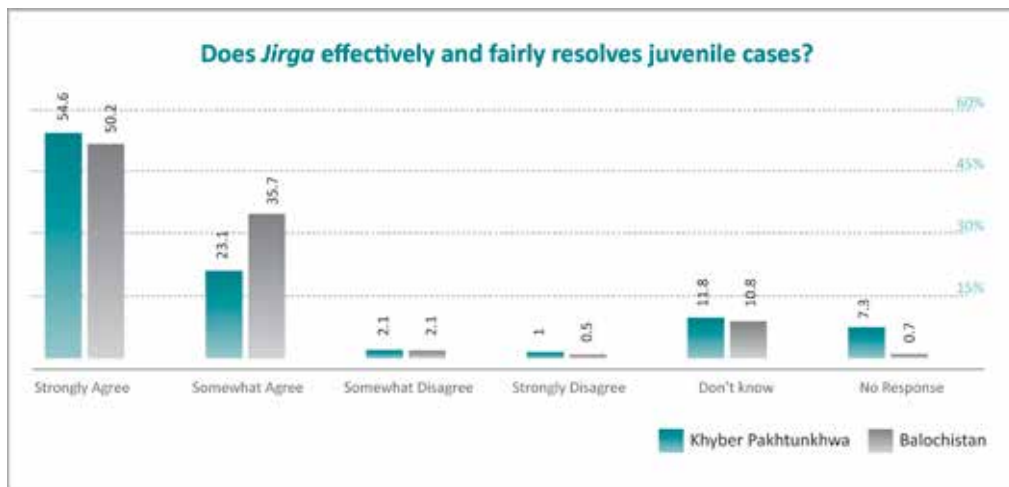
### Juvenile Justice in Pakistan

The environment in Pakistan, specially within the Pakhtun belt has never been favorable for children due to poverty, lack of educational facilities and least economic opportunities. Parents are forced to send their children to work from a very young age to support the family. Inevitably, this exposes the children to a wide range of evils prevalent in the society and at times, a future of crime. Juvenile justice is the area of criminal law applicable to persons who at the time of commission of an offence have not attained the age of 18 years. According to a report by SPARC, in December 2011, there were 1,421 children in Pakistan's jails. Only 165 of these had been

### Do you agree/disagree with the statement, that the *Jirga* effectively and fairly solves juvenile cases?

79.2% of the respondents agreed, including 53.8% who 'strongly agree' and 25.4% who 'somewhat agree', While only 3% opposed the notion, including 0.9% who 'strongly disagree' and 2.1 % who 'somewhat disagree'. The cross tabulation of data by province generated mirrored results, as 77.7 % of the respondents in KP and 85.9% in Balochistan believed that the *Jirga* provided justice to underage offenders. Similarly, 3.1% of the respondents in KP and 2.6% in Balochistan were not content with *Jirga* decisions in Juvenile cases in the region.

### Male Focus Group Discussions (FGDs)



convicted and the remaining 1256 children were still under trial.<sup>129</sup> The report further explained that in December 2011, there were a total of 241 children in the juvenile cells of the 22 prisons of KP. Of the 241, 211 were under trial and 30 were convicted. There are presently no borstal jails for the children of the KP. Whereas, in Balochistan there are no separate or special prisons for children in the province; most of the convicted children are kept in the Central Jail Mach, and the majority of under trial prisoners are kept at the District Jail in Quetta. In December 2011, there were 40 juvenile prisoners in Balochistan. Out of this, a total of 33 were convicted and 7 were under trial.<sup>130</sup>

Nearly all participants claimed that the *Jirga* system promotes social cohesion and reflects values of equality and justice accrued over generations therefore tribal elders guarantee that the Fundamental Rights of children are taken into consideration and protected. However, it was accepted that since the tribal code has no special law or *Riwaj* in place to safeguard child rights, therefore, the future of the child is exclusively in the hands of tribal elders and *Jirgamaars*. Conversely, several respondents raised concerns regarding the little evidence and precedence available that proves that the best interests of the child are taken into account by the *Jirga* while they execute their judicial power. It was unanimously agreed that children form a vulnerable fragment of the society and therefore the *Jirga*

The survey posed the following question with reference to the treatment of juveniles:

129) Ibid

130) Ibid

Do you agree/disagree with the statement, that the <i>Jirga</i> effectively and fairly resolves juvenile cases?			
Response	Gender of the Respondents		
	Male	Female	Total
Strongly Agree	772	520	1292
Somewhat Agree	307	303	610
Somewhat Disagree	24	26	50
Strongly Disagree	10	12	22
Don't know	80	199	279
No Response	12	135	147
<b>Total</b>	<b>1205</b>	<b>1195</b>	<b>2400</b>

should sympathise with them and ensure that their rights are not violated. Children from the Pakhtun belt become victims of injustices under the guise of culture and tradition; especially in cases of *Swara*, divorce and child custody, where it is in the best interest of the child to remain with his/her mother but the *Jirga* makes decisions in favour of the father. Furthermore, girls given in *Swara* are murdered if they rebel against the *Jirga's* decision. However, certain respondents disagreed with this statement and claimed that the tribal *Jirga* allows the child to remain with the mother till he is old enough to live with the father. Advocating for transparency and justice for human beings of all ages, respondents agreed that the *Jirga* and the contesting party refrain from making callous decisions. The *Jirga* makes it clear that since children do not have the capability to understand the consequences of their actions and have no intention to cause harm, therefore, their punishment should be analogous to their susceptibility.

#### Female Focus Group Discussions (FGDs)

An overwhelming majority of the respondents defending the traditional justice system were of the opinion that the *Jirga* acts as the guardian of the Fundamental Rights of children in the Pakhtun belt. In cases of separation and divorce, the custody of the children is generally given to the mother. However, if the child is old enough to make his decisions, then the *Jirga* seeks his/her opinion and grants custody accordingly. A respondent from Qilla Abdullah explained that a local woman remarried after her husband's death. After her marriage, her former in-laws asked for her child's guardianship; however the *Jirga* granted the child's custody to his mother till the age of seven. Justifying *Jirga's* just and impartial decisions, a respondent gave account of the occasion in their village of two underage children who

were playing with a gun. While doing so, one boy killed the other accidentally firing the gun. The issue was taken to the *Jirga*; where the tribal elders took into account the child's age and decided to forgive him. This demonstrates that the traditional justice system is based on rehabilitation rather than punishment to avoid the stigmatization resulting from criminal conviction. However, several respondents were of the opinion that sensitive matters such as these are rarely brought in front of the *Jirga* and resolved behind closed doors. If a child is accused of a crime such as theft, the *Jirga* resolves the dispute judiciously with due consideration to whether the child is mature enough to understand and judge the nature and consequences of his or her behaviour. The *Jirga* prefers to resolve the conflict itself and avoids the involvement of police and official authorities.

#### Rights of Minorities

Susceptible to social and psychological poverty, minorities all over Pakistan have always been a victim of our society's indifference and unjust treatment. These vulnerable, marginalised and disempowered segments of our society suffer from discrimination, displacement and poverty, solely based on their gender, ethnicity, beliefs, language or social class. It is not rare for the decisions of the tribal council to affect the fundamental Human Rights, particularly the rights to life and security of these marginalised groups.

#### International Convention on the Elimination of Racial Discrimination (ICERD)

According to the provisions of ICERD, tribal elders of the *Jirga* should ensure to make unbiased decisions when dealing with conflicts that involve minorities of the Pakhtun society.

The ICERD came into force in 1969 and Pakistan has been a party to it ever since. Significantly, Pakistan has not entered any reservations to the ICERD. This convention was adopted by the United Nations General Assembly to define and condemn racial discrimination and to oblige states to amend national laws that create or perpetuate racial discrimination.<sup>131</sup>

### Substantial Provisions

**Article 1** of the Convention defines “racial discrimination” to mean “any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Human Rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”<sup>132</sup> Pakistan ratified this imperative convention to demonstrate the commitment of the democratic government to promote Human Rights in the country, including the rights of women, children, minorities and the underprivileged.

**Article 2** requires State parties to condemn racial discrimination and pursue by all appropriate means, including law reform, a policy of eliminating racial discrimination and promoting understanding among all races. It is worth noting that, pursuant to Article 2(1) (d), States parties are under a duty to prohibit and eliminate racial discrimination not just by public institutions and actors, but also by private individuals and organisations.<sup>133</sup> Therefore, the State is under the obligation to ensure that the *Jirgamaars*, refrain from making discriminatory decisions when resolving conflicts which involve women, minorities or persons with disabilities.

**Article 5** obliges the State to ensure that tribunals and all other organs administering justice treat everyone equally.<sup>134</sup> Therefore, the government is

under the duty to ensure that religious and ethnic minorities, and women are given representation in the *Jirga* decision making process.

**Article 6** requires States parties to assure “effective protection and remedies, through the competent national tribunals and other State institutions . . . as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”<sup>135</sup> Therefore, in cases where the *Jirga* verdicts are not just and inclusive of minorities and females, the State is legally bound to provide justice to the victims.

**Article 16** stipulates that “State parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) the same right to enter into marriage; (b) the same right to freely choose a spouse and to enter into marriage only with their free and full consent; (c) the same rights and responsibilities during marriage and its dissolution.”<sup>136</sup> Therefore, the State should ensure that the *Jirgamaars* and tribal elders take into account laws enshrined in this convention when resolving conflict and making *Jirga* decisions.

### The Constitution of Pakistan and domestic laws

The Constitution of Pakistan includes several Articles that safeguard religious and ethnic minorities against any form of discrimination:<sup>137</sup>

**Article 4** provides that it is the inalienable right of every citizen to enjoy the protection of law

**Article 9** guarantees security of life and liberty of every citizen.

**Articles 15 -20** guarantee freedom of movement, assembly, association, speech, profess

131) <http://www2.ohchr.org/english/law/cerd.htm>. (accessed 25th July 2012)

132) Article 1, International Convention on the Elimination of Racial Discrimination (CERD), <http://www2.ohchr.org/english/law/cerd.htm>. (accessed 25th July 2012)

133) Article 2 International Convention on the Elimination of Racial Discrimination (CERD), <http://www2.ohchr.org/english/law/cerd.htm>. (accessed 25th July 2012)

134) Article 15 International Convention on the Elimination of Racial Discrimination (CERD), <http://www2.ohchr.org/english/law/cerd.htm>. (accessed 25th July 2012)

135) Article 6 International Convention on the Elimination of Racial Discrimination (CERD), <http://www2.ohchr.org/english/law/cerd.htm>. (accessed 25th July 2012)

136) Article 16, International Convention on the Elimination of Racial Discrimination (CERD), <http://www2.ohchr.org/english/law/cerd.htm>. (accessed of 26th July 2012)

137) <http://www.pakistani.org/pakistan/constitution/>, (accessed 14th July 2012)

religion and manage religious institutions, to every citizen.

**Articles 21** provides safeguards against any special tax, the proceeds of which are to be spent on the propagation or maintenance of any religion other than his own as well.

**Article 22** provides safeguards against receiving religious instructions or taking part in any religious ceremony other than her/his own.

**Article 25** guarantees equal protection of law to all citizens, irrespective of their cast, gender or creed etc.

**Article 26** guarantees non-discrimination in respect of access to public places.

**Articles 27** provides safeguards against discrimination in appointments in the civil services of Pakistan.

**Article 28** guarantees promotion of distinct language, script or culture to any section of citizens and establishing institutions for promoting their language, script or culture.

**Article 33** states that the State shall discourage parochial, racial, tribal, sectarian and provincial prejudices among the citizens.

**Article 36** guarantees protection of minorities and states that the State shall safeguard the legitimate rights and interests of minorities, including their due representation in the Federal and Provincial services.

**Article 37** makes it the State's responsibility to ensure promotion of educational and econom-

ic interests of backward groups or areas and make higher education accessible to all on the basis of merit.

**Article 227** While stating that "all existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Quran and Sunnah", makes it clear that, "Nothing in this Part (of the Article) shall affect the personal laws of non-Muslim citizens or their status as citizens".

Furthermore, the laws enacted by the government to protect and provide justice to minorities include:

**Pakistan Penal Code Section 153(A) (PPC)** prohibits promotion of enmity between different groups, on the basis of race, religion, language, caste or community or any other ground. Anyone found promoting such differences, is liable to imprisonment and heavy fines. Whereas under Section 505 of the PPC publication of any material that may incite group differences will be considered as a criminal offence.<sup>138</sup>

**The New Police Order 2002** contains special provisions to ensure protection of the rights of vulnerable sections of society which includes religious and ethnic minorities.<sup>139</sup>

#### Minorities in the *Jirga* System

After carrying out research on international and constitutional rights, the research then focused on the rights of minorities in the process in the Pakhtun region of Pakistan. The issues concerning ethnic and religious minorities were approached, the findings of which are as follows.

138) [153-A. Promoting enmity between different groups, etc.: Whoever, (a) by words, either spoken or written, or by signs, or by visible representations or otherwise, promotes or incites, or attempts to promote or incite, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities; or (b) commits, or incites any other person to commit, any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities or any group of persons identifiable as such on any ground whatsoever and which disturbs or is likely to disturb public tranquility; or (c) organizes, or incites any other person to organize, and exercise, movement, drill or other similar activity intending that the participants in any such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in any such activity will use or be trained to use criminal force or violence or participates, or incites any other person to participate, in any such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in any such activity will use or be trained, to use criminal force or violence, against any religious, racial, language .or regional group or caste of community or any group of persons identifiable as such on any ground .whatsoever and any such activity for any reason whatsoever cause or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community.....shall be punished with imprisonment for a term which may extend to five years and with fine

139) [http://www.nrb.gov.pk/publications/Police\\_order\\_2002\\_with\\_amendment\\_ordinance\\_2006.pdf](http://www.nrb.gov.pk/publications/Police_order_2002_with_amendment_ordinance_2006.pdf) (Accessed 26th September 2012)

## Ethnic Minorities

### Female Focal Group Discussions (FGDs)

Majority of the respondents rejected the notion that *Jirga* discriminates between ethnic minorities while resolving disputes. They were of the opinion that because the *Jirga* uses restorative justice, which considers societal wellbeing, social cohesion and harmony rather than the individual, the *Jirga's* decision is not affected by a disputant's language, ethnicity or religion. However, there were clear tensions between the respondent's views regarding the representation of ethnic minorities in the traditional justice system. As a result, respondents alleged that ethnic minorities are given representation in the *Jirga* as a disputant and to witness the proceedings. However, they are not permitted to be part of the decision making process.<sup>140</sup> Defending the impartiality of the tribal institution of justice, a participant argued that in cases of conflict between a Pakhtun and a non Pakhtun, the *Jirga* recognizes the necessity of treating both parties equally, and disregards the fact that they are Punjabi or Pakhtun. In contrast, a few respondents indicated that generally, under privileged, poor and disputants from lower castes are not treated equally and given due representation in the *Jirga*.

### Male Focus Group Discussions (FGDs)

Currently, the *Jirga* system is not representative of the communities it serves, since marginalised and vulnerable groups, including women and minorities are excluded from directly participating in, and influencing *Jirga* decisions. The respondents were unable to come up with a strong argument for their opinions, while

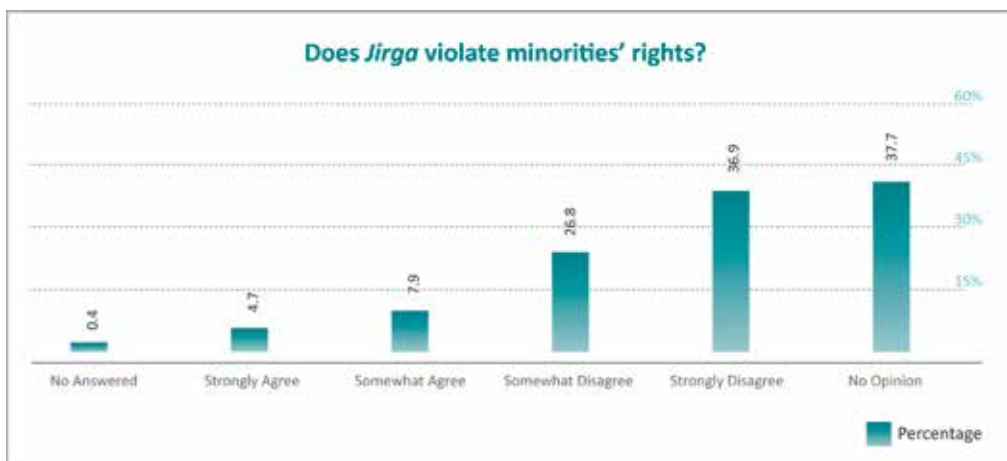
some young voices were heard supporting the notion and blaming the tribal justice system for not providing any platform for the minorities and demanded for their representation in the decision making process. Although a number of respondents alleged that they were not aware of any ethnic minorities or indigenous persons residing in their community, they were of the opinion that even if there was a dispute which involved minorities, it would be dealt with sensitivity and equality. Furthermore, principles of *Shariah* place the *Jirga* elders under the obligation to grant ethnic and religious minorities their rights when resolving their disputes.

The FGDs concluded that the institution of *Jirga* is a recognized platform, for supporting and protecting the vulnerable, despite differences in religion or ethnicity, in the Pakhtun society.

### *Jirga* violates minorities' rights

The first observation on the statement was that 37.7% did not have an opinion. Considering that minorities tend to be clustered in some sub-districts, it is understandable that a third of the respondents could not offer an opinion. 74.6% of the interviewees said that they did not believe that the *Jirga* violated minority rights.

A cross-tabulation of data by region in the figure below showed that 13.9% of the respondents in FATA, 26.3% in KP and 39.3% in Balochistan believed that the *Jirga* violated the Fundamental Rights of minorities. Whereas, 63.6% of the respondents in FATA, 25.9% in KP and 32.5% in Balochistan thought that the decisions of the *Jirga* protected the rights of ethnic minorities in the Pakhtun belt.



140) Swat female interview FGD

<b>Jirga violates minorities' rights</b>			
<b>Response</b>	<b>Gender of the Respondents</b>		
	<b>Male</b>	<b>Female</b>	<b>Total</b>
Strongly Agree	55	57	112
Somewhat Agree	97	93	190
Somewhat Dsiagree	174	123	297
Strongly Disagree	575	311	886
Don't Know	299	606	905
No Response	5	5	10
<b>Total</b>	<b>1205</b>	<b>1195</b>	<b>2400</b>

### Religious Minorities

To further understand the perception of the Pakhtun belt relating to the role of minorities in the tribal *Jirga*, the survey asked the respondents to give their opinion on the inclusion of religious minorities in the traditional justice system and their access to justice in the region.

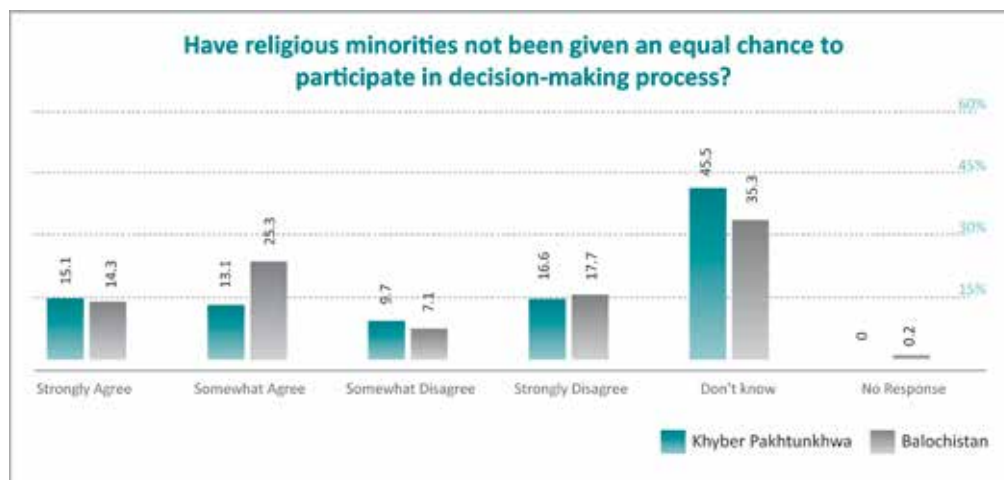
### Female Focus Group Discussions (FGDs)

There was not much inconsistency between the views of the female respondents regarding the inclusivity of ethnic and religious minorities in the *Jirga* system. It has been strongly argued repeatedly, that the existence of the *Jirga* is based on the notion of justice, therefore, whether the disputants are Punjabi or Pakhtun, Muslim or Hindu, is irrelevant. The *Jirga* treats everyone with equality. It was further elaborated that tribal elders make decisions based on universal principles of fundamental right and not on the disputant's religious beliefs. The *Jirga* is the backbone of the Pakhtun society, tending to its societal interests; similarly, every region, tribe or community has their distinct custom and tradition, which they use to resolve their conflicts. Therefore, non-Muslims and non-Pakhtuns will

prefer to have their elders mediate and resolve disputes. However, in cases of conflicts between Muslims and non-Muslims, the *Jirga* respects their rights and makes just decisions. Similar to the ethnic minorities, religious minorities are not permitted to be part of the mediation and decision making process.

### Male Focus Group Discussions (FGDs)

The respondents had a similar view to the question of the inclusivity of religious minorities in the *Jirga* process. Nearly all respondents rejected the notion that the grievances of the religious minorities are not heard and they are barred from participating in the proceedings of the traditional justice system. A respondent explained that *Jirga* decisions are based on the Fundamental Rights protected by Islam and its ideology of justice, which does not discriminate against religious or ethnic minorities belonging to the Pakhtun belt. Consequently, a disputant will be treated with impartiality and equality regardless of the language he speaks or beliefs he follows; and there are rare instances of *Jirga* failing to provide justice. According to a participant from Loralai, *Jirgas* held in their



community also comprise of religious minorities and their leaders and priests. He believed that religion is extraneous to dispensation of justice, therefore, they resolve conflicts according to their local customs and traditions, at times seeking the help of neighboring tribes to intervene and mediate between Muslims and non-Muslims of their region. Despite these exceptional situations, generally, religious minorities are excluded from the *Jirga's* decision making process. In their defense, the respondent explained that in complex disputes if the parties are not cooperating, then it is essential for the tribal elder to be socially well connected for the *Jirga's* decision to be accepted.

### Survey Data

#### How strongly do you agree with the statement that: 'religious minorities have not been given an equal chance to participate in *Jirga* decision-making processes?

The findings are almost uniform with the previous question, suggesting that 30.2% of the respondents believe that religious minorities are given an equal chance to participate in the *Jirga* process, including 14.9% who 'strongly agree' and 15.3% who 'somewhat agree'.

While only 26.1% disagreed with this notion (16.8% 'strongly disagree' and 9.3% 'somewhat

disagree'). Also, notably, 43.7% said that they 'don't know' whether the *Jirga* is inclusive of religious minorities. This figure depicts the lack of awareness in the region, regarding the Fundamental Rights of minorities and their right of participation in the decision making process. Analogous results were found in the cross-tabulation of data, where 28.2% of the respondents in KP and 39.6% in Balochistan agreed with the notion. While 26.3% of the respondents in KP and 24.8% in Balochistan disagreed and; similarly, 45.5% in Khyber Pakhtunkhwa and 35.3% in Balochistan 'didn't know' of the role of minorities in the *Jirga* process.

### Conclusion

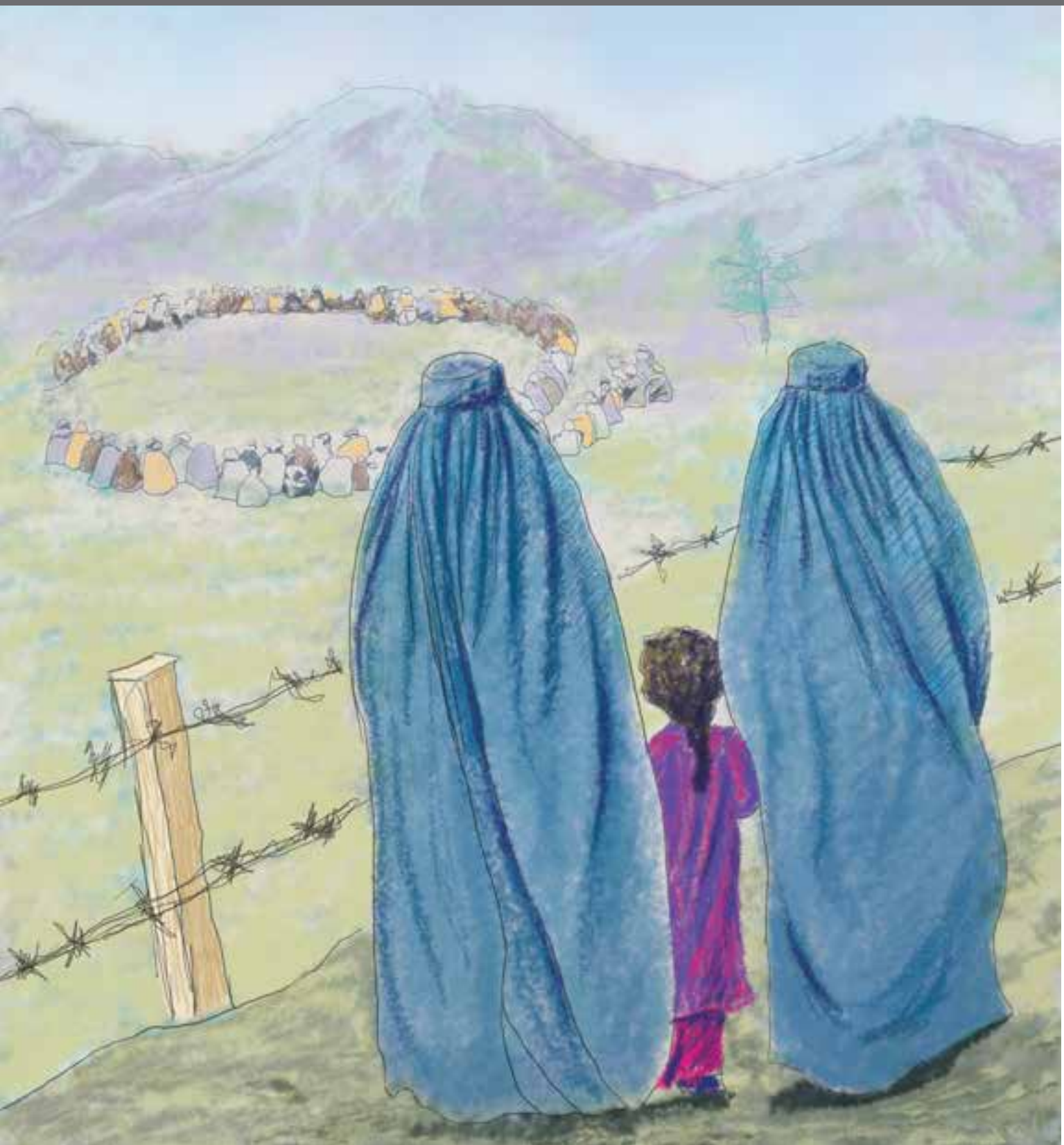
The reality in the Pakhtun belt of Pakistan is that justice mechanisms, especially the *Jirga* system, has been and is insufficient to redress the Human Rights violations of the marginalized segment of the society. Recognising both the strength and weakness of the *Jirga* system, majority of the respondents are defensive of this traditional mechanism. However, both male and female respondents agreed in most cases that the system needs to be reformed to safeguard the fundamental Human Rights of the vulnerable segment of the society.

<i>Jirga</i> violates minorities' rights			
Response	Gender of the Respondents		
	Male	Female	Total
Strongly Agree	55	57	112
Somewhat Agree	97	93	190
Somewhat Dsiagree	174	123	297
Strongly Disagree	575	311	886
Don't Know	299	606	905
No Response	5	5	10
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## CHAPTER: 8

### Women and the *Jirga* system



## WOMEN AND THE JIRGA SYSTEM

### Introduction

This chapter is based around the status of women in the Pakhtun region and its interrelation with *Pakhtunwali* and the *Jirga* system. The tribal code (*Pakhtunwali*) and the *Jirga's* fundamental principles of justice have been criticised by human rights organizations globally and nationally because certain traditions and customs that impinge on women's rights have been part of the culture in the region. The survey, focus group discussions and interviews with key informants examine the perception of males and females of the Pakhtun population regarding three distinct topics concerning women and the traditional justice mechanism:

### Rights Of Women and the *Jirga* system

Patriarchal values of the Pakhtun society embedded in the local tradition and culture exclude the voice of women in the *Jirga* system. Traditionally women are represented by their male relatives and do not have direct participation in the traditional justice system. Therefore, in disputes involving women that infringe upon their fundamental rights, their fate is dependant on the decisions of the *Jirga* elders and the male members of the family.

### Types of *Jirga* Cases and the Interests of Women

Although Honour related disputes are widespread in the Pakhtun region and given that *Nang* (honour, particularly of women) is among the most fundamental notions of *Pakhtunwali*, these types of cases are often not reported to the media or the police except as stories. For that reason, the local population prefers the

*Jirga* to resolve honour related disputes for example, marital, divorce and child custody cases. Honour related crimes, according to the code and tradition, include infidelity or men and women running off to marry without family consent. This errant behavior brings shame or a loss of honour to the families involved.

### Violence Against Women and the Assessment of Justice for Women in those cases

Violence against women is a common phenomenon across the Pakhtun region<sup>142</sup>; women, despite their social and educational status, are subject to violence at every stage of their life within the extended family. This section examines the types of violence inflicted on Pakhtun women and the role played by the traditional *Jirga* to address these crimes.

### Rights of Women and the *Jirga* system

There is no denial of the fact that there is no direct representation of women in *Jirga* system, therefore in practice this traditional justice mechanism is discriminatory against women by blocking their access to the tribal council. *Jirgamaars*/tribal elders hold the right to decide the fate of women involved in disputes, based on customs, without seeking the opinion or consent of the concerned female.<sup>143</sup> This is contradictory to the requirements of modern justice and international human rights standards. The cost of such abuse is borne by the *Pakhtun* society, because, by marginalising women, the tribal society is not only committing a crime of violating various international and domestic legal mechanisms, it is also

142) "Honour killings in Pakistan and compliance of law" by Maliha Zia Lari, Aurat Foundation, 2011.

143) Naveed Ahmed Shinwari (2010), 'Understanding *Jirga*: Legality and Legitimacy in Pakistan's Federally Administered Tribal Areas'

desecrating half of its potential and thereby encumbering development, security and peace.<sup>144</sup>

A *Pakhtun* woman does have an identity- a name, which marks her individuality. She is someone's daughter, mother and wife. A young tribal woman is generally seen as the guardian of the tribal/familial honour among most *Pakhtuns*. Thus, as a woman can easily be a source of shame to the male-dominated extended family/tribe, she does exercise a significant degree of hidden control over them.<sup>145</sup>

Notions, institutions and customs of *Pakhtunwali* have been interpreted and practiced to exercise, justify and reinforce patriarchal authority. *Pakhtunwali*, with an admixture of Islam and *Pakhtunwali*, has been used throughout the ages to establish superiority of men over women in the *Pakhtun*-dominated areas.<sup>146</sup> The most fundamental notions of *Pakhtunwali*, revolve around women and land. Man claims to have the right to control a woman's body, thoughts and emotions. Any real or imagined violation of the boundaries, drawn by man, grants him the right to even kill her with impunity in the name of honour.<sup>147</sup>

Divorces are also very rare if not non-existent in the *Pakhtun* belt. Women are told at the time of their marriage to bear everything in silence, as there exists no recourse for anybody, not even the parents to turn to in case of a dispute with the husband or in-laws. If there is dislike and conflict between wife and husband, the husband may marry another girl if he can financially afford it and would keep his old wife as well.<sup>148</sup>

In addition to blood feuds, honour related disputes are also settled by giving/taking *Swara*. The tradition of *Swara* is prevalent in various parts of the *Pakhtun* belt and is deeply entrenched in Pakistan's tribal culture. The custom calls for a girl to be given away in marriage to an aggrieved family as compensation for a serious crime committed by her father, brothers or uncles. Generally, a girl is given in *Swara* marriage as compensation for murder, adultery,

abduction and/or kidnapping committed by the men of her family. This appalling decision is usually made and supported by the tribal/local institution of decision-making and dispute settlement<sup>149</sup>. Since the *Jirga* decision making process is completely male dominated, it takes the liberty to decide the fate of women and the pronouncement of *Swara* without seeking the opinion or consent of the women concerned.

The practice of *Khag* or *Ghag* is also one of customs that is an inherent part of *Pakhtunwali* in some of the *Pakhtun* dominated areas. This historical custom, *Khag*, is a man's declaration of claim over a woman for marriage. Through this custom, males (particularly paternal cousins) have a birth right to marry their female cousins, even if their match is incompatible. There are many cases of women being forced to marry men from their family who are criminals, or suffering from mental or physical disability under this custom.<sup>150</sup> This implies that if someone has an advanced claim (*Khag*) over a girl and if anyone else wishes to marry her, he will have to deal with the claimant first. Therefore, far better proposals for girls cannot be even considered and at times, girls who are affected because of this custom, are forced to remain spinsters all their lives.

Furthermore, *Walwar*, bride price, has been a cultural practice for centuries in the tribal areas of Pakistan. Bride price usually consists of tangible items (cattle, gold etc.) or money that is paid by the groom to the bride's family in exchange for the bride. Traditionally, this custom was a gift which aimed to bring families together, by easing the financial burdens of the bride's family associated to the wedding ceremony as a token of appreciation. Today, however, unfortunately this practice appears to have become commercialised and has lost much of its traditional value in many instances. The significance of this centuries old custom has now changed to a list of demands made by the bride's family. It now appears as if the man is 'buying' his wife as a commodity, with the price wholly depending on her beauty, monetary status and age. The im-

144) "Women Rights in FATA Pakistan: A Critical Review of NGOs' Communication Strategies for Projects' Implementation"

145) Naveed Ahmed Shinwari (2010), 'Understanding *Jirga*: Legality and Legitimacy in Pakistan's Federally Administered Tribal Areas'

146) Maryam Bibi, Chief Executive, Khwendo Kor, Hayatabad, Peshawar, 11 February 2011

147-148) Fakhr-u-Nisa Advocate, F.R Lakki, Former vice President Peshawar High Court Bar Association, Peshawar, 22 January 2011

149) 'The Dark Side of Honour' Women Victims in Pakistan, Rabia Ali, Shirkat Gah, 2001

150) Roundtables/Awareness sessions held by CAMP, Phase II of *Jirga* Project Islamabad 2011

pact of this iniquitous custom on young women is catastrophic as it reduces them to chattels - a clear violation of their fundamental human rights and dignity.<sup>151</sup>

Women in the Pakhtun belt are vulnerable to economic poverty and scarcity. There is a dire need to enforce and implement international law, to which Pakistan is a signatory including; 'The Convention for the Elimination of All Forms of Discrimination against Women (CEDAW)' and 'The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)'; As well as domestic laws that safeguard the rights of women in KP and Balochistan, such as the recent Prevention of Anti-Women Practices (Criminal Law Amendment) Act 2011, that includes the punishment for giving a female in marriage or otherwise in *badla-e-sulh*, *wanni* or *Swara*. This act also prohibits further offences against women which include depriving a woman from inheriting property, prohibition of forced marriage and prohibition of marriage with the Holy Quran.<sup>152</sup> However, due to Article 247(3) of the Constitution, no act of Parliament applies to FATA unless the President so directs. Therefore, it is essential to repeal this section of the Constitution to extend all national legislation to FATA in order to articulate issues concerning tribal women, such as lack of health, education and employment opportunities, restrictions on mobility, bride price, domestic violence, and denial of share in inheritance, representation in parliament and *Jirga*, as well as consensual marriage, are amongst the more important ones.

The following is a list and brief description of the issues that should be addressed and will be discussed in this report:

#### ***Jirga* and Women's rights**

The *Jirga* at times fails to safeguard the rights of women in disputes because the decision making process is dominated by male *Jirga* members, who are reluctant to go against certain tribal customs that infringe women rights.

#### **No representation**

At present, the *Jirga* system is not inclusive of the communities it serves because it excludes women from directly participating in and influencing *Jirga* decisions.

#### **Indirect representation**

Women in the Pakhtun region can be represented in the *Jirga* system by entrusting a male member of the family (usually father, husband or son) to advocate on their behalf.

#### ***Jirga* in family Disputes**

Family disputes in the tribal region are usually resolved behind closed doors or among the families; however there are numerous cases where the *Jirga* intervenes to resolve these disputes especially if they are longstanding. Due to the predominance of male *Jirga* members and deeply entrenched social values, due weight is not given to the opinion of females involved in these family disputes.

#### **Honour Killings**

Honor killing is the practice of killing women (and men) if they are suspected of violating family/ tribal honour. Tribal *Jirgas* rarely perpetuate honour killing as they are crimes committed by families without consulting a *Jirga*. However the traditional *Jirga* system has been indicted over time for supporting families responsible for honour crimes in the region.

#### ***Swara***

*Swara* is the process through which conflict is resolved by giving a girl in marriage to another family. This tribal custom has been practiced by the *Jirga* to resolve longstanding enmities over time. As will be reported, this practice was banned by a Grand *Jirga* of Maliks only in 2012 in FATA.

#### **Inheritance**

Women in the Pakhtun region have a right to inheritance protected by *Shariah* law and national legislation; however *Pakhtunwali* and social traditions do not endorse this fundamental right.

We begin this analysis with a general question, of the sampled respondents. "Do you agree or disagree that the *Jirga* Process violates women's rights?"

In spite the commonly held negative perception of the *Jirga* system with regard to women's rights, the overall results from the survey depict a very different picture as shown in the following figure:

151) Roundtables/Awareness sessions held by CAMP, Phase II of *Jirga* Project Islamabad 2011.

152) [http://www.na.gov.pk/uploads/documents/1321415693\\_161.pdf](http://www.na.gov.pk/uploads/documents/1321415693_161.pdf)(accessed on 15<sup>th</sup> September 2012)

<i>Jirga</i> violates women's rights?	Balochistan		KP		FATA	
	Male	Female	Male	Female	Male	Female
Strongly Agree	20.3	11.5	2.9	7.5	10.03	4.8
Somewhat Agree	22.6	37.3	9.1	11.1	11.5	9.4
Somewhat Disagree	12	7.8	15.7	19.9	23.26	13.4
Strongly Disagree	43.3	5.5	50.2	30.9	45.99	40.8
Do Not Know	1.8	37.8	22.1	30.6	7.89	21.4
No response	NA	NA	NA	NA	1.34	10.1
<b>Total</b>	100	100	100	100	100	100

First we note that 25% of the respondents did not know, then we note that only 20.8% agreed with the statement. 54.1% disagreed, that is thought that the *Jirga* system did not violate women's rights.

### *Jirga* violates women's rights

As shown in the figure above, cross-tabulation by gender demonstrates substantial differences between men and women and across the Pakhtun region. The 'Do Not Know' category shows a uniform 30+% among women, in FATA, when considering 21.4% 'Do Not Know' and 10.1% of women did not provide a response the 30+% is reaffirmed. Males have a lower 'Do Not Know' or 'No Response' rate.

The other point that should be highlighted is that on this question, the responses in Balochistan are quite different from the other two provinces, that is, at the 50% level, both males and females in Balochistan agree that the *Jirga* process violates women's right, but in the other two provinces approximately 20% agree. The inverse, logically, is seen in the disagreement categories with an interesting finding in the case of women in FATA and KP where 50% of the women disagree, that is, they do not believe that the *Jirga* process violates women's rights.

These positions will be explored in more detail in the following sections of the report.

### No Representation of Women in *Jirgas*

The issues of access, participation and representation of women in the *Jirga* have received criticism on both the international and domestic front. The reality is that local leadership outside of the district headquarter town is entirely dominated by men, as a consequence the *Jirga*, the lone social system which regulates all facets of Pakhtun life, deprives women of the right of access to justice. The tribal code of *Pakhtunwali* allows the men to regulate a woman's body, thoughts and emotions, which has been interpreted to and practiced to exercise and reinforce patriarchal authority. To explore the level of isolation or the lack of representation for women in the *Jirga* process we framed two questions: 1) "Do you agree/disagree with the statement, that there is no representation of women in the *Jirga* system?" and 2) "Do you agree/disagree there is indirect representation of women (through male relatives) in the *Jirga* system?" The first question was only asked in the survey, but the latter was asked in the FGD and reveals interesting cultural perspectives.

### Do you agree/disagree with the statement, that there is no representation of women in the *Jirga* system?

The survey results verify the concern of women's exclusion because over 70% of the respondents agreed that there isn't direct representation of women in the *Jirga* system. Approx-

Do you agree/disagree with the statement, that there is no representation of women in the <i>Jirga</i> system?	Balochistan		KP	
	Male	Female	Male	Female
Strongly Agree	54.4	42.4	50.6	55.3
Somewhat Agree	20.3	31.8	23.1	10.4
Somewhat Disagree	7.4	3.7	6.7	6.5
Strongly Disagree	12.9	7.8	9.8	10.3
Don't know	4.1	13.4	8	7.7
No Response	0.9	0.9	1.8	9.7
<b>Total</b>	100	100	100	100

imately 20% disagreed with the notion. Differences between provinces are minor with one exception. More women (13.4%) were unaware in Balochistan as compared to KP. Balochistan is a less urban area compared with KP.

This was reflected in the survey results as 62.7% of the respondents agreed that women have indirect representation in the *Jirga*; including 42.3% who 'strongly agree' and 20.4% who 'somewhat agree'. Whereas, 17.6% disagreed with this notion, including, 12% who 'strongly disagreed' and 5.6% who 'somewhat disagreed'. The cross-tabulation by province and gender produced surprising results, as 93.5% of the male respondents, and only 45.6% of the females in Balochistan agreed that women are represented indirectly in *Jirgas*. Furthermore, 4.1% of the males and 21.2% of the females disagreed with the statement. The results can also be attributed to the low level of awareness in females regarding justice mechanisms, as 26.7% of the females answered that they 'don't know'. Whereas, in KP, 78.6% of the male and 43.7% of the female respondents agreed that there is indirect representation of the female voice in a *Jirga*. While a mere 8.1% of the male

it has now become possible to root out the age old tribal tradition of isolating women from the tribal justice system. However, significant steps need to be taken in further educating the tribal society regarding the fundamental rights of women in the region. Now that the findings on the overall issue of women and participation and representation in the *Jirga* process have been presented, the second section of this chapter will deal with specific types of cases.

### Types of *Jirga* Cases and the Interests of Women

#### The *Jirga* and the Resolution of Family Disputes

##### Introduction

In Pakhtun dominated regions of Pakistan, especially the rural areas, *Jirgas* deal with a vast array of matters, including matters related to matrimonial disputes of divorce and guardianship of children. Even in the presence of formal judicial and police systems in settled districts of KP, the Pakhtun population of Balochistan and FATA people prefers to resolve their matters through the *Jirga*. It must be kept in mind that in Pakhtun society cases of divorce might be

Do you agree/disagree there is indirect representation of women (through male relatives) in the <i>Jirga</i> system?	Balochistan		KP	
	Male	Female	Male	Female
Strongly Agree	85.3	17.5	55.8	24.4
Somewhat Agree	8.3	28.1	22.9	19.2
Somewhat Disagree	2.3	2.3	5.5	7.3
Strongly Disagree	1.8	24.9	2.6	20.9
Don't know	2.3	26.7	8.9	17.3
No Response	0.0	0.5	4.4	10.9
<b>Total</b>	100	100	100	100

and 28.1% of the female respondents disagreed with the notion. The results re-establish the extent to which *Nang/Ghairat* is embedded in the Pakhtun society, as most tribal women believe that they have no recourse to justice in the region. Even though the men seem convinced that female voices are heard through indirect representation, the female respondents however are not content.

The conclusion at the end of this first part of the chapter is that because of the increase in awareness and education in the rural society,

rarely reported or brought before a *Jirga* and are usually resolved behind closed doors.<sup>153</sup>

This research question will be explored through focus group information and the sample survey responses to questions concerning marital disputes, divorce, and the custodianship of children. Of particular importance is the extent of and differences in the belief of men and women as to gender bias when resolving these types of disputes through *Jirga*.

153) Naveed Ahmed Shinwari (2010), 'Understanding *Jirga*: Legality and Legitimacy in Pakistan's Federally Administered Tribal Areas'.

### Female FGDs

Nearly half of the female participants believed that the *Jirga* is biased against women when addressing matrimonial disputes. They confided that the fear of losing their children forced many to stay in abusive marriages as in cases of divorce, the custody of children is given to the husband by the *Jirga*. A female participant from Zhob quoted a recent example of the *Jirga* giving shelter to a woman whose life was endangered by her family and husband. Comparatively majority of the participants from KP assured that the *Jirga* is impartial and fair when deciding the fate of women in family disputes. They believed that *Jirga* elders consulted religious leaders when deciding cases related to child custody to make decisions that are in conformity with *Shariah*. A respondent from Swat narrated the occasion where a woman was forced to leave home due to her husband's mistreatment was helped by the local elders and residents to get divorce and the custody of her two children. The conclusion is that the experience of the FGD participants is varied and that there are cases showing bias for and against women as well as what one would call a just decision.

### Male FGDs

Even though the majority of the male respondents disregarded the fact that the *Jirga* is biased against women, several participants from Balochistan accepted that in women related disputes, *Pakhtunwali* and customs supersede *Shariah*. Therefore, in cases related to women, the *Jirga* at times disregards the principles of justice as per *Shariah* law and instead follows discriminatory tribal customs. A participant agreed that since in the male dominated Pakhtun society there is no direct representation of women in the *Jirga*, their grievances are not heard and justice is rarely served. Therefore, in cases of divorce, the wom-

an is thrown out of her matrimonial home and is denied the custody of her children. Whereas, supporting the traditional justice system, a participant gave an account where he was part of the *Jirga*, resolving a case of child custody of a five year old boy after the parent's divorce. The *Jirga* decided to give custody of the child to the mother till the age of 16, which he believed was in conformity with women's inherent Islamic and legal right. It was noted that an overwhelming majority of participants in KP believed that the *Jirga*, being an institution of fairness and justice, protects the rights of both men and women. Supporting this argument, a respondent from Timergara narrated the occasion where in the case of a conjugal dispute, the local *Jirga* supported the woman in getting a divorce and compelled the husband to pay her dowry and other expenses.

The FGDs bring up particular cases or examples that are not consistent evidence of the *Jirga* being biased toward or against women. However, the survey data provides a means for weighing the research question based on the percentages of the sample that agree or disagree that there is bias against women under specific circumstances. Furthermore, we can examine the collective opinion by gender.

### Do you agree with the statement, that the *Jirga* at times is biased against women when resolving matrimonial disputes, including divorce and custody of children?

In the figure below showing the tabulation of responses to the question, we first find that almost a quarter of women and a tenth of men do not have an opinion. The high percentage of women not having or sharing an opinion is a concern. Could it be that bias is not a subject of concern for women? Overall, the male opinion is the inverse of the female position, that is, males believe that bias against women

Do you agree with the statement, that the <i>Jirga</i> at times is biased against women when resolving matrimonial disputes including divorce and custody of children?	Percent by Gender			
	Male	Female	Sum Male	Sum Female
To a large extent	7.3	13.1		
To some extent	12.9	25.0	20.2	38.1
Not to some extent	20.2	15.9		
Not at all	47.7	22.1	67.9	38.0
Don't know	11.9	23.9		
<b>Total</b>	100	100		

is less than women believe. However, we find that females are evenly divided, that is, 38% believe that there is some bias against the woman's side of family disputes when mediated by a *Jirga* and 38% believe that the *Jirga* is not biased against the women's position. Men, on the other hand believe (3:1 20.2% to 67.9%) that the *Jirga* is not biased against women.

The conclusion is that although a minority (20% male and 38% female) believe that there is a gender bias in these decisions against females, the majority believes that there is no bias. The survey data indicates that the severity presented in anecdotal and historical description is overstated at the present time. One also has to consider that the urbanisation of the Pakhtun may have had an impact over the decades. For example, when we examine the same question by province, we find that more than half, (55.1%) of the respondents in KP, and less than half, (43.1%) of the respondents in Balochistan, indicated that there was bias on the part of *Jirgas* against women in marital disputes. The variation in results by province can be attributed to the difference in mindsets in the provinces when dealing with a social taboo such as divorce, which historically has no place in *Pakhtunwali*.

In the figure above, we note that males respond inversely to females in both provinces. That is, proportionally more women than men believe that *Jirgas* are biased against women, and more men than women believe that the *Jirga* is not biased. The second observation is that women in Balochistan (59% - 11.5+47.5) are more likely to believe that *Jirgas* are biased against them when compared with women from KP (33.4% - 13.4+20). This difference, that is the tendency for women to be disadvantaged in Balochistan in comparison with KP, is found in many of the questions of this research. We attribute the difference to the rural-urban difference with rural traditions being more prevalent in Balochistan. The third finding is that women are twice as likely not to know or have an opinion compared with men.

### The third area of inquiry concerns Honour Killings

As described in the introduction to this chapter, a tribal woman is generally seen as the guardian of the tribal/family honour among most Pakhtuns. Thus, a woman can be a source of shame to the male-dominated extended family/tribe. Although she may exercise a significant degree of hidden control over males,<sup>155</sup>

Do you agree with the statement, that the <i>Jirga</i> at times is biased towards women when resolving matrimonial disputes including divorce and custody of children?	Balochistan		KP	
	Male	Female	Male	Female
To a large extent	6.9	11.5	7.4	13.4
To some extent	14.7	47.5	12.6	20.0
Not to some extent	10.1	6.9	22.4	17.9
Not at all	59.9	9.2	45.0	24.9
Don't know	8.3	24.9	12.7	23.7
<b>Total</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

*khtunwali*.<sup>154</sup> Note that KP is more urban than Balochistan and FATA is the least urban, one would expect that with modernisation or urbanisation that the opinion of males and females will reflect a change in culture, in this case, bias against women in the traditional *Jirga*. The following figure shows the data by Province. This question was not asked in the FATA survey.

she may also be the subject of punishment if it is perceived that she has violated the code of *Pakhtunwali*, that is, brought shame upon her family or tribe. As a result, hundreds of women in Pakistan are murdered by their fathers, husbands or brothers for allegedly dishonoring their family every year.<sup>156</sup> In reference to the Constitution and human rights, "Any practice legitimized by custom that infringes the right

154) Ibid

155) Naveed Ahmed Shinwari (2010), 'Understanding *Jirga*: Legality and Legitimacy in Pakistan's Federally Administered Tribal Areas'.

156) <http://www.telegraph.co.uk/news/worldnews/asia/pakistan/9160515/1000-Pakistani-women-and-girls-honour-killing-victims.html>

to protect from torture or the right to life guaranteed by Pakistan's constitution is illegal and punishable by law.<sup>157</sup> The subject of honour killings was presented to both discussion groups and in the general survey question.

#### Female FGDs

Most of the respondents condemned the custom of killing in the name of honour in the Pakhtun belt. They were of the opinion that Islam lays a strong foundation of forgiveness and equality throughout history, and based on that, and then what right does a human have to punish and kill? The tribal belt is filled with stories of innocent women losing their lives to suspicion and distrust. A few of these stories were retold by the respondents in our FGDs, which included the time a father brutally murdered his daughter by poisoning her when he suspected her of having an illicit relationship. The father was found crying and begging her for forgiveness when she was taking her last breaths and explained that he was forced to take this step to be able to live in the Pakhtun community. Another respondent from Swat narrated the time where a tailor from their community had befriended a local girl. One day they were caught talking to each other in a room by a villager, who locked them in and called their parents. After which, the parents shot both of them on the spot. The concept of killing in the name of honour may be acceptable in a Pakhtun man's point of view and then justified by the *Jirga*.

Conversely, female participants believed that *Jirga* elders discourage honour killing as it undermines the principles of *Shariah* and infringes upon the inherent rights of women. However, they were convinced that honour related crimes were widespread in the Pakhtun belt due to the social pressure and the family's *Nang/ Ghairat* (individual and family honour) the most fundamental notions of the tribal code. A respondent further explained this by narrating the story of a local man, who was forced to commit suicide after being socially shunned by the village for his sister's alleged disreputable character. Some respondents claimed that the custom is justified if it deters others in the community from taking such an ignominious step. Others argued that in certain cases, only the accused woman is stoned to death due to her weak stature, and the unquestionably pure

role that she is expected to play in society, whereas the man goes scot free. However, it is still believed to an extent that the *Jirga* makes just decisions by investigating all aspects of the case and in the light of *Shariah*. At times the *Jirga* even tries to intervene and stop families killing their children in the name of honour.

#### Male FGDs

According to the male participants, the institution of *Jirga* condemns blood-shed therefore the *Jirga* mediates to resolve disputes and ultimately avert further violence. However, heart-rending cases of killings in the name of honour were not denied by the respondents, as a participant narrated the incident where a man from his village, shot his wife and younger brother on the spot when he saw them alone in a room suspecting them of having an illicit relationship. Another respondent gave an account of the occasion where two students of class 6 and 7 were caught talking to each other after which people of the village brutally killed both of them. Post-mortem and medical reports proved that they were not guilty, which shows that innocent people are killed due to social pressure. A number of participants from Balochistan argued that the concept of honour constitutes an inherent aspect of *Pakhtunwali*, therefore elimination of honour crimes is considered next to impossible. However they believed that the *Jirga* plays a significant role in investigating honour crimes from various dimensions to ensure that 'innocent' lives are not lost.

In cases where the murderer is found guilty of using honour as an excuse to commit crime, then a girl from his family is given away in marriage to the aggrieved party as compensation. This illustrates how the *Jirga* deprives women from their fundamental rights to provide justice to men. Comparatively, certain respondents defended the tribal custom of killing in the name of honour to stop such ills from spreading in the society. However, another respondent disagreed with this argument and suggested that the culprits should be married to each other.

The survey data reveals the weighting of opinions identified in the FGD.

The analysis of the data by provinces and gender illustrated that in Balochistan 70% of the

157) The Constitution of Pakistan 1973 <http://www.pakistani.org/pakistan/constitution/> (accessed on 11 October 2012)

Do you support/oppose the <i>Jirga</i> making decisions in favour of honour killing?	Balochistan		KP	
	Male	Female	Male	Female
Strongly Support	8.3	19.8	17.4	9.2
Somewhat Support	4.1	18.4	8.9	10.5
Somewhat Oppose	11.1	15.2	15	17.1
Strongly Oppose	59	26.7	45.3	35.8
Don't know	17.5	19.8	13.4	27.4
<b>Total</b>	100	100	100	100

male respondents and 41.9% of the female respondents opposed the *Jirga* making decisions that favour the custom of honour killing. Conversely, only 12.4% of the male respondents and 38.2% of the female respondents supported the notion. Whereas, in KP majority, 60.3% of the male respondents and 52.9% of the female respondents opposed the *Jirga* making decisions in favour of honour killing. However, 26.3% of the male respondents and 19.7% of the female respondents were in support of this. The disparity in the opinion of male and female respondents demonstrates the dire need for education and awareness on fundamental human rights in the Pakhtun belt with a culturally sensitive approach. Furthermore, the higher percentage of female support towards honour killing can also be attributed to the more traditional and rural nature of Balochistan compared with KP.

### The Inheritance of Property

The Holy Quran states very clearly and specifically the inheritance rights of family members including women – wives and daughters. However, when it comes to inheritance, social and religious

kistan<sup>158</sup>; however *Pakhtunwali* and social traditions do not endorse this fundamental right.

The subject of inheritance was posed in focus groups and then followed up in the surveys.

### Female FGDs

There was a consensus among those consulted that women should be given the right of inheritance in their region, in conformity with principles of Islam and the constitution of the nation. A female respondent from Buner said that over the years, with the increase in awareness and education in the region, the traditional justice system has become relatively sensitive to fundamental rights of women.

### Male FGDs

Similarly, the opinion of male respondents coincided with that of the females. One respondent explained that as a common practice, widows are denied a share in their late husband's property. Typically, after the completion of the mourning period, the widow is married to her brother-in-law, at times without seeking her consent. It was noted that family disputes including conflicts

Do you agree/disagree that women should have a right of inheritance in your community/area?	Balochistan		KP	
	Male	Female	Male	Female
Strongly Agree	94.5	53	88.7	87.4
Somewhat Agree	4.6	35.5	7.5	4.1
Somewhat Disagree	0	1.8	2.4	0.6
Strongly Disagree	0.9	0	0	0.3
Don't know	0	9.7	0.9	3.6
No Response	0	0	0.5	4
<b>Total</b>	100	100	100	100

values are in conflict. Society gives precedence to social values over religious ones. In Pakistan women have a right to inheritance protected by Islamic principles and the legislation of Pa-

related to female inheritance are rarely brought to the *Jirga* and are usually resolved within the family behind closed doors. This long standing defect of the justice mechanism was reiterated

158) [http://www.na.gov.pk/uploads/documents/1321415693\\_161.pdf](http://www.na.gov.pk/uploads/documents/1321415693_161.pdf)(accessed on 15th September 2012)

by a participant who said that *Pakhtunwali* is prejudiced towards women as nearly all Pakhtun women are deprived of their right of inheritance.

What we find in the survey data, because of the way the question was asked, was that, overwhelmingly, males and females agreed that women should have inheritance rights. But, when considering the FGD and understanding how widows are married to brother in law or assumed under the protection of younger male relatives who receive the inheritance, it is clear that women do not receive the shares prescribed in the Holy Quran.

In the figure above, almost all males in both Balochistan and KP agree that women should have a right of inheritance in their region. Women, overwhelmingly also agree, but not as strongly as men.

#### **Swara as a Violation of Women's Rights**

Blood feuds and honour related disputes can be settled by giving/taking *Swara*. The custom calls for a girl to be given away in marriage to an aggrieved family as compensation for a serious crime committed by her father, brothers or uncles. It is believed that *Swara* ends lifelong enmities and prevents further violence and bloodshed. It must be kept in mind that the role of *Jirgas* is to reduce tension between families, sub-tribes and tribes so that some normalcy of collective life can continue. The value of individual rights, compared with collective needs, has been given secondary importance. The exchange of women as a valued property has been the traditional system. In modern times, there is a growing recognition

in the region. A respondent from Charsadda noted that in general, local people have a strong concept of rights and are taking significant steps in preventing this outdated custom from being wrongly practiced. Participants also expressed their sympathy toward the innocent girls who pay for the crimes committed by their male relatives. While *Swara* is an effective tool to resolve long-standing disputes, it sacrifices the life and future of a girl; and is against Islamic principles and teachings. Children often become victims of this brutal custom, girls as young as eight or nine are often given in marriage to men old enough to be their grandfathers to resolve disputes and only in certain fortunate cases, the victim's family waits for the child to reach puberty. However, several participants defended this tribal custom by giving examples of occasions in their families where girls given in *Swara* were treated well by their in-laws and were even given the permission to associate with their families after the marriage.

#### **Male FGDs**

Recognising the importance of the *Jirga* system in the Pakhtun society, several respondents were of the opinion that the life of a girl given as *Swara* is endangered as she is mistreated, degraded and despised for the rest of her life. *Pakhtunwali* and the concept of *Nang* (honour) has been interpreted and practiced to exercise, justify and reinforce traditions such as *Swara* based on the notion of preventing further bloodshed between sub-tribes, tribes or families.

The majority of the respondents thought that this local tradition was oppressive and un-Islamic because the principles of *Shariah* strongly

Do you believe that <i>Swara</i> violates women's rights.	Balochistan		KP		FATA	
	Male	Female	Male	Female	Male	Female
Yes	77.4	63.1	87.3	83.4	81.7	51.9
No	4.6	16.1	6	4.7	7.6	18
Don't Know	18	20.7	6.7	11.9	10.7	30.2
<b>Total</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

that women have fundamental rights and that they are not "property." We will see this in the FGD and survey data that follows.

#### **Female FGDs**

Participants raised concerns about the use of the custom of *Swara*, which is associated with low levels of awareness and lack of education

forbid forced marriages without the consent of the female. One respondent reported that he once stood before a *Jirga* of 400 participants and announced a perpetual ban on *Swara* and asked the participants who concurred with his decision to raise their hands. All four hundred participants including a renowned religious leader endorsed the decision. While defending

its continued importance in the Pakhtun society, stressing on its values and relevance, several respondents were reluctant to accept that this custom was widespread in the Pakhtun belt. According to them, this tradition was practiced by their forefathers and has perished over time. They claimed that now a days, the *Jirga* resorts to monetary compensation when deciding intricate matters that involve bloodshed and honour.

In the figure above regarding “Do you believe that *Swara* violates women’s rights?” We find a few themes. 1) The majority of men and women believe that *Swara* violates women’s rights, 2) A greater number of men support *Swara*, as compared to women; 3) Women, however show significant and important differences across the three provinces. Note that in the most rural, FATA, only 51.9% say yes it is a violation, in Balochistan 63.1% say yes and in the most urban province, KP, 83.4% of women say yes, it is a violation. “Not knowing” follows a similar pattern: 30% of the females in FATA do not know and 11.9% of women in KP do not know.

#### ***Swara* as a way of resolving conflicts between two families or parties**

One of the beliefs is that conflicts between two parties may be resolved by exchanging an unmarried woman or girl from the party found guilty of the grievance to the aggrieved party. The girl or woman does not have a say in the matter. The ancient practice is considered a violation of human rights. The question was posed in both focus groups and also in the overall survey. We begin with the focus groups for general opinions and then use the survey data to weigh the differences in the population.

#### **Female FGDs**

Most of the respondents expressed their concern over the practice of *Swara* to resolve complex disputes concerning murder or honour related crimes at the cost of an innocent girl’s life.<sup>159</sup> According to a participant the principles of retribution and justice lie in the heart of Islam through the notion of ‘a life for a life’, but where has Islam permitted exchanging a girl for a life? He further explained that there are several other methods of resolving such grave issues, for example, by compensating the victim’s family with money or property. Therefore, there is no need for Pakhtun men to sacrifice their sisters and daughters. Another respondent was of the opinion that girls

given in *Swara* are treated worse than animals or chattels, as they lose the right to speak, feel, think or live; as it is culturally accepted that the only escape from their fate is death. It has also been evident that *Jirga* decisions that call for *Swara* cause graver problems rather than resolving the dispute. While some respondents did not necessarily consider *Swara* to be negative, they believed that “*Swara* is an effective tool to resolve old enmities provided the victim’s family treats the girl with respect and honour.” In their opinion, this outdated custom clearly defies the fundamental rights of women, however, it also saves a family from the catastrophe of losing their breadwinner and in certain cases, the birth of the offspring of the marriage effectively turns an enmity in to friendship.

#### **Male FGDs**

There was not much disparity between the responses of the male participants from that of the females. Respondents from both provinces outlined substantive concerns about women’s rights in *Jirga*, particularly by the use of *Swara*; describing it as a ‘curse’. Despite this, several participants were of the opinion that *Swara* is only given in circumstances to resolve disputes where the culpable family is underprivileged and cannot afford to pay the blood money.<sup>160</sup> The supporters of this rigid custom claimed that it restores family ties, which is impossible to achieve by blood money. Defending the relevance of *Swara* in the tribal code, respondents argued that historically, *Swara* successfully resolved disputes. However, over the years, individual Pakhtuns have been exploiting this custom for personal gain or to settle old scores.<sup>161</sup> Matching the opinion of the female respondents, there was a consensus that rather than restoring justice and harmony, the practice of *Swara* gives birth to more complex issues.

#### **To what extent do you support *Swara* as a way for resolving conflicts between two families/parties?**

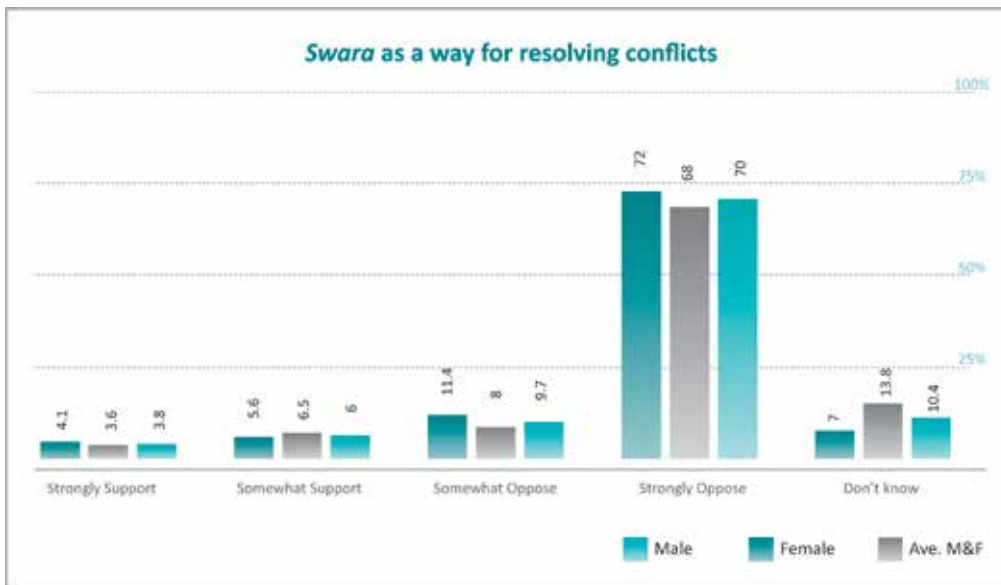
The result of the survey shown in the figure above is that there is not an important difference between the views of men and women on this issue and that only about 10% of the sample supported the practice in comparison with approximately 80% of them being against the practice. In conclusion, the consensus is that the custom that infringes on women rights is opposed. This conclusion by the Pakhtuns is extremely encour-

159) Timargara female FGD

160) Qillah Abdullah male FGD

161) Swabi male FGD





aging, and, as was portrayed in the Grand *Jirga* held on 22<sup>nd</sup> May 2012 by CAMP, 800 tribal elders from FATA declared a permanent ban on the custom of *Swara* along with *Khag* and *Walwar* (bride price) through the *Jirga*.

The justification for practicing *Swara* over the centuries is that it is an effective mechanism of resolving conflicts between two parties. The statistics also show an increase in the levels of awareness and education in the region. As a result, the Pakhtun society is now more sympathetic towards the impact of this custom on a girl's life. The cross tabulation of the data by provinces establish that, 8.6% of the respondents in KP, 4.8% in FATA and 15.9% in Balochistan supported the notion that *Swara* resolved enmities between two families. While, 81.9% of the respondents in KP, 67.4% in FATA and 7% in Balochistan opposed the practice of the tribal custom as a mechanism of dispute resolution.

#### **Violence Against Women and the Assessment of Justice for Women**

We now move to the subject of the types of violence that women suffer in the Pakhtun areas and the assessment of the interviewees as to the efficacy and fairness of the *Jirga* when it deals with these crimes. We begin with the reports from focus group discussions and then move on to the statistical data from the survey. Interviewees were first asked about the types of violence most experienced in their areas. Then those interviewees who indicated a type

of violence were asked about the level of satisfaction with the performance of the *Jirga* in dealing with this type of violence.

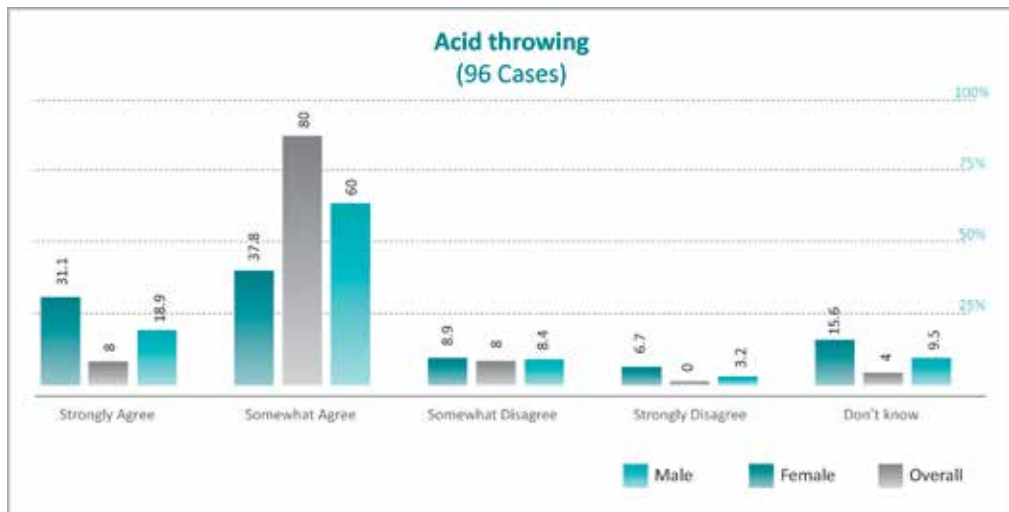
#### **Physical Abuse**

Physical abuse includes acts of violence such as slapping, beating, arm twisting, stabbing, strangling, burning, choking, kicking, threats with an object or weapon and murder. It also includes traditional practices harmful to women such as female genital mutilation, honour killing and wife inheritance (the practice of passing a widow, and her property, to her dead husband's brother)<sup>162</sup>. According to media monitoring by HRCP, there were reports of at least 366 women who suffered from domestic violence in 2011. Amongst them, 81 suffered attempted murder, 47 were set on fire, 98 were tortured and 9 women had their nose or other parts of their body amputated as punishment. The common reasons found for this inhumane and brutal treatment were some form of domestic dispute and the suspicion of illicit relations.<sup>163</sup> Furthermore, it was reported at a discussion organized by 'Insaani Haqooq Ittehad', that approximately 80% of the women in Pakistan were subjected to physical and psychological domestic violence, which is unreported since 66% accept it as their fate, 33% only complained while less than 5% took actions against it.<sup>164</sup> CAMP's report evaluated the role played by the tribal *Jirga*'s when dealing with crimes related to 'Physical Abuse' of women; 89.1% agreed with the notion, includ-

162) <http://www.unicef-irc.org/publications/pdf/digest6e.pdf> (Accessed 20 November 2012)

163) State of Human Rights, Human Rights Commission of Pakistan, 2011

164) Ibid



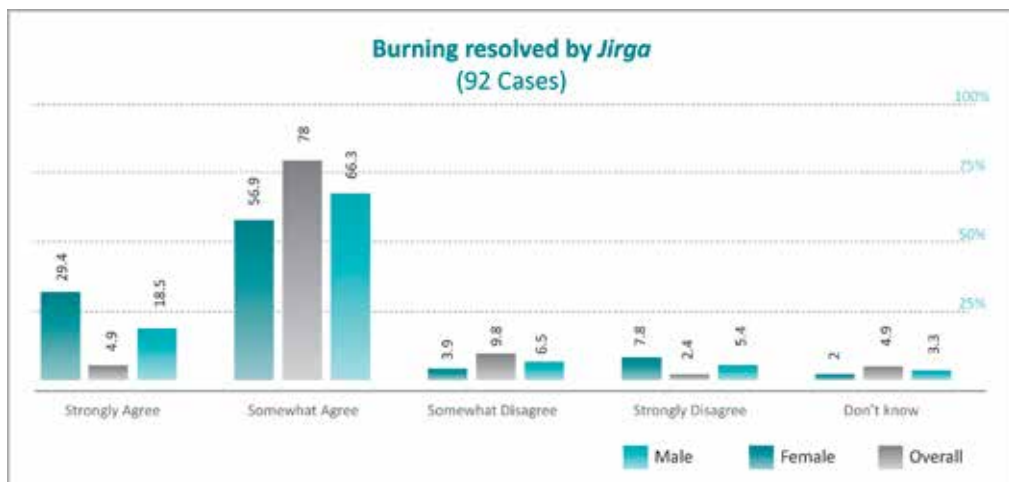
ing 50.5% who 'strongly agree' and 38.6% who 'somewhat agree'. Whereas 10.9% disagreed with the notion, including 5.1% who 'strongly disagree' and 5.8% who 'somewhat disagree'. In the cross tabulation of data according to the provinces, 77.2% of the respondents agreed and 8.9% disagreed with the notion in KP, conversely 86.8% agreed and 12.2 % disagreed in Balochistan.

**The issues are presented one by one, always with regard to the *Jirga* as a system of justice for these issues. The number of cases is stated in parenthesis and the statistics refer to those cases and not the whole sample of 2,400 interviewees.**

**Acid throwing** is a form of violent assault usually inflicted on women. It is defined as the act of throwing acid onto the body of a person "with

the intention of injuring or disfiguring [them] out of jealousy or revenge".<sup>165</sup> According to Aurat Foundation (AF) fourth Annual Statistics reports of Violence against Women 2011, there were 44 reported cases of acid throwing (32 in Punjab; 6 in Sindh; 0 in KP; 4 in Balochistan; 2 in Islamabad). The 'missing cases' in the data could be blamed on the reluctance of families to report cases related to domestic violence to the police or media; as it damages the *Nang/Ghairat* of Pakhtun families. Therefore these cases are usually taken to the local *Jirga* or resolved behind closed doors in conformity with the fundamental notions of *Pakhtunwali*.

The statistical data collected by CAMP regarding the effectiveness of the *Jirga* resolving acid throwing disputes showed that 78.9% agreed with the notion, including 18.9% who 'strongly agree' and 60% who 'somewhat agree'. Whereas



165) Karmakar, R.N. (2003). *Forensic Medicine and Toxicology*. Academic Publishers

11.6% disagreed with the notion, including 3.2% who 'strongly disagree' and 8.4% who 'somewhat disagree'. In the cross tabulation of data according to the provinces, 61.3% of the respondents agreed and 12.9% disagreed in KP, conversely 87.5% agreed and 11% disagreed in Balochistan.

**Burning of Women is also an Issue**

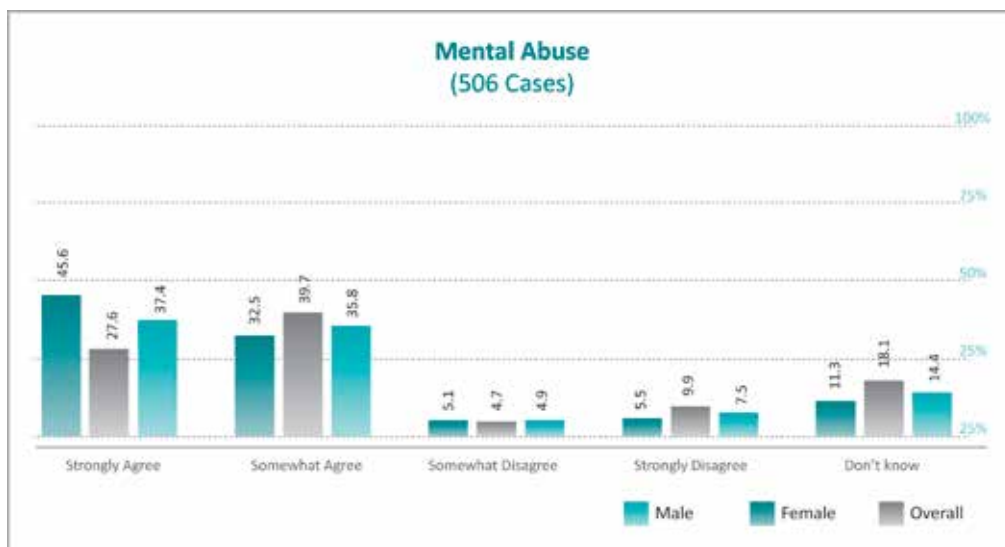
Burning' or 'stove burning' is a popular form of domestic violence in Pakistan practiced by husbands and/or in-laws because it is easy to pass off as an accident and can easily be undetected by the media or police authorities. Victims of burning usually succumb to the injuries before getting medical treatment or justice.<sup>166</sup> Aurat Foundation's latest report accounted for 29 cases of burning (28 in Punjab; 1 in Sindh; 0 in KP; 0 in Balochistan; 0 in Islamabad). The lack of statistical data, compounded by the fact that women do not come forth and report violence makes it difficult to estimate the frequency and magnitude of the problem. CAMP's report evaluated the role played by the tribal *Jirga's* when dealing with 'burn crimes', 84.8% agreed with the notion, including 18.5 % who 'strongly agree' and 66.3% who 'somewhat agree'. Whereas 11.9% disagreed with the notion, including 5.4% who 'strongly disagree' and 6.5% who 'somewhat disagree'. In the cross tabulation of data according to the provinces, 82.0% of the respondents agreed and 10.2% disagreed in KP, conversely 86.8% agreed and 13.2% disagreed in Balochistan.

In the present survey, only 92 interviewees knew of burn cases. They were asked if they believed that burn cases are justly resolved by *Jirgas*. As shown in the figure below, over 80% of the males and females stated that they believed that *Jirgas* do resolve burn cases.

**Mental Abuse**

The United Nations Declaration on the Elimination of Violence against Women (1993) defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life".<sup>167</sup> Psychological/mental abuse which includes behaviour that is intended to intimidate and persecute, and takes the form of threats of abandonment or abuse, confinement to the home, surveillance, threats to take away custody of the children, destruction of objects, isolation, verbal aggression and constant humiliation. A United Nations research study found that 50% of the women in Pakistan are physically battered and 90% are mentally and verbally abused by their men.<sup>168</sup> According to the monitoring cell of Aurat Foundation, 8539 women became victims of violence in 2011.<sup>169</sup>

In the figure below the instance of abuse and the ability of *Jirga* to address the issue is presented

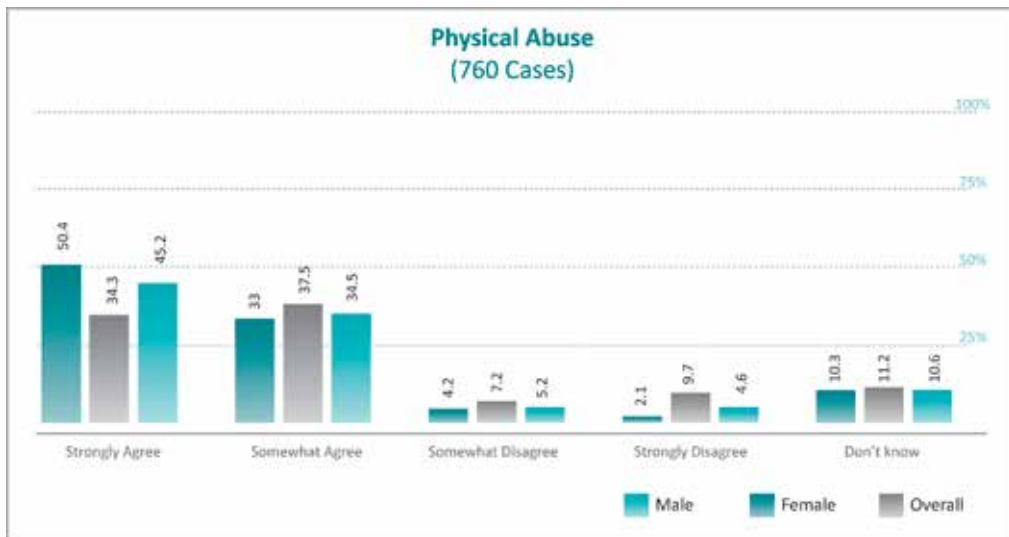


166) <http://watandost.blogspot.com/2006/02/domestic-violence-in-pakistan.html> (Accessed 20 November 2012)

167) <http://www.unicef-irc.org/publications/pdf/digest6e.pdf> (Accessed 23 November 2012)

168) Tinker GA. Improving women's health in Pakistan. Karachi: World Bank; 1999

169) Aurat Foundation, Violence Against Women in Pakistan, 2011



by gender. Again, we see that over three quarters of the men and women and three quarters of the females agree that the *Jirga* as a system of justice deals with the issue of metal abuse. Note however, that twice the proportion of males compared with females 'Strongly Agree.'

#### Physical Abuse

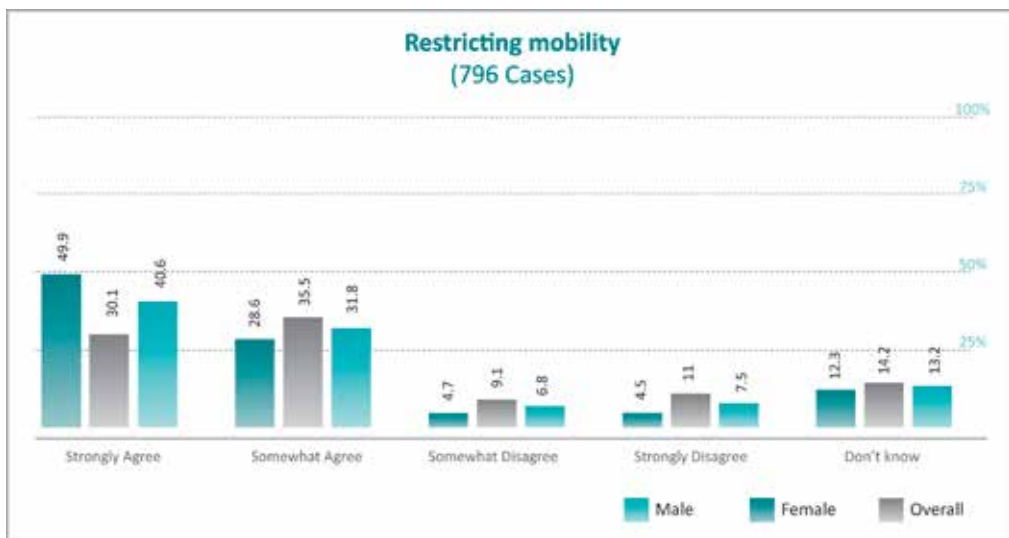
Physical abuse is more general than the abuse described above, but, once again, we find similar patterns, although three quarters of Pakhtun males and females surveyed agree that the *Jirga* brings justice here too, more males (54%) strongly agree than do females (34.3%). Clearly females, when it comes to the issue of the *Jirga* process treating women's issues, do not agree as do males that they are receiving the justice that they are due.

#### Restricted Mobility

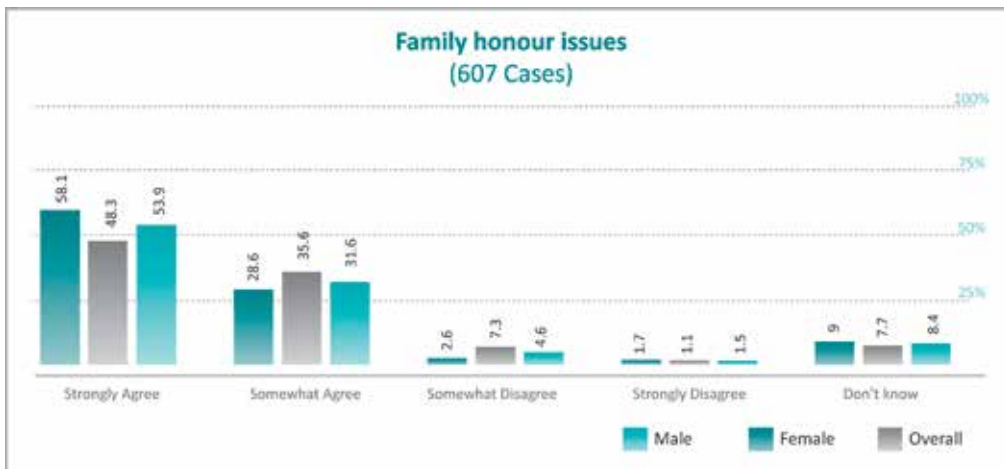
Restricted mobility is presented in the figure below. Again we see that the majority agrees that the issue is handled by *Jirgas*. Nevertheless, the pattern shows that women strongly agree to a much lesser extent than do men.

#### Honour Issues

In Pakistan, when a man takes the life of a woman or physically harms her in suspicion that she was guilty of immoral sexual conduct, it is called an 'honour crime'. The killing of the 'adulterous' female, and at times her illicit partner, is intended to erase shame, restore honour<sup>170</sup> to the family. It is justified by a social code that controls the lives of women especially in the Pakhtun region. According to



170) The Dark Side of Honour, Women Victims in Pakistan, Rabia Ali, Shirkat Gah 2001

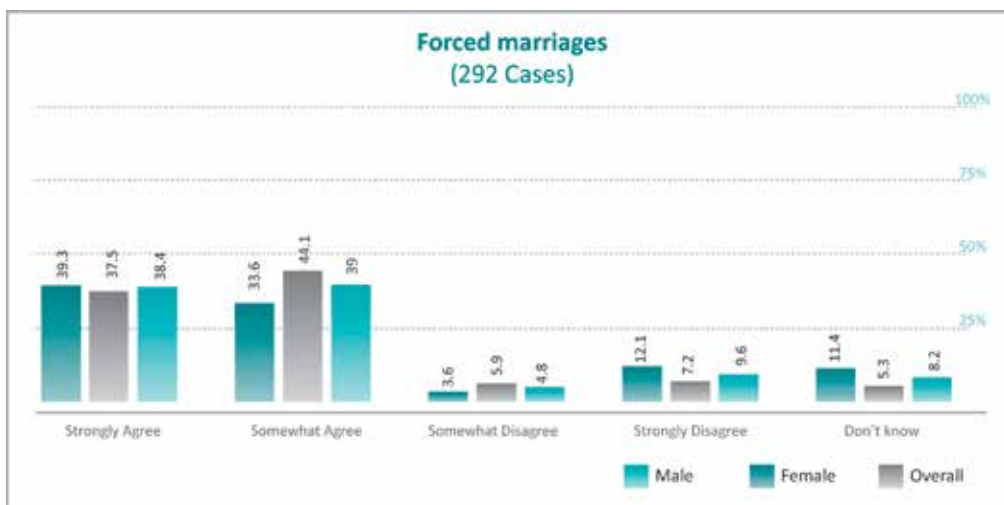


Aurat Foundation’s Annual report, there were 705 cases of ‘honour’ killing reported in the country last year (322 in Punjab; 266 in Sindh; 30 in KP; 86 in Balochistan; 1 in Islamabad). Unfortunately, that most of the perpetrators of violence against women were found to be relatives of the survivor or the victim such as husband, brother, cousin, father, uncle, father and mother in law, brother in law, son or step son.<sup>171</sup> The tribal *Jirga* has faced criticism globally and nationally for justifying and sustaining honour killing in the Pakhtun belt. Contrary to the negative perception, CAMP’s study shows, in the following figure, that an overpowering majority (85.5%) believed that the tribal *Jirga* resolves honour issues effectively, including 53.9% who ‘strongly agree’ and 31.6% who ‘somewhat agree’. While 6.1 % of the respondents disagreed with the notion, including, 1.6 % who ‘strongly disagree.’

Cross tabulation of the data by province produced similar results - 84.6% in KP; 88.7% in Balochistan. Again, we find that women (48%) do not agree as strongly as men (58%) that the *Jirga* resolves the problem justly.

#### Forced Marriages

Statistics on the prevalence of forced marriage in Pakistan that would allow for a comparison between provinces are unavailable. However, the HRCP observed in its 2010 report that, ‘[Pakistani] girls and women continued to be forced into marriages against their will, killed or intimidated for asserting their right to choose their spouse or generally to make decisions about their own lives. The practice of giving away women and even underage girls in marriage to settle men’s disputes also continued’.<sup>172</sup> According to the survey reported here, in the following figure, an overwhelming majority of



171) Aurat Foundation, Violence Against Women in Pakistan, 2011

172) HRCP 2011, *supra*, note 13 at 211

the respondents (77.4%) agreed that the *Jirga* resolves issues involving forced marriages effectively. Interestingly, more women (81.6%) than men (72.9) agree with the notion. The ‘disagreement’ responses, although small in proportion, showed that men strongly disagree compared to women with the way that *Jirgas* handle forced marriages. When cross-tabulated by province, the data reveal that 74.3% of the respondents in KP and 82.3% in Balochistan agreed, whereas 13.4 % of the respondents in KP and 15.9 % in Balochistan disagreed with the notion.

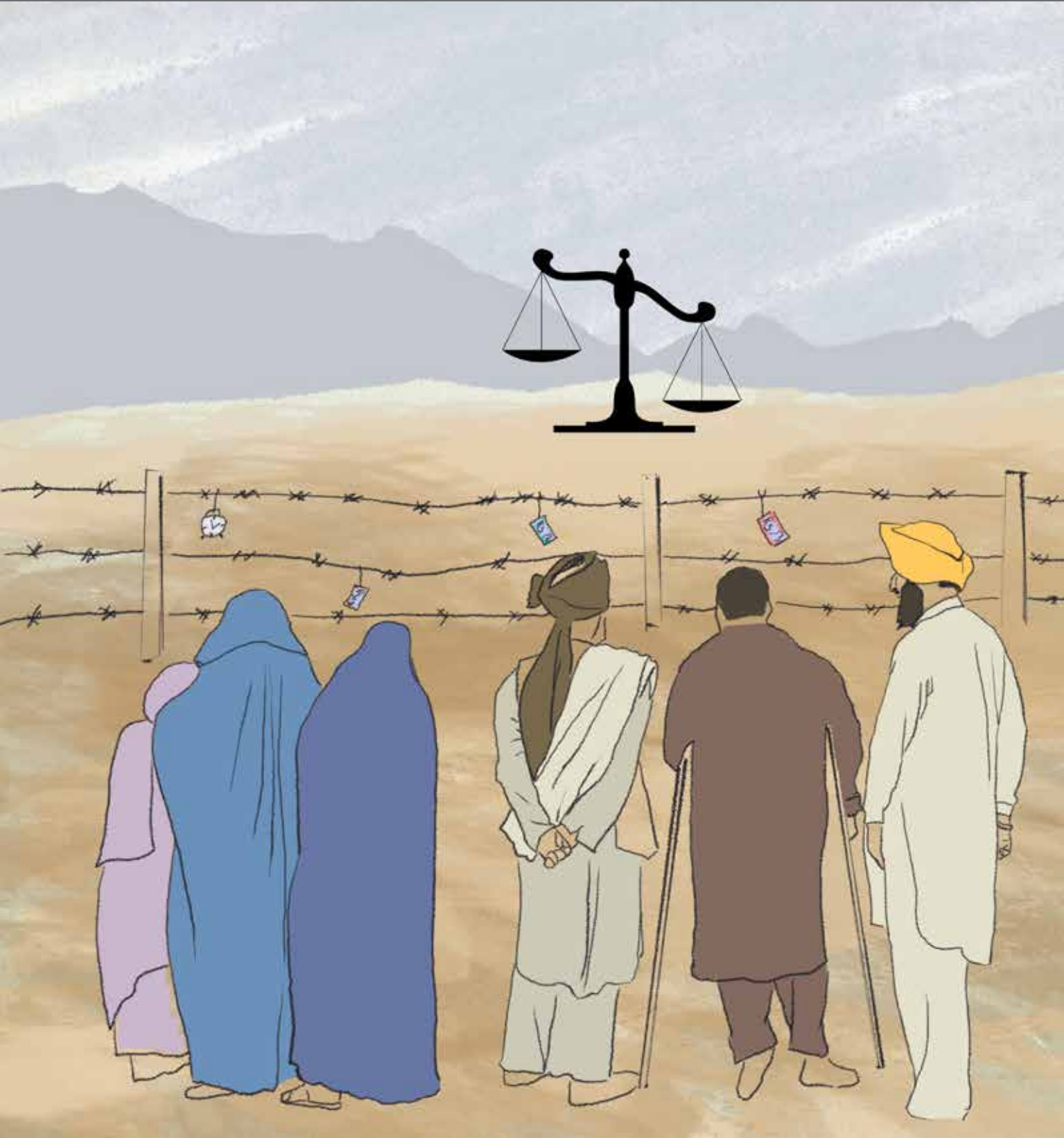
### **Conclusion**

It is evident from the findings of the survey, focus group discussions and key informant interviews that the patriarchal *Jirga* system fails

to provide access to justice to the women belonging to the Pakhtun region. Therefore, there is a need to support and promote education on human rights within communities to increase understanding and awareness. Furthermore, it is also essential to promote evidence based reforms and advocate for a more representative and inclusive *Jirga* system, in a culturally sensitive manner to improve access to justice for all members of the society especially women in KP, Balochistan and FATA. The support for the *Jirga* system and its impact is also evident in the results; consequently it is necessary to promote locally owned and led reforms that take place in a locally acceptable timeframe.

# CHAPTER: 9

## Conflict Dynamics and Access to Justice



## CONFLICT DYNAMICS AND ACCESS TO JUSTICE

### Introduction

This section begins with information collected from focus group discussions on the presence of various formal and informal dispute resolution systems, people's access to such institutions, and the nature of disputes/cases that instigate conflicts. After the FGD findings, the survey data is presented so that the weight of the opinions can be taken. We have also tried to document respondents' level of confidence in formal and informal justice systems. The chapter closes with an analysis of different modalities of the preferences expressed by respondents for the justice systems within their areas.

### Understanding of Access to Justice

This section begins by documenting how respondents understand the meaning of 'Access to Justice'.

### Male FGDs

This question was asked in all 12 FGDs organised in KP and Balochistan. In almost all FGDs, the majority view was that everyone has the right to have Access to Justice without any discrimination. Participants were of the view that access to formal justice system is expensive and time consuming while informal ways of justice are transparent, easy for the people to access and inexpensive. Respondents shared that elders of their communities are held in great respect within their communities and that they work selflessly providing justice to all on equal footings. Although some FGD participants had concerns or reservations about the *Jirga* process, they believed the *Jirga* to be less corrupt and a better option than formal system of justice.

Some of the respondents opined that the Islamic system of justice is the best way, because it ensures that every human being is treated properly

and justly without discrimination on the basis of colour, gender, race, and nationality.

Some of the respondents had had some harsh experience in the formal justice system and opined that the formal system of justice is incapable of ensuring justice. They noted that cases are usually pending in courts for decades and people have to visit courts regularly, spending a huge amount of money and at the end they do not get anything but pain, waste of money, and time. They believed that informal ways of mediation and resolving disputes do serve majority of the people.

Nevertheless, a few respondents believed that criminal cases, if properly investigated, are settled quickly in formal courts. This school of thought believed that the number of cases on formal courts have been increased because *Jirga* system has no value anymore and people are losing their trust in *Jirgas*.

Another group of respondents thought that the formal justice system needed to be revived and improved so that people regain trust in it. This will help the state to discourage informal ways of justice dispensation that, at times, leads to violation of human rights, especially those of women and minorities.

Most of the respondents from Swabi district identified the police as the main source of trouble when accessing justice. They believed that the most important stage in getting justice is the First Investigation Report (FIR) that the police department handles. They complained that police casually treat cases or manipulate crime scenes and that poor reporting leads to confusion, leading to delays in accessing proper justice.

Respondents from Peshawar district, capital of KP and the most modern urban center of Pakhtun population, had reservations against formal courts. In spite of being an urban area with formal courts the majority believed that the *Jirga* ensures some level of justice while formal courts have disappointed the majority because they consume resources and time.

In summary, the male FGD, had grievances with the formal justice system, including the police and the courts. Their criteria for ‘Access to Justice’ was very simple; they believed that people getting proper, inexpensive, and timely justice defines “Access to Justice.” Additionally that the process must not be discriminatory no matter if it is a formal or an informal justice process. The majority concluded that Access to Justice is a rare commodity as far as formal justice system is concerned. They concluded that the *Jirga* is the only process that ensures Access to Justice to a large extent. This is not surprising as the survey data and other responses to several questions favour, overwhelmingly, the *Jirga* as the most trusted system of dispute resolution.

**Female FGDs**

According to the Pakhtun tradition, women are not allowed to take part in the informal *Jirga* proceedings. Furthermore, the conservative Pakhtun society does not allow women to visit the courts or police stations because they consider this against family honour.

In spite of the exclusion of women, and we have to assume lack of experience in these matters, the responses of the women were not different from the men. Despite the lack of access to *Jirgas*, the women concluded

that the *Jirga* is the only justice system that ensures justice to all. Women respondents also believed that ‘Access to Justice’ is difficult through formal courts while they believe that the *Jirga* ensures justice to all without discrimination. Interestingly they offered an opinion not expressed by the males which was that the rich and influential could get justice from formal courts. They also feared that *Jirga* decisions are sometime biased and favour the rich and influential.

In Pakhtun society, females have very rare interaction with both formal and informal justice systems. Generally, their close family members, such as husband, father, brother or son, etc., depending on the nature of the case, represent women. However, surprisingly, the majority of female respondents of 12 FGDs of KP and Balochistan had a very simplistic approach like the men. The simplicity shows that they had little knowledge about these systems. The women agreed that visiting a court or a police station is not acceptable for women in their society and it would be considered against family honour. They showed satisfaction with the informal systems of justice, which they believed, is accessible to all, including women. However, when asked whether women could access the *Jirga* system, they said no, but they thought that they could trust their men who represented them in *Jirga* proceedings.

**Survey Findings**

The question asked in the survey was: “What is your understanding of Access to Justice?”

The respondents were provided with multiple options and were allowed to select more than one option. Looking carefully at the data in the

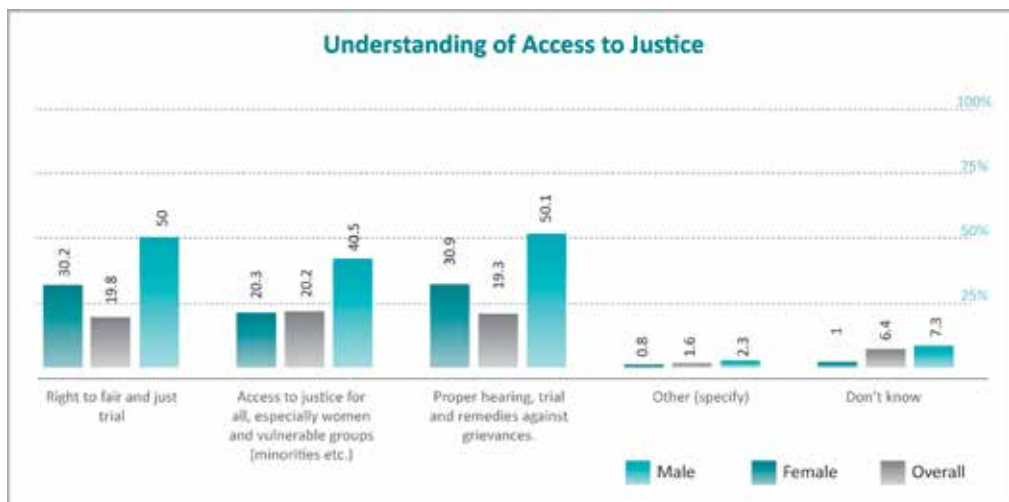


figure below reveals important gender issues. Although, overall, half of the respondents (50%) believed that 'Access to Justice' means that the litigants should be provided with the 'right to fair and just trial,' but there is a difference between men and women's opinions. A similar pattern is seen in reference to a 'Proper hearing, trial and remedies against grievances.' Interestingly, equal proportions of men and women, 40.5%, thought that 'Access to Justice' should be available to all, especially women and vulnerable groups (minorities, children, etc.). Only 7.3% did not have an opinion.

The result shows that people have expectations and very rightly identified areas of concerns.

### **Perception of Access to Justice**

Once the respondents had been asked to define access to justice, that is their expectation, they were asked their perception of how access really was provided.

As shown in the following figure, the majority, 68.3%, believed 'to a moderate extent', (there has been Access to Justice in their districts or area) while just 9.2% thought that there has been no Access to Justice at all. Some 17.1% respondents opined that there has been 'Access to Justice' to a large extent. This set of responses reinforced the conclusion from the FGDs that access to justice was not as expected.

### **Perception of Equal Access to Justice - Under the Formal System**

Respondents shared their opinion on the categories of individuals/groups that do not have Access to Justice under formal justice system. Respondents were asked through a multiple-choice question as shown in the figure below.

### **What categories of individuals/groups do not have Access to Justice in your district/area under the formal justice system such as the Supreme Court, High Courts and Lower Courts?**

According to the data, close to two-third, 65.6%, respondents believed that low caste groups and poor people do not have Access to Justice under the formal justice system. Another group of respondents, 29.8%, identified women who do not have 'Access to Justice'. Some 15.4% opined that physically challenged people do not have 'Access to Justice' while only 4.5% respondents thought that minorities do not have 'Access to Justice'. The case of minorities is quite weak and shows that respondents have been biased in their opinion when

it comes to minority rights. Close to one-fifth of the respondents (19.5%) could not share their opinion, a substantial number which needs to be considered.

### **Perception of Equal Access to Justice – Informal Justice System (*Jirga*)**

A similar question with similar options is repeated here, but this time the question is in reference to the informal justice system, specifically the *Jirga*. The data provides a striking contrast with the previous opinions about the formal system of justice. Recall that for the Pakhtun society the formal system was imposed while the informal justice system is rooted in Pakhtun culture and tradition; the *Jirga* is, after all, *Pakhtunwali*.

In the figure below we first note, in comparison with the previous figure, that twice as large a proportion responded that they did not know. This is odd considering that one would expect greater knowledge about a local, culturally based system than about a system that came from "outside." The major difference however, is that in the previous question 65.6% respondents opined that low caste groups and poor do not have Access to Justice under the formal justice system. Now that figure has dropped to just 21.7% under the *Jirga* system. The remainder of the groups is believed to have similar access in both the formal and informal systems.

Results for *Jirga* show that Pakhtun society has more confidence and believes that *Jirga* is more accessible for low caste and poor groups as compared to formal justice system for justice.

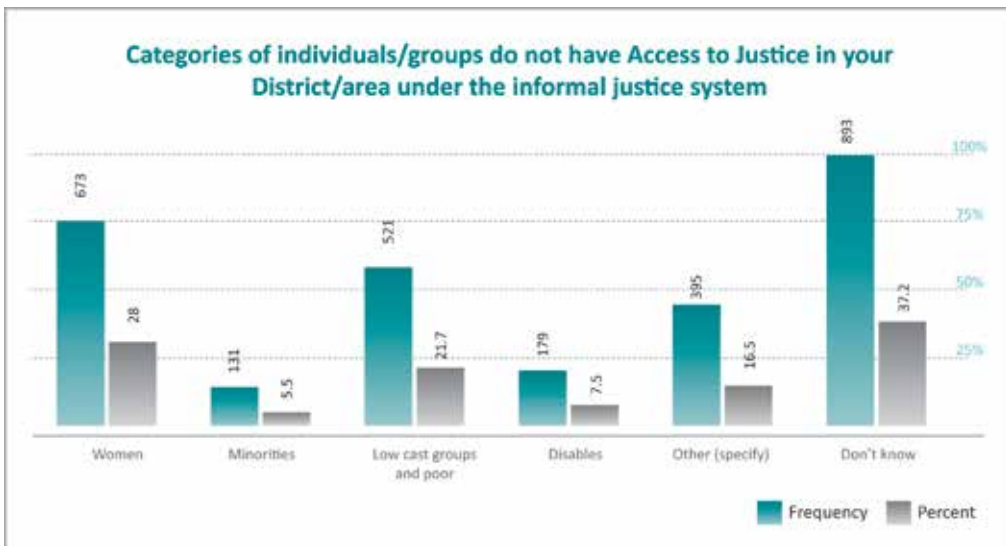
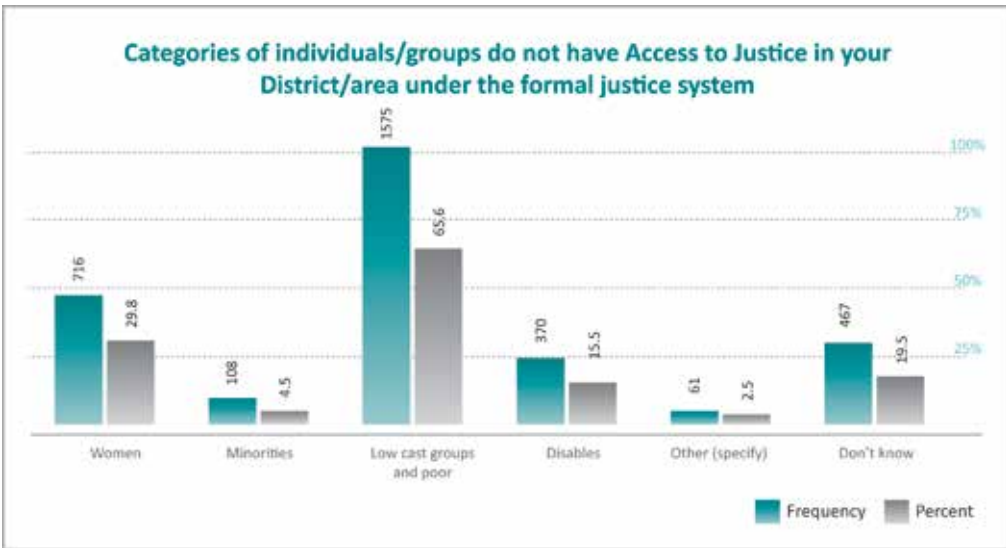
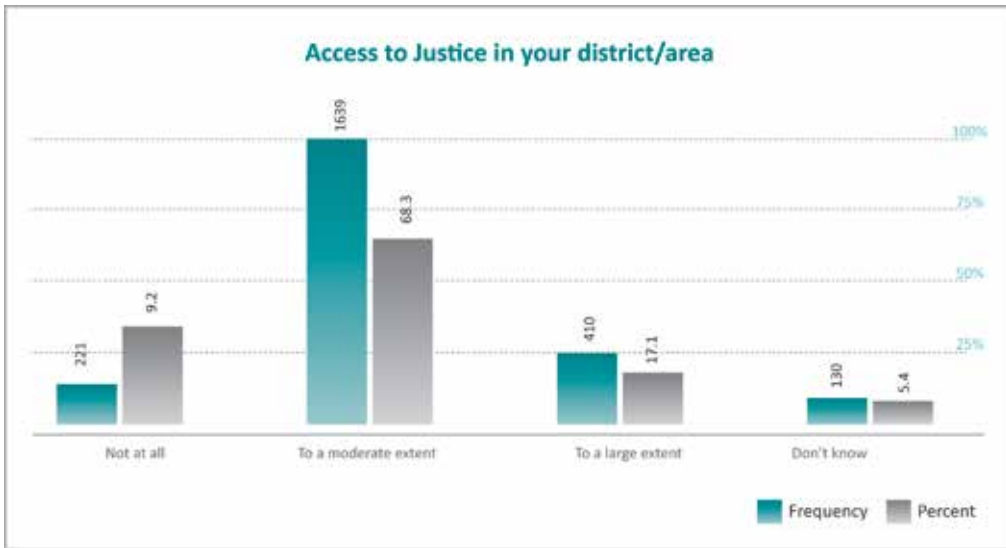
### **Perceived reasons for limited Access to Justice under formal justice system**

The survey used another dimension to explore Access to Justice, and the reasons for limited access.

### **Male FGDs**

Male respondents were posed with this complex question. Majority of the respondents of almost all FGDs had identical views on limitations of formal justice system. The most striking shortcoming of formal justice system, as per the majority respondents, was that the formal system is time consuming and it is very costly. They shared that it takes decades for them to get justice, which consumes a huge amount of money in the shape of court fees, lawyers' fees, bribes to police, and secretarial staff fees in the courts. During the course of time, they shared that most of the litigants lose their patience and finally resort to out of court settlements, and end up making compromises.





Some of the participants also informed the survey team that for the poor it is hard to pay lawyers' fees and therefore cases are usually decided against them, because there is no proper public defending system available within the government system that could ensure free and accessible legal aid for such people.

Formal courts are mainly located at district headquarters, quite far from rural areas, and this makes it quite challenging for them to travel to the courts. On the other hand, they opined that the informal justice system, *Jirga*, is very much accessible for them, because in each village a *Jirga* can be convened.

Some respondents shared a very interesting dimension. They believed that the majority is not fully aware of how to access formal courts. This lack of awareness leads them to confusion and they end up having their cases settled through the *Jirga* system. These findings show that there is a need for general awareness to clear any misperceptions regarding formal justice system.

#### Female FGDs

Female's views on the subject were not different from their male counterparts, as stated with regard to previous questions. They have a very concise and simple approach towards both formal and informal justice system. The majority opined that the formal justice system is expensive and beyond reach. They believed that as long as they have access to an inexpensive system of justice, then they do not bother to approach the formal system where corruption is also rampant. Female respondents, in support of their argument, shared their family and neighbors' stories of how

they faced difficulties in formal courts where it took them years to settle their cases.

They pointed out that if women access the courts it is considered against family honour and therefore, they believed, that it is also a major limitation when it comes to the formal justice system. Going to courts and police stations is considered a taboo in Pakistan's rural areas, especially in the Pakhtun society.

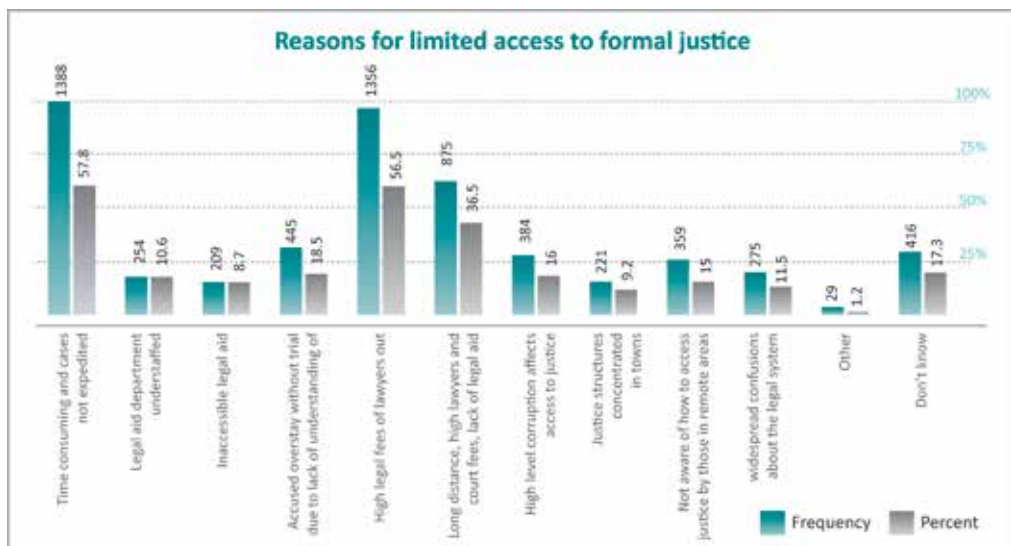
#### Survey findings

A multiple-response question was asked from 2,400 male and female respondents of KP and Balochistan in a qualified manner. As shown in the figure below, more than half (57.8%) of the respondents believed that one of the reasons for limited access to formal justice is that it is a time consuming process where cases are not expedited. 56.5% offered the opinion that high fee rates of lawyers have made it difficult for common people to have access to justice. The responses to Q28 confirmed the conclusions of the FGDs.

#### What are the reasons for limited access to formal justice?

Another set of reasons that 36.5% respondents identified was 'long distance, high cost of lawyers and court fees, and lack of legal aid'. While 18.5% shared that usually the accused overstay at jails without proper trial due to lack of understanding of their legal rights. Unfortunately, majority of Pakistani community do not have proper orientation or education of their legal rights.

Another reason identified by 17.1% respondents was lack of proper reporting of cases. It has been observed that most cases go unreported.



16.0% respondents also pointed out that corruption in the formal legal system has also affected the justice system. Though lowest on the list of reasons, still the number of respondents identified this reason is quite substantial, and one can get convinced that corruption is perceived by common people as one of the causes in getting proper justice.

15.0% respondents believed that people living in remote areas are not aware of how to access formal justice system set up in urban centres/cities. The data also shows other reasons identified by respondents, which could be seen clearly but are not of great significance.

All of these reasons would be very useful for designing a public education program so that people become aware of their rights and also become aware of how to manage the system for their benefit.

#### **Perceived reasons for limited Access to Justice under informal justice system**

Just as in reference to the formal system, the respondents were asked to share the reasons for limited Access to Justice under the informal justice system, such as the *Jirga*.

#### **Male FGDs**

In the male FGD, the majority favoured the *Jirga* system over the formal system, and there were few respondents who shared their reservations on the *Jirga* system. However, some believed that implementation of *Jirga* decisions in KP and Balochistan is a challenge, as opposed to FATA where *Jirga* decision implementation is strong and sustainable. They opined that *Jirga* decisions are to be accepted voluntarily and *Jirga* cannot force its decisions on parties to the dispute. This is true to a large extent, however, there is a social pressure, which compels parties to come to terms and accept the decision.

Because there is a suspected element of corruption in the *Jirga* system too, a large group of respondents thought that *Jirga* members are sometime biased and favour a particular party. In some cases, a politically stronger party to the dispute gets favours and, therefore, people have developed grievances against *Jirga* system too. Nonetheless, this group also pointed out that the level of corruption is far less than in the formal system.

A considerable number of respondents in all these FGDs feared that *Jirga* members do not have sufficient technical knowledge to resolve

some complex cases and, therefore, they pointed out the need for including educated and technically qualified people in the *Jirga* proceedings, such as lawyers and retired judges.

On the question of the inclusion of women in the *Jirga* process, the majority thought that women are represented through their male family members and that the *Jirga* ensures when there is a need, to take the testimony of a woman. However, some respondents contested this view and feared that such representation leads to confusion and in the end women are deprived of proper justice.

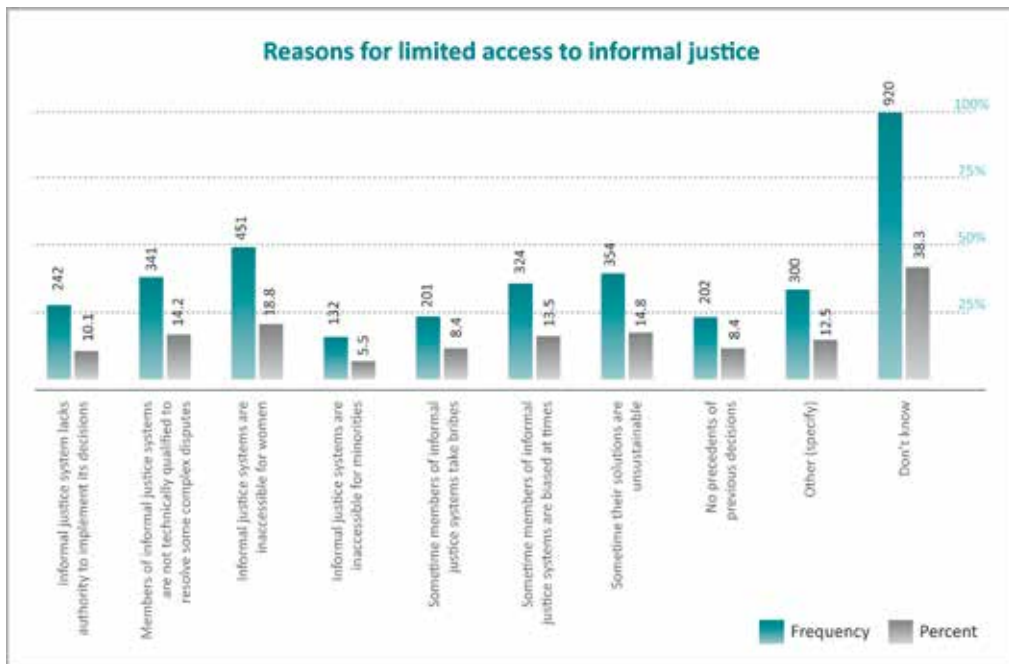
On the question of minorities, the majority informed the survey team that minorities are given the option to either access formal courts or resolve their disputes through their own religious or customary practices. Respondents also informed that since minorities represent a small portion of the population, seldom do such issues come up and, therefore there are not widespread grievances against the informal system. Nonetheless, there were a few respondents in different FGDs, who raised concerns regarding disputes arising between local Muslims and a non-Muslims. They opined that in such a situation, it has been observed that *Jirga*, unfortunately, favours Muslims against a non-Muslim.

#### **Female FGDs**

Because women do not have more than basic knowledge of the informal justice system beyond what they learn from their male family members, the female respondents in their FGDs could provide much more than the males. The women agreed that inclusion of women in the *Jirga* process is against their culture and that their male family members could represent them in such matters. However, a considerable number of respondents, especially from Peshawar, Charsadda, and Swabi (urban areas) thought that women should be given space to take part in the process. Nonetheless, there was still confusion about the role of women in the *Jirga* process. They were still not very sure whether a woman could take part as a decision maker, be a party to, or just be a spectator during the process.

#### **Survey Findings**

A different list of options/reasons/limitations was provided keeping in view the nature of informal justice system. The following figure lists the multiple responses from the survey. The data shows that against each option, the response level is considerably low as compared to respondents' reaction against formal justice



system, and, furthermore, 38.3% did not have opinion and 8.4% did not know of precedents.

Although the responses in the survey echo the FGDs, the percentage of the respondents stating these reservations was small – consistently less than one fifth.

The conclusion is that when compared with the formal justice system, the Pakhtun population has more confidence in the *Jirga* system, as seen in the low response rate or statements of weaknesses.

### Experience in Litigation

This section aims to document the respondents’ or their family members’ experience with litigations.

#### Male FGDs

Members of FGDs were asked whether they faced any litigation. The majority confirmed that they never faced any such issue. However, the issues of those who responded affirmatively were mainly, as identified in the previous question, over land issues, shared property, fraud, water distribution for irrigation, etc. Fewer respondents shared that they had business disputes, and some informed the survey that they faced cases of murders and family feuds.

#### Female FGDs

Surprisingly, female respondents shared something unusual, as opposed to male respondents.

Those who confirmed that they had experienced conflicts said that they were mainly over children fighting where older family members had gotten involved. Some respondents shared their family experiences of issues raised due to forced marriages while some informed that their domestic violence had led to disputes between families.

At the end a few female respondents confirmed that they or their families faced cases of murder, fraud and property. Interestingly, some female respondents informed that the use of mobile phones between boys and girls had led families to fight.

### Survey Findings

To ascertain the level of these types of issues or conflicts all of the options were provided so that the interviewee could respond: yes, no, do not know or simply not reply. Because crimes should be assumed as a rare thing in any society and that the majority may not have experienced it, we start with the ‘Yes’ attribute of the question rather than counting those who said ‘No’. This will help us to understand the level of violence and nature of litigations within Pakhtun population living in KP and Balochistan. The figure below shows the responses to question 8 “Have you or your household members experienced any of the following?”

After all of the discussion about cultural issues or rural life, it is surprising that 12.9% of the responses confirmed that they or their family members had sustained injuries in road acci-



Have you or your household members experienced any of the following					
Household Members Experienced	Yes	No	Don't Know	No Response	Total
Victim of theft or fraud	11.5	84	3.3	1.3	100
Victim of assault	5.5	88.7	4.2	1.6	100
Victim of domestic abuse	3.8	88.3	5.3	2.5	100
Victim of forced marriage	0.8	90.9	6.2	2.1	100
Victim of tribal customs such as <i>Swara</i> , Bride price and <i>Khag</i>	0.6	89.4	7.9	2.1	100
Family member has gone missing or disappeared	2	90	6	2	100
Arrested without warrant by the administration or police	1.9	88.1	7.2	2.8	100
Accused of an offence under the Anti-Terrorism Act	0.8	87.9	7.7	3.7	100
Accused of committing sexual abuse/assault (under the Hudood Ordinance or the Pakistan Penal Code)	0.2	88.3	7.8	3.7	100
Accused of committing any other crime	1.2	88.1	7.9	2.8	100
Unlawful detention, search or arrest by the political administration	0.8	89.7	7	2.6	100
Bribery by police, <i>Khasadar</i> or levies force	3.6	86.3	7.8	2.3	100
Assault or torture by FC or Army	0.9	89.8	6.9	2.4	100
Money Recovery, or Debt/Obligation Settlement	1	87.5	9.3	2.3	100.0
Contract enforcement in business dealings	2.7	84.8	10	2.4	100
Purchase or sale of movable property	7.3	80.5	9.6	2.5	100
Lease and rental issues: disrepair, eviction etc.	2.5	85.8	8.9	2.9	100
Family law issues: divorce, maintenance, child custody, guardianship, inheritance	1.9	86.9	8.3	2.9	100
Dispute with employer for unpaid wages	0.6	87.5	9.5	2.4	100
Debt bondage	1.1	88	8.5	2.4	100
Found involved in sectarian violence	0.4	89.6	7.2	2.8	100
Found involved in tribal/family clashes	3.2	87.8	6.3	2.7	100
Injured in an accident (motor vehicle, etc.)	12.9	79.2	4.8	3.1	100

dents. This attests to the urbanisation of daily life and the access to cars in the rural areas (or the access to the rural areas by cars). Road accidents were followed by 'theft or fraud' (11.5%) as an experience by interviewees or their families. Both issues are important because a considerable proportion of respondents confirmed them.

7.3% shared that they or their family members faced litigations when purchasing or selling movable property, followed by 5.5% respondents who confirmed that they or their family members had been a 'victim of assault'.

The rest of the list is self-explanatory and does not need a detailed analysis but is left for readers' observations.

#### Access to justice systems in case of litigation

Once experiences of respondents or their family members were documented the next step was to analyse their experience with different formal and informal dispute resolution systems that they approached to seek justice.

#### Male FGDs

Those respondents, who informed the survey team that they or their family members had experienced litigations, were asked which justice system they accessed for getting justice. An overwhelming majority confirmed that they had approached *Jirga* for resolving their disputes. In a few cases, respondents said that they had to submit FIRs and ultimately approached formal courts, however, they also informed that their cases were ultimately resolved through *Jirga*.

#### Female FGDs

Interestingly, all female respondents who confirmed they had disputes identified the *Jirga*

system where they or their family members went to access justice.

#### Survey Findings

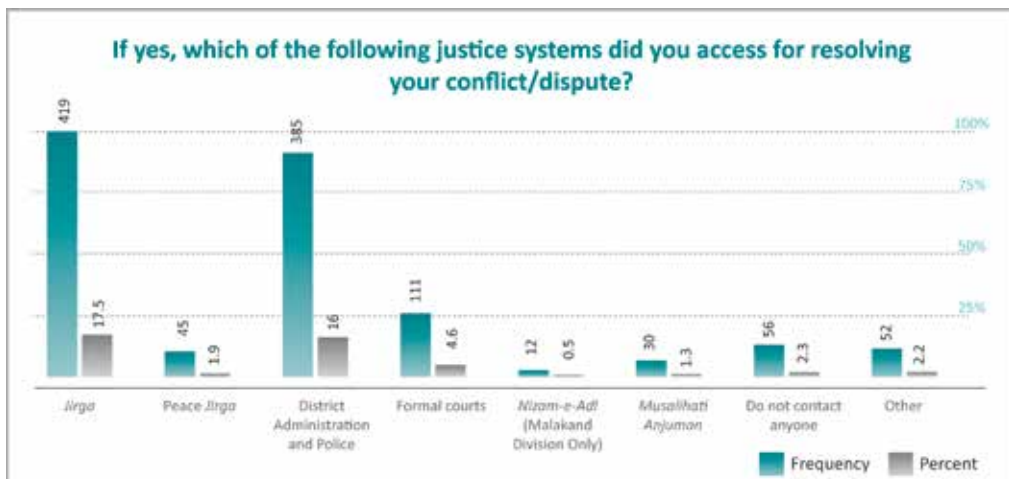
A multiple-choice question was asked of those respondents who had stated 'Yes' in the previous question. Those who said 'No' were not asked.

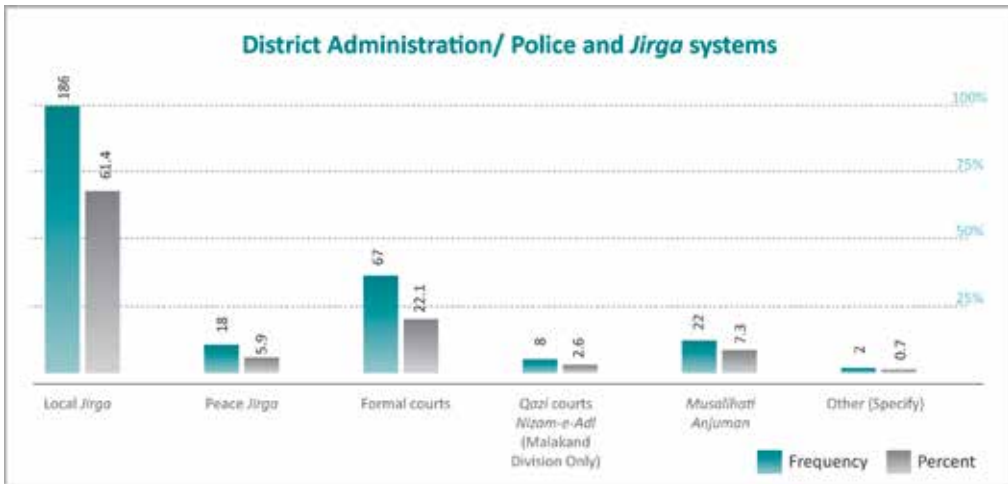
As shown in the figure above, from the small proportion of respondents having experienced of litigation, a higher number of them, 17.5%, confirmed that they accessed the 'local *Jirga*', followed by 16% respondents who identified the 'District Administration and police'. Some 4.6% respondents confirmed that they access formal courts to get justice. Generally, this is seen in complex cases, which are reported by litigants and where either *Jirga* has failed to reach any conclusion or one, or both parties trust the formal system and are determined to get justice according to universal standards.

As stated in the previous sections, it is generally believed that litigants report to the police administration and the *Jirga* simultaneously in order to pressurise the opponent party to come to terms with the *Jirga* decision. To verify this belief the data from questions 12 and 12c were cross tabulated. In the figure below it is clear that simultaneous access is used. 61.4% of the cases in reference were managed simultaneously.

#### Simultaneously Accessed District Administration/Police and *Jirga*

Other options are of little importance to be elaborated and analysed here. The data is self-explanatory.





**Level of contentment in choosing dispute resolution systems**

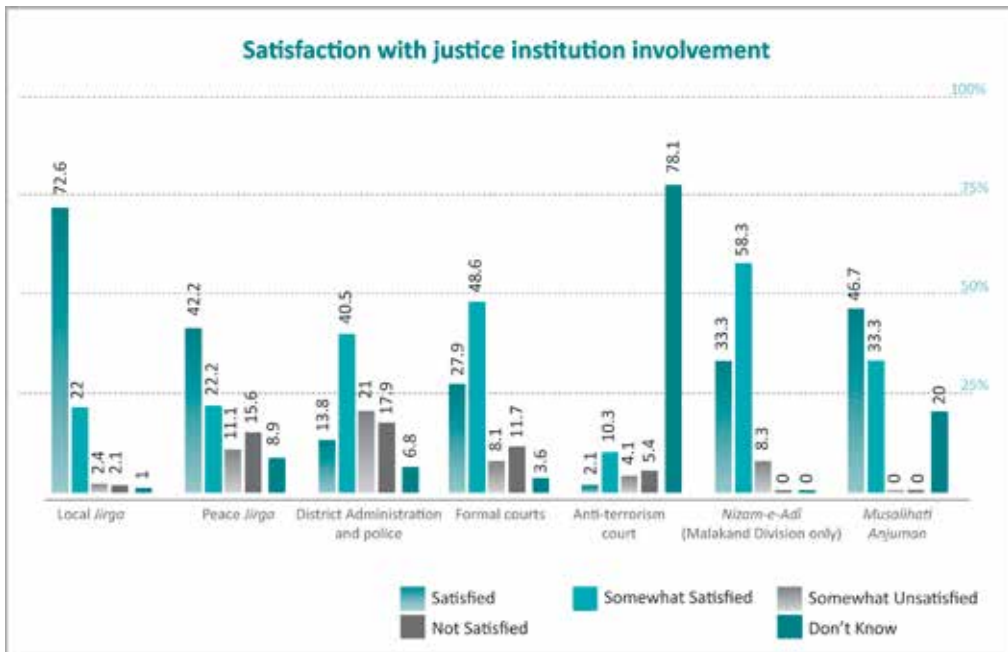
This question intends to document the level of contentment in choosing and experiencing various dispute resolution systems in resolving respondents' legal issues. Because this question was asked only of those who had approached and involved various dispute resolution systems in resolving their legal issues, logically, the majority that had not responded 'yes' to the previous question were not included. The responses are shown in the following figure:

**Local Jirga:** Looking at the survey results, we see huge gaps in the satisfaction levels among various institutions. Out of the 419 respon-

dents who were involved with the local *Jirga* 94.6%, expressed satisfaction. Only 4.5% were unsatisfied while just 1% were un-decisive about their opinion. This shows a surprising result for a system which is being criticised by the civil society in Pakistan while survey results show an exemplary level of legitimacy within the affected population.

**Peace Jirga:** 45 respondents involved a Peace *Jirga* to resolve their dispute. The data shows the respondents also appreciate the peace *Jirga*. The majority, 64.4%, showed satisfaction with the peace *Jirga* while one quarter of respondents, 25.7%, were not satisfied.

**District Administration and police:** Out of 385 respondents who approached district



administration and the police, more than half (54.3%) showed satisfaction with District Administration and Police involvement, however, the response level is low as compared to the informal *Jirga* system. A substantial number of respondents (38.9%) shared their dissatisfaction; 6.8% were un-decided.

**Formal courts (Supreme Court, High/Session Courts):** A total of 111 respondents confirmed that they had approached formal courts. According to the results, more than three quarters of respondents (76.5%) showed their satisfaction with the formal courts while 19.8% were not satisfied. Some 3.6% could not share their opinion. Comparing with informal *Jirga*, the satisfaction level is, again, considerably low.

**Ant-terrorism court:** A total of 242 respondents accessed Anti-terrorism courts for justice. As stated earlier, the majority in Pakistani society is not very aware of the existence of Anti-terrorism courts. Besides, few people have interaction with these courts, because only cases of special nature are dealt with in such courts, therefore, only 12.4% respondents showed their satisfaction while 9.5% were not satisfied. More than three quarters of the survey sample could not share their opinion, because they were unaware and presumably had no experience dealing with such courts.

**Nizam-e-Adl (Malakand Division Only):** Interestingly, only 12 respondents shared that they or their family members had to access the *Nizam-e-Adl* in Malakand Division. These courts are not fully functional or wide-spread yet. However; the data shows that people still have high expectations, especially respondents from the Malakand region. According to the data, 91.6% respondents have shown their satisfaction, while only 8.3% of the respondents have shown their dissatisfaction. In this case, surprisingly, every respondent shared his/her opinion, which is very rare in surveys. The *Nizam-e-Adl* are described in detail in the chapter "Informal Justice Systems and *Shariah*-Based Systems".

**Musalihati Anjuman:** Only 30 respondents confirmed that they or their family members had to access *Musalihati Anjuman* to settle their disputes. Supported by UNDP and provincial governments in all four provinces of Pakistan, the *Musalihati Anjuman*/councils were set-up as part of the local government plan. *Musalihati Anjuman* was meant to reduce burden

on formal courts by resolving petty disputes between the conflicting parties on a consensus basis. This system is a mixture of all prevailing informal systems of different ethnic groups in Pakistan.

As mentioned earlier, only three districts in the survey areas had this service - D.I. Khan in KP and Loralai and Quetta in Balochistan. According to the data, 80%, have shown their satisfaction, none were dissatisfied, while 20% did not have an opinion.

#### Reasons for choosing various justice systems

Respondents or their family members who accessed various dispute resolution systems were asked a subsequent multiple-response question. They were asked to share the reasons they chose these institutions.

#### Male FGDs

Because the majority had chosen the *Jirga* system, they reflected that *Jirga* quickly dispenses justice and compensates victims. They added that the *Jirga* is easily accessible and affordable. Besides, they opined, the *Jirga* is the oldest institution of Pakhtun community and therefore people approach it rather than wasting time and money in formal courts. Some respondents thought that it is against the Pakhtun code of honour to go to courts and conveys weakness of the disputant while Pakhtun always convey a message of strength within their locality.

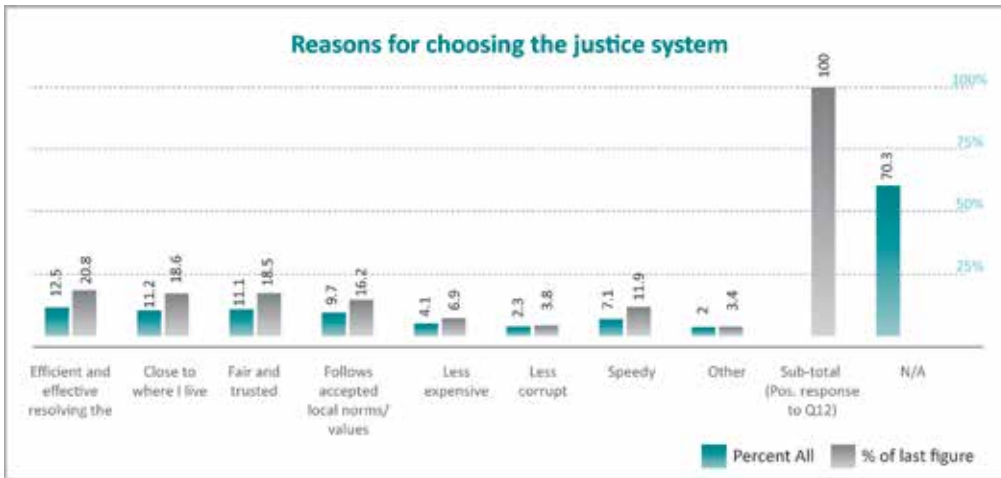
However, some respondents also said that they approached the formal court system because they thought that *Jirga* members are no longer respected within their community and therefore they had to rely on formal courts.

#### Female FGDs

Not surprisingly, female respondents in almost all FGDs gave responses similar to the males. The exceptions explained that their family members had to approach the courts because of the complexity of cases. Those cases were mainly land disputes or murder cases.

#### Survey Findings

The question was asked only of interviewees who had responded affirmatively that they had used justice systems in question 14. They consisted of 30% of the interviewees. The percentages in the right-hand column in the following figure are only from those 1,469 interviewees.

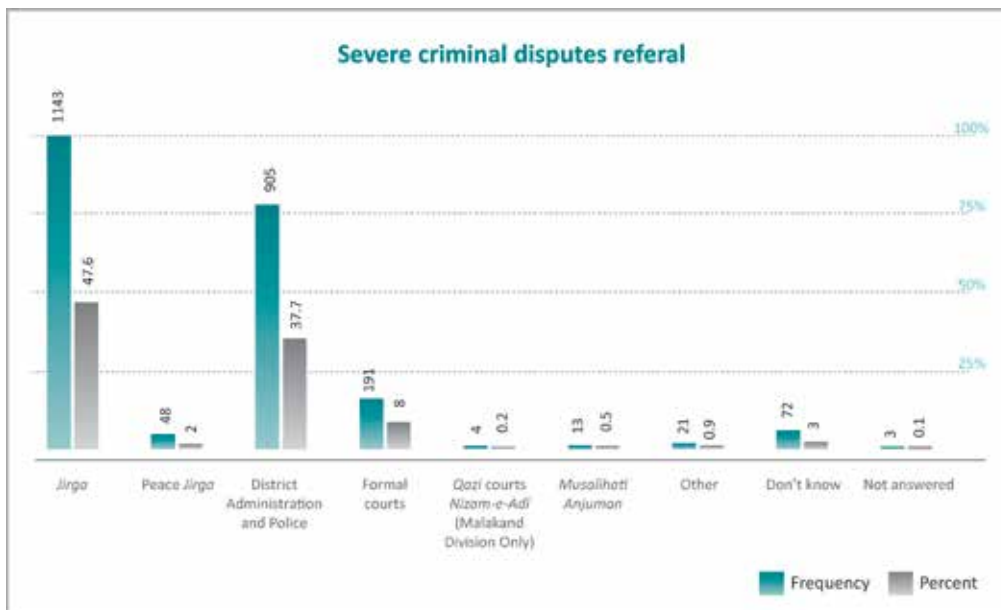


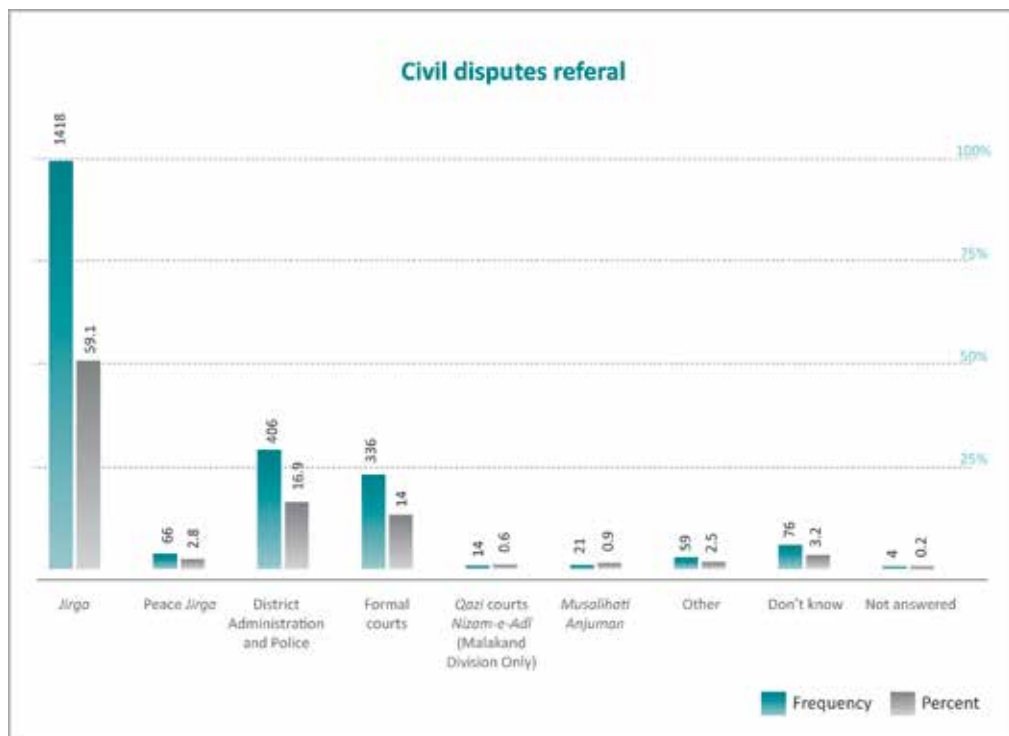
The largest response category (20.8%) shared that the decision was based on the efficiency and effectiveness of that particular institution which helped resolve their dispute, while almost equal number of respondents, 18.6%, informed that the system they chose was close to where they lived. Some 18.5% believed that it was a fair and trusted system, and 16.2% respondents thought that the system followed accepted local norms/values. Some 11.9% believed that the system they chose was quick in deciding their cases, followed by 6.9% who thought that the system they chose was less expensive. Surprisingly, just 3.8% believed that the system they chose was less corrupt. Generally, both formal and informal systems are perceived to be corrupt but at different levels.

**Where would you refer your critical criminal disputes (Murder/Theft/Robbery etc) for resolution?**

The 2,400 adult male and female respondents were asked where would they refer cases of a criminal nature, and interestingly, a higher number of respondents (47.6%) confirmed 'Jirga' and a lesser percentage (37.7%) of the respondents stated the District Administration and police. In previous questions this fact, the preference of Jirga over the Formal system, was established for Pakhtun inhabited areas of both provinces. Hence the Jirga, the District Administration and the police are three of the most important of the systems.

A very small percentage of the respondents (8.0%) identified the formal courts; that re-





flects the fact that the respondents do not have faith in the formal courts system. Other options identified by respondents are not of importance and can be seen in the figure.

#### Where would you refer your civil dispute (Land Disputes/Divorce etc) for resolution?

After examining the respondents' institution of choice for resolving criminal cases, the next question concerned the preferred system for civil cases. For civil cases more than half of the respondents (59.1%) confirmed that they would refer their civil cases to a local *Jirga*, followed by 16.9% respondents who identified District Administration and police. The data in the figure below shows that more people prefer referring their civil cases to a local *Jirga* than their criminal cases. 14.0% respondents also identified 'Formal courts'. In the previous question for criminal cases only 8% respondents confirmed that they would take their criminal cases to formal courts while 14.0% respondents would refer their civil cases to formal courts.

Again, the data shows the level of confidence of the local people in local *Jirgas* over the police and formal courts. We have already seen that the preference is due to speedy justice; civil cases may take years or decades while the formation of a *Jirga* and its decision takes weeks or months to reach a settlement.

The rest of the figure is of negligible importance and the data is self-explanatory.

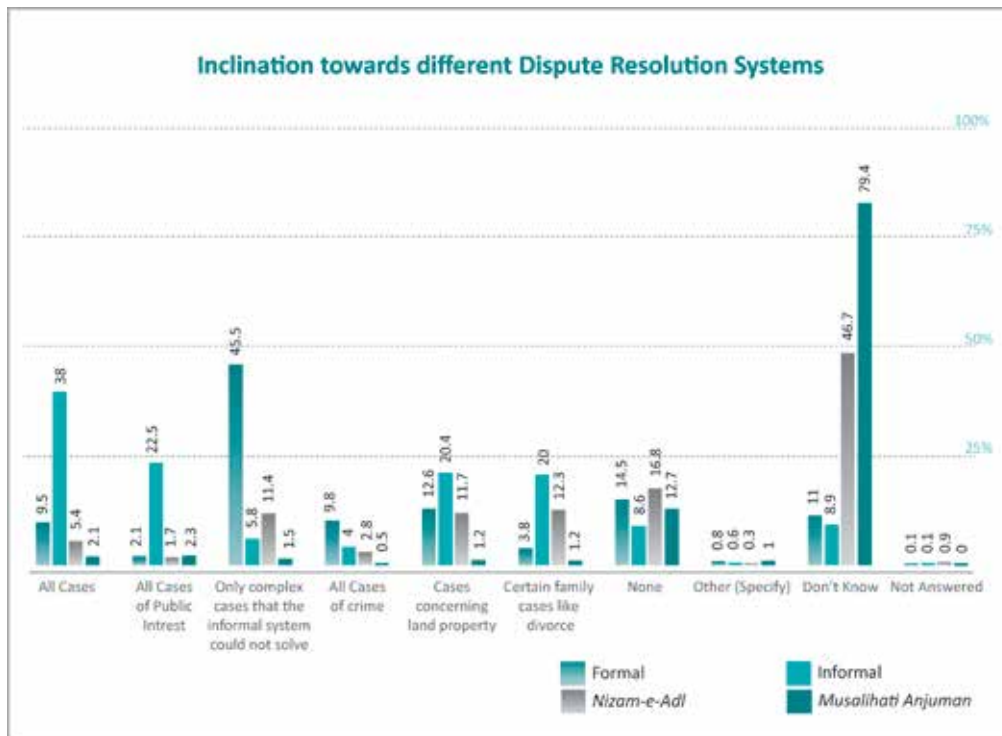
#### Respondents' inclination towards different dispute resolution systems

##### Formal courts

This question intends to gather respondents' inclination towards various dispute resolution systems, depending on the nature of dispute. They were asked what system they would prefer if they were faced with a dispute. Several options are provided in the list. Let us examine these one by one.

The largest category (44.5%) confirmed that they would refer their complex cases to formal courts. Here, respondents are confirming the role of formal courts and showing the weakness of an informal system. Only 5.8% respondents identified *Jirga* when it came to resolving a complex dispute. Nevertheless 38% said that they would refer all cases to the informal systems. Followed by 14.5% who said they would refer no case to the formal courts, while 12.6% respondents confirmed that they would refer cases concerning land and property.

The result pattern in this regard shows that people have a faith in *Jirga* but they do realise the necessity of formal courts when they are faced with complex issues.



### Informal Jirga

Comparing both formal and informal systems, it is clear that respondents showed greater trust in the informal rather than formal courts for all cases. For instance, only 9.5% respondents in the previous question confirmed that they would take all cases to formal court while data gathered for informal systems shows that 38.0% respondents would take all their cases there.

The data reveals another striking comparison. Only 2.1% respondents believed that they would refer cases of public interest to formal courts while one-fifth of the respondents (22.5%) believed that informal dispute resolution systems are the best places to take cases of public interest.

Formal courts take the lead only in cases of complex nature (44.5%) compared with only 5.8% for the informal justice system.

### Nizam-e-Adl (Malakand Division)

Because the *Nizam-e-Adl* is partially established in Malakand Division and not in the other districts, the survey was conducted only in three districts of Malakand division and the number of respondents were few. Therefore, 46.7%, of the Malakand sample could not share an opinion, 16.8% informed the survey that they would not take any case to a *Nizam-e-Adl*. A very small

number of respondents, 5.4%, confirmed that they would take all cases to this institution while 1.7% respondents believed that all cases of public interest should be referred to this system. The data is self-explanatory and shows that the local people in Malakand Division have not yet gained confidence in the *Nizam-e-Adl*. There could be several reasons – either the system is not yet fully functional; or it is not fully established; people are not aware; or because it is new, people have to experience the system. The *Nizam-e-Adl* is examined in further detail in the chapter “Informal Justice Systems and *Shari-ah*-Based Systems.”

### Musalihati Councils/Anjuman

The survey was conducted in Balochistan and KP, including some of the districts where *Musalihati* Councils were set-up by UNDP with the provincial governments.

An overwhelming majority, 79.4%, could not share their opinion as they did not know about the functions of *Musalihati* Councils while 12.7% informed the survey that they would not take a case to this institution.

A very small number of respondents, 2.1%, confirmed that they would take all cases to this institution while 2.3% respondents believed that all cases of public interest should be referred to this system.

Overall, the conclusion about all four institutions is quite clear. Pakhtun communities across the region have shown greater confidence in the *Jirga* system as compared to other formal and informal systems. Based on this evidence, it is time for the policy makers to review the options and try to reform the formal system so that people start gaining trust of formal systems. The alternative and it may be the more practical alternative, would be to make the informal system a recognized part of a greater formal system of justice so that more people have access to quick and inexpensive justice and also relieve the formal system of backlog.

### **Conclusion**

The survey reveals that Pakhtuns view Access to formal Justice system as expensive and time consuming while they believe that informal ways of justice are transparent, easy for the people to access and inexpensive.

Overall, the conclusion about all four institutions is quite clear. Pakhtun communities

across the region have shown their greater confidence on the *Jirga* system compared to other formal and informal systems. However, the data also shows that Pakhtuns have little confidence on the implementation of *Jirga* system and that a minority identified the importance of women participation. How it is possible for women to sit in a *Jirga* is an interesting aspect which needs further exploration and research.

Furthermore, looking at the evidence, it is now time for the policy makers to think and review the options and try to reform the formal system so that people start gaining trust on formal system. The alternative, and which may be the more practical alternative, would be to make the informal system a recognized part of a greater formal system of justice so that more people have access to quick and inexpensive justice and also relieve the formal system of congestion.

## CHAPTER: 10

### Legality & Legitimacy of *Jirga* and Institutions Dispensing Formal Justice



## LEGALITY & LEGITIMACY OF *JIRGA* AND INSTITUTIONS DISPENSING FORMAL JUSTICE

### Introduction

This chapter presents the perception of the Pakhtun regarding the legality and legitimacy of formal and informal systems of justice by presenting survey and FGD findings concerning trust, effectiveness and fairness of various justice systems.

At present, there are two types of justice-related services in Pakistan: operating through two modalities: formal justice system and community-based dispute resolution or informal justice systems. On the informal side, the Pakhtun *Jirga* operates in FATA, KP and Balochistan's Pakhtun populated districts while *Panchayat*, *Faislo* and Baloch *Jirga* are practiced by communities in the Punjab, Sindh and in the Baloch areas of Balochistan, respectively.

With the exception of FATA, the formal system described in previous chapters applies to the rest of the nation and the remaining Pakhtun areas.

This report, as stated earlier, analyses the Pakhtun *Jirgas* of FATA, KP and Balochistan. In this chapter, the descriptions and analysis of the two different forms of justice systems in the survey area are based upon a conceptual division between legality and legitimacy.

The principle of legality is easier to define and comprises the body of laws which established the congress or parliament of the nation under a constitutional framework. Thus, its focus is on the written rules that

comprise the State's system of statutory law, and the application by decision makers of those rules – which have been established beforehand - in a manner that does not entail discretionary departures from established law. In other words, the principle of legality is closely related to the formalist approach to rule of law, which tends to focus on purely formal characteristics that a legal system must possess, and shies away from assessments of the fairness of specific laws or legal decisions. Law is a codification and replacement of traditional authority.<sup>173</sup> That does not alter the fact that the courts have to decide many cases, often with respect to immensely complex and interwoven problems.<sup>174</sup> Sometimes the legitimacy of a court decision is questioned because a decision in a case runs contrary to public opinion that is often quite superficially informed by the media.<sup>175</sup> Another problem is that formal legal procedures may take a long time, whereas the substance of individual consent to a process of decision-making, that may initially attach to and legitimate outcomes, thins as the process expands in scope and lengthens in time.<sup>176</sup>

On the other hand, the principle of legitimacy is linked to criteria such as clarity and comprehension, and non-arbitrary and non-retrospective application. The ability of a legal system to deliver justice in a form that is acceptable to the people it governs is one of the tasks for gaining legitimacy. Indeed, it is the notion

173) L.M. Friedmann, *The Republic of Choice. Law, Authority and Culture*, Harvard University Press: Cambridge Mass., 1994a (1990), p. 17

174 - 175) J.L.M. Gribnau, LEGITIMACY OF THE JUDICIARY

176) Vining 1995, p. 280. In urgent cases, a party can resort to a speedy civil or administrative procedure (interim injunction proceedings or provisional relief) before the president of a district court; see Blankenburg and Bruinsma 1991, p. 23 ff



of justice that makes laws meaningful to ordinary people in their day-to-day lives. However, the idea of justice is different for each society based on its particular assessment of right versus wrong. In other words, it is the values, norms, and expectations of the people towards the legal system that conveys legitimacy. As one would expect, in each society the notion of justice and how it is rendered are not static, but rather subject to change in response to evolving social, political and economic conditions. In the end, for a particular legal system to be considered just, the present normative values, sensibilities and expectations of a society must be reflected in the legal system. In other words, social definitions of justice should coincide with the institutions, laws, and procedures of a State's justice system. In this respect, legitimacy conforms with substantive conceptions of the rule of law, which looks to the outcome of laws against criteria such as justice or fairness.

The *Jirga* system does not have legal status in the settled districts of KP and Balochistan. Nonetheless, it is accepted under the law in Pakistan's Federally Administered Tribal Areas. This section deals with *Jirga's* legality and legitimacy in Pakistan's Pakhtun populated areas, including FATA. It is important to understand that although the *Jirga* and its process are not codified, i.e., written laws, it does have a jurisprudence that is transferred by oral tradition and observation in practice from one generation to the next.

### Effectiveness of various systems in resolving disputes

#### Male FGDs

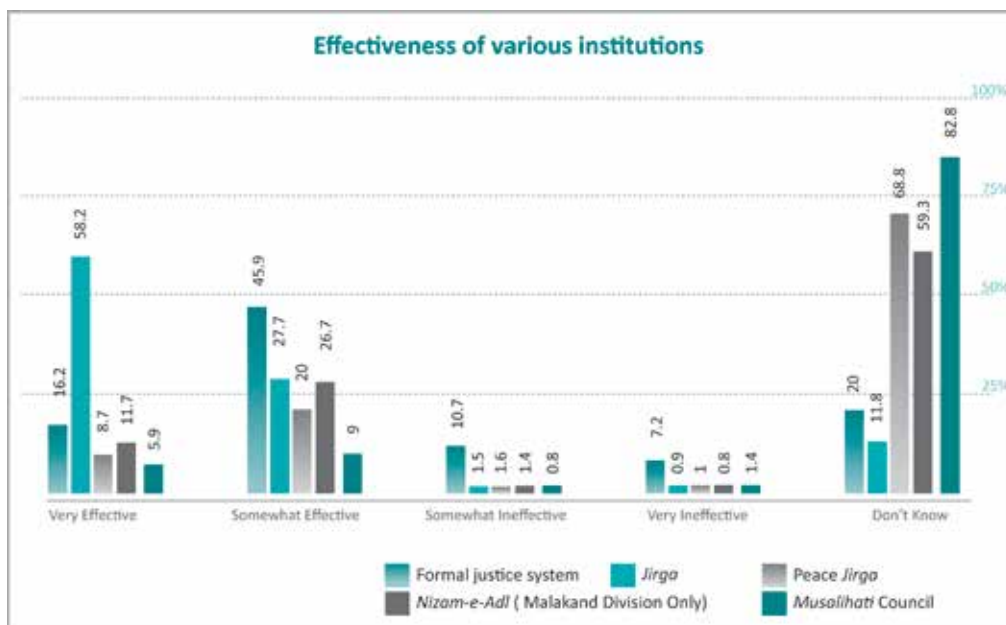
The overwhelming majority in male FGDs were of the opinion that informal ways of mediation and dispute resolution are the best ways to get justice on time and without spending too much money and resources. Some respondents thought that one could get justice from both formal and informal systems. However, getting justice through formal ways is very time consuming and therefore people generally rely on informal ways.

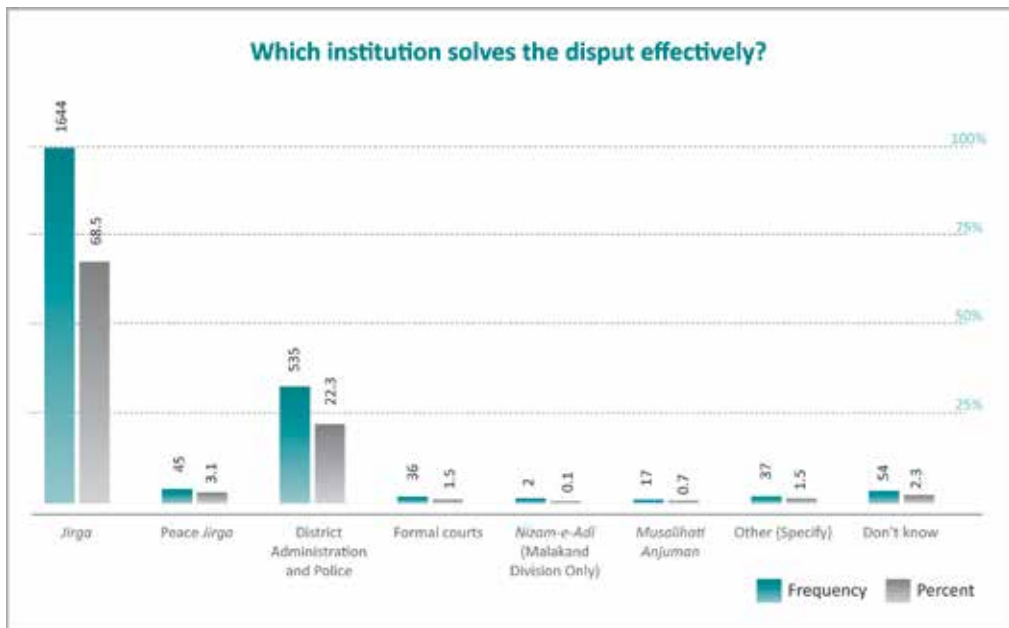
When further probed, the majority preferred the *Olasi Jirga*. They thought the *Jirga* is as old as Pakhtun society and because it is tested, people rely on it. Several respondents quoted their own cases as well as their family members cases, which were resolved, according to them, through *Jirga*.

There were a few respondents in almost all FGDs who did not have much confidence in the informal justice system and thought that the formal court system provides the best solution for conflicts. They believed that the *Jirga* puts one in a compromising position while court system provides equal opportunity to both parties according to the generally accepted national laws and international Human Rights standards.

#### Female FGDs

Female respondents' opinion was not very different from males. Almost 90% of the respondents confirmed that they and their families





trusted the *Jirga* system and believed that the *Jirga* adheres to both *Shariah* and local *Riwaj* (customs). There were a couple of female respondents who shared a very interesting idea – they said the formal and informal justice system should have coordination mechanisms so the load between them could be divided with clearly defined Terms of Reference. Most of the respondents were of the opinion that since their childhood, they have been hearing about the *Jirga* system and shared that their families do not trust any other system but the *Jirga*. The survey responses that follow will show the relative importance of these opinions.

### Survey Findings

By means of a single-response, closed-ended question, the opinion of 2,400 adult respondents of KP and Balochistan was taken on the effectiveness of various dispute resolution systems. The question was, ‘which institution resolves the dispute effectively?’ As shown in the graph below, two-thirds of the respondents (68.5%) believed that the *Jirga* effectively solves disputes that arises in communities followed by just over one-fifth of the respondents (22.3%) who identified the District Administration and police as the institutions which usually resolves issues in their communities. The third significant option identified by 3.1% respondents was the ‘*Peace Jirga*’, which is, as described above, a specialised type of *Jirga* found only in some Pakhtun areas. Only 2.3% respondents could not share their opinion.

### Effective system in dispensing justice

#### Male FGDs

Male FGDs respondents expressed their trust on the *Jirga* system when they were asked this question. The majority supported the notion that the *Jirga* is very effective in dispensing justice. They added that the *Jirga* provides cheap or free justice services in less time as compared to the formal justice system, which is seen as expensive, time consuming and corrupt.

However, there was a small number of respondents who believed that it is not the *Jirga* that provides answers to all the issues but it is the local administration and police. They believed that the *Jirga*’s role is to convey their issues to the local authorities and request for assistance. They also added that although the *Jirga* may help resolve petty issues and other common disputes over matters such as electricity, water, roads and communication, etc. When it comes to complex issues, the *Jirga* fails to come up with appropriate solutions.

There was another small group of respondents who was not very optimistic about the *Jirga*’s role and believed that the *Jirga* cannot play any role all when settling disputes.

Nonetheless, as was seen in the survey data above and will be confirmed later, the majority in the FGDs believed that the *Jirga* is effective and can play a major role in resolving issues of communal interest.

### Female FGDs

Women were also very vocal in sharing their thoughts on the *Jirga's* effectiveness. The majority of female respondents in KP and Balochistan were of the view that the *Jirga* is effective in dispensing justice quickly and cheaply and is seen as a viable institution at the community level. Some were pessimistic and shared that the *Jirga* cannot address issues concerning women of Pakhtun society in both KP and Balochistan.

Some female respondents were more concerned about the implementation of the *Jirga* verdicts. They thought that hardly any decisions are being followed and implemented by people.

Overall, majority supported the notion that *Jirga* is effective in dispensing justice.

### Survey Findings

In this question, respondents' views were documented on the effectiveness of various institutions. Options on five formal and informal justice systems were provided so that respondents could share their opinion on the effectiveness of these institutions when dispensing justice.

Interestingly, out of all five institutions, once again the *Jirga* came out as the most effective justice system. According to the data, 85.9% rated the *Jirga* as effective in dispensing justice; 62.1% of the respondents thought that the formal justice system is more effective in dispensing justice. Furthermore, 38.4% of the respondents rated the *Nizam-e-Adl* as effective while 28.7% believed *Peace Jirga* is effective in dispensing justice. The last on the hierarchy is *Musalihati* Council, which, according to 14.9% respondents, is effective in dispensing justice.

Looking at frequency under 'don't know', we see that the institutions that are specialised in operating in specific areas are not known to the local population. *Musalihati* Council, (82.8%) *Peace Jirga* (68.8%) and *Nizam-e-Adl* (59.3%).

The response pattern shows that, overall, the respondents are satisfied with both the formal and informal systems with the vote going to the informal *Jirga* system.

### Fairness of the justice system

The respondents were asked to rate the fairness of the justice systems. Again, this was first discussed in focus groups and then polled in the survey of the 2,400 males and females.

### Free and fair trial

#### Male FGDs

During the course of fieldwork, it was observed that the overwhelming majority was not satisfied with many forms of justice – formal and informal. The majority of the FGD commentary expressed trust in the *Jirga* and confirmed that the *Jirga* is the only institution which ensures free and fair trial without discrimination on the basis of economic and political condition. They added that the *Jirga* treats both rich and poor equally. In addition, a considerable proportion of the FGDs respondents were of the opinion that the *Jirga* provides free and fair trial to both parties involved in a dispute.

Some respondents feared that the *Jirga* is partial and supports those who are rich and politically powerful by forcing underprivileged and poor, victim party to accept the *Jirga* decisions.

#### Female FGDs

Female respondents shared similar views and thought that the formal courts system is a waste of time and money and in the end, neither party is satisfied with the decision. Some respondents expressed distrust of the *Musalihati Anjuman*. However, there was a large group of respondents who shared their positive experience with *Musalihati Anjuman*.

Female respondents shared their thoughts in a qualified manner despite being out of the decision making process. They believed that the *Jirga* is fair in dealing with cases and treats both parties equally and without any discrimination. They viewed the *Jirga* as the most trusted institution because of its impartial role and fairness in providing justice to all.

### Survey Findings

As shown in the graph below, the result for this question is identical to the previous questions, and this reinforces the overall impression from the responses.

***Jirga*:** Interestingly, 85.7% respondents believed that the *Jirga* process is a fair justice system providing services to the common people; only 19.5% believed that this system is not fair. Also it is clear that the *Jirga* process is biased against women and cannot be considered completely fair according to the reality on the ground. However, another reason for the popularity of the *Jirga* could be its quick

resolution of disputes in Paktun districts when compared with the slow pace of the country's formal system.

**Formal Justice System:** 60.4% of the interviewees believed that the formal justice system is fair in dispensing justice to common people while 19.5% disagreed. Some 20% respondents did not share their perception.

**Nizam-e-Adl:** 40.2% believed that *Nizam-e-Adl* is fair while only 2.0% believed that it is an unfair justice system. The majority, 57.8%, did not share their opinion. This is surprising, considering that this question was only applied to the sample living in the districts of Malakand Division, where the system is established.

**Peace Jirga:** 17.8% thought that the Peace *Jirga* is fair in providing justice services to the people and 1.4% shared that this system is unfair. More than two-thirds of the respondents (69.48%) could not share their experience. This is odd considering that this question was only applied to the sample living in the districts of Swat only where the system was established.

**Musalihati Anjuman:** 14.5% respondents were of the opinion that *Musalihati* Council is a fair system of justice while 1.2% thought otherwise. Again, almost all of the respondents (83.4%), did not know about this system. The low response rate, as in the case of the *Peace*

*Jirga* and *Nizam-e-Adl*, shows how much more effort remains to be made when introducing new systems to locals.

### Judging the "Free and Fair" criteria

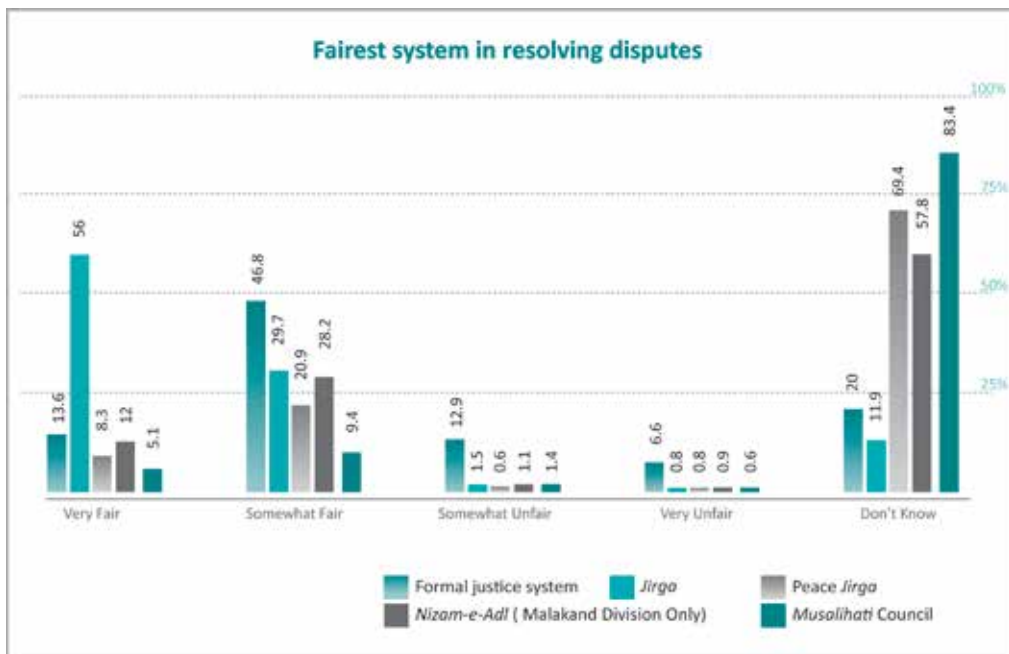
#### Survey Findings

The respondents were asked to share their opinion on the criteria of the systems being free and fair for disputants. Again, interestingly, respondents seemed to be very content with the *Jirga* system when compared to other formal and informal justice systems. The graph reveals the following:

An overwhelming majority, 85%, opined that the *Jirga* system provides a free and fair trial to both parties to the dispute during the process while a negligible number of respondents (2.4%) disagreed.

Looking at the data, *Nizam-e-Adl* follows the *Jirga* system in terms of respondents' positive opinion. More than one-third of respondents (37.9%) believed that the *Nizam-e-Adl* provides a free and fair trial to both parties during the process while only 2.4% had a negative perception. Again, the majority (59.7%) of the sample in Malakand could not share their perception.

The *Peace Jirga* is the third most favourable institution on the list. One quarter of respondents, 27.7%, believed that *Peace Jirga* provides a free and fair trial to both parties during



the proceedings, while just 1.4% had negative views. An overwhelming majority, 68%, could not share their opinion despite of the fact that the *Peace Jirga* was specifically instituted in Swat in late 2007 by the NWFP Cabinet<sup>177</sup> during the period of military operations as an important strategy for resolving the conflict. Perhaps they never had experienced the system or, perhaps, the system was not promoted by the media.

### Male FGDs

The *Jirga*, as a mediation process, has a very simple and straightforward probing/inquiry mechanism. It is said that Pakhtuns know their enemies without any doubts and hardly any case goes without being noticed by the community, because crimes committed in the region, most of the time, are seen as a restoration of family honour and avenging old insults. Therefore, gathering evidence in most cases, if not all, is easy. Cases



The empirical data shows a negative perception about formal courts. Only 17.8% believed that formal courts, to some extent, provide free and fair trial to both the parties during the process of justice dispensation while a higher number of respondents (45%) have the opposite view. A considerable number, more than one quarter, did not share an opinion.

The last on the list is *Musalihati Council*. Only 14.4% of the respondents believed that *Musalihati Council* provides a free and fair trial to both the parties while only 1.4% had a negative perception. An overwhelming majority, 86.4%, did not know about this institution and could not share their views.

Overall, an overwhelming majority believed that *Jirga* is an institution from where people could get free and fair trial.

### Are you satisfied with the probing/inquiry mechanism of the *Jirga* process?

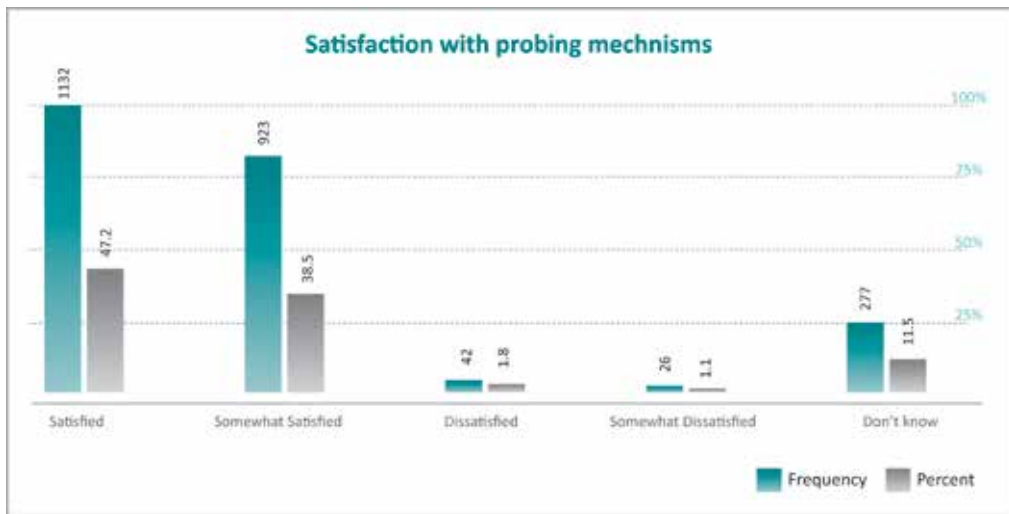
are brought to the *Jirga* with all the evidence beforehand and communities have little doubt on the evidence or proof. Therefore, *Jirga* members have to do little with collecting evidence, while they engage both parties and mediate for reaching a settlement rather than establishing evidence and nature of a crime as in formal courts.

Respondents were asked whether they were satisfied or dissatisfied with the probing/inquiry aspect of the process and, an overwhelming majority of FGDs respondents confirmed that they were satisfied with the probing inquiry. However, there were a few respondents who were not satisfied and complained that *Jirga* sometimes fails to collect all the evidence because the members of the *Jirga* usually believe what they are told by the disputants.

### Female FGDs

The women shared the same views as the men. Overwhelmingly, the majority was supportive of this notion and have shown their trust on the probing/inquiry mechanism.

177) Daily Times, "NWFP cabinet to call *Jirgas* for peace in Swat," November 25, 2007.



### Survey Findings

The respondents were asked to share their level of satisfaction with the probing mechanisms of *Jirga* process. The results of the survey are amazing and astonishing. It is interesting to see that 85.7% of the sample confirmed their satisfaction with the probing mechanism of the *Jirga* process. Those who have shown dissatisfaction are just 2.9%, which should be alarming for those who support formal justice system.

### Do you seek aid of police/local administration to implement *Jirga* decisions?

Once a *Jirga* and the disputants have arrived at a settlement or conclusion, enforcement then becomes a question. We wanted to ascertain the involvement of the police or local administration for enforcement. Recall that disputants will involve local administrative and police authorities as a means to pressure the opponent, but also recall that the *Jirga*, except FATA, is not part of the formal system of justice.

### Male FGDs

Male respondents of all focus group discussions were requested to share their knowledge on whether *Jirga* seeks help of local police or administration to implement its decisions. An overwhelming majority argued that because *Jirga* is a community institution and based on local customs and norms, the involvement of police or local administration is irrelevant.

Respondents shared that *Jirga* members take an oath from all disputing parties that they would accept the decisions of the *Jirga*. On the other hand *Jirga* members also take bail money into their custody (good faith deposits), which

may be confiscated if a party does not accept the decision. This way, parties are bound to accept *Jirga* decisions.

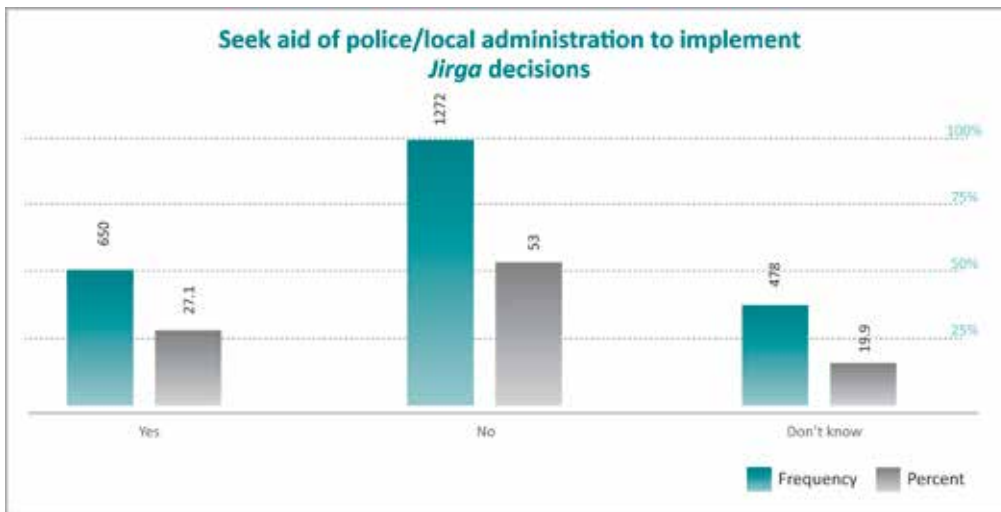
Another argument that respondents shared was that because the *Jirga* is widely respected by communities and decisions are announced after gaining consensus from the disputing parties on the basis of good intentions, therefore implementation is respected.

However, a few respondents, in almost all FGDs, believed that *Jirga* decisions are not respected because in the settled districts of KP and Balochistan, decisions are accepted voluntarily. Therefore, the administration and or police have to play their role in implementing *Jirga* decisions. However, this could be possible if the *Jirga* process were mainstreamed into a formal justice system.

### Female FGDs

According to the majority of the respondents in the female FGDs, *Jirga* decisions are seen as just and therefore not only respected but also obeyed. Female respondents believed that social pressure is also very vital for respect and cannot be avoided. An important dimension that female respondents shared, which males overlooked, was the fact that the *Jirga* process of mediation seeks reconciliation, and if both parties agree to come to terms and give their consensus, then there is no room for either party to disobey the verdict.

Hence, majority of female respondents confirmed that police or local administration's involvement is irrelevant and not necessary for implementing *Jirga* decisions.



### Survey Findings

Administration or police cannot take part in the *Jirga* process, legally, however, respondents were asked to share their opinion whether they have ever sought police or local administration's support in implementing *Jirga* decisions. More than half, 53%, confirmed that they do not seek the help of police or local administration in implementing *Jirga* decisions, while one quarter, 27.1%, informed the survey that they seek the support of police or local administration in implementing *Jirga* decisions.

In Balochistan, the research team was informed by the key informants that in some special cases, the local administration helps implement *Jirga* decisions.

This could be done off the record, as stated above, legally police or administration is not allowed to assist communities in implementing *Jirga* decisions.

### Does the police/local administration interfere in the *Jirga* proceeding?

#### Male FGDs

*Jirga* decisions are not implemented with the involvement of police as that would mean the State's official entities are recognizing the existence of the *Jirga* as an institution. However, there has been some political support by the police to certain *Jirga* decisions. Besides, Pakhtunwali has strong roots in the Pakhtun society and therefore avoiding or disobeying a *Jirga* decision is seen as going against the Pakhtun code which will remain in people's memories for a long time and haunt those who breach the fundamental principles of *Pakhtunwali*.

The overwhelming majority informed that in *Jirga* proceedings locals do not wish to involve the police department or local administration. They added that people believe that it would make the case worse if the police were involved. They argued that involving police would mean opting for formal ways of justice which would make the process more complicated and expensive for the parties to the dispute.

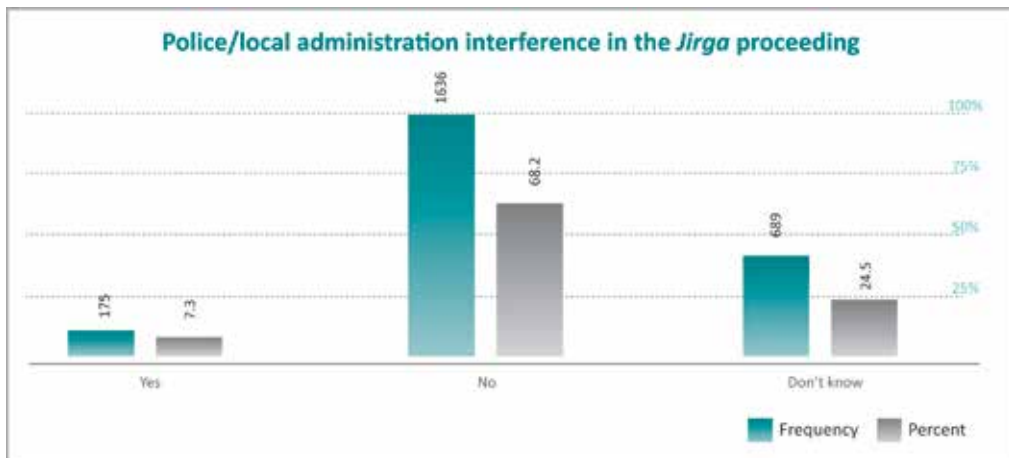
Some thought that because the *Jirga* takes power of attorney from the disputants and bail money, therefore, it makes it easy for the *Jirga* members to enforce the decisions and make sure that the decision is properly implemented.

Nonetheless, some respondents in almost all FGDs argued that cases of political nature and where public safety is involved, people make sure that police is taken into confidence unofficially. They added that it is certain that local leaders and politicians seek support of police department, discretely, and therefore in such cases, police try to make sure that the *Jirga* decision is implemented.

#### Female FGDs

Surprisingly, female respondents shared almost similar views. They thought that *Jirga* members are selected because of several qualities, including their ability to implement their decisions. In that case they do not need police support. They were of the opinion that police do not interfere in *Jirga* proceedings or decisions. However, they added, it is known that in some cases where Human Rights are at stake, then the involvement of the police has to be sought.

The media has reported that in certain cases, where Human Rights are feared to be violat-



ed, the local administration through its police force is supposed to interfere and prevent any such violation.

### Survey Findings

The direct question reflecting the FGDs asked of the sampled respondents was “whether “the police or local administration interferes in the functioning of *Jirga* proceedings.

More than two-thirds of the respondents (68.2%) replied that the police and local administration do not interfere in the *Jirga* proceedings. Only 7.3% informed the survey that police or local administration interfere in *Jirga* proceedings. A considerable number of respondents, 24.5%, replied that they did not know or have an opinion.

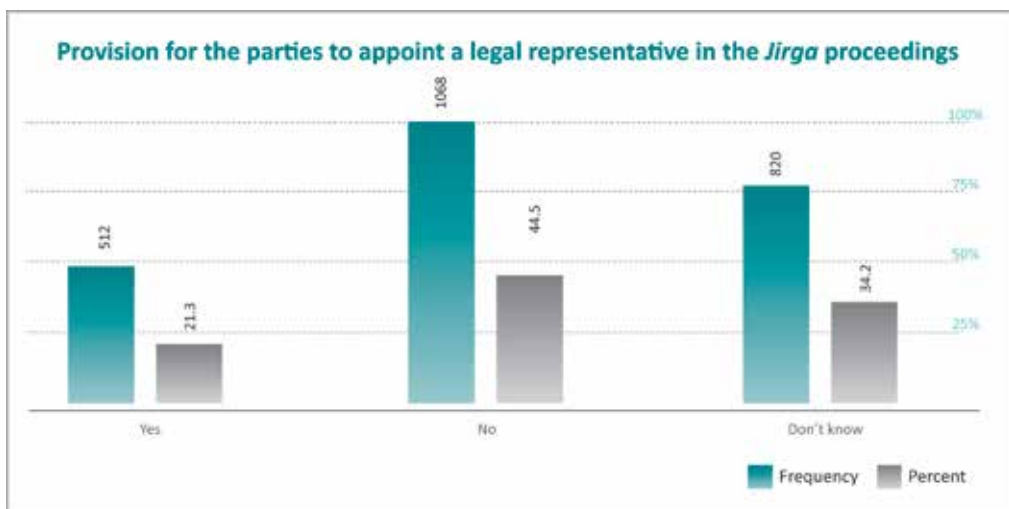
**Is there any provision for the parties to appoint a legal representative (similar to a lawyer in formal justice system) in the *Jirga* proceedings?**

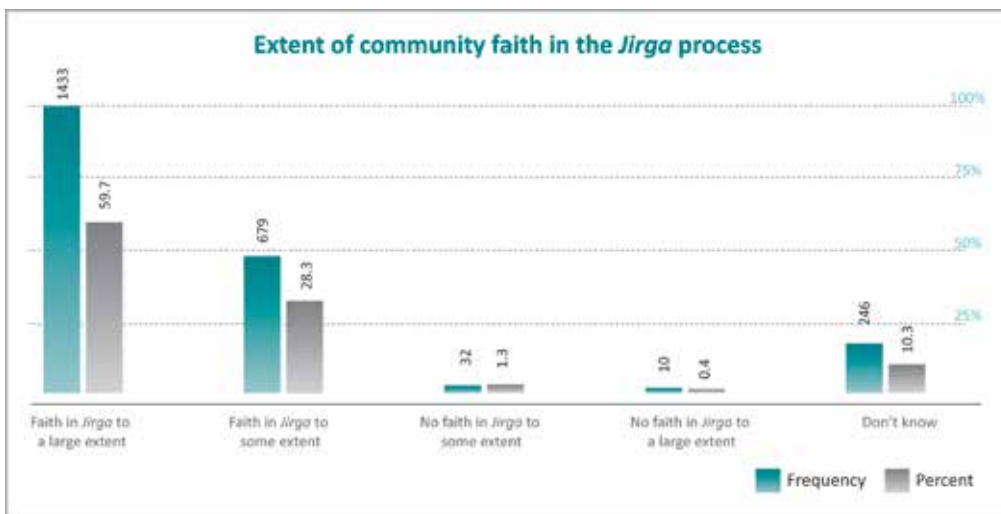
### Male FGDs

An overwhelming majority of respondents confirmed that there are rare cases where *Jirga* members sought legal expertise for some complex natured cases. However, generally, *Jirga* members are not flexible in this regard.

Generally, disputants nominate a *Jirgamaar*, with wisdom of local *Riwaj* and history, who is assigned to argue and mediate with the other party and reach to a point where both parties could agree on a settlement. This nominated person could be a doctor, lawyer, businessman, councilor or politician, etc.; however, appointing a legal expert would be a special case and, as such, is rare according to the FGD.

There was another group of respondents who thought that a disputant is more aware of his problem and could express himself in a more clear manner as compared to a legal representative.





### Female FGDs

Interestingly, female respondents were fully supportive of the idea of having a legal representative in *Jirga* proceedings. They simply believed that a legal representative could represent a disputant with strong technical knowledge of the State's laws so as to avoid any confusion and not to breach the law.

There are cases of a complex nature where *Jirga* members do seek some guidance from people having technical knowledge, such as lawyers or retired judges, religious scholars, etc., according to some key informants. However, some *Jirga* members could be lawyers or retired judges too, depending on the situation. In complex cases, where lawyers' services are acquired, especially in Balochistan province, *Jirga* members have shown flexibility, which is a positive sign, according to key informants.

The survey intended to document the general feelings of the respondents regarding this question.

### Survey Findings

The opinion of the 2,400 respondents is divided. A greater proportion (44.5%) confirmed that provision is not made for a legal representative in *Jirga* proceedings, compared to 21.3% who said that there is a provision for the parties to appoint a legal representative. One-third of the respondents (34.2%) did not know the answer.

### To what extent does the community have faith in the *Jirga* process?

Another question was posed about another dimension of the *Jirga* process. They were

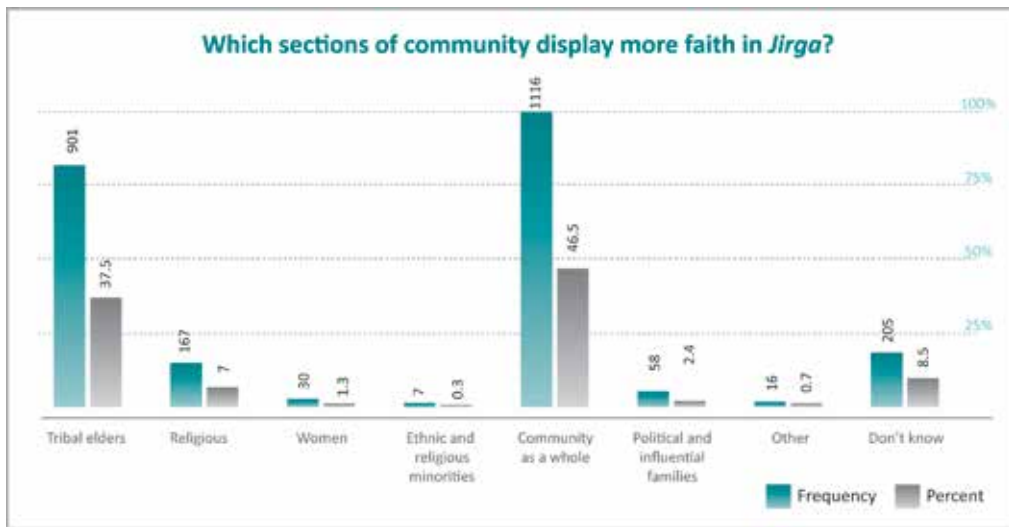
asked whether the community had faith in the *Jirga* institution. Out of 2,400 respondents, the majority (59.7%) confirmed that they had faith in the *Jirga* process to a large extent and an additional 28.3% said that they had to some extent. Combined, the 88.0% positive response reinforces the faith in the *Jirga* system. Only 1.7% did not have any faith in *Jirga* institution. These consistently high response rates seem quite astonishing considering all of the commentary about the *Jirga's* limitation on Human Rights, especially women's rights.

### Which sections of the community display more faith in *Jirga*?

Now the focus of the survey shifted to know which sections of the Pakhtun community have more faith in the *Jirga* institute. Few options were given and respondents were allowed to identify one or more options.

A higher proportion of respondents (46.5%) thought that the Pakhtun community as a whole has faith in the *Jirga* institution; more than one-third (37.5%) thought that tribal elders have more faith in *Jirga* as compared to other sections of the community; 7.0% believed that religious leaders have more faith in the *Jirga* system; while only 2.4% believed that political and influential families possess greater faith in *Jirga* system. These statistics are shown in the graph below. It is interesting that from reviewing the individual personal opinions to the questions one would have expected larger percentages when asking those same people to guess in which section of the community had faith in the *Jirga* process.

Interestingly, just 1.3% identified women followed by 0.3% who confirmed ethnic and



religious minorities have more faith in *Jirga* system. The survey clearly highlighted the fact that *Jirga* has limitations when it comes to women and minorities participation.

#### How far is the *Jirga* relevant to redress the grievances and dispense justice to the community?

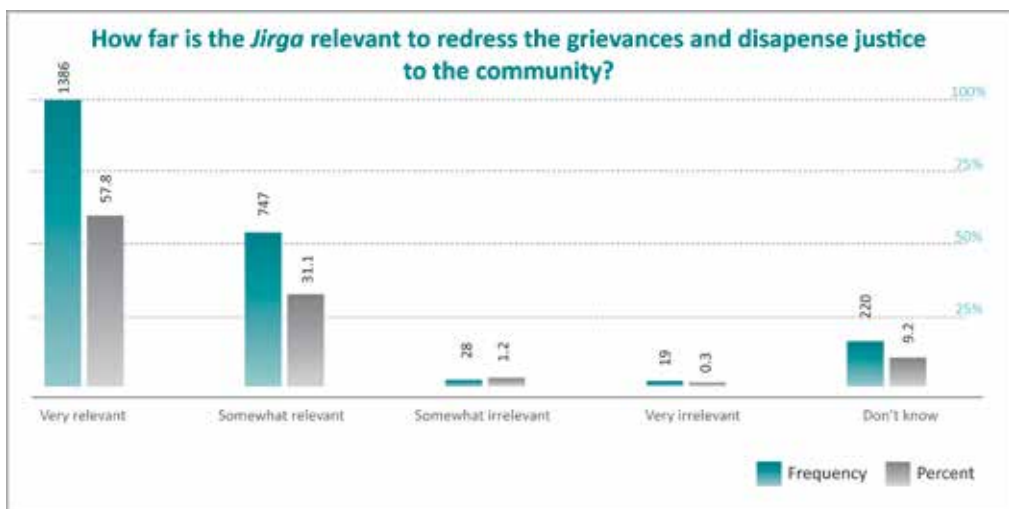
##### Male FGDs

The question of *Jirga* relevancy was also checked through FGDs. An overwhelming majority were of the opinion that *Jirga* is very relevant to their circumstances and is effective in resolving their issues. They shared that *Jirga* resolves their personal/family issues as well as issues communities face, such as road, electricity and water, etc. They also argued that *Jirga* provides cheap and quick justice without delays and therefore, fits in to their culture and environment.

However, a minority of the respondents also believed that all issues are resolved mainly by the government department/administration and not *Jirga*. They added that *Jirga* is irrelevant in today's situation and should not be encouraged and relied on. They also added that *Jirga* should only be used to convey communal issues to the local administration and not be taking up issues which it cannot resolve.

##### Female FGDs

Female views were slightly different from males. They thought that *Jirga* is not taking up women's issues seriously and therefore women felt left out. They argued that *Jirga* has answers to many communal issues, local crimes and civil disputes. However, women are not treated justly under *Jirga*. They demanded that their voices should be heard according to Constitution of Pakistan and international Human Rights standards.



### Survey Findings

Respondents were asked to give their opinion in a systematic way about whether *Jirga* is relevant to redress the grievances and dispense justice to the community. The respondents were very vocal and generous in sharing their opinion.

According to the survey results, an overwhelming majority (88.8%) believed that the *Jirga* is relevant to redress grievances and dispense justice to the community. This is surprising and again poses a challenge to the formal justice system of Pakistan. Another surprising element of these responses is that it includes women respondents' opinion, which could have been negative, as they do not participate in the process and it is also believed that they do not get justice from the *Jirga* process. However, the women's perception may be based on their male family member's opinions. Then again, the women may believe that the formal system would not be able to address their issues.

Only 2% respondents thought that *Jirga* is irrelevant for redressing grievances and dispensing justice to the community.

#### Is *Jirga* inherently class and gender biased?

The survey questionnaire has questions with different dimensions, which helps gather information from respondents through different angles. To reconfirm this, the survey respondents were asked whether *Jirga* has some inbuilt mechanism, which is class and gender biased. A clear-cut majority, 63.6%, completely denied that and only 6.6% believed that *Jirga* was inherently unjust with class and gender.

The survey result show some confusion and conflict with the previous questions. More than one quarter, 29.8%, could not share their

opinion, which shows that they were lacking confidence on this aspect of *Jirga*, which creates doubts on *Jirga* institution when it comes to class and gender.

However, the reality might be different from what the respondents perceive. *Jirga* has no women representation, which shows very clearly that it is gender biased. In regards to class, there are mixed views and different experiences of people who accessed the *Jirga*.

#### If yes, should *Jirga* be abolished?

Those 6.6% who believed that *Jirga* has inherent biases against class and gender were asked whether *Jirga* should be abolished. Out of 6.6%, only 1.4% thought that *Jirga* should be abolished. However, surprisingly, 3.9% still believed that it should not be.

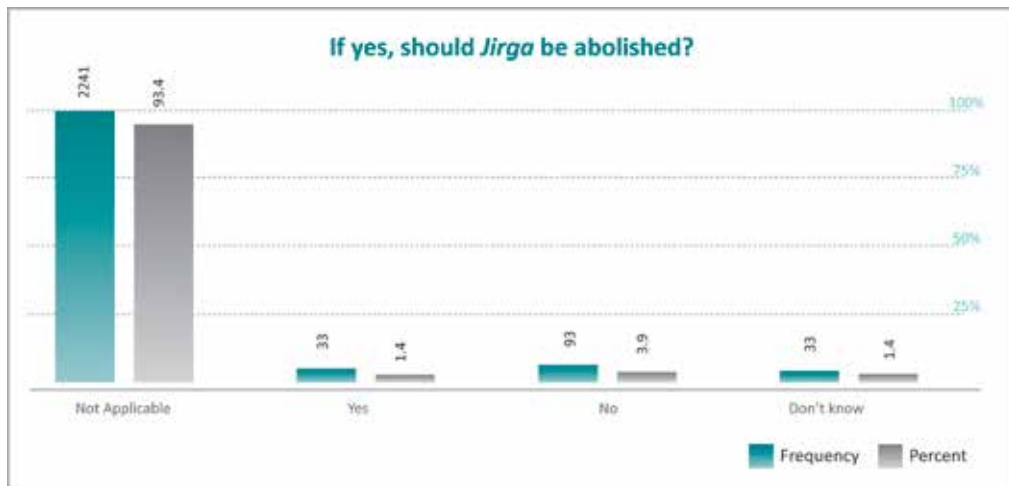
The 93.4% 'Not Applicable' sample size itself falls under the 'No category', which means that an overwhelming majority does not approve the idea of abolishing *Jirga* from the Pakhtun society.

#### How strongly do you agree/disagree with the statement: '*Jirga* is a speedy and less expensive mechanism of dispute resolution'?

Poverty is widely spread all over Pakistan and people do not have adequate resources to make both ends meet. In this situation acquiring justice services in Pakistan through formal means is beyond one's imagination where courts' and lawyers' fees are quoted in hundreds of thousands. Besides, the time consuming process also creates frustration and generally, when justice is served, it is often too late.

In this situation, it is perceived that, the poor end up in compromising standard justice with





informal ways of resolving their disputes – no matter big or small.

Respondents were asked how strongly they agreed/disagreed with the statement that *Jirga* is a speedy and less expensive mechanism of dispute resolution. Out of 2,400 respondents, unsurprisingly, an overwhelming majority, 85.7%, agreed that *Jirga* is a speedy and less expensive dispute resolution system. While, only 1.1% did not agree with this notion. 13.2% were indecisive and could not share their opinion. The data shows that women also do consider *Jirga* as a viable system when it comes to cheap and quick justice no matter how far women's issues are addressed through it.

**How strongly do you agree with the statement: 'One of the main outcomes of *Jirga* decision is just and fair compensation to the victim's family?'**

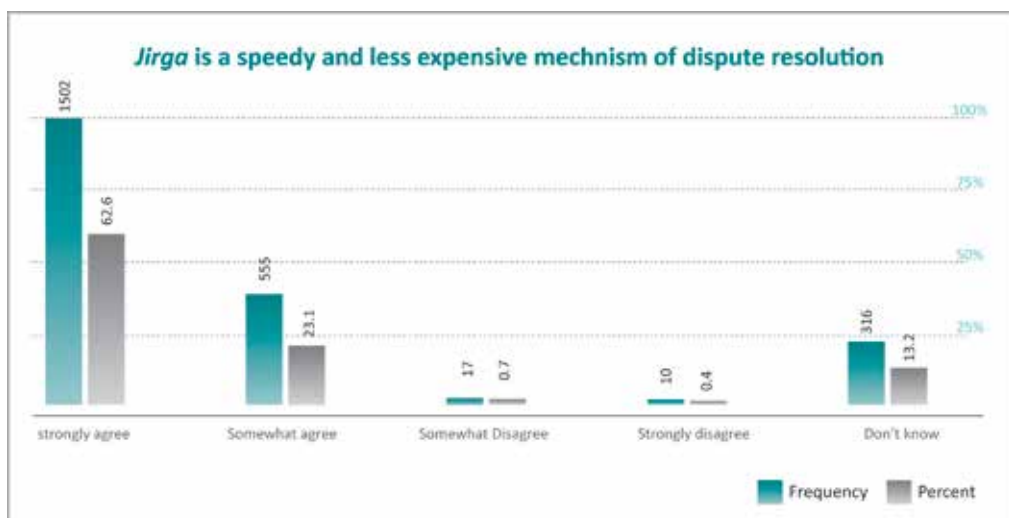
The element of compensation is one of the ma-

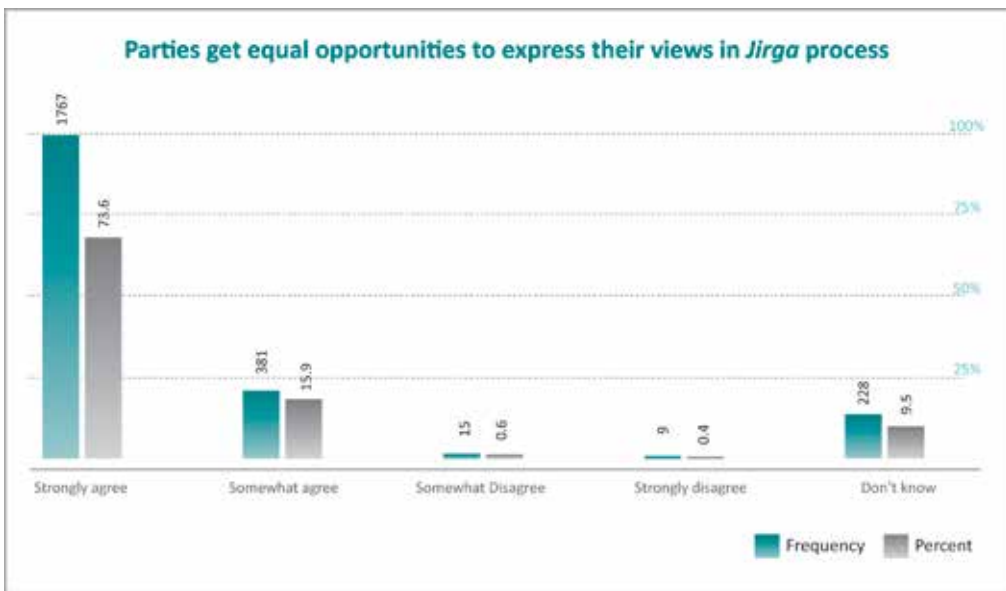
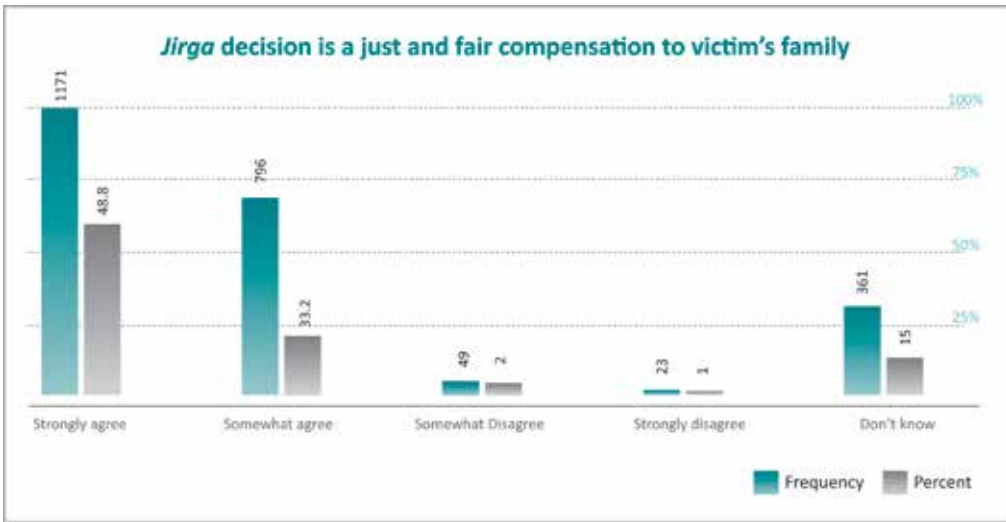
ior attractions for the people who use the *Jirga* system. Under the formal justice system, the State is mainly compensated against a crime (in criminal cases), while victims get no financial compensation in the end, despite spending a lot of money and time. However, on the other hand, in the *Jirga* process, the victim's family's honour is restored and compensated financially and without taking too much time.

Keeping in view this aspect, the respondents were asked how strongly they agree/disagree whether the *Jirga* decision is a just and fair compensation to victim's family.

Out of 2,400 respondents, more than two-third, 72%, agreed that a *Jirga* decision compensates the victim's family fairly while only 3% thought the opposite.

**Both parties are provided with equal opportunities to express their views in *Jirga* process**





Another aspect which *Jirga* is known for is its mechanism where both parties are given equal opportunity to express their viewpoints. However, similar to the formal justice system in Pakistan, as per the laws.

Unsurprisingly, an overwhelming majority of 89.5% agreed that *Jirga* provides equal opportunities to both parties in expressing their viewpoints. Only 1.0% believed the opposite while 9.5% were indecisive about their opinion.

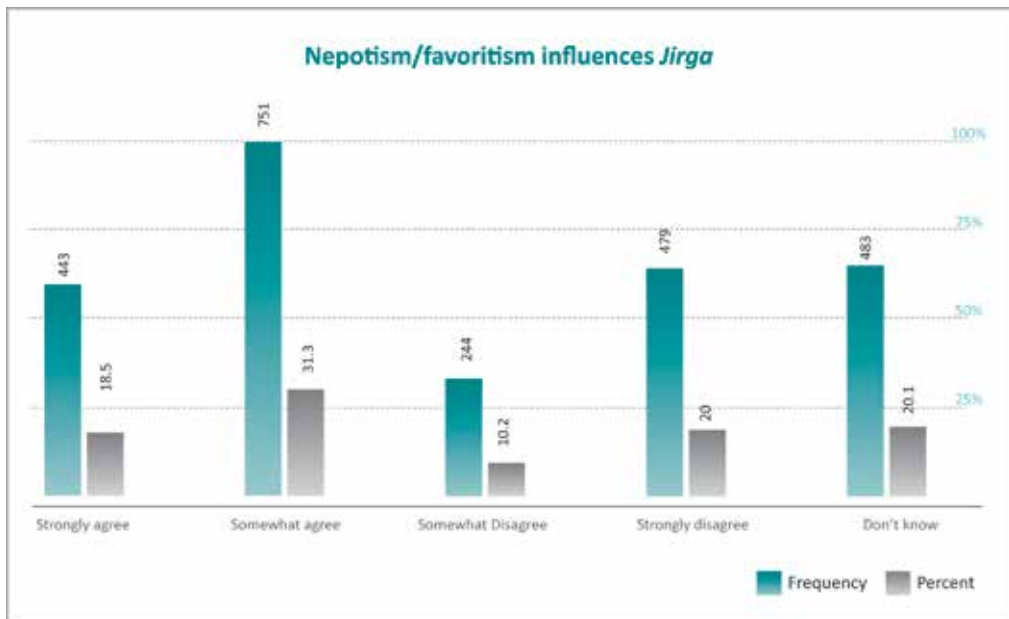
**Neptism or favouritism influences the decision making process of *Jirga***

There is an impression that *Jirga* decisions are usually influenced by the powerful and rich. It is perceived generally that *Jirga* members are allegedly involved in favouritism and nepotism.

However, this could also be true for any other formal or informal system.

The survey tried to confirm this by gathering the perception of 2,400 male and female adult respondents. The response is surprising, and does not go in favour of *Jirga* as compared to previous responses favouring the *Jirga* system.

Results show that close to half of the respondents, 49.8%, agreed with the notion that nepotism or favouritism influences *Jirga* decision making process. There were a considerable number of respondents, 30.2% who disagreed with this notion while 20.1% could not share their opinion. The survey trend shows confusion, however, still the response favouring the notion is worrisome and should be compared with other results on *Jirga's* legitimacy.



There is another argument that *Jirga* as a system is accepted by the majority. However, this is being manipulated by the powerful due to the element of materialism introduced recently. Therefore, *Jirga* as a system is acceptable but it should be transparent.

**Decisions given by *Jirga* are unbiased and free from all kinds of pressure from the rich or privileged section of the society**

**Male FGDs**

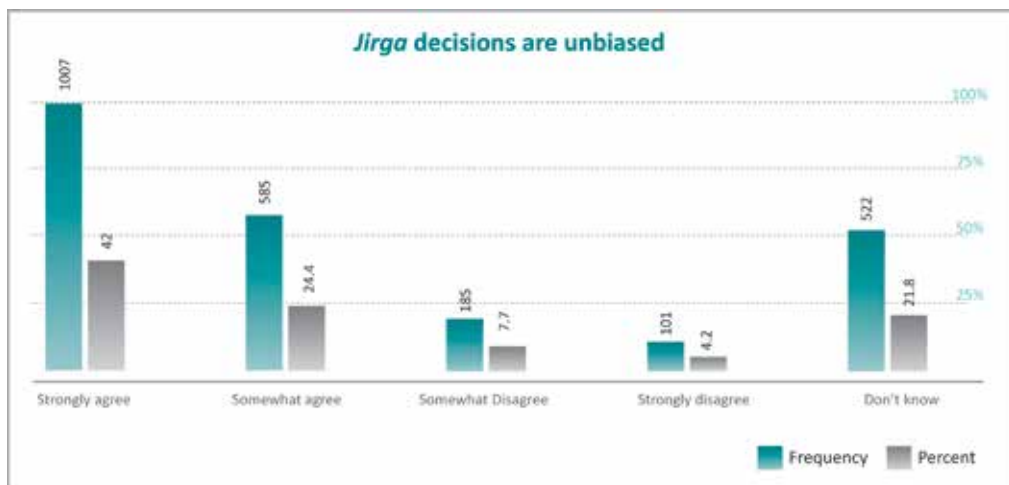
The perception survey data supports the notion overwhelmingly while only a handful of respondents disagreed. An overwhelming majority in the FGDs also believed so and were of the opinion that *Jirga* is respected because it favours both rich and poor and can yield to the pressure from the influential. They added that

the *Jirga* satisfies both the poor and the rich so that both parties save face and that the poor are compensated accordingly.

Nonetheless, there were respondents who were not very supportive of *Jirga* and argued that *Jirga* always favours the rich and influential and poor received compensation according to the *Jirga* members discretion.

**Female FGDs**

Female respondents were slightly pessimistic about the role *Jirga* plays in dealing with cases where women are a party. They believed that *Jirga* always favour men who are powerful and can manipulate the system easily as compared to women who are not allowed to even take part in the proceedings. Therefore, the women's argument came up quite strong on this aspect.



**Survey Findings**

Respondents were provided with an option that all *Jirga* decisions are unbiased and free from all kinds of pressures from economically and politically powerful elite of the society. Out of 2,400 respondents, two-thirds (66.6%) agreed with the notion of being unbiased while just 11.9% disagreed. A considerable number of respondents, 21.8%, could not share their opinion.

The graph below confirms previous results which show that the population generally and in most responses overwhelmingly favours the *Jirga* from various perspectives.

For these two questions, one message is conveyed clearly – that *Jirga* in recent times has been corrupted materially where rich can maneuver and can easily get justice – sometimes if not always.

**Some decisions are harsh and not commensurate with the deed done between the parties**

**Male FGDs**

Throughout the focus group discussions, respondents repeatedly confirmed that *Jirga* is fair in dispensing justice to all. However, there were few instances where respondents agreed with the notion that sometimes decisions taken by *Jirga* are harsh and not commensurate with the deed between the parties. This could not be denied and was true to some extent. However, in majority cases, people have shown their trust on the *Jirga* and confirmed that its decisions are just and punishments are not out of proportion.

**Female FGDs**

Female respondents shared the views of their male counterparts. They viewed *Jirga* as a system which is fair and respected by all because of its just treatment to all. They disagreed that *Jirga*

decisions are harsh and not commensurate to the deeds done between the parties. They added that if that was the case, then people would have discouraged *Jirgas* and that the practice of acquiring justice through it would have diminished from the society long time ago.

However, they repeated that decisions regarding women are sometimes harsh which could have been avoided.

**Survey Findings**

Since *Jirga* decisions are made through consensus and that both parties have to agree however, in some cases it has been observed that either party, which might not be happy with the decision, has to accept this after being pressurised by the *Jirga*. Therefore, the survey intended to document what respondents opined about this fact.

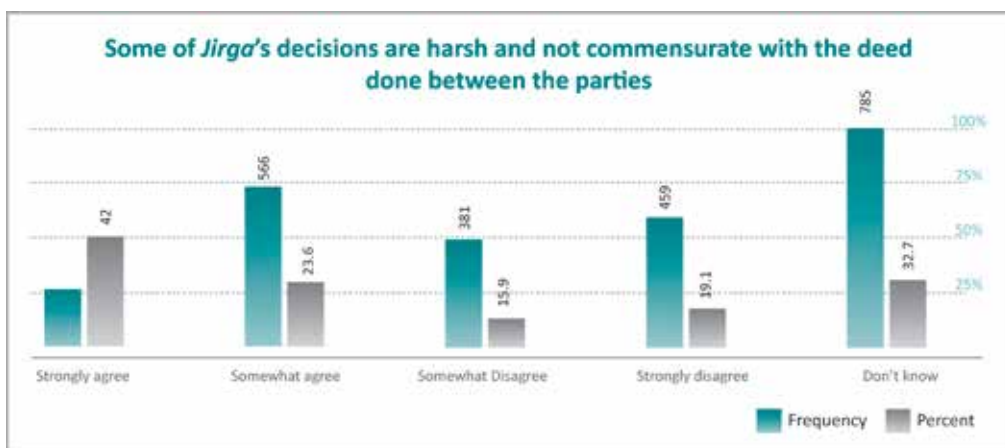
The survey results show a mixed response. Close to one-third (32.1%) agreed that some decisions are harsh and not commensurate with the deed done between disputing parties while just slightly over one-third (35%) opposed this notion.

An equal number of respondents, 32.7% could not share their opinion. This clearly shows a state of confusion, depending on what the respondent’s experience might have been.

***Jirga* fails to resolve disputes effectively**

**Male FGDs**

The responses from FGDs are stronger than the perception survey on the issue of *Jirga* being effective in resolving disputes. Throughout the discussions, the overwhelming majority confirmed that *Jirga* has the ability to resolve disputes effectively, while only few respondents had the opposite view. Respondents



from D.I. Khan shared some bad experiences of the *Jirga* process and therefore were not quite content with the *Jirga* institution.

#### **Female FGDs**

Except a few, an overwhelming majority shared their views and were having the same views as their male counterparts. Some respondents added further that it is *Jirga*, which binds Pakhtun society together and resolves all kinds of issues effectively.

#### **Survey Findings**

There is a strong belief among the Pakhtun communities across KP and Balochistan (and of course FATA) that *Jirga* effectively resolves disputes. The survey documented this fact but through a negative notion. In this question, 2,400 male and female adult respondents were asked whether they agree/disagree with the notion that *Jirga* fails to resolve disputes effectively.

Only 14.7% respondents agreed with the statement while majority (63.5%) did not agree. A significant number, 21.8%, did not share their opinion.

#### ***Jirga* maintains social order and restores harmony in a village**

One aspect that Pakhtun communities across Pakistan are content with *Jirga* institution is its ability to maintain social order and restore communal harmony after a conflict. This question is similar to the previous one but with another angle so that the survey gathers each dimension of *Jirga's* ability to resolve disputes and bring life to normalcy.

To confirm this fact, 2,400 respondents were asked in a qualified manner whether they agree/disagree with this notion.

Unsurprisingly, more than three-quarter, 76.2%, agreed with the notion that *Jirga* maintains social order and restores communal harmony with in communities after conflict. Only 4.9% disagreed with this notion. Some 18.9% could not respond to this question, as they did not know the answer.

#### ***Jirga* plays a role in conflict transformation and resolution.**

*Jirga*, as an indigenous institution, is rooted within Pakhtun society for many positive aspects, according to Pakhtun communities. This question brings us to another aspect of

peace building when conflicts are resolved and transformed into peace among warring families and tribes. Therefore, the survey intended to confirm this notion from the survey sample.

Out of 2,400 male and female adult respondents, more than two-third majority, 73.3%, agreed that *Jirga* plays its role in conflict transformation and resolution while only 5.3% did not agree with this notion. One-fifth (21.3%), a considerable number of respondents did not share their opinion, which shows that a considerable proportion of Pakhtun society is confused and cannot give any credit or discredit to *Jirga* institution for its ability to manage conflicts. This could be their lack of exposure to the *Jirga* institution, which, if experienced, could have developed their opinion – whether negative or positive.

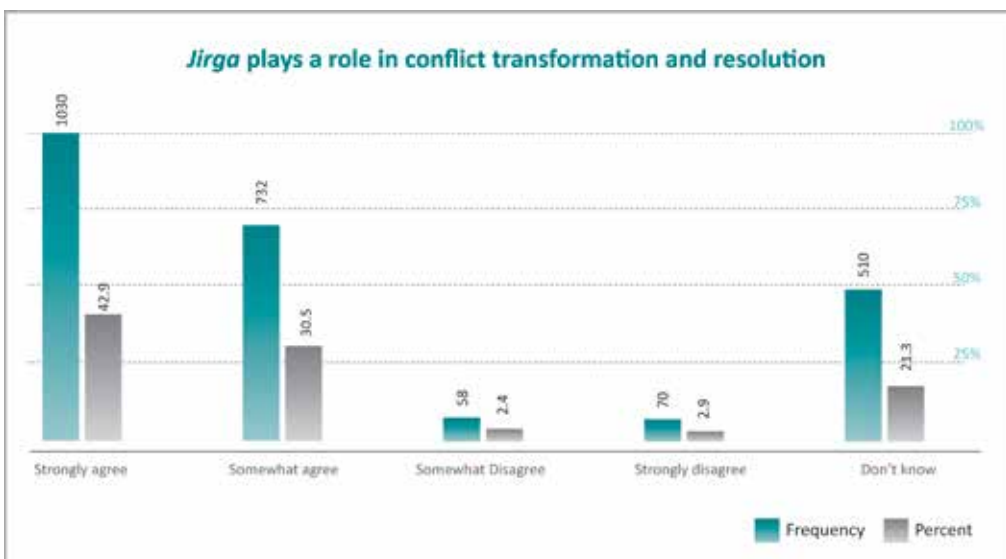
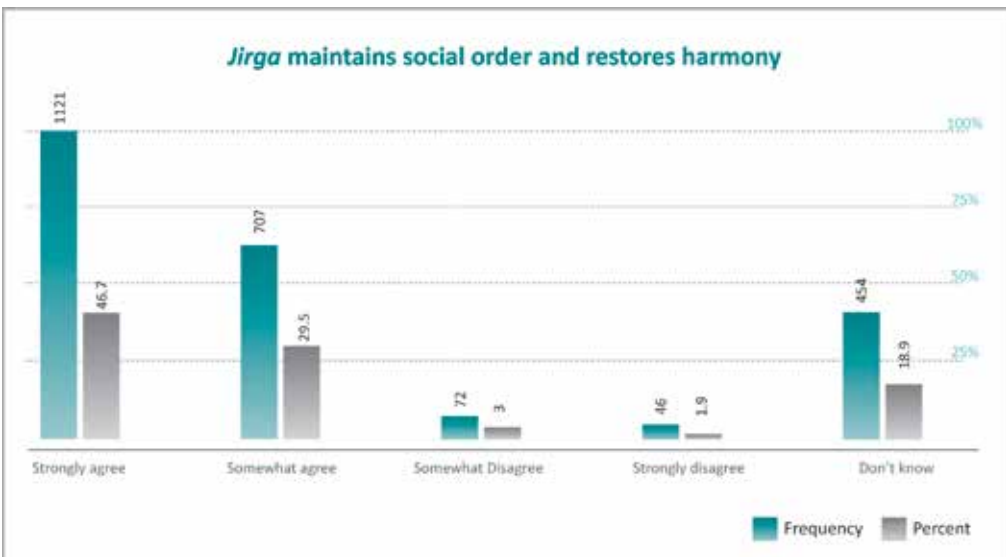
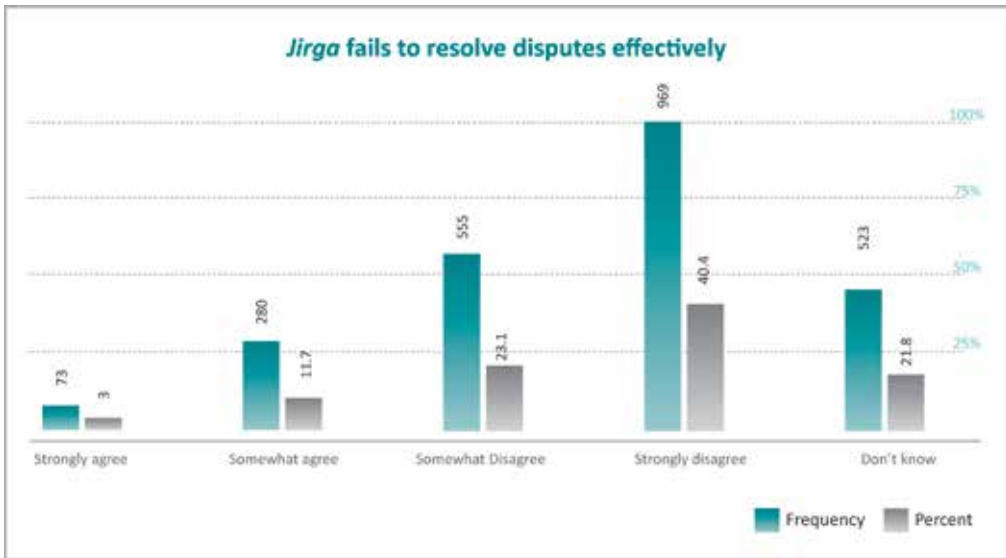
#### ***Jirga* can play a role in reducing the levels of militancy in the region**

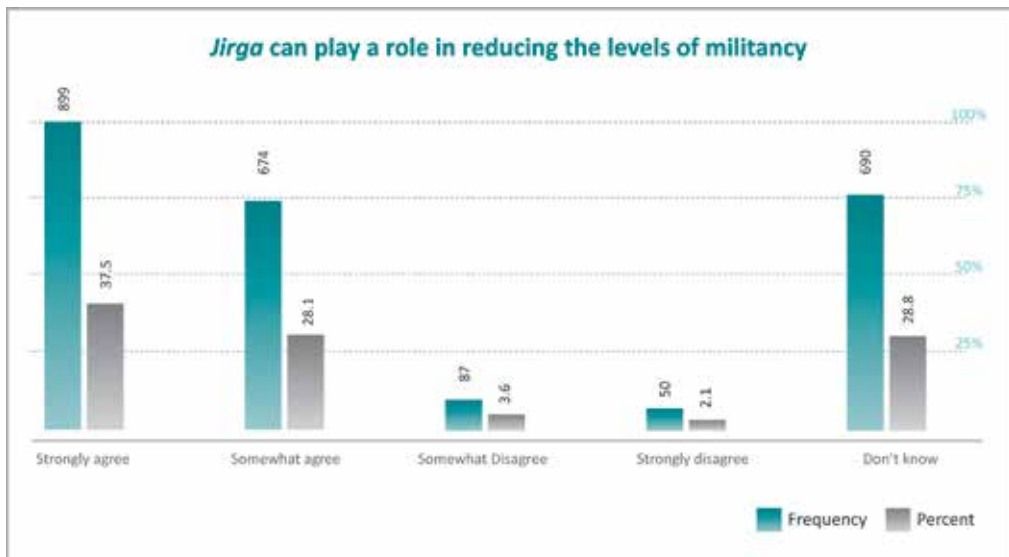
#### **Male FGDs**

Male respondents shared that the communities across FATA, KP and parts of Balochistan are faced with a unique militancy where locals are recruited, trained and involved against State's law enforcing agencies and civilians. They believed that the role of *Jirga* has not been fully and truly utilised, which could have played a role to prevent this militancy from spreading across the region. They were of the view that *Jirga* could be best placed to help resolve the militancy issues at grassroots level. They confirmed that *Jirga* could play an effective role in conflict transformation and reconciliation of individuals and families affected by militancy. They added that recruits are locals and should be provided a fair chance under *Jirga* to give up their weapons and reconcile within local society and live normal lives. However, this is not very simple, according to some respondents, as State should patronise *Jirga* and support it to revive and strengthen this age old institution for people's good. Some respondents quoted examples of how their local *Jirgas* had been able to curb the militancy in their areas or villages. They also suggested that mediation with militants should be initiated through local *Jirgas* rather than government taking the lead on such negotiations. They believed that the *Jirga* should be provided with a mandate to talk to the militants.

Some respondents blamed the *Jirga*, for promoting militancy. However, they could not







provide any strong justification or evidence to support their argument.

#### Female FGDs

The female respondent's views were mixed. Although half of the respondents supported what male respondents had said about the *Jirga's* role to reduce militancy, the other half were not quite happy with *Jirga's* role in curbing militancy and manage conflict in the region.<sup>178</sup> They could not give reasons to support their argument in criticising *Jirga's* role. However, their discontentment also reflects that in some areas, the *Jirga* did not play its due role.

#### Survey Findings

Apart from political and sectarian violence, post 9/11, Pakistan has been suffering from a severe form of militancy in many parts of Pakistan, especially in Pakhtun dominated areas of FATA, KP and Balochistan. It has been observed that indigenous institutions such as *Jirga* have not been fully utilised to play a role in reducing the impact of militancy, especially in the post-military operation phases.

Respondents were asked whether *Jirga* could play a role in reducing violence in the region. Out of 2,400 respondents, more than two-third majority (65.6%) agreed that *Jirga* could play its role in reducing militancy while only 5.7% did not agree.

More than a quarter (28.8%) did not know the answer and did not share an opinion. This is understandable, looking at the complexity of the militancy problem, as everyone in Pakistan is confused and does not have the precise answer to this issue. *Jirga*, for the simplicity of the Pakhtun masses, could be the answer, but one cannot claim that it can reach to any conclusion reducing militancy. However, it does have the capabilities to face the challenge and could be utilised accordingly.

#### *Jirga* is more effective in resolving only civil disputes

It is believed that *Jirga* resolves some very complex and long-standing civil disputes among families. Respondents were asked whether they agree/disagree with this notion. Out of 2,400 respondents, a high number of respondents (40.5%) agreed while 29.1% did not agree with the notion.

Quite a large number of respondents, 30.5%, did not share their opinion.

#### *Jirga* reintegrates militants/extremists into the community

##### Male FGDs

This question is related to two previous questions. According to majority of the respondents, once the *Jirga* takes place and reconciles warring parties [local population and militants] and decisions are reached, then the next step

178) One has to keep in mind that the *Jirga* process will only work if both parties to a dispute or conflict agree to mediation by a *Jirga*. In the present context of Taliban militancy where the Taliban are rebelling against traditional custom, there is no the willingness to enter into mediation. Local Jigas should not be expected to mediate when armed rebellion against a government beyond their community is the context.

is how to live together peacefully. They argued that in that case, an amnesty has to be provided to those who fought, after penalising them. *Jirga* will help both parties to forgive each other, lead peaceful lives and victims should be compensated accordingly.

This is not very simple, as one respondent added that forgiving is not that easy in Pakhtun culture but the *Jirga* process saves face and therefore, after *Jirga* decisions, a militant could be reintegrated into the society, keeping in view the crime he committed. So it depends on the nature of crime and the context.

**Female FGDs**

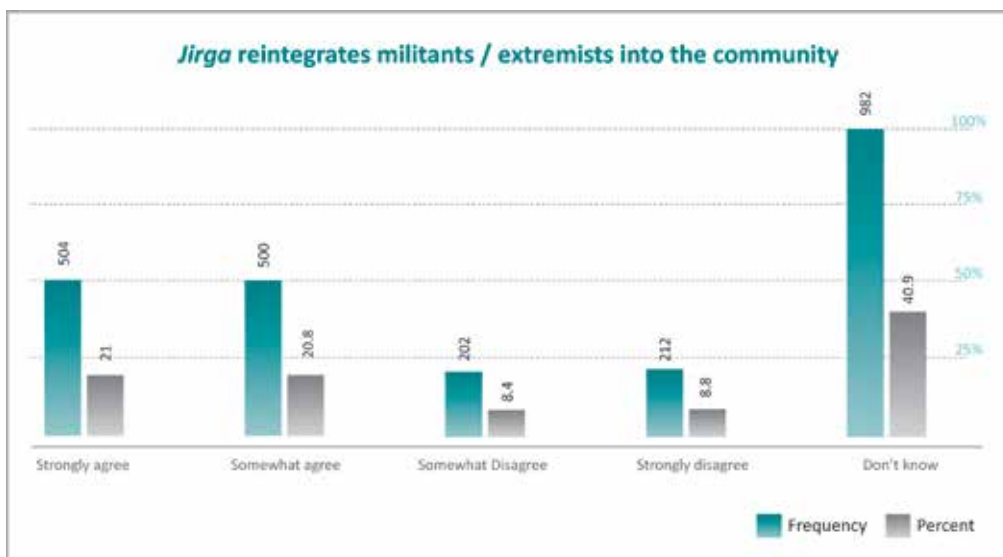
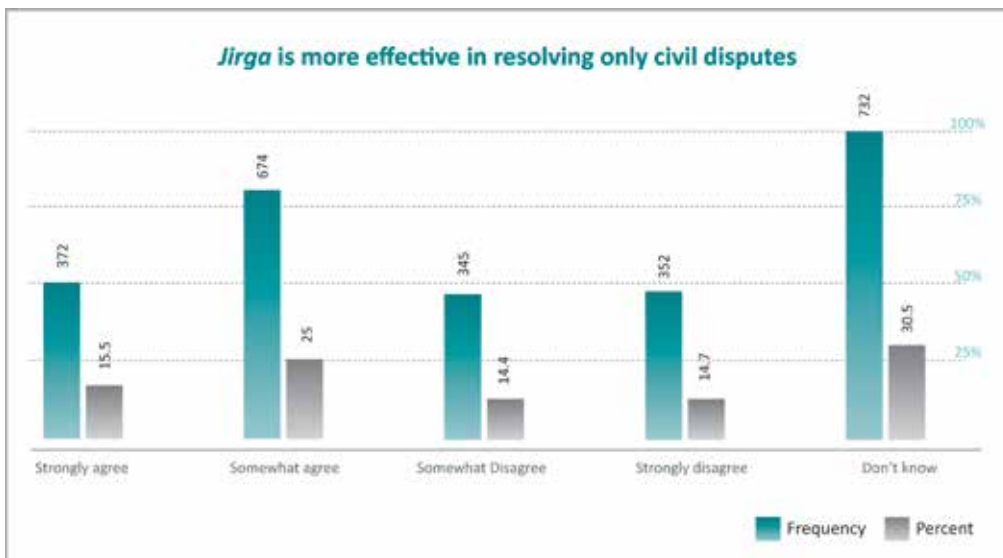
The results of the FGDs were not different from the male FGDs, except that a few respondents protested and asked, “How could people for-

give the treatment meted out to local communities by militants. They were of the opinion that such criminals should be tried under State law and should not be forgiven.

Some experts are suggesting that *Jirga* should be utilised, as an indigenous conflict transformation mechanism to reintegrate conflicting groups or offenders into communities to ensure lasting peace. However, no such efforts have been initiated by any government or non-governmental entity.

**Survey Findings**

Let us examine what the general perception would be about the ability of *Jirgas* to reintegrate extremists or militants into society, after rehabilitation. Out of 2,400 respondents, a high number of respondents (41.8%) agreed that *Jirgas* can



help reintegrate militants into communities compared with only 17.2% who did not agree.

The data shows that a substantial number of respondents, 40.9%, were indecisive and could not share their opinion. This could tilt to either side and can make a good case for both options.

#### ***Jirga* is effective in resolving both civil and criminal disputes**

This question intends to document respondents' opinion on the effectiveness of *Jirga* in resolving both civil and criminal disputes.

Out of 2,400 male and female adult respondents, interestingly, close to three-quarters, 72.6%, agreed that *Jirga* is effective in resolving both criminal and civil disputes while only 6.7% did not agree with the notion. Some 20.9% could not share their perception.

#### ***Jirga* can prevent some very serious crimes**

During Key Informant Interviews, the survey team was told that *Jirga* could play its role in preventing serious crimes within communities. To test this angle, the survey asked this question from 2,400 male and female respondents in a qualified manner.

Again, interestingly, more than half, 53%, agreed while a quarter of them, 25.5% did not agree with the notion. Close to one quarter (23.4%) did not share their opinion as they did not know.

#### ***Jirga* is an organised, well-established, transparent and an efficient institution in the Pakhtun society**

Now is the time to document how well organised, well established, transparent and efficient institution *Jirga* is for the Pakhtun society.

Respondents were asked whether they agree/disagree with the notion that *Jirga* is an organised, well-established, transparent and efficient institution of Pakhtun society.

Out of 2,400 respondents, an overwhelming majority, 84%, agreed with the notion while only 1.8% did not agree with the notion. Some 14.2% could not share their opinion. With the passage of survey questionnaire, it seems as more respondents are favouring different characteristics of a *Jirga*.

#### ***Jirga* makes lasting peace between/among disputants**

Formal justice system satisfies international standards and conveys a lesson to the society that every criminal will be punished. However, sometime formal ways of settling disputes cannot ensure peace between the disputing parties, especially in Pakhtun society, because Pakhtun society believes in concept of *Badl*, according to the Islamic code – an eye for an eye, a tooth for a tooth, and blood for blood.<sup>179</sup> Because of this conflicts may go on for years and decades if they are not resolved through *Jirga*. In that case, *Jirga* has proved to bring lasting peace between conflicting families after proper mediation to prevent further bloodshed or damage to any of disputants.

To test this perception, 2,400 respondents were asked whether *Jirga* has the ability to bring lasting peace between or among disputants. Interestingly, eight out of ten, 83%, agreed while only 2.1% did not agree with the notion. Some 14.9% could not share their opinions, as they did not know the answer.

#### **How strongly do you support the involvement of government officials in *Jirga* proceedings?**

##### **Male FGDs**

Majority opposed the idea of government officials' involvement during the *Jirga* proceedings. They believed that if government officials are involved then the *Jirga* institution will become corrupt and people will lose their confidence in this century's old institution.

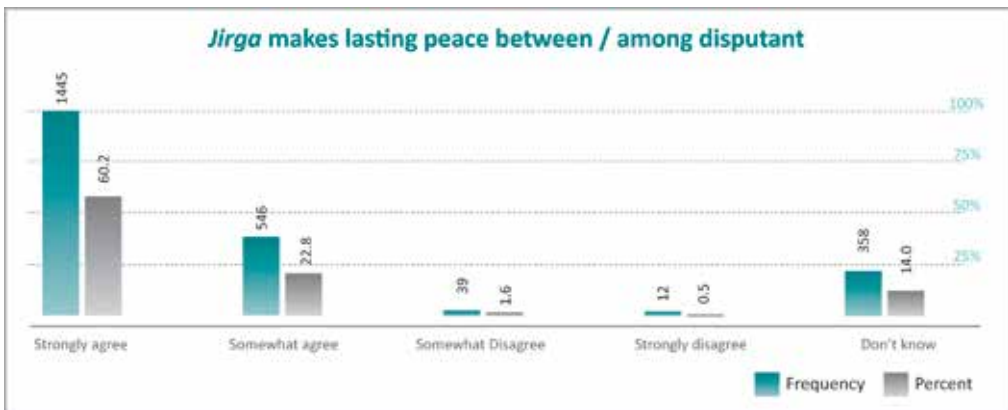
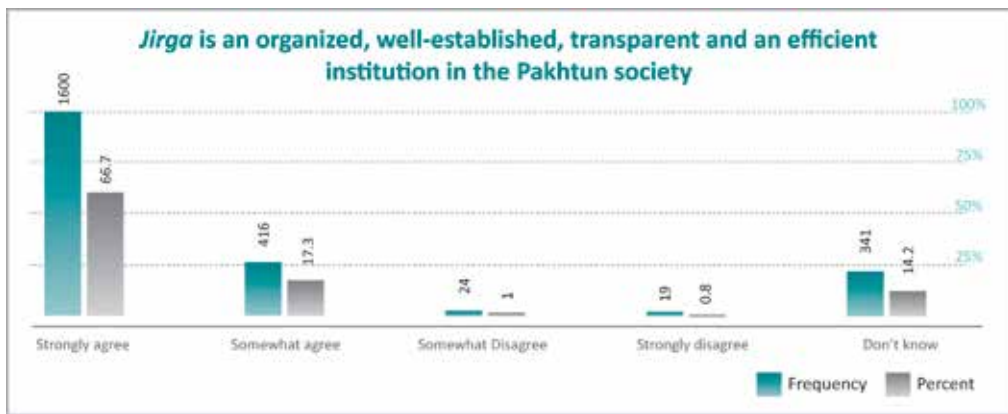
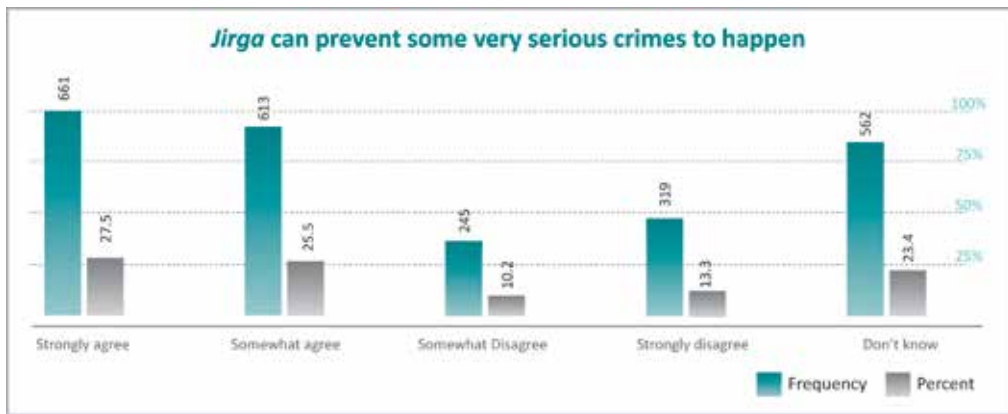
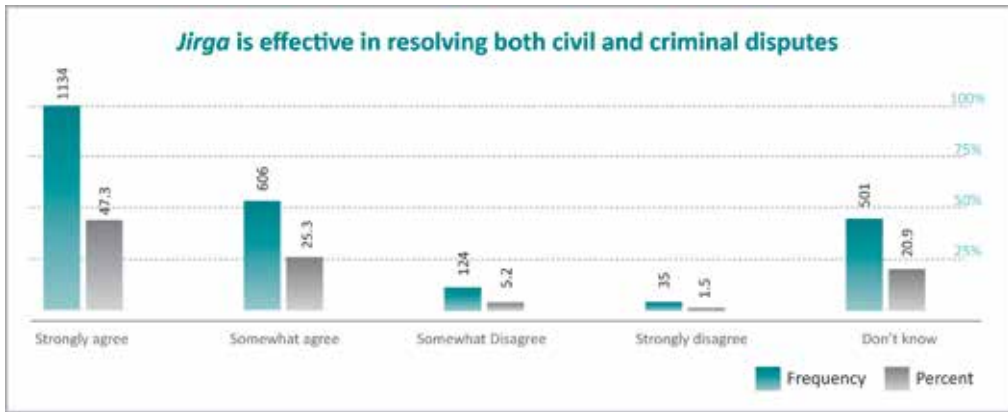
Some respondents had an opposite view and supported the idea of government officials' involvement. They argued that this way parties to the conflict will take the matter seriously and that the implementation of the *Jirga* decision will become binding on both the parties to the dispute. Nonetheless, overall, an overwhelming majority did not support the idea.

##### **Female FGDs**

Female respondents shared mixed views. Half of the female respondents supported the notion and thought that government should ensure that *Jirga* proceedings are transparent and that decisions are implemented accordingly. However, half of the respondents were having opposing views and had shown their concerns on the credibility of government departments.

179) The theology of the expression is that the punishment should not exceed the damage done; it does not mean that the price has to be exacted. This interpretation is also found in other religions, e.g., the Old Testament in Christianity.

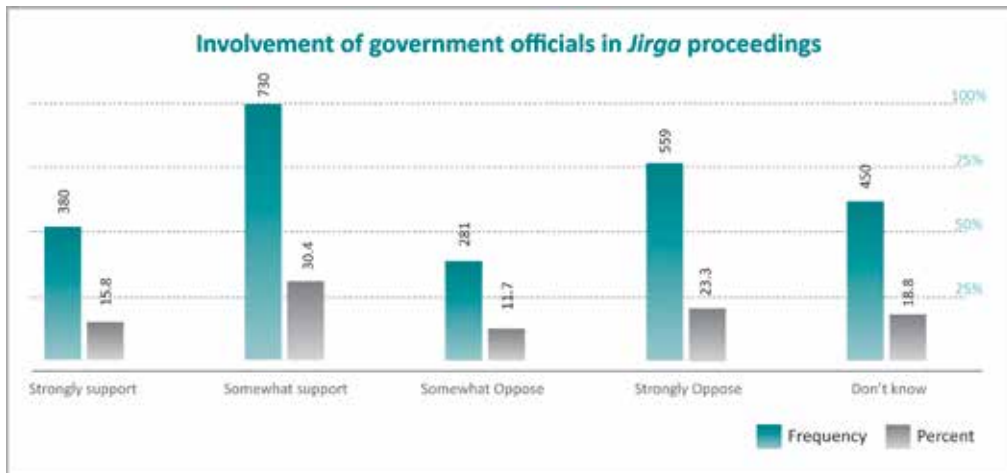




During the KIIs in KP and Balochistan, some experts on *Jirga* shared their experiences on government officials' involvement, such as police officers, or a representative of a local administration. They opined that police involvement or any official from the local administration always failed to resolve issues. Most of the time, interference by these officials lead to more complexities in the end.

thought, that there is little room left for either party to disobey.

An overwhelming majority also pointed out that community pressure is always behind the implementation of *Jirga* decisions and therefore it seems unlikely that a disputant would try to offend the entire community and make enemies rather than following the *Jirga* decision.



This conveys a strong message of mistrust on the government departments and ownership for *Jirga* as indigenous institution. This aspect was tested through the quantitative survey too. The response is mixed and shows confusion.

#### Survey Findings

Out of 2,400 respondents, a higher number of respondents, 46.2%, supported the idea that government officials should be involved in the *Jirga* proceedings. However, almost equal number of respondents, 42.1%, opposed the idea.

Some 18.8% could not share their opinion, which could go either way.

#### How are the decisions of *Jirgas* implemented?

##### Male FGDs

Respondents informed that the *Jirga* gives considerable time to the parties to implement its decision, which makes it easy for either party to adhere to the decision. Some respondents also pointed out that *Jirga* takes bail money and take an oath from both the parties and in case of breach of rules, *Jirga* can confiscate the money and can give it to the victim party. Some respondents added that since *Jirga* decisions are taken after getting consensus from both the parties therefore, they

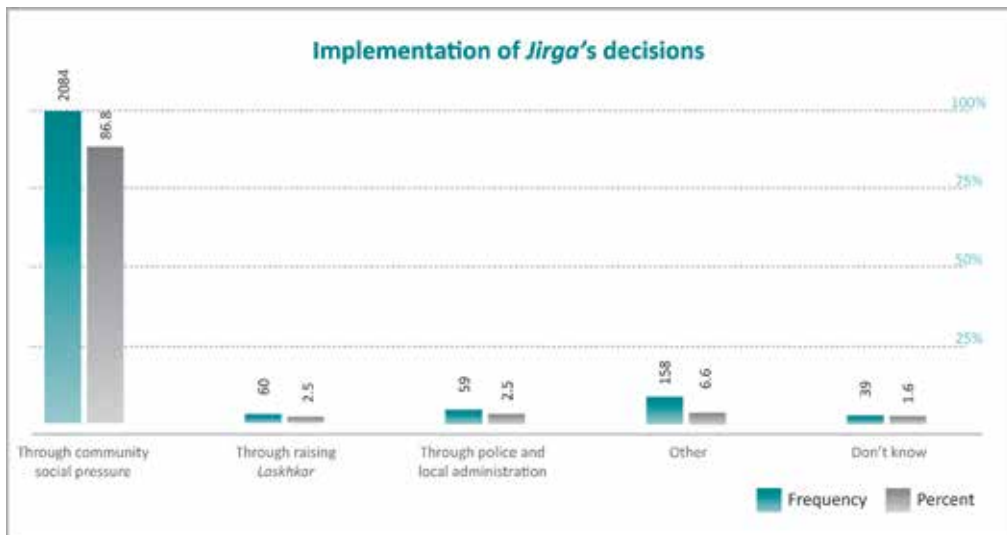
##### Female FGDs

Female respondents' views were not much different from those of the men. However, they shared a new dimension. They believed that *Jirga* is a step towards reconciliation between the conflicting parties, which means the process of peace has already begun and therefore, there is less likelihood that a party will breach any such agreement. They also said that there is social pressure behind *Jirga* decisions and therefore no one dares to offend the entire community by not complying with the *Jirga* decision.

##### Survey Findings

To know how the *Jirga* decisions are implemented, an important question was asked from the respondents. Out of 2,400 respondents, an overwhelming majority (86.8%) shared that *Jirga* decisions are implemented through pressure by community. As the *Jirga* does not have a legal or State back up, a mechanism, beyond social pressure, does not exist to enforce *Jirga* decisions. Social pressure within the Pakhtun society ensures *Jirga* decisions are implemented accordingly.

Some other options are identified by very few respondents. For example, 2.5% believed that *Jirga* decisions are implemented through



*Lashkars*<sup>180</sup>, and another 2.5% confirmed that police and local administration help implement the *Jirga* decisions. The concept of *Lashkar* is very old and in recent times we have had few instances where *Lashkars* have been raised for enforcing *Jirga* decisions especially in the settled districts of KP and Balochistan's Pakhtun areas. *Lashkars* have been raised recently to curb Taliban militancy in parts of FATA and KP's few non-urban areas. Nonetheless, this is quite surprising and needs cross-tabulation to know in which districts such implementation takes place.

2.5% respondents identified police and local administration who helped enforced *Jirga* decisions.

#### If the decision is not acceptable to a party, what happens?

In FATA, defiance to *Jirga* decision is very rare while in the settled districts of KP and Balochistan, there are many such instances when *Jirga* decisions are not accepted by any or both parties. This is because in settled districts of KP and FATA, *Jirga* is practiced but it is not very well-organised and communities accept decisions, mostly voluntarily. However, since *Jirga* decisions are based on consensus, therefore it is less likely that any or both parties to the dispute would defy the decisions.

#### Male FGDs

This question was repeated during the FGDs. An overwhelming majority confirmed that *Jirga* decisions are generally accepted and honoured by both disputing parties. However, respon-

dents view that if any party to the dispute is not content with the *Jirga* decision and believes that justice has not been served then they can appeal to the community for another *Jirga* to be formed, which is generally an accepted practice.

Respondents also informed that in case the *Jirga* decision is not accepted even after the second *Jirga*, the bail money is confiscated, and the local community cuts off social ties with that particular party.

#### Female FGDs

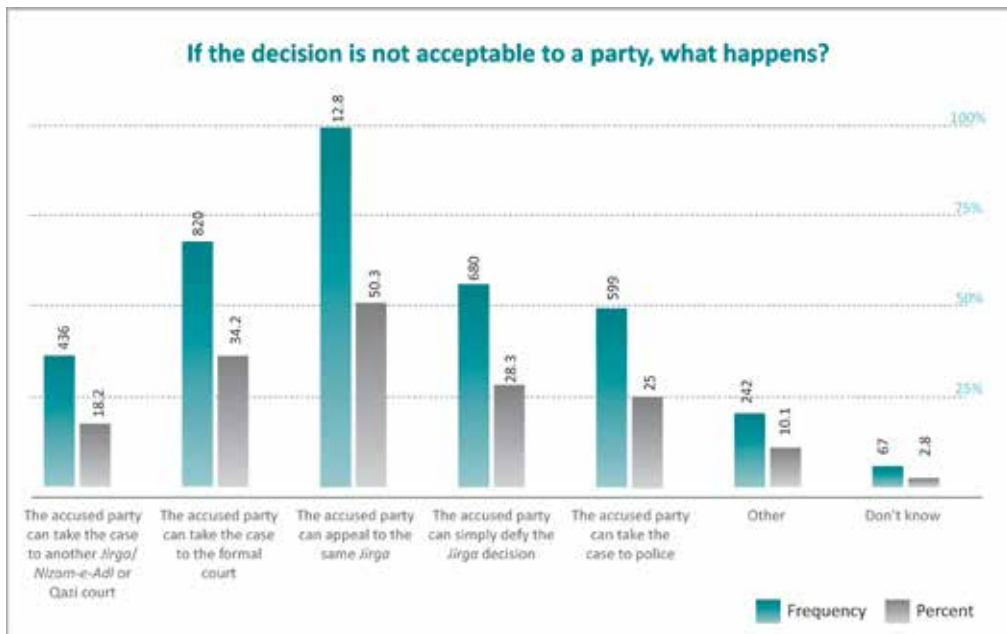
Unsurprisingly, female respondents had the same view. They added that if any party disagreed with the *Jirga* decision, it may lead to prolonging conflicts and therefore result in more bloodshed and losses.

#### Survey Findings

To test this, respondents were asked what happened if the *Jirga* decision is not acceptable to one or both parties to the dispute. Respondents were given different scenarios and the option to choose one or more options.

The survey results show that half of the respondents, 50.3%, confirmed that the accused party can submit an appeal to the same *Jirga* which decided the case, while more than one-third informed the survey that the accused party can take the case to the formal court. More than one quarter, 28.3%, thought that the accused party can simply defy the *Jirga* decision, as there is no strong mechanism in place to compel the accused party to accept the decision. A quarter

180) A Lashkar is a group of men who, by tribal decision, are brought together to enforce a decision of the elders. The men will be armed and expected to fight the person, family or group that has violated the code or committed a crime



of the sample size, 25%, shared that the accused party can take the case to the local police. Some 10.1% came up with various options on their own, while only 2.8% did not know the answer.

Various scenarios mentioned above may be applied by parties in different situations. However, the intention was to find out which one is more generally practiced.

#### Should the party be expelled from the community in case it defies the Jirga decision?

Expelling the accused party from the community is an extreme step, which any Jirga could take. Even in worst situations such decisions are avoided by the Jirga itself. On the other hand, the accused party usually follows the decision and does not let the situation reach a level where the Jirga is compelled to take such steps. In FATA, a Jirga can expel the accused party from the village in case of defiance, as it has the ability to do so. While in settled districts, such steps could not be taken as the accused parties usually follow the decisions voluntarily. Nonetheless, Pakhtun communities could react this way too, depending on the complexity of the situation as well as on the accused party's political and social status.

#### Male FGDs

Respondents were asked whether a criminal or offending party could be expelled from a village as a punishment decided by a Jirga, it is surprising to know that an overwhelming majority disagreed. They shared that such incidents have occurred in the past. However, it is no more the

case. Some respondents believed that it could happen in FATA in the absence of any security apparatus, but in settled districts such incidents are rare due to the presence of police and local authorities who could interfere and prevent such gross violation of Human Rights.

There was a small minority who believed that if expelling a party from the village as a punishment could bring some peace, then it could be a good measure.

#### Female FGDs

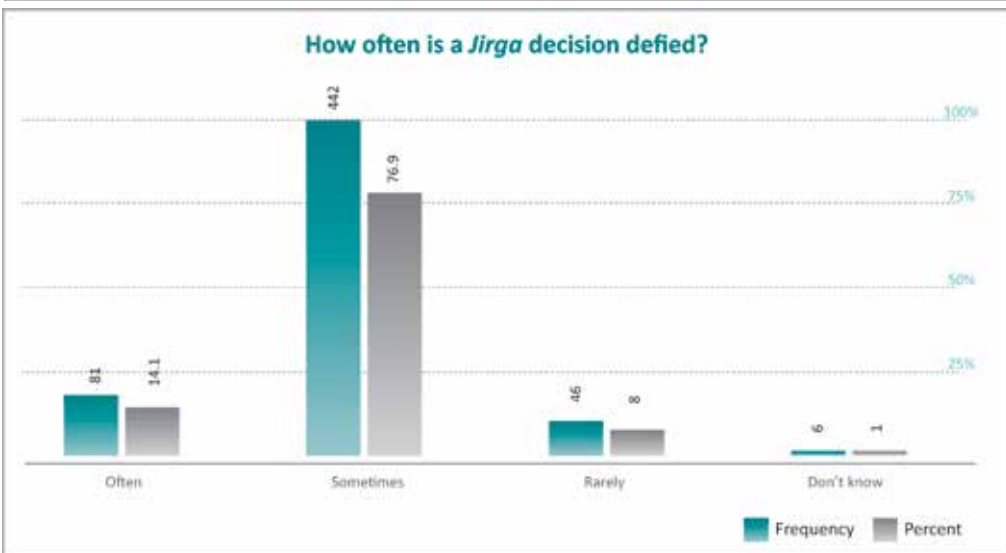
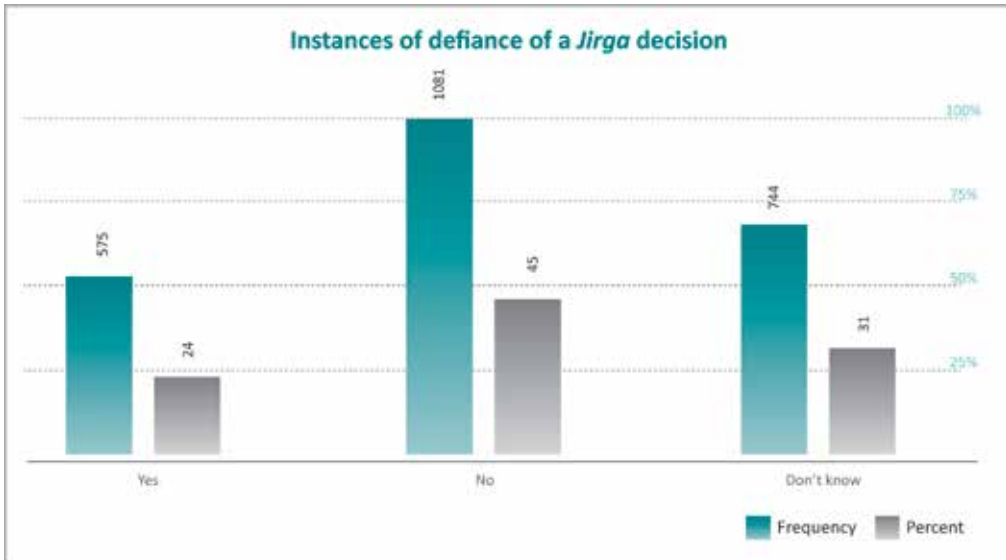
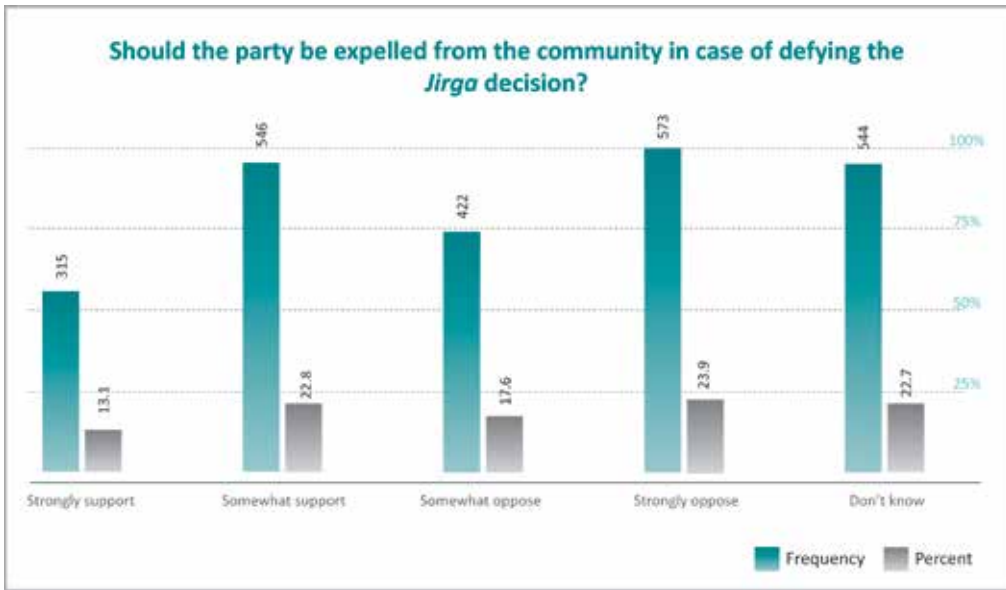
Female respondents' views were mixed and confusing. One group of respondents opposed the idea of punishing a disputing party by telling them to leave the village. However, some believed that it would be a good idea and a lesson for all villagers to avoid committing such crimes.

#### Survey Findings

When tested though the survey question, responses were mixed. A high number of respondents, 41.5%, opposed the idea while more than one-third, 35.9%, supported the idea. Close to a quarter did not know the answer.

#### Are there any instances of defiance of a Jirga decision?

Connected to the previous question, the survey wanted to gauge whether defiance of Jirga decisions is commonplace. Out of 2,400 respondents, a high number of respondents, 45%, shared that accused parties do not defy Jirga decisions while 24% thought the oppo-



site. A large number of respondents, 31%, did not know the answer.

**If yes, how often does this happen?**

The 575 respondents who confirmed that *Jirga* decisions are not followed by accused parties, were asked how often such instances happen. Out of 575 respondents, 76.9% thought that such instances happen sometimes while 14.1% believed that such instances happen often. Some 8% thought that such instances rarely happen, and 1% did not know the answer.

**Conclusion:**

The present report supports the proposition that legality is an attribute of the formal justice system, while its legitimacy amid Pakhtun communities is quite limited as evidenced by their negative perceptions of its ability to deliver just outcomes. By way of contrast, the *Jirga* is not formally recognised by law, but it is perceived as the more legitimate system by the Pakhtun population of KP, Balochistan, and FATA. While the FCR *Sarkari Jirga* (not to be confused with the community-based *Olas Jirga*) is convened under a system of rules inherited from the British colonial period, its processes, i.e. decision-making by a political agent, and its sanctions that include collective punishment, are

generally known to FATA residents. Moreover, it is backed by the force of law and coercive enforcement tools. Thus, by and large, it possesses legality. On the other hand, few respondents would identify FCR *Jirga* as capable of delivering justice. Alternatively, community-based dispute resolution processes are not subject to state rules. Also, their decisions cannot be legally enforced, and instead, rely on the commitment of community members who share a set of cultural values. However, this lack of legality for *Olas Jirga* has not undermined its legitimacy. Indeed, what sets the *Olas Jirga* apart from FCR *Jirga* are its timely decisions, limited costs, consistency with local notions of equity derived from customary laws, as well as the promotion of community harmony and stability through mediated settlements.

In the end, the present study puts forward a general finding, that while FATA residents are able to access both formal and informal, community-based dispute resolution processes to seek relief, it is due to compulsion in the former case, while in the latter, it is the result of the greater legitimacy of the forum and its processes in the eyes of its adherents that results in preference for the informal over the formal.



# CHAPTER: 11

## Way Forward



## WAY FORWARD

Due to numerous confusions and limitations connected with *Jirga* institutions, the *Jirga* has attracted criticism from civil society, Human Rights activists, and the media for perceived gaps that lead to the violation of Human Rights, especially those of women and children.<sup>181</sup> Hence, support for the *Jirga* in the 21<sup>st</sup> century is not appreciated much by modern society. It might be added, that the *Jirga* is misunderstood in the 21<sup>st</sup> century, but this research draws on the peoples opinions who form *Jirgas* and who use it as a traditional justice system.

The *Jirga* is a century's old and trusted institution rooted within the Pakhtun society.<sup>182</sup> As discussed in this report, the *Jirga* has several positive attributes that make it a legitimate justice dispensation institution in Pakhtun community despite its limitations. *Jirga* is not expensive, it is accessible to the poor, and delivers quick justice compared to the formal justice system.

On the other hand, the State's formal system itself has limits, which provide ample reasons for the people to turn to the *Jirga* as a means of justice dispensations.<sup>183</sup> The formal system is seen as corrupt, expensive, time consuming and not very accessible to poor and vulnerable groups.<sup>184</sup> In contrast, the informal system of *Jirga* in Pakhtun communities is mainly based on the Pakhtun code of conduct – Pakhtunwali - and its many dimensions - which include, the concept of collective defence of honour and prestige, the restoration of peace, and the maintenance of basic order.<sup>185</sup>

Furthermore, the recent militant threat in Pakistan has raised the importance of indigenous institutions.<sup>186</sup> The Pakhtun region has faced both internal and external conflict for centuries. However, the recent threat from militants is unprecedented that the local communities and the State machinery cannot address completely. Out of confusion or lack of political will, local Pakhtun indigenous or traditional institutions were overlooked in addressing the militant issue; they could have been used to minimise the militant's threat and to fill the vacuum created by the lack of trust on State institutions, developed over the years. People have developed grievances against the State for leaving them at the mercy of militants, especially in FATA and PATA and parts of Balochistan's Pakhtun areas.<sup>187</sup> However, lately, the militants' threat has led to realisation of the importance of the *Jirga* process in the Pakhtun areas of FATA, KP and Balochistan for reconciliation of the communities to return to peace.<sup>188</sup> Given this situation the State has to show interest in relying on traditional ways, which would mean that the *Jirga* would play a central role (on the part of the formal system) by helping the government institutions reconciliation and mediation, for peacebuilding.<sup>189</sup>

In order to respond to this new role, there is a dire need for reform in the *Jirga* system to bridge modernity with tradition. This survey was designed to document what 2,400 respondents thought about reform in the *Jirga* system and the support it will receive from the communities and State machinery across the Pakhtun areas in Pakistan.

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181) Interviews with Women Rights Activists in Peshawar and Quetta – April 2012

182) Interviews with Key Informants in Peshawar and Quetta – April 2012

183) Interviews with NGOs, lawyers and journalists, etc. in Peshawar and Quetta – April 2012

184) Interviews with Key Informants in KP and Balochistan – March and April 2012

185) Page 88. Pakistan: A Hard Country by Anatol Lieven, Penguin Publication 2011

186) Interviews with Key Informants in KP and Balochistan – March and April 2012

187 - 189) Interviews with Key Informants in Peshawar and Quetta – March and April 2012



This chapter focuses on respondents' views on how to reform the *Jirga* system so that it will be in compliance with international Human Rights standards and acceptable to the State of Pakistan under the Constitution of 1973.

### Integration of the *Jirga* into formal justice system

FGD respondents were very vocal in sharing their opinion in a qualified manner. The majority confirmed that if the *Jirga* were formalised or made part of the formal court system, then it would lose its credibility and people would not have faith in its judgments and process. However, we also saw that the younger generation was supportive of innovative ideas and wanted to bring certain reforms to bring the *Jirga* in compliance with international standards and the Constitution of Pakistan, while keeping its traditional essence in order to ensure people's ownership and respect for it.

The survey data shows respondents' confusion on the question of whether communities will support it if the *Jirga* is integrated into the State's formal system. Looking at the data, it is clear that respondents are divided. One quarter of the sample (25.6%) approved the idea while one-third (34%) rejected the idea. Surprisingly, 40.5% were indecisive and could not share their opinion.

In order for there to be gradual change in the role of the *Jirga* in becoming part of the formal system, a comprehensive education campaign

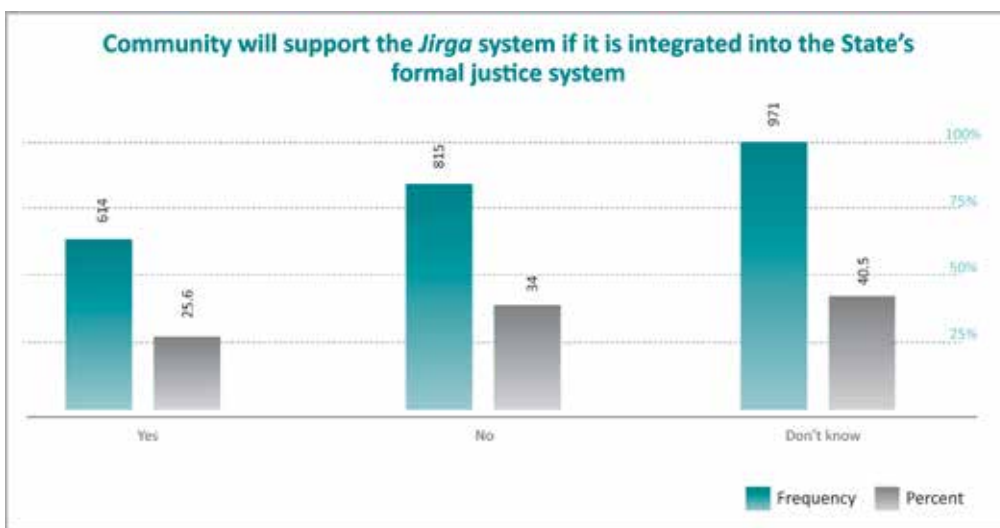
on the *Jirga*'s pros and cons is needed so that people can incorporate knowledge into practice and can then make choices before approaching any justice system.

### Recording or Transcribing *Jirga* decisions

It is perceived that *Jirga* decisions are based on the word of honour given by mediators and disputants, and that all such decisions are honoured. Also it is believed that its traditions are based on oral tradition. However, during the Focus Group Discussions and Key Informant Interviews, it was revealed that, generally, *Jirga* decisions are recorded and written especially in cases of land disputes, business deals, etc.<sup>190</sup> Due to population growth, erosion of local values, influence of money and material, people's psyche and mind set has changed considerably.<sup>191</sup> Therefore, lack of trust has compelled *Jirga* members to record decisions and proceedings in writing, signed by witnesses, so that no one can backout from their decision at the end.<sup>192</sup> In addition, if a party has to approach the formal system to get justice, then a written document is helpful and saves time.<sup>193</sup>

Let's examine how 2,400 male and female respondents reacted to the question of recording *Jirga* decisions.

Looking at the data, the majority of respondents (65.4%) agreed with the notion that *Jirga* decisions should be documented while only 16.6% disagreed. Some 18% were undecided.

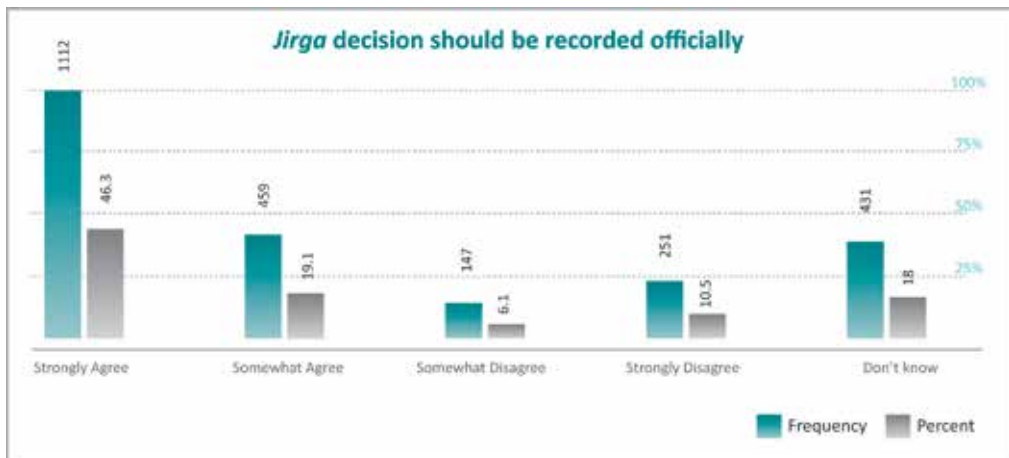


190) Interviews with *Jirgamaars* in KP and Balochistan, March-April 2012

191) Interview with Nawab Ayaz Jogezi, Quetta, Balochistan, 30th April 2012

192) Ibid

193) Interviews with *Jirgamaars* in KP and Balochistan, March-April 2012



The conclusion is quite clear; the people want *Jirga* decisions to be recorded.

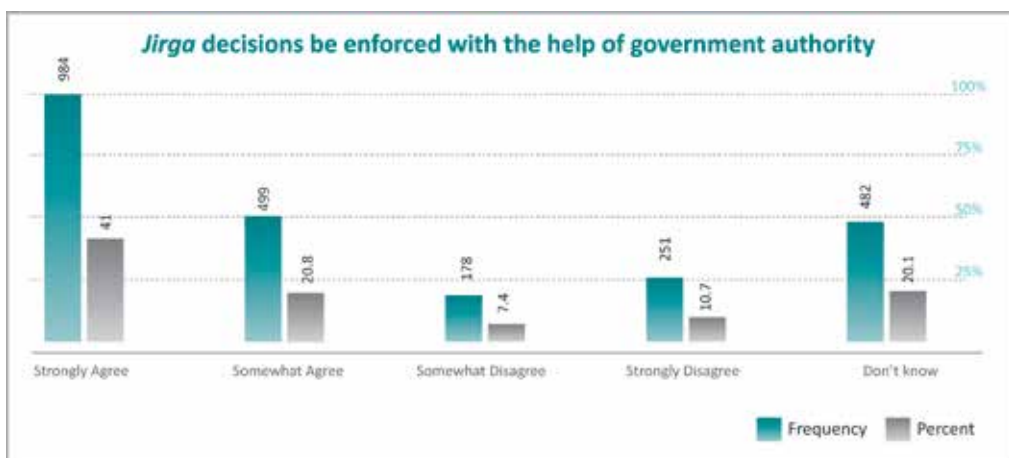
#### Jirga verdicts' official implementation

In FATA there is a strong tribal structure and social bonds, and, based on this solidarity, local decision makers can enforce *Jirga* decisions. Seldom are there instances when disputants disobeyed such decisions.<sup>194</sup> Furthermore, the *Jirga* is also a traditional way of accessing justice in FATA and decisions could also be enforced through the State's machinery. The case of *Jirgas* in KP and Balochistan is different; there is only social pressure to enforce *Jirga* decisions.<sup>195</sup> Disputants feel insecure when it comes to enforcement of *Jirga* decision.<sup>196</sup> There are instances in KP and Balochistan when the *Jirga* decisions have been dishonoured and disputants, sometime, ended up taking their cases to courts.<sup>197</sup>

The survey question determined what percentage of respondents of KP and Balochistan would agree/disagree on whether *Jirga* decisions should be enforced with the help of government authority. Majority (61.8%) agreed while only 18.1% disagreed. There is a considerable percentage of respondents, 20.1%, who did not know. Overall, the data conveys that people believe that the official government courts can be brought in to enforce *Jirga* decisions.

#### The right to appeal to the Courts against Jirga decisions

Since *Jirga* is not part of the State's judicial system therefore there is no such provision available for the appellant to access courts after the *Jirga* decision. Those who are not content with the *Jirga* decision access the courts and file a fresh case rather than submitting

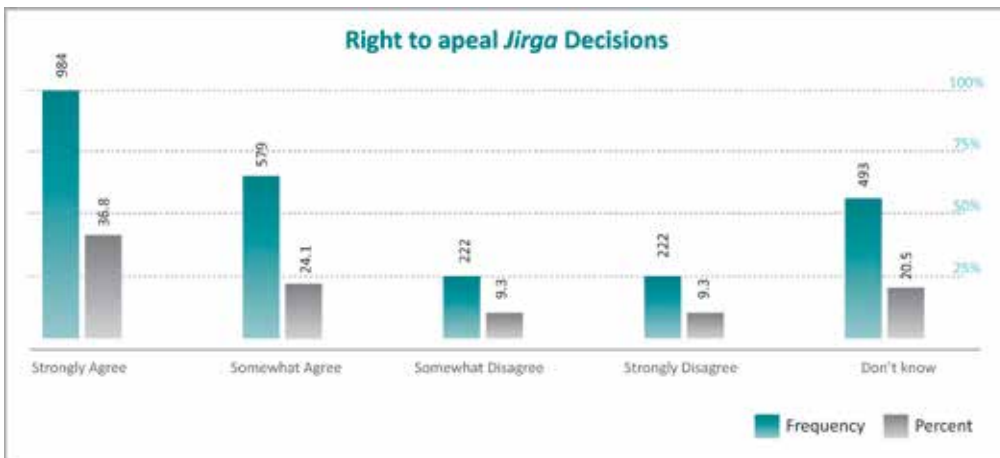


194) Interviews with Key Informants in FATA – January 2010

195) Interviews with Key Informants in KP and Balochistan, March-April 2012

196) Interviews with *Jirgamaars* in KP and Balochistan, March-April 2012

197) Interviews with *Jirgamaars* in KP and Balochistan, March-April 2012



an appeal. However, *Jirga* decisions, if documented, could help the applicant by providing some evidence when processing a case in the formal courts.<sup>198</sup> The survey question asked if disputants for a *Jirga* have the right to appeal against *Jirga* decisions. The majority (60.9%) agreed and thought that it would be good if the right to appeal were provided against *Jirga* decisions. Only 18.6% did not agree with this. Again, a fifth (20.5%) were undecided or did not know.

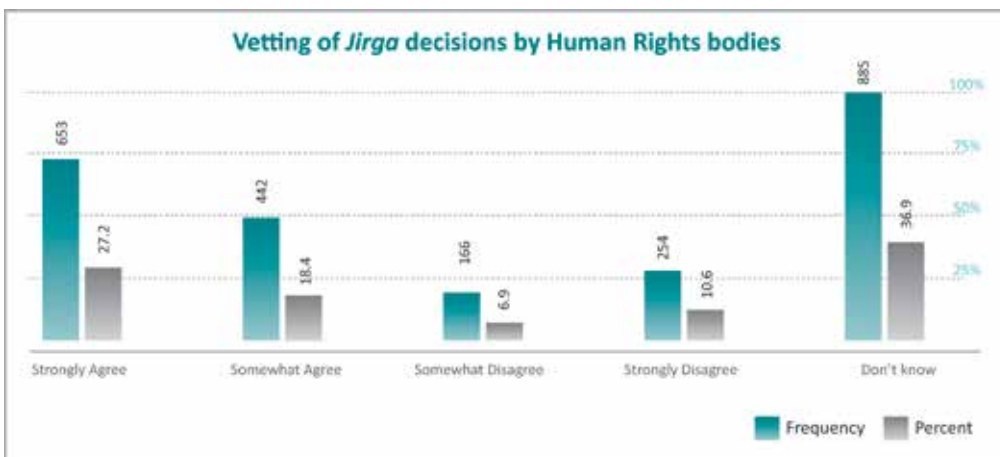
**Vetting of *Jirga* decisions by Human Rights bodies**

Generally, *Jirga* is perceived as an institution parallel to State’s judicial system, which threatens State’s authority.<sup>199</sup> It challenges the State’s ability to provide justice to all and has legitimised its existence due to numerous reasons.<sup>200</sup> However, at

the same time, the *Jirga* is perceived as a system that tends to violate Human Rights.<sup>201</sup>

Key Informants expressed that the *Jirga* is not in compliance with the Constitution of Pakistan and it tends to threaten the rule of law.<sup>202</sup>

Based on these opinions, the need to bring *Jirga* under some regulation is the need of the hour. Therefore, the survey asked the Pakhtun respondents’ approval on setting up a Human Rights Commission or entity, that should be mandated to scrutinise every *Jirga* decision before the *Jirga* announces it. According to the survey results shown in the figure above, a high number of respondents (45.6%) agreed while 17.5% did not agree. More than one-third (36.9%) of the respondents were not clear or did not know. The conclusion is that setting up an appropriate



198) Interview with Nawab Ayaz Jomezai, Quetta, Balochistan, 30th April 2012  
 199) Interviews with Human Rights and Women Activists, March-April 2012  
 200) Interview with Nawab Ayaz Jomezai, Quetta, Balochistan, 30th April 2012  
 201) Interviews with Human Rights and Women Activists, March-April 2012  
 202) Interviews with lawyers and administration in KP and Balochistan, March-April 2012

Human Rights body for reviewing of decisions would work and people will accept it.<sup>203</sup>

### Women inclusion as observers

Under the principles of Pakhtunwali, women in the tribal society are supposed to remain in the sanctity of their homes at all times. Therefore, when disputes arise, such as matrimonial and child custody cases, women are not aware of their rights and have no recourse to justice. If tribal women are allowed to sit in *Jirga* proceedings as observers, they will be able to gain knowledge regarding various tribal laws and principles of justice. This would be a significant step towards including the voice of women in the *Jirga* proceedings. Key informants alleged that there are certain *Jirgas* in Khyber Pakhtunkhwa and Balochistan where women are allowed to sit as observers. However, it is essential to advocate for this with *Nawabs* and *Maliks* (tribal leaders) in the region.

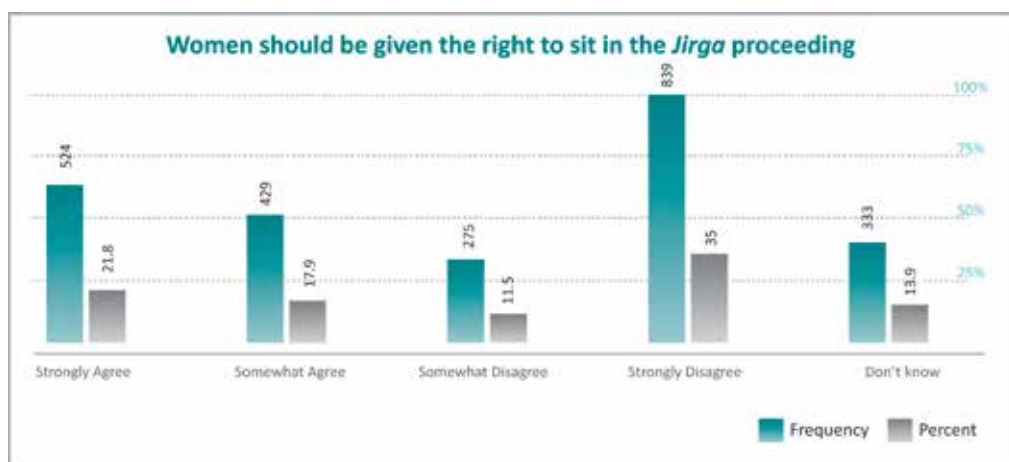
Respondents were asked whether women should be given the right to sit in the *Jirga* proceedings. The graph below shows that 39.7% agreed with the notion, including, 21.8% who strongly agreed and 17.9% who somewhat agreed. Whereas, 46.5% disagreed with the Statement, including, 35.0% who strongly disagreed and 11.5% who somewhat disagreed. The response is encouraging, as the Pakhtun tribal culture and the concept of *Pardah* (veil) does not allow the participation of women in the *Jirga* process as an observer alongside men. The 39.7% who agreed with the presence of women in *Jirgas* represents a change in the

local mindset which also may be attributed to the increase in the level of education and awareness in the region, it also illustrates the possibility to change culture through awareness and exposure to fundamental rights.

The cross tabulation of the data by gender, showed that a majority of the female respondents, 50% agreed and 42% disagreed, while only 28% of the male respondents agreed and 59% disagreed with the notion. This shows that Pakhtun women are willing to sit in the *Jirga* as observers, however, the men and the Pakhtun code are hindering this process. Therefore, it is essential to sensitize men on the fundamental rights of women through education and awareness.

### Women inclusion as decision-maker/*Jirga* member

The reality is that the *Jirga* members or decision-makers are all men. This gender bias has received criticism on the international and domestic fronts, because it deprives women of the right to participate and gain access to justice.<sup>204</sup> However, one woman in the FGD suggested that the representation of women in the *Jirga* system could be in three different capacities: 1) as a *Jirgamaar*, 2) as a party to the dispute, and 3) as an observer.<sup>205</sup> She explained that having female representation in the *Jirga* is possible, because, in her case, renowned tribal elders had asked her to visit their villages and convene their *Jirgas*. She believes that is because of the developmental work her organisation is undertaking in their areas and also the respect given to her old age.<sup>206</sup> Furthermore, she offered that people

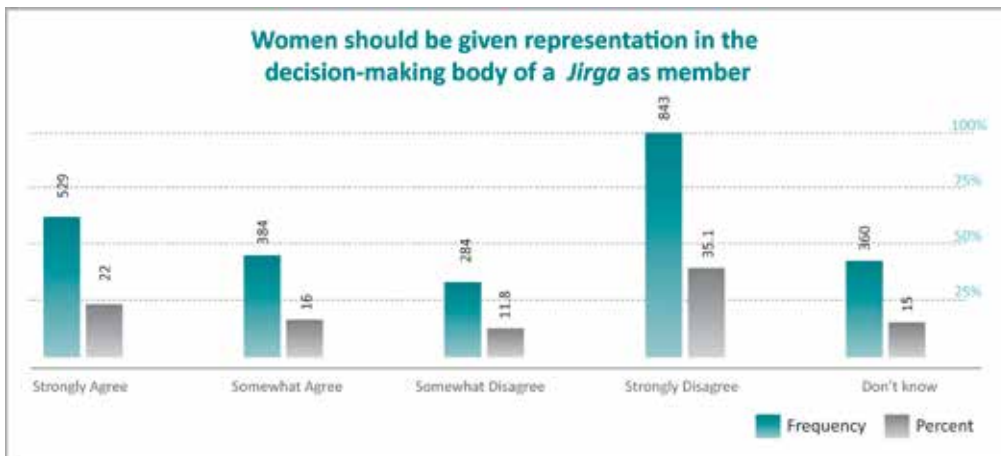


203) One would have to weigh this against the earlier findings that the people appreciated the speedy justice of the *Jirga* and just what would the addition of such a commission mean in terms of speedy justice.

204) Key Informant Interview, Mariam Bibi, Peshawar, 16 April 2012

205) Ibid

206) Women Elders are respected females in most cultures



in the Pakhtun belt are drowning in their sorrow and are no longer concerned whether their saviour is a man or a woman.<sup>207</sup> According to a prominent tribal leader in Balochistan, women should be asked about their basic rights. Indirect representation of women should be ensured in a *Jirga*, because without safeguarding the rights of women, it is not possible to reform this traditional justice system. He further explained that if a *Jirga* is held in his presence, women are given the opportunity to explain their views in any disputes related to them.<sup>208</sup>

After the focus group discussion the survey respondents were asked whether women should be given representation in the *Jirga* as a decision maker. In the graph given below are the results: 38% agreed, including 22% who strongly agree and 16% who somewhat agree, but 46.9% disagreed, including 35.1% who strongly disagree and 11.8% who somewhat disagree with the notion. The results illustrate a willingness to move towards inclusivity of women in the decision making process; but cultural and religious sensitivities are still strong and conservative.

The difference between male and female responses is quite revealing. When cross tabulated by gender it is found that of females, 49.3% agreed and 33.1% disagreed that women should be part of the *Jirga* process, but only 26.9% of the male respondents agreed and a majority (60.7%) disagreed with the idea of female participation. Therefore, there is a dire need to educate the people of Balochistan and Khyber Pakhtunkhwa.

#### **Inclusion of religious and ethnic minorities as observers in the *Jirga* proceedings**

Consultations with key stakeholders in the region deduced that minorities belonging to the Pakhtun region resolve their disputes amongst themselves and their cases are rarely heard by the tribal *Jirga*. However, in conflicts between a Pakhtun and religious or ethnic minorities, the *Jirga* usually supports the Pakhtun and justice is seldom served. Key informants were also of the opinion that in such cases, the social status of the disputant plays a significant role, as underprivileged and vulnerable segment is often discriminated against even by the police and formal administration.<sup>209</sup> Representing a different view, a local *Jirga* elder in Quetta said, the principles of justice are taken into account when resolving such disputes and both parties (the religious minority and the Pakhtun) are given an opportunity to plead their case in front of a *Jirga*.<sup>210</sup>

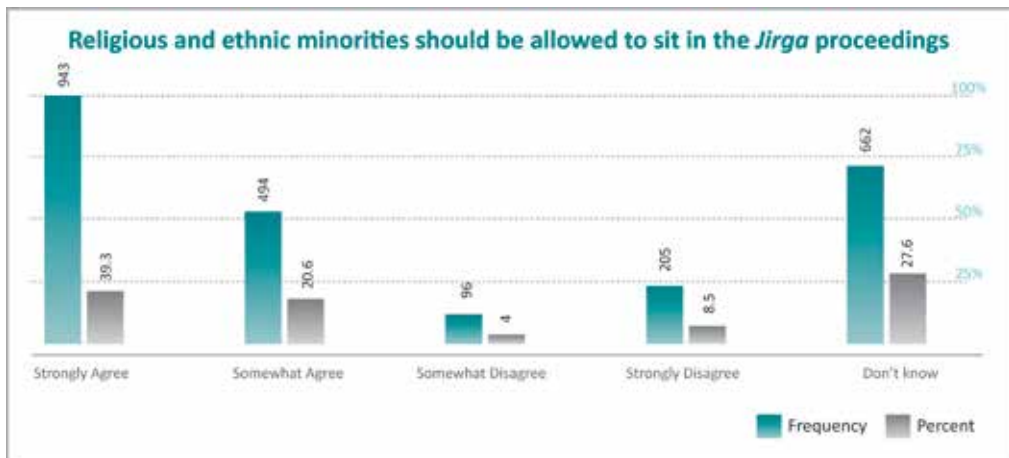
The data from the survey, see figure below, exemplifies a positive disposition because the majority of the respondents (59.9%) agreed, including 39.3% who strongly agreed and 20.6% who somewhat agreed. Whereas only 12.5% disagreed, including 8.5% who strongly disagreed and 4% who somewhat disagreed, with the notion that religious and ethnic minorities should be allowed to sit in the *Jirga* proceedings. Keeping in view the results, one can analyse that there is a potential for bringing reforms to the Pakhtun *Jirga* system by providing more space to the minorities. Involving minorities in the *Jirga* proceedings will also make the traditional justice system acceptable to all.

207) Key Informant Interview, Mariam Bibi, Peshawar, April 2012

208) Key Informant Interview, Nawab Ayaz Jogzair, Quetta, May 2012

209) Key Informant Interview, Khizer Hyat, Peshawar, April 2012

210) Key Informant Interview, Nadir Khan Achakzai, Quetta, May 2012



Cross tabulation of the data by the level of education illustrates that the more educated respondents (secondary school and higher) supported the inclusivity of minorities in the *Jirga* proceedings as compared to the respondents with only primary education or lesser education. This reaffirms the need for increased education in the region.

**Religious minorities should be given a fair chance to resolve their disputes according to their customs and religious beliefs**

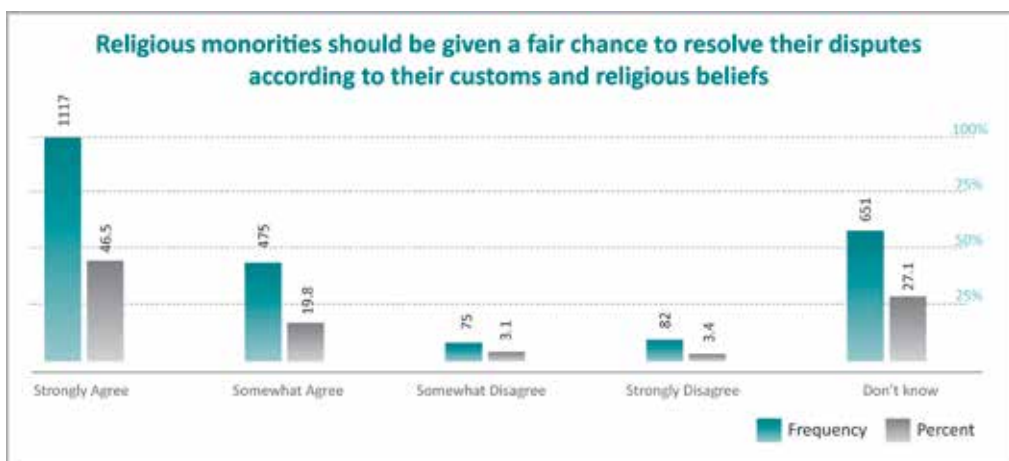
There is a consensus amongst all key informants that generally there is no interference with religious minorities resolving their disputes according to their own customs and religious beliefs. Even though there is not a significant composition of religious minorities in the Pakhtun belt of Balochistan and Khyber Pakhtunkhwa, they are still respected by the locals and are not discriminated against.<sup>211</sup>

The general perception of the respondents

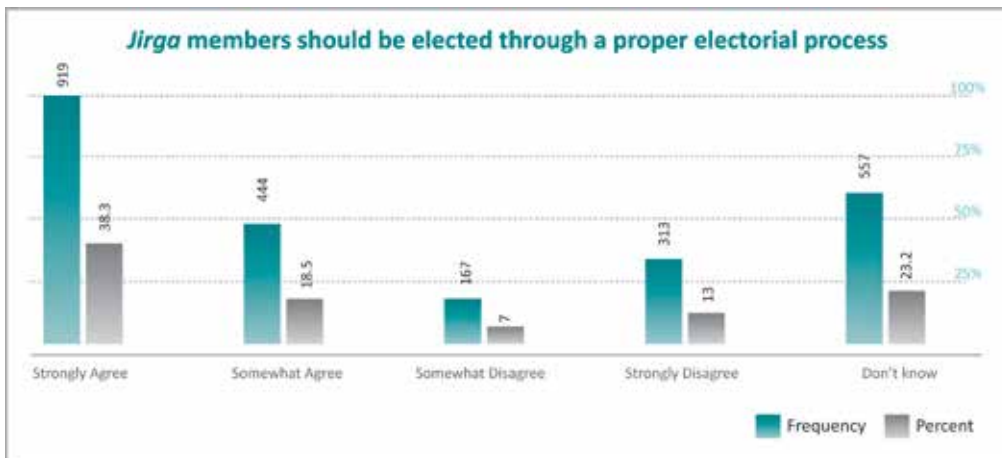
was the same as the Key Informants, that is, majority (66.3%) agreed, including 46.5% who strongly agreed and 19.8% somewhat agreed that religious minorities should be given a fair chance to resolve their disputes according to their customs and beliefs. Only 6.5%, including 3.4% who strongly disagreed and 3.1% who somewhat disagreed, with the notion that religious minorities should be given a fair chance to resolve their disputes according to their customs and religious beliefs.

**Election and not selection of *Jirga* members**

In the first chapter and in subsequent sections it has been explained how some notables can become *Jirga* members or *Jirgamaar* or *Jirgab-aaz*. There are several arguments that *Jirga* members should be elected. However, the *Jirga* institution is as old as Pakhtun society while the system of democracy is new and has been practiced in patches for the last few decades in Pakistan, including KP and Balochistan. *Jirga* members inherit their status from their fathers



211) Key Informant Interview, Esa Khan, Quetta, May 2012



and others gain this status due to their wisdom and knowledge of culture and history. Furthermore, some *Jirga* members reach this status due to their piety and welfare work that they become recognised for in their communities.

However, the younger generation has a different mindset since they are brought up in a democratic culture and practices, who are now trying to take this power away from their elders.<sup>212</sup>

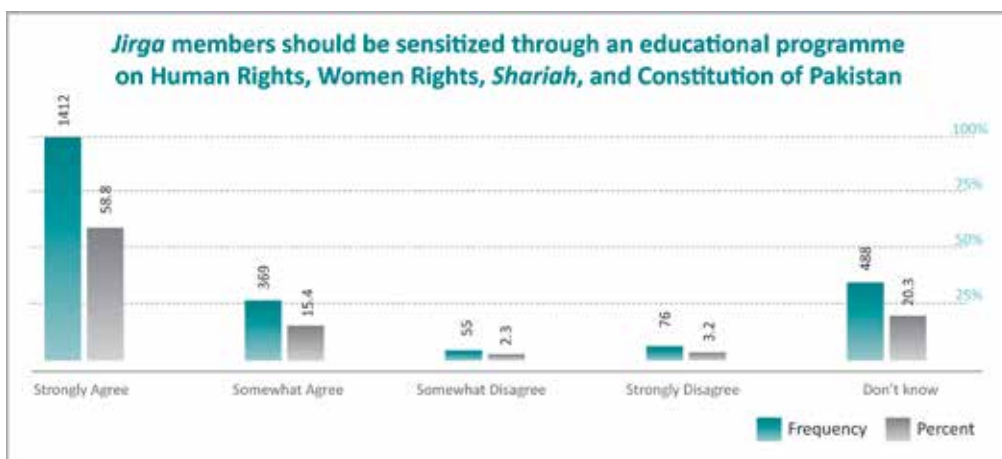
Through the survey we tried to document how many respondents approve of the idea of an election process to select *Jirga* members. The data seems to be quite supportive of the idea. The majority (56.8%) agreed that *Jirga* members should be elected rather than selected, and only 17% did not agree. The 23.2% group of respondents did not have an opinion or did not know.

The results are encouraging and if *Jirga* members are elected, it will show some level of

transparency and accountability. An electoral process would also bring credibility to the system, legitimise it, and, perhaps minimise the level of criticism against it.

#### Sensitising *Jirga* members to Human Rights, Women Rights, *Shariah*, and the Constitution of Pakistan

CAMP has been conducting training to sensitise *Jirga* elders on Human Rights, Women's Rights, *Shariah* and the Constitution of Pakistan since the second phase of its Rule of Law programme; it has trained over 400 tribal elders and *Mullahs* from FATA. The pre and post evaluation of the trainings found a substantial change in attitude towards the fundamental rights of women in the region. Many tribal elders accepted that rights of women were not taken into account when resolving conflicts through the *Jirga* due to ignorance; however they expressed their commitment to change and to ensure that women's rights are not infringed upon by *Jirga* decisions.



212) Interviews with Key Informants in KP and Balochistan, March-April 2012

Survey respondents were asked whether *Jirga* members should be sensitised on Human Rights, Women's Rights, *Shariah* and the Constitution of Pakistan. An overwhelming majority of the respondents (74.2%), including 58.8% who strongly agreed and 15.4% who somewhat agreed; while 5.5% disagreed, including 3.2% who strongly disagreed and 2.3% who somewhat agreed with the Statement that *Jirga* members should be sensitised through an educational programme on Human Rights, Women's Rights, *Shariah* and the Constitution of Pakistan. The result is encouraging, especially for the organisations that are working on educating and creating awareness regarding fundamental rights in the region.

Cross tabulation by gender demonstrates that the majority of females (66.4 %) and males (79%) supported the Statement, whereas only 8.5% males and 2.3% females disagreed with the notion. This shows the change in mindset towards education and awareness, and the fact that both genders accept the importance of education of fundamental rights in the region.

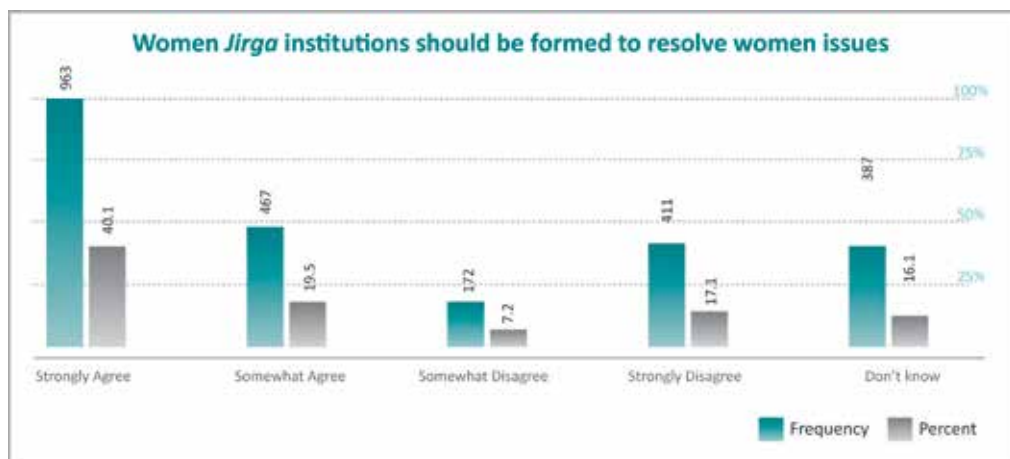
#### Women *Jirga* for women's issues

According to a Key Informant working in KP on women's rights, women belonging to rural Pakhtun areas prefer traditional system of dispute resolution because they do not have access to the formal courts. Furthermore, due to the harsh treatment of the local police, there exists an environment of fear when it comes to going to the police and local police stations. Pakhtuns in KP and FATA access local *Jirga*'s to resolve their conflicts. However, in a country with a formal

court system and police, alternate judicial systems merely exist because the formal systems do not provide justice.<sup>213</sup> People are being forced to access other instruments that dispense justice. In response to this, the State must ensure that the rule of law is extended to each and every corner of Pakistan so that people can rely on an effective and formal source of justice.<sup>214</sup> Given the support Pakhtun women give to the traditional justice system, it is essential to ensure that women have representation in the decision making process.<sup>215</sup> Another Key Informant was of the opinion that Pakhtun women can play a significant role in dispute resolution if a platform were provided to them. Therefore, women *Jirgas* can play an effective role in resolving women-related conflict in the region<sup>216</sup>.

The survey asked this question of respondents in KP and Balochistan, i.e., whether women *Jirga* institutions should be formed to resolve women related issues. The majority of the respondents (59.6%), including 40.1% who strongly agreed and 19.5% who somewhat agreed, believed that women *Jirga* institutions should be formed to resolve women's issues. 24.3% of the respondents were in disagreement with the notion, including 17.1% who strongly disagreed and 7.2% who somewhat disagreed.

Cross tabulation by gender showed that almost half (49.5%) of the male respondents agreed and 36.5% disagreed with forming women *Jirgas*; while a majority (69.1%) of the female respondents agreed and 12% disagreed with establishing women *Jirgas* to resolve women related disputes. The results demonstrate

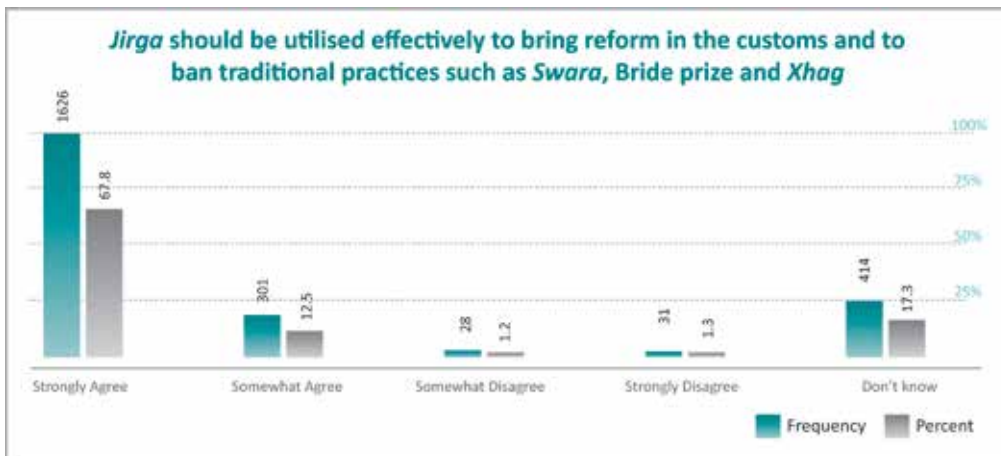


213) Key Informant Interview, Mariam Bibi Peshawar, April 2012

214) Interview with Zubaida Noor, Noor Education Trust, Peshawar, 17 April 2012

215) Key Informant Interview, Shabina Ayaz, Peshawar, April 2012

216) Key Informant Interview, Mariam Bibi Peshawar, April 2012



the reluctance of the male respondents to accept the need for women to have recourse (towards justice), whereas the females believe that in modern times and with progression of education in the region, Pakhtun women can advocate for themselves and their grievances in front of a decision making body.

#### CAMP Initiative to change *Jirga* customs

CAMP decided to take a significant step forward in the reform of the tribal justice system by holding *Jirgas* in every agency in FATA to address the core issue, which is criticised globally, 'violation of the rights of women' in the *Jirga* System. In order to address this extremely multifaceted task, CAMP gained the approval of the tribal Maliks to hold these local, agency-wise *Jirgas*, which included all the influential and prominent *Jirgamaars*, Maliks and traditional *Qazis* from every tribe of the region. In these local *Jirgas*, facilitated by CAMP, the tribal elders banned discriminatory traditional practices such as *Swara*, Bride Price and *Xhag*, which have deprived countless Pakhtun women of their fundamental Human Rights. These local *Jirgas* also decided the mode of punishment for these crimes according to the tribal code in their agency.

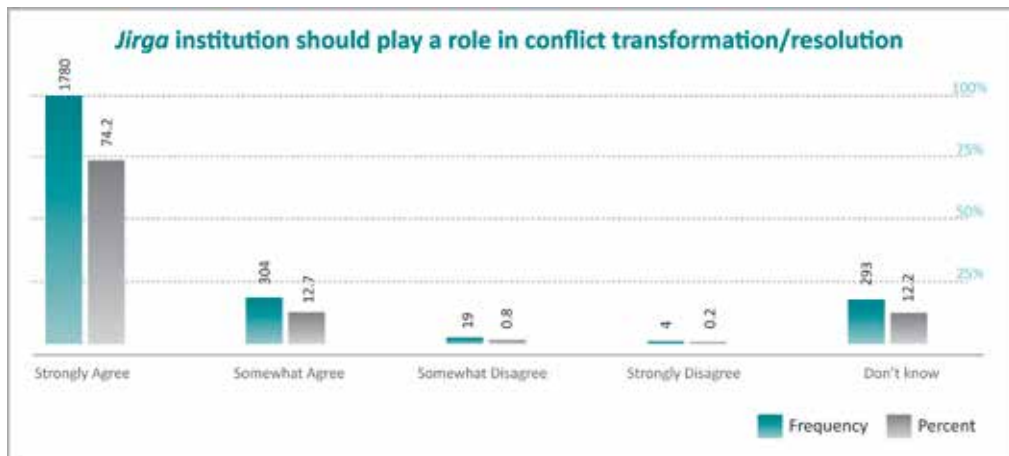
Based on the agency-wide *Jirgas*, CAMP organised, on the 29<sup>th</sup> of May 2012, a Grand *Jirga* in the Jinnah Convention Centre in Islamabad, where more than 800 *Jirga* members from all of the agencies of FATA announced a ban on these customary practices. The 800 *Jirgamaars* included tribal elders and traditional *Qazis* from all agencies and FRs of FATA. This case study exemplifies the power and influence of the *Jirga* to bring about reform in practices that deprive the women in Pakhtun society of their fundamental rights.

An overwhelming majority of the respondents (80.3%) agreed that the *Jirga* system can be utilised to bring positive reforms in customs, which included 67.8% who strongly agreed and 12.5% who somewhat agreed. Whereas, a mere 2.5% disagreed with this suggestion, including 1.3% who strongly disagreed and 1.2% who somewhat disagreed. The result demonstrates the significance of the institution of *Jirga* in Pakhtun culture even today and the role that it can play in bringing positive change in local customs. Therefore, in order to strengthen and reform the tribal code and customs, it is essential to engage the *Jirga* in this process.

Cross tabulation by gender exemplifies that both male (81.7%) and female (78.9%) respondents believed that the *Jirga* institution should be utilised to reform tribal customs. Conversely, 3.8% of the male and 1.1% of the female respondents were against the notion. The acceptance of this use of the *Jirga* format portrays the social acceptability of a justice mechanism by both genders that can work towards bringing much needed social change in the region.

#### Role of *Jirga* in conflict transformation/resolution

In the conflict areas of FATA, KP and Balochistan, *Jirga* could play a role in reconciling warlords and warring communities. Historically, *Jirga* has been very effective in resolving long-standing disputes and has helped reconcile quarrelling families and tribes, thus restoring peace. However, the magnitude of the atrocities that militant groups have committed in the region in the name of *Jihad*, has left the informal justice system helpless and ineffective. Under these circumstances, *Jirgas* are unable to satisfy the anger of the victims' families and communities who were terrorised; after the expulsion of the



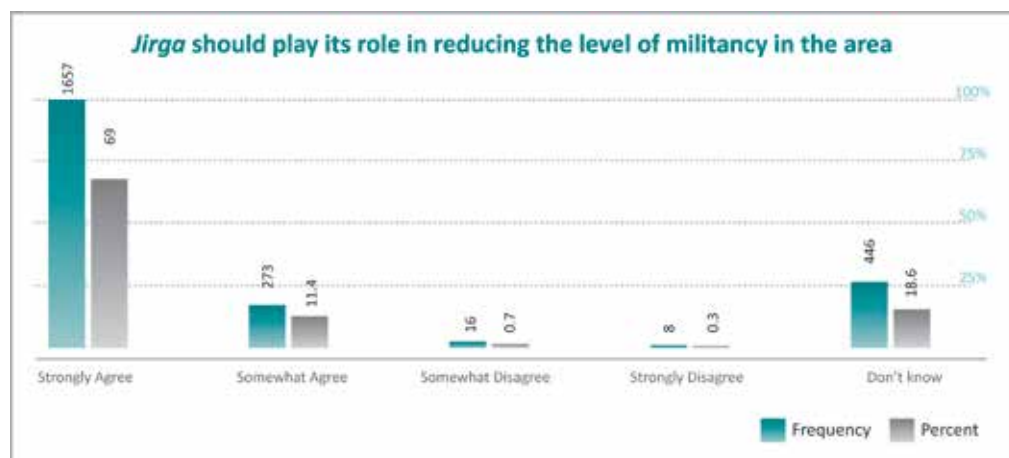
Taliban from power in Afghanistan and the subsequent US war on terror after 9/11. Those who only supported militants politically or ideologically and did not take part in the actual armed fight may have a chance to come back and be reunited in their communities.<sup>217</sup> However, for those who are fighting and have committed gross criminal acts and atrocities, it would be very difficult to be reintegrated into the community.<sup>218</sup> Nonetheless, there should be some solution to this problem and it is perceived that *Jirga* could play a role in reconciliation and conflict transformation.<sup>219</sup>

The researchers wanted to seek the respondents' views on the *Jirgas* role in conflict resolution. The survey result for this question is encouraging when an overwhelming majority (86.9%) agreed with the Statement that *Jirga* should play its role in conflict transformation

while 1% did not agree, whereas, 12.2% did not know.

After the successful military takeover of Swat and Buner, the government of KP had formed *Aman* (peace) *Jirgas*. The *Aman Jirga* itself is involved in raising armed militia against militants, which in turn raises the risk for civil war or conflict between two communities. This could lead to a prolonged conflict.

Because the *Jirga* is an old tradition, which has evolved through time and remained in its original form, any effort to change its form or spirit would be a mistake.<sup>220</sup> Ownership of the *Jirga* by the local people in its original form is important; however, its mandate could be expanded. The role of *Jirga* has always been conflict resolution and peace building and it should remain so in the



217) Interviews with Key Informants in KP and Balochistan, March-April 2012

218) Ibid

219) Ibid

220) Interviews with Key Informants in KP and Balochistan, March-April 2012

current situation. The government should patronise the *Jirga*, however it should not be influenced by politics.

### **Role of *Jirga* in reducing militancy**

Key informants were confident in arguing that *Jirgas* have always played a role in reducing armed violence within Pakhtun communities and could have played its role in reducing militancy. However, the militant groups knew the strength of the *Jirga* and therefore they inflicted severe blows to this institution by targeting well known tribal elders and bombing a few *Jirga* proceedings. This may have weakened this *Jirga* temporarily because, the *Jirga* tradition contains strong cultural roots and a long history of survival. Therefore it will survive through this difficult situation.<sup>221</sup>

The survey asked the respondents whether *Jirgas* could play a role in reducing militancy in Pakhtun areas. The results are very clear, eight out of ten respondents agreed with the Statement while just 1% disagreed. These findings show the Pakhtuns' strong belief in the system for reducing militancy in their areas, if given a chance.

### **Conclusion**

The way forward is clear. The findings of this research on systems of justice are encouraging, but questions have been raised too. One thing which is very clear from the research findings is that *Jirga* needs to be reformed while leaving it as an informal justice dispensation and mediation institution.

The findings indicate that there is support for bringing change in the *Jirga* system. Men are seen to be supportive of the inclusion of women and minorities and respondents have shown their willingness to bring in the element of Human Rights, women's rights and *Shariah* while bringing *Jirgas* into compliance with the Constitution of Pakistan and international Human Rights standards. In addition, the role of *Jirga* in bringing peace to the region is being supported and recommended to the government of Pakistan.

The Pakhtun have also shown their resolve in keeping the system in its original form – owning it as a traditional dispute resolution system. Integration of the *Jirga* into the formal justice system is not supported much and *Jirga* implementation through official means is also not supported by majority.

Another surprising aspect of Pakhtun opinion is their overwhelming agreement on utilising *Jirgas* to change unjust customs in their area. This is something CAMP has applied when convincing tribal elders to ban certain bad practices against women's rights in FATA .

The overall results are very encouraging and there is sufficient evidence for the policy makers to take steps in bringing reforms in FATA through educational programmes, providing incentives to the *Jirga* institution and assisting it to come into comply with the laws of Pakistan and International Human Rights standards.

221) Ibid

**RESEARCH  
METHODOLOGY AND  
SAMPLE PLAN**

## RESEARCH METHODOLOGY AND SAMPLE PLAN

### Introduction

The focus of the “*Understanding Justice System of Khyber Pakhtunkhwa, FATA & Balochistan the Pakhtun Perspective*” research is the opinion of Pakhtun people living in Balochistan and KP, with regard to the systems of justice in those Provinces. In 2010 similar research was conducted among the Pakhtuns in FATA. In this report comparisons between these provinces and FATA will be presented.

The report is based on both qualitative and quantitative data. For the qualitative information, 24 focus-group discussions (half male and half female) and 60 key informant interviews were conducted to gather opinions. Minutes were recorded, analysed and utilised to write this report. Because the FGDs were used to inform the design of the final survey questionnaire, not all of the questions in the survey were asked or discussed in the focus groups. Background and historical material used in the report came from a review of historical books, newspapers, reports, articles, journals, and the experience from CAMP’s programmes.

The quantitative data was collected through structured questionnaires. The objective was to sample enough adult males and females, urban and rural, to ascertain their opinion on key issues related to *Jirgas* and the system of justice for the people of KP and Balochistan with a 95% confidence and interval of 2%. Because gender plays such an important role in public opinion, equal numbers of men and women interviewed at all levels of community hierarchy, that is, in each village, community and urban neighborhood in eight districts of KP and four districts of Balochistan among Pakhtun and non Baloch

population. The sample goal was 2,400 males and females, and to accomplish that, using a trustworthy system of substitution, over 3,600 sample contacts were made. Although there may be slightly unequal proportion of males and females in each district due to seasonal migration and immigration of males, plus the cultural tendency to keep women away from work, an exact sample based on gender is not possible because current statistics are not available. It is assumed that the unknown deviation from the actual male/female proportion is slight and that it will not cause doubt about the conclusions and descriptive statistics herein.

### Research Methods and Instruments

#### Qualitative

##### Focus-group discussions (FGDs)

The organisation of the 24 focus-groups, as a qualitative research tool, was planned to document the opinion of key informants. All sections of the KP and Balochistan society were included in these discussions. Participants were chosen so that they would have diverse political, social, technical and religious backgrounds. They were also chosen because they were respected people within their circles. The technique was to provide all of the informants with substantial opportunity to express their viewpoints so that they would help provide informed and representative perspectives on key issues related to the Pakhtun *Jirga* in KP and Balochistan. An average of nine participants attended each FGD. A total of 24 FGDs were held as per the following plan:

S.#	District	Province	Male FGD	Female FGD
1.	Peshawar	KP	05-May-12	05-May-12
2.	Swat	KP	04-May-12	04-May-12
3.	Swabi	KP	30-Apr-12	30-Apr-12
4.	Charsadda	KP	30-Apr-12	30-Apr-12
5.	D.I. Khan	KP	02-May-12	02-May-12
6.	Dir Lower	KP	05-May-12	05-May-12
7.	Buner	KP	02-May-12	02-May-12
8.	Batagram	KP	04-May-12	04-May-12
9.	Quetta	Balochistan	07-May-12	07-May-12
10.	Loralai	Balochistan	08-May-12	08-May-12
11.	Qilla Abdullah	Balochistan	09-May-12	09-May-12
12.	Zhob	Balochistan	11-May-12	11-May-12

### Key Informant Interviews

60 key informant interviews (KIIs) were conducted in 12 districts representative of the two provinces to inform and complement data collected in the FGD and the quantitative surveys. The purpose of the key informant interviews was to collect information from a wide range of people—community leaders or elders, lawyers, religious leaders, teachers and civil society professionals who have firsthand knowledge about the community and *Jirgas* in general. A total of 60 key informant interviews were conducted in KP and Balochistan Province as per the following plan.

### Desk review

To understand historical background of the people and the area; facts about the governance system of KP and Balochistan, constitutional standing of the two provinces; and formal and informal justice systems in KP and Balochistan a desk review was conducted using books, newspapers, reports, articles, journals, and CAMP's experience in prior research and project implementation.

Themes for the qualitative discussions (FGDs) and Key Informant Interviews (KIIs)

The following themes were used to focus the interviews on the research subject: Awareness of formal and informal justice systems; conflict

S.#	District	Province	Community Elder	Lawyer	Religious Leader	Teacher	Civil Society Member
1.	Peshawar	KP	1	1	1	1	1
2.	Swat	KP	1	1	1	1	1
3.	Swabi	KP	1	1	1	1	1
4.	Charsadda	KP	1	1	1	1	1
5.	D.I. Khan	KP	1	1	1	1	1
6.	Dir Lower	KP	1	1	1	1	1
7.	Buner	KP	1	1	1	1	1
8.	Batagram	KP	1	1	1	1	1
9.	Quetta	Balochistan	1	1	1	1	1
10.	Loralai	Balochistan	1	1	1	1	1
11.	Qilla Abdullah	Balochistan	1	1	1	1	1
12.	Zhob	Balochistan	1	1	1	1	1
<b>Total</b>			<b>12</b>	<b>12</b>	<b>12</b>	<b>12</b>	<b>12</b>

dynamics and access to justice; legality and legitimacy of formal and informal justice systems; hearings and proceedings used in the informal justice system; hearings and proceedings used in *Jirgas*; implementation of *Jirga* verdicts; the state of fundamental rights in the *Jirga* system; the state of rights of children and youth in the *Jirga* system; the state of rights of women in the *Jirga* system and *Swara*; and the inclusion of women in the *Swara* decision-making process.

### Quantitative

In addition to a well structured questionnaire, the key to successful social research is in the sampling frame. If well designed, then the population and segments will be represented by a manageable number of interviews. The objective was to sample 12 districts of KP and Balochistan with a sample size so that the margin of error would be small. The desired margin of error for the whole of KP and the Pakhtun areas of Balochistan was 2%. This margin of error, in reference to the selected 12 districts with an estimated population of approximately

Method (PSSM), and to ensure a representative sample for the entire population as well as each district is as per the following table:

Thus, based on the use of small samples per district, it is possible to make inferences about the sampled population which is, in this case, the people of KP and the Pakhtuns of Balochistan within the planned margin of error.

### Margin of Error

The overall margin of error with all interviews pooled under “people of KP and the Pakhtun of Balochistan” for single questions of a “Yes/No” nature was planned to not exceed 2% at the 95% confidence level. That is, if a random sample were drawn 100 times, then in 95% of the cases, one would expect there to be 2% plus or minus difference around a sample mean. That being said, once one begins to partition the data set and look at specific districts of KP or Balochistan, then, within those units, the margin of error increases because of the smaller population size and sample size. The right-hand

District	Province	Population (1998 Census)	Sample Size	Margin of Error
Buner	KP	506048	129	8.6
Batagram	KP	307278	78	11.1
Charsadda	KP	1022364	260	6.1
D.I.Khan	KP	852995	218	6.6
Dir Lower	KP	717649	183	7.2
Peshawar	KP	2026851	516	4.3
Swabi	KP	1026804	262	6.1
Swat	KP	1257602	320	5.5
<b>8-Districts</b>	KP	<b>7717591</b>	<b>1966</b>	2.2
Lora lai	Balochistan	297555	76	11.2
Qilla Abdullah	Balochistan	370269	94	10.1
Quetta	Balochistan	759941	194	7.0
Zhob	Balochistan	275142	70	11.7
<b>4-Districts</b>	Balochistan	<b>1702907</b>	<b>434</b>	4.7
<b>12-Districts</b>		<b>9420498</b>	<b>2400</b>	<b>2.0</b>

9.42 million, called for a sample of 2,400 interviews.

The sample size of 2400 was drawn from the 12 districts of KP and Balochistan. The sample per district used Proportionate Stratified Sampling

column in the table above summarizes the margin of error by district.

### Sampling Plan and Field Implementation

Accessibility

222) Note that for smaller samples of smaller populations, the margin of error increases.

223) Current population statistics for KPK and Balochistan are not available; it was assumed that the 1998 census figures would be accurate enough.

At the beginning of this project, CAMP gathered information on the accessible areas within KP and Balochistan by making a list of villages, towns and Tehsils that were not accessible because of security concerns, government imposed curfews, and/or extreme weather conditions. That list was removed from the master list of approximately 1180 villages and urban locations of the master list across KP and Balochistan, 270 (23%) of which were located in inaccessible areas. The 360 villages and urban locations sampled came from the remaining 910 villages and urban locations.

Two stages were used to select the sample. In the first stage, CAMP randomly selected among the accessible tehsils. In the second stage CAMP randomly selected 360 villages/towns in the tehsils that were selected in the first stage. In addition to the evenly divided male to female ratio, the second stage was planned

limited due to the conflict and the threat of violence. Thus, the sample was biased towards more peaceful areas of each district of KP and Balochistan in general. One would expect, therefore, that by not being able to include people in the conflict areas that there is a bias in the conclusions. Unfortunately, except for the former IDPs, we do not know which way the opinion of those areas would swing the results. Inaccessible villages totalled 23% of the approximately 1180 villages/towns in KP and Balochistan. Unfortunately, the characteristics of those unsampled villages are not known, but one could assume that they were the more rural and remote villages and that would change the demographics and cultural perspective of the survey. We do not know how the practice of *Jirga* and the resulting perception of the process of justice are influenced in the context of conflict.

District	Province	Sampling frame		
		Total	Rural	Urban
Buner	KP	129	65	64
Batagram	KP	78	39	39
Charsadda	KP	260	130	130
Dera Ismail Khan	KP	218	109	109
Dir Lower	KP	183	91	91
Peshawar	KP	516	258	258
Sawabi	KP	262	131	131
Swat	KP	320	160	160
Lora lai	Balochistan	76	38	38
Qilla Abdullah	Balochistan	94	47	47
Quetta	Balochistan	194	97	97
Zhob	Balochistan	70	35	35
<b>12-Districts</b>		<b>2400</b>	<b>1200</b>	<b>1200</b>

so that both urban and rural locations were sampled 50/50 and not according to the rural/urban population distribution.

In each village and urban location, 5 interviews of males and females were conducted. Because of the culture of the region female enumerators interviewed women, and male enumerators interviewed men.

The resulting sampling frame is shown in the following table:

**Bias due to Inaccessibility:**

As pointed out in the description of the selection of villages, access to all villages was

**SELECTION OF INTERVIEWEES:**

Method of selecting starting points

In villages, the survey universe was divided into four areas i.e. two for male enumerators and two for female enumerators. In each area, two starting points were selected by male and two by female enumerators. Male and female enumerators interviewed three respondents from one point and two from the other point. These starting points were local landmarks such as *Hujra* of a prominent Malik, popular shops, mosque, *Imam Bargah* of *Shia* community, schools and hospitals, etc. From each point, the enumerators (both male and female) would in-



interview five respondents. In urban city or town, five respondents, male or female were interviewed with two starting points for each urban location. In the city or town, male and female enumerators were assigned different urban locations for interviewing respondents.

After the selection of the starting points, the male enumerators selected a household on their left hand while female enumerators selected a household on their right hand. In some areas where the houses were scattered and this rule could not be applied precisely, the survey enumerators made note of the difficulty on the contact sheet.

#### **Bias due to “Starting Point” Methodology:**

As stated above, the starting points in each village/town were local landmarks such as *Hujra* of a prominent Malik, popular shops, and mosque, *Imam Bargah* in *Shia* communities, schools and hospitals. From each point the enumerators (both male and female) would interview five respondents by counting off every third door or compound. This approach biased the sample toward the centre of villages. Typically, the wealthy or more established families are located at these locations (for example, the *Hujra*) or in close proximity. These would be the more urban and educated citizens of the community and their status probably influences statistics such as literacy, the use of media and educational status when compared to a general population in those same villages and, of course, other parts of Pakistan.

#### **Method of respondent selection**

Before selecting the interviewees, the enumerators made sure that the respondents were 18 years old or above, that they were Pakistani nationals belonging to KP and Balochistan, and were from the district and from that particular village or urban location. The survey enumerators also ensured that the respondents had not participated in any survey in the last six months.

#### **Guidelines for replacing respondents (substitution)**

During the respondents’ selection, if a desired respondent was not available or refused to be interviewed, the enumerator would try three times to interview the designated sampled household. If the interview was refused or the three attempts did not work, then the enumerator would skip three houses and knock at the fourth house for a substitute.

The substitution system was a crucial part of this

research. As is shown in the final table of this annex, in order to achieve the sample of 2,400 interviewees, 3,614 contacts had to be made for various reasons, while 1,208 of the randomly selected interviewees did not meet the criteria.

In summary, the overall sampling design was robust and limited the margin of error for KP and Pakhtun areas of Balochistan statistics. When specific districts are noted, the margin of error in the table above must be considered. Overall, the urban and accessibility biases must be kept in mind when reviewing the findings.

#### **Questionnaire**

In 2012, CAMP used a structured questionnaire with both open and close response possibilities to replicate the methodology used for 2011 *Jirga* Perception Survey in FATA. After consultation with the donor, the previous questionnaires were revised for use in the 2012 *Jirga* Perception Survey in KP and Balochistan.

#### **Interviewer training**

Prior to conducting the survey, CAMP enumerators were trained by independent consultants, under the supervision of CAMP senior management who observed the training and pre-test interviews. The training for KP field enumerators and supervisors on the quantitative survey tool, methodology and pre-testing was conducted on 02-03 April 2012 and for Balochistan was conducted on 12-13 April 2012.

The purpose of the pre-testing was to:

- Determine the length of time of the interview
- Check questionnaire content
- Check the skipping and coding patterns
- Correct and improve translation

The pre-tests were conducted with adult Pakistani males and females aged 18 and above in the Pakhtun community of Islamabad suburbs on 4 April 2012. The average time of the interview during the pre-tests was 50 minutes. The minimum time taken to complete the interview was 40 minutes while the maximum time taken to complete the interview was 60 minutes. Hence, the general understanding of the enumerators on the questionnaire was found to be adequate and satisfactory. The enumerators were able to handle the questionnaire well and they read the questions to the respondents as written on the questionnaire without introduction of bias. Enumerators were also able to comply with

the field methodology for data collection. Their understanding of the house skipping pattern and following the left hand/right hand rule was also at par. The supervisors were able to manage the field supervision through different checking methods. Feedback related to the substance and structure of the questionnaire was shared with the senior management of CAMP.

#### Data entry and cleaning

Upon the completion of the survey, CAMP did the data entry of the 2400 questionnaires using a database entry program. The data was then checked and cleaned using SPSS.

#### Survey Management and Monitoring

The CAMP Project Coordinator (PC) coordinated the survey with the Survey Manager (SM), based in the Peshawar regional office. CAMP's PC and SM coordinated the initial training of the enumerators, the pre-tests, and the field implementation. During the implementation of the survey, CAMP's head office regularly followed up with the PC and his SM at CAMP's regional office in Peshawar. The regional office, in turn, coordinated closely with the field teams to monitor the progress of the survey as well as to make sure that the survey and sampling plan were being implemented properly.

#### Description of field team

1. The enumerators were from the areas in which they conducted interviews.
2. The content of the questionnaire focused mainly on Pakhtun *Jirga*, and

respondents appeared willing and happy to participate in this study.

3. Because the sampling plan was based on the feedback received from the field teams, the areas where these interviews took place were relatively safe and accessible for the enumerators.

#### Back-checking and method of contact

The table below provides a breakdown of the number of questionnaires back-checked per agency. Back-checking was done by CAMP's five field offices in FATA as well as from the CAMP regional office in Peshawar. The following table is a summary by type of back-checking derived from the contact sheets used by the enumerators:

Back-checking of the data collection process was done through different methods. 8.2% of the total interviews were personally observed by the supervisors during the interviews, 7.0% were back-checked by the supervisors during data collection process by revisiting the villages and confirming the respondents, their family members, or locals, and 6.1% of the interviews were back-checked and confirmed by telephone contacts from the CAMP regional office in Peshawar. A total of 21.3% of the interviews were back-checked for quality control. All the back checked interviews were confirmed by the respondents. This confirm the validity of the interviews that were conducted.

#### Contact Sheet and Response Rate:

Successful Interviews / Successful Contact as per Specification

District	Sample	Back Checked Personally	Back Checked on Telephone	Accompaniments	Total Interviews with Quality Control
Swat	320	19	20	34	73
Swabi	262	10	10	36	56
Peshawar	516	21	56	16	93
Charsadda	260	13	6	12	31
Batagram	78	7	6	0	13
DI Khan	218	16	5	35	56
Buner	129	5	4	4	13
Dir Lower	183	13	0	11	24
Qilla Abdullah	94	16	8	8	32
Loralai	76	10	9	15	34
Zhob	70	13	7	10	30
Quetta	194	25	15	15	55
<b>Total</b>	<b>2400</b>	<b>168</b>	<b>146</b>	<b>196</b>	<b>510</b>
<b>Percentage</b>		<b>7.0</b>	<b>6.1</b>	<b>8.2</b>	<b>21.3</b>

### Conclusion

The methods selected produced both the quantitative and the qualitative information desired for ascertaining the opinions of the people of KP and Pakhtun areas of Balochistan. Although compromises or assumptions had to be made due to a lack of current statistics and also because of the accessibility issue, the sampling frame was executed and this provided the confidence intervals and margin of error desired. When interpreting the results,

it is important to keep the accessibility and the starting point biases in mind. The knowledge of bias is crucial to the rational interpretation of the apparent opinions; it is not a weakness such as hidden bias.

S. #	District	Sample Size	No Response/ Door Locked	Refused to Cooperate	Age Not Re- quired	Gender Not Required	Nationality Not Required	Interrupted Interview	Successful Interview	Total Contacts
1.	Swat	320	84	59	46	17	6	3	320	535
2.	Swabi	262	33	21	10	6	0	1	262	333
3.	Peshawar	516	109	92	39	58	26	1	516	841
4.	Charsadda	260	7	8	6	6	4	0	260	291
5.	Batagram	78	0	14	1	0	1	2	78	96
6.	D I Khan	218	11	69	7	18	11	13	218	347
7.	Buner	129	46	45	5	3	0	0	129	228
8.	Dir Lower	183	11	9	12	11	3	1	183	230
9.	Quetta	194	19	47	38	10	32	1	194	341
10.	Qilla Abdullah	94	9	16	2	2	0	3	94	126
11.	Lora Lai	76	19	16	2	16	7	0	76	136
12.	Zhob	70	4	13	13	0	4	0	76	110
		<b>2400</b>	<b>352</b>	<b>409</b>	<b>181</b>	<b>147</b>	<b>94</b>	<b>25</b>	<b>2406</b>	<b>3614</b>
<b>Percentage</b>			<b>9.7</b>	<b>11.3</b>	<b>5.0</b>	<b>4.1</b>	<b>2.6</b>	<b>0.7</b>	<b>66.6</b>	

# QUESTIONNAIRE

**QUESTIONNAIRE  
JIRGA RESEARCH STUDY  
MARCH 2012**

**SERIAL NUMBER:** \_\_\_\_\_ **DATE OF INTERVIEW:** \_\_\_\_\_

**PROVINCE:** \_\_\_\_\_

**DISTRICT:** \_\_\_\_\_

**URBAN/RURAL:** \_\_\_\_\_

**CITY/VILLAGE NAME:** \_\_\_\_\_

**AREA NAME:** \_\_\_\_\_

**MALE/FEMALE:** \_\_\_\_\_

**SUPERVISOR NAME:** \_\_\_\_\_

**SURVEYOR NAME:** \_\_\_\_\_



## 1: SOURCES OF INFORMATION

**Q1: What sources of information do you have access to?** (Don't read the list – check appropriate box) - Multiple responses are allowed)

Response	Code	Response	Code
Pakistani Newspapers	1	Friends & family	10
Pakistani radio	2	Work colleagues	11
Pakistan TV	3	Neighbours	12
British Newspapers	4	Friday sermon	13
British TV channels	5	Communal gathering	14
British radio	6	Government officials	15
American Newspapers	7	Tribal elders	16
American radio	8	Other (specify)	77
Internet, books and films	9	Don't know	88

**Q2: Which sources of information do you trust the most?** (Don't read the list – check appropriate box) - Multiple responses are allowed)

Response	Code	Response	Code
Pakistani Newspapers	1	Internet, books and films	10
Pakistani radio	2	Friends & family	11
Pakistan TV	3	Work colleagues	12
British Newspapers	4	Neighbours	13
British TV channels	5	Friday sermon	14
British radio	6	Communal gathering	15
American Newspapers	7	Government officials	16
American TV	8	Tribal elders	17
American radio	9	Other (specify)	77

**Q3: Which newspapers do you read regularly?** (Don't read the list – check appropriate box) - Multiple responses are allowed)

Response	Code	Response	Code
Daily Ausaf	1	Daily Pakistan	13
Daily Times	2	The Post	14
The Dawn	3	Daily Aaj Kal	15
The Frontier Post	4	Daily Aaj	16
Daily Jang	5	Daily Mashriq	17
Daily Khabrain	6	Daily Wahdat	18
The Nation	7	UK newspapers	19
Daily Nawa-e-Waqt	8	Afghan newspapers	20
The News	9	Do Not Read Newspapers	21
Observer	10	Other (specify)	77
The Statesman	11	Don't know	88
Daily Express	12		

**Q4: What television stations do you watch regularly?** (Don't read the list – check appropriate box) - Multiple responses are allowed)

Response	Code	Response	Code
Aaj	1	BBC	14
ARY News	2	CNN	15
Geo News	3	Sky News	16
Dunya News	4	ARY Digital	17
Samma	5	Geo Entertainment	18
Express News	6	AVT	19

Din	7	PTV	20
Dawn News	8	Hum	21
CNBC	9	Star	22
Wagt	10	Century TV	23
Bolan	11	Geo Super	24
ATV Khyber	12	Do Not watch TV	25
Al Jazeera	13	Other (specify)	77

**Q5: Which radio stations do you listen to regularly?** (Don't read the list – check appropriate box) - Multiple responses are allowed)

Response	Code	Response	Code
BBC Pushto	1	FM 103	10
BBC Urdu	2	FM 104 Buraq	11
BBC English	3	FM 106	12
Dewa (Voice of America)	4	Miranshah, 1593 KHZ	13
Radio Pakistan	5	Khyber Agency 91 MHZ	14
RADIO Pak MW	6	Razmak 1584 KHZ	15
FM 88 Lakki	7	Do Not Listen Radio	16
FM 100	8	Other (specify)	77
FM 101	9	Don't know	88

## 2. AWARENESS OF THE INSTITUTIONS AND ACTORS

**Q6: Are you aware of the following institutions and actors?** (Multiple-choice question)

Name of Institution / Actor	Yes	No	Don't Know
a) Superior Courts in Pakistan ( Supreme Court and High Courts)	1	2	88
b) Lower Courts in Pakistan (Judicial Magistrate, District & Sessions Courts)	1	2	88
c) Specialized Anti-Terrorism or Narcotics Courts	1	2	88
d) Federal <i>Shariat</i> Court	1	2	88
e) Religious seminary boards (e.g. <i>Wafaq ul Madaris</i> and other registered <i>Madaris</i> )	1	2	88
f) Ombudsman	1	2	88
g) Human Rights Commission of Pakistan	1	2	88
h) <i>Jirga</i> system or other informal dispute resolution mechanisms (e.g. Taliban <i>Shura</i> )	1	2	88
i) Police Department	1	2	88
j) <i>Nizam-e-Adl</i> Courts (Malakand Division Only)	1	2	88
k) <i>Musalihat</i> i Council	1	2	88

**Q7: What is your opinion/perception of the following institutions and actors? Perceptions of Institutions and Actors – Codes: Affordable (01) Speedy (02) Bribes (03) Influence Peddling (04) Unresponsive to Criticism (05) Ignores Human Rights (06) Gender Equality (07) Class Bias (8) Don't know (99).** (Multiple-choice question)

Name of Institution / Actor	Affordable	Speedy	Bribes	Influence Peddling	Unresponsive to Criticism	Ignores Human Rights	Gender Equality	Class Bias	Don't know
a) Provincial Police Authorities and their local representatives (e.g. S.H.O, D.S.P., etc.)	01	02	03	04	05	06	07	08	88
b) Superior Courts in Pakistan ( Supreme Court and High Courts)	01	02	03	04	05	06	07	08	88
c) Lower Courts in Pakistan (Judicial Magistrate, District & Sessions Courts)	01	02	03	04	05	06	07	08	88

d) Specialized Anti-Terrorism or Narcotics Courts	01	02	03	04	05	06	07	08	88
e) Federal <i>Shariat</i> Court	01	02	03	04	05	06	07	08	88
f) Religious seminary boards (e.g. <i>Wafaq ul Madaris</i> or other registered <i>Madaris</i> )	01	02	03	04	05	06	07	08	88
g) Ombudsman	01	02	03	04	05	06	07	08	88
h) Human Rights Commission of Pakistan	01	02	03	04	05	06	07	08	88
i) Informal dispute resolution mechanisms (e.g. <i>Jirga</i> , <i>Shura</i> , respected elder(s), or other influential person(s) in your family/community)	01	02	03	04	05	06	07	08	88
j) Religious leader in the community	01	02	03	04	05	06	07	08	88
k) Police Department or their local representatives	01	02	03	04	05	06	07	08	88
l) <i>Nizam-e-Adl</i> (Malakand Division Only)	01	02	03	04	05	06	07	08	88
m) <i>Musalihati</i> Council	01	02	03	04	05	06	07	08	88
n) Taliban <i>Shura</i>	01	02	03	04	05	06	07	08	88

### 3. LINKAGES BETWEEN FORMAL AND INFORMAL JUSTICE SYSTEMS

#### 3.1 CONFLICT DYNAMICS AND ACCESS TO JUSTICE

**Q8: Do you have the following institutions in your community/area?** (Multiple-choice response is allowed)

Response	Code
a) Local <i>Jirga</i>	1
b) Aman <i>Jirga</i>	2
c) District Administration and police	3
d) Formal courts (Supreme Court, High Court, Session Court etc)	4
e) Taliban <i>Shura</i>	5
f) Qazi courts ( <i>Nizam-e-Adl</i> ) (Malakand Division Only)	6
g) <i>Musalihati Anjuman</i>	7
h) Other (specify)	77
i) Don't know	88

**Q9: Who do you first contact in case of any conflict or dispute?** (Single Response)

Response	Code
a) Local <i>Jirga</i>	1
b) Aman <i>Jirga</i>	2
c) District Administration and police	3
d) Formal courts (Supreme Court, High Court, Session Court etc)	4
e) Taliban <i>Shura</i>	5
f) Qazi courts ( <i>Nizam-e-Adl</i> ) (Malakand Division Only)	6
g) <i>Musalihati Anjuman</i>	7
h) Do not contact anyone	8
i) Other (specify)	77
j) Don't Know	88

**Q10: What are the main issues that instigate conflict in your community?** (Multiple-choice response is allowed)

Response	Code
a) Cultivated land	1
b) Distribution of water sources (Warabandi)	2
c) Neighborhood (position of shared wall, property, etc)	3
d) Political violence	4
e) Grazing animals	5
f) Sectarian	6

g) Family issues (forced marriages, divorce, child custody, shared property, wedding expenses)	7
h) Youth/children quarrelling and fighting	8
i) Family honour issues	9
j) Tribal clashes	10
k) Tribal customs such as <i>Swara</i> , Bride prize and <i>Xhag</i>	11
l) Militancy	12
m) Terrorism	13
n) Unequal distribution of aid	14
o) Theft/robbery	15
p) Murder/homicide	16
q) Other (specify)	77

**Q11: Have you or your household members experienced any of the following?** (Multiple-choice response is allowed)

Issues	Yes	No	Don't Know	No Response
a) Victim of theft or fraud	1	2	88	99
b) Victim of assault	1	2	88	99
c) Victim of domestic abuse	1	2	88	99
d) Victim of forced marriage	1	2	88	99
e) Victim of tribal customs such as <i>Swara</i> , Bride prize and <i>Xhag</i>	1	2	88	99
f) Family member has gone missing or disappeared	1	2	88	99
g) Arrested without warrant by the administration or police	1	2	88	99
h) Accused of an offence under the Anti-Terrorism Act	1	2	88	99
i) Accused of committing sexual abuse/assault (under the Hudood Ordinances or the Pakistan Penal Code)	1	2	88	99
j) Accused of committing any other crime	1	2	88	99
k) Unlawful detention, search or arrest by the political administration	1	2	88	99
l) Bribery by police, <i>Khasadar</i> or levies force	1	2	88	99
m) Assault or torture by FC or Army	1	2	88	99
n) Money Recovery, or Debt/Obligation Settlement	1	2	88	99
o) Contract enforcement in business dealings	1	2	88	99
p) Purchase or sale of movable property	1	2	88	99
q) Lease and rental issues: disrepair, eviction etc.	1	2	88	99
r) Family law issues: divorce, maintenance, child custody, guardianship, inheritance	1	2	88	99
s) Dispute with employer for unpaid wages	1	2	88	99
t) Debt bondage	1	2	88	99
u) Found involved in sectarian violence	1	2	88	99
v) Found involved in tribal/family clashes	1	2	88	99
w) Injured in an accident (motor vehicle, etc)	1	2	88	99

**Instruction: If respondent experienced any then ask Q12, 13 and 14 otherwise move to Q15.**

**Q12: If yes, which of the following justice systems did you access for resolving your conflict/ dispute?** (Multiple-choice response is allowed)

Response	Code
a) Local <i>Jirga</i>	1
b) Aman <i>Jirga</i>	2
c) District Administration and police	3
d) Formal courts (Supreme Court, High Court, Session Court etc)	4
e) Taliban <i>Shura</i>	5
f) Qazi courts ( <i>Nizam-e-Adl</i> ) (Malakand Division Only)	6

g) <i>Musalihati Anjuman</i>	7
h) Do not contact anyone	8
i) Other (specify)	77

**Q13: What were the reasons for choosing the justice systems to deal with the dispute?**  
(Multiple-choice response is allowed) – provide response for each mentioned in Q12.

Response	Code
a) Efficient and effective at resolving the dispute	01
b) Close to where I live	02
c) Fair and trusted	03
d) Follows accepted local norms/values	04
e) Less expensive	05
f) Less corrupt	06
g) Speedy	07
h) Other (Specify: _____ )	77

**Q14: How satisfied were you with their involvement?**

Response	Very Satisfied	Somewhat Satisfied	Somewhat Unsatisfied	Not Satisfied	Don't know
a) Local <i>Jirga</i>	1	2	3	4	88
b) Aman <i>Jirga</i>	1	2	3	4	88
c) District Administration and police	1	2	3	4	88
d) Formal courts (Supreme Court, High/Session Courts)	1	2	3	4	88
e) Ant-terrorism court	1	2	3	4	88
f) Taliban <i>Shura</i>	1	2	3	4	88
g) Qazi courts ( <i>Nizam-e-Adl</i> ) (Malakand Division Only)	1	2	3	4	88
h) <i>Musalihati Anjuman</i>	1	2	3	4	88
i) Other (specify)	1	2	3	4	88

**Q15: Generally, who solves the conflict/dispute that arises in your community/area? (Single Response)**

Response	Code
a) Local <i>Jirga</i>	1
b) Aman <i>Jirga</i>	2
c) District Administration and police	3
d) Formal courts (Supreme Court, High Court, Session Court etc)	4
e) Taliban <i>Shura</i>	5
f) Qazi courts ( <i>Nizam-e-Adl</i> ) (Malakand Division Only)	6
g) <i>Musalihati Anjuman</i>	7
h) Other (specify)	77
i) Don't know	88

**Q16: Where would you refer your severe criminal dispute (Murder/Theft/Robbery etc) for resolution? (Single Response)**

Response	Code
a) Local <i>Jirga</i>	1
b) Aman <i>Jirga</i>	2
c) District Administration and police	3
d) Formal courts (Supreme Court, High Court, Session Court etc)	4
e) Taliban <i>Shura</i>	5
f) Qazi courts ( <i>Nizam-e-Adl</i> ) (Malakand Division Only)	6
g) <i>Musalihati Anjuman</i>	7

h) Other (specify)	77
i) Don't know	88

**Q17: Where would you refer your civil dispute (Land Disputes/Divorce etc) for resolution? (Single Response)**

Response	Code
a) Local <i>Jirga</i>	1
b) Aman <i>Jirga</i>	2
c) District Administration and police	3
d) Formal courts (Supreme Court, High Court, Session Court etc)	4
e) Taliban <i>Shura</i>	5
f) Qazi courts ( <i>Nizam-e-Adl</i> ) (Malakand Division Only)	6
g) <i>Musalihati Anjuman</i>	7
h) Other (specify)	77
i) Don't know	88

**Q18: What types of cases you would prefer to take to the formal courts (Supreme Court, High Court, Session Court etc)? Multiple-choice response is allowed)**

Response	Code
a) All cases	1
b) All cases of public interest	2
c) Only complex cases that the informal systems could not solve	3
d) All cases of crime	4
e) Cases concerning land or other property	5
f) Certain family cases like divorce	6
g) None	7
h) Other (specify)	77
i) Don't know	88

**Q19: What types of cases you would prefer to take to the *Jirga*? Multiple-choice response is allowed)**

Response	Code
a) All cases	1
b) All cases of public interest	2
c) Only complex cases that the informal systems could not solve	3
d) All cases of crime	4
e) Cases concerning land property	5
f) Certain family cases like divorce	6
g) None	7
h) Other (specify)	77
i) Don't know	88

**Q20: What types of cases you would prefer to take to the *Nizam-e-Adl* Qazi courts? (Malakand Division Only) Multiple-choice response is allowed)**

Response	Code
a) All cases	1
b) All cases of public interest	2
c) Only complex cases that the informal systems could not solve	3
d) All cases of crime	4
e) Cases concerning land property	5
f) Certain family cases like divorce	6
g) None	7
h) Other (specify)	77
i) Don't know	88

**Q21: What types of cases you would prefer to take to the Musalihati Anjuman? (Multiple-choice response is allowed)**

Response	Code
a) All cases	1
b) All cases of public interest	2
c) Only complex cases that the informal systems could not solve	3
d) All cases of crime	4
e) Cases concerning land property	5
f) Certain family cases like divorce	6
g) None	7
h) Other (specify)	77
i) Don't know	88

**Q22: What types of cases you would prefer to take to the Taliban Shura? Multiple-choice response is allowed)**

Response	Code
a) All cases	1
b) All cases of public interest	2
c) Only complex cases that the informal systems could not solve	3
d) All cases of crime	4
e) Cases concerning land property	5
f) Certain family cases like divorce	6
g) None	7
h) Other (specify)	77
i) Don't know	88

**Q23: What is your understanding of Access to Justice? Multiple-choice response is allowed)**

Response	Code
a) Right to fair and just trial	1
b) Access to justice for all, specially women and vulnerable groups (minorities etc)	2
c) Proper hearing, trial and remedies against grievances.	3
d) Other (specify)	77
e) Don't know	88

**Q24: To what extent do you think there has been Access to Justice in your district/area?**

Response	Code
Not at all	1
To a moderate extent	2
To a large extent	3
Don't know	88

**Q25: What categories of individuals/groups do not have Access to Justice in your district/area under the formal justice system such as the Supreme Court, High Courts and Lower Courts? (Multiple-choice response is allowed)**

Response	Code
a) Women	1
b) Minorities	2
c) Low cast groups and poor	3
d) Disabled	4
e) Other (specify)	77
f) Don't know	88



**Q26: What categories of individuals/groups do not have access to justice in your district/area under informal justice system such as Jirga? (Multiple-choice response is allowed)**

Response	Code
a) Women	1
b) Minorities	2
c) Low cast groups and poor	3
d) Disabled	4
e) Other (specify)	77
f) Don't know	88

**Q27: Other than the formal justice system, are there other informal structures like NGOs, religious institutions, traditional ones concerned with increasing access to justice for various groups of people?**

Response	Code
Yes	1
No	2
Don't know	88

**Q28: What are the reasons for limited access to formal justice? (Multiple-choice response is allowed)**

Response	Code
a) Time consuming and cases not expedited	1
b) Legal aid department understaffed	2
c) Inaccessible legal aid (Criminally abused have no support, inaccessible legal aid)	3
d) Accused overstay without trial due to lack of understanding of their legal rights	4
e) High Legal fees of lawyers out	5
f) Not all cases reported	6
g) Long distance, high cost of lawyers and court fees, lack of legal aid	7
h) High level of corruption affects access to justice	8
i) Justice structures concentrated in towns	9
j) Not aware of how to access justice by those in remote areas	10
k) Widespread confusion about the legal system	11
l) Other (specify)	77
m) Don't know	88

**Q29: What are the reasons for limited access to informal justice mechanisms? (Multiple-choice response is allowed)**

Response	Code
a) Informal systems lacks authority to implement its decisions	1
b) Members of informal systems are not qualified to resolve some complex disputes	2
c) Informal systems are inaccessible for women	3
d) Informal systems are inaccessible for minorities	4
e) Sometime members of informal systems take bribes	5
f) Members of informal systems are biased at times	6
g) Sometime their solutions are unsustainable	7
h) No precedents of previous decisions	8
i) Other (specify)	77
j) Don't know	88

### 3.2 LEGALITY AND LEGITIMACY OF FORMAL AND INFORMAL JUSTICE SYSTEMS

**Q30: For the following systems please indicate your level of trust in them for dispensing justice.**

Response	Very Trusted	Somewhat Trusted	Somewhat Untrusted	Very Untrusted	DK
a) Formal justice system (supreme Court/High Court/Session Court etc)	01	02	03	04	88

b) <i>Jirga</i> system	01	02	03	04	88
c) <i>Aman Jirga</i>	01	02	03	04	88
d) <i>Taliban Shura</i>	01	02	03	04	88
e) <i>Nizam-e-Adl</i> (Malakand Division Only)	01	02	03	04	88
f) <i>Musalihati</i> Council	01	02	03	04	99

**Q31: For the following systems please indicate how effective they are for dispensing justice.**

Response	Very effective	Somewhat Effective	Somewhat Ineffective	Very Ineffective	DK
a) Formal justice system (supreme Court/High Court/Session Court etc)	01	02	03	04	88
b) <i>Jirga</i> system	01	02	03	04	88
c) <i>Aman Jirga</i>	01	02	03	04	88
d) <i>Taliban Shura</i>	01	02	03	04	88
e) <i>Nizam-e-Adl</i> (Malakand Division Only)	01	02	03	04	88
f) <i>Musalihati</i> Council	01	02	03	04	88

**Q32: For the following systems please indicate how fair they are for resolving disputes..**

Response	Very Fair	Somewhat Fair	Somewhat Unfair	Very Unfair	DK
a) Formal justice system (supreme Court/High Court/Session Court etc)	01	02	03	04	88
b) <i>Jirga</i> system	01	02	03	04	88
c) <i>Aman Jirga</i>	01	02	03	04	88
d) <i>Taliban Shura</i>	01	02	03	04	88
e) <i>Nizam-e-Adl</i> (Malakand Division Only)	01	02	03	04	88
f) <i>Musalihati</i> Council	01	02	03	04	88

**Q33: For the following systems please identify how free and fair trial the trials are for both the parties?**

Response	To a large extent	To some extent	Not at some extent	Not at all	Don't Know
a) Formal justice system (supreme Court/High Court/Session Court etc)	01	02	03	04	88
b) <i>Jirga</i> system	01	02	03	04	88
c) <i>Aman Jirga</i>	01	02	03	04	88
d) <i>Taliban Shura</i>	01	02	03	04	88
e) <i>Nizam-e-Adl</i> (Malakand Division Only)	01	02	03	04	88
f) <i>Musalihati</i> Council	01	02	03	04	88

**Q34: Please evaluate the following systems with regard to their level of compliance with International Human Rights standards?**

Response	To a large extent	To some extent	Not at some extent	Not at all	Don't Know
a) Formal justice system (supreme Court/High Court/Session Court etc)	01	02	03	04	88
b) <i>Jirga</i> system	01	02	03	04	88
c) <i>Aman Jirga</i>	01	02	03	04	88
d) <i>Taliban Shura</i>	01	02	03	04	88
e) <i>Nizam-e-Adl</i> (Malakand Division Only)	01	02	03	04	88
f) <i>Musalihati</i> Council	01	02	03	04	88

**Q35: Please evaluate the following systems with regard to their level of compliance with Fundamental Rights guaranteed by the Constitution of Pakistan?**

Response	To a large extent	To some extent	Not at some extent	Not at all	Don't Know
a) Formal justice system (supreme Court/High Court/Session Court etc)	01	02	03	04	88
b) <i>Jirga</i> system	01	02	03	04	88
c) Aman <i>Jirga</i>	01	02	03	04	88
d) Taliban <i>Shura</i>	01	02	03	04	88
e) <i>Nizam-e-Adl</i> (Malakand Division Only)	01	02	03	04	88
f) <i>Musalihati</i> Council	01	02	03	04	88

### 3.3 HEARING AND PROCEEDINGS OF THE INFORMAL JUSTICE SYSTEM

**Q36: How long has that informal justice system been operating in your community/area?**

Response	0-5 Years	5-25 Years	25-50 Years	50 + Years	Don't know
a) Local <i>Jirga</i>	1	2	3	4	88
b) Aman <i>Jirga</i>	1	2	3	4	88
c) <i>Musalihati Anjuman</i>	1	2	3	4	88
d) Taliban <i>Shura</i>	1	2	3	4	88

**Q37: What is the composition of the informal justice system in your community/area? – Who are the members? (Multiple-choice response is allowed)**

Response	Code
a) Tribal maliks/elders	1
b) Influential, rich and political leadership	2
c) Councillors of the Union Councils	3
d) Religious leaders	4
e) Civil society members	5
f) Other (specify)	77

**Q38: Do women have representation in informal justice system?**

Response	Yes	No	Don't know
a) <i>Jirga</i> system	01	02	88
b) <i>Nizam-e-Adl</i> (Malakand Division Only)	01	02	88
c) <i>Musalihati</i> Council	01	02	88
d) Taliban <i>Shura</i>	01	02	88

**Q39: Do ethnic non-Pakhtuns have representation in informal justice system?**

Response	Yes	No	Don't know
<i>Jirga</i> system	01	02	88
<i>Nizam-e-Adl</i> (Malakand Division Only)	01	02	88
<i>Musalihati</i> Council	01	02	88
Taliban <i>Shura</i>	01	02	88

**Q40: Do ethnic religious minorities (Christians, Sikhs and Hindus) have representation in informal justice system?**

Response	Yes	No	Don't know
<i>Jirga</i> system	01	02	88
<i>Nizam-e-Adl</i> (Malakand Division Only)	01	02	88
<i>Musalihati</i> Council	01	02	88
Taliban <i>Shura</i>	01	02	88

**Q41: Are members of the following systems elected/selected/nominated by the community?**

Response	Elected	Selected	Nominated	Don't Know
a) <i>Jirga</i> system	01	02	03	88
b) <i>Nizam-e-Adl</i> (Malakand Division Only)	01	02	03	88
c) <i>Musalihati</i> Council	01	02	03	88
d) <i>Taliban Shura</i>	01	02	03	88

**Q42: What are the criteria for membership in the *Jirga* system? (Multiple-choice response is allowed)**

Response	Code
a) Member should belong to a respected family	1
b) Member should have wisdom of local culture and history, inherited from his forefathers	2
c) Member should have a good reputation in his community	3
d) Member should have formal education	4
e) Member should have religious education	5
f) Member should have legal education	6
g) Member should be known for his piety	7
h) Member should have a political back-up	8
i) Other (specify)	77
j) Don't Know	88

**Q43: What are the criteria for membership in the *Nizam-e-Adl*? (Multiple-choice response is allowed) (Malakand Division Only)**

Response	Code
a) Member should belong to a respected family	1
b) Member should have wisdom of local culture and history, inherited from his forefathers	2
c) Member should have a good reputation in his community	3
d) Member should have formal education	4
e) Member should have religious education	5
f) Member should have legal education	6
g) Member should be known for his piety	7
h) Member should have a political back-up	8
i) Other (specify)	77
j) Don't Know	88

**Q44: What are the criteria for membership in the *Musalihati Anjuman*? (Multiple-choice response is allowed)**

Response	Code
a) Member should belong to a respected family	1
b) Member should have wisdom of local culture and history, inherited from his forefathers	2
c) Member should have a good reputation in his community	3
d) Member should have formal education	4
e) Member should have religious education	5
f) Member should have legal education	6
g) Member should be known for his piety	7
h) Member should have a political back-up	8
i) Other (specify)	77
j) Don't Know	88

**Q45: What are the criteria for membership to the *Taliban Shura*? (Multiple-choice response is allowed)**

Response	Code
a) Member should belong to a respected family	1
b) Member should have wisdom of local culture and history, inherited from his forefathers	2
c) Member should have a good reputation in his community	3



d) Member should formal education	4
e) Member should religious education	5
f) Member should legal education	6
g) Member should be known for his piety	7
h) Member should have a political back-up	8
i) Other (specify)	77
k) Don't Know	88

**Q46: Do disputants pay fee to the Jirga members when their disputes are resolved through Jirga?**

Response	Code	
Yes	01	Go to Q47
No	02	Go to Q48
Don't know	88	Go to Q48

**Q47: If yes, Please specify amount .....**

**Q48: How do Jirga members receive compensation for their services? (Multiple-choice response is allowed)**

Response	Code
a) As travel/food expenses	01
b) As a widely accepted and agreed upon fee	02
c) As a gift	03
d) As a bribe	04
e) Do not take any compensation for their services	05
f) Other (please specify)	77
g) Don't know	88

### 3.4 HEARING AND PROCEEDINGS OF THE JIRGA

**Q49: Who attends the proceedings of Jirga? (Multiple-choice response is allowed)**

Response	Code
a) Only Jirga Committee members	1
b) The entire community, including minorities	2
c) The entire community, except minorities	3
d) Only the heads of the families involved in the dispute	4
e) Women allowed to attend	5
f) Government officials	6

**Q50: Have you attended these proceedings?**

Response	Code	
Yes	1	Go to Q51
No	2	Go to Q52

**Q51: If yes, in which capacity? (Multiple-choice response is allowed)**

Response	Code
a) As a Jirga member	1
b) As a Government official	2
c) As a disputant	3
d) As an observer	4
e) Others (specify)	77

**Q52: How do Jirgas convene their proceedings?**

Response	Code
In open	1
Behind closed doors	2

**Q53: Are both parties to the dispute always present at the hearing?**

Response	Code
Yes	1
No	2

**Q54: Is the decision of a Jirga final?**

Response	Code
Yes	1
No	2
Sometimes	3

**Q55: Is there a provision of appeal in the Jirga proceedings?**

Response	Code
Yes	1
No	2
Don't know	88

**Q56: Is there any higher authority/superior court/tribunal to which you can appeal against a decision?**

Response	Code
Yes	1
No	2
Don't know	88

**Q57: How are Jirga decisions usually taken? (single response)**

Response	Code
Through consensus	1
Unanimously (Unanimous decision by all members)	2
Through vote (Majority Decision)	3
Don't know	88

**Q58: What procedures/rules are applied to resolve conflict/dispute through the Jirga?**

Response	Code
Tribal law (customs)	1
Islamic law	2
Combination of both	3

**Q59: Are you satisfied with the probing/inquiry mechanism of the Jirga process?**

Response	Code
Satisfied	01
Somewhat Satisfied	02
Dissatisfied	03
Somewhat dissatisfied	04
Don't know	88



**Q60: Do you seek the aid of the police/local administration to implement the Jirga decisions?**

Response	Code
Yes	1
No	2
Don't know	88

**Q61: Does the police/local administration interfere in the functioning of the Jirga?**

Response	Code
Yes	1
No	2
Don't know	88

**Q62: Is there any provision for the parties to appoint a legal representative (similar to a lawyer in formal justice system) in the Jirga proceedings?**

Response	Code
Yes	1
No	2
Don't know	88

**Q63: To what extent does the community have faith in Jirga?**

Response	Code
Community have a faith to a large extent	1
Community have a faith to some extent	2
Community have no faith in Jirga to some extent	3
Community have no faith in Jirga to a large extent	4
Don't know	88

**Q64: Which sections of the community display more faith in Jirga? (Multiple-choice response is allowed)**

Response	Code
a) Tribal elders	1
b) Religious leaders	2
c) Women	3
d) Ethnic and religious minorities	4
e) Community as a whole	5
f) Political and influential families	6
g) Other (specify)	77
h) Don't know	88

**Q65: How relevant is Jirga for redressing the grievances and imparting justice to the community?**

Response	Code
Very relevant	01
Somewhat relevant	02
Somewhat irrelevant	03
Very irrelevant	04
Don't know	88

**Q66: Do you believe that community will support the Jirga system if it is integrated into the state's formal justice system like the Supreme Court/High Court/Session Court?**

Response	Code
Yes	1
No	2
Don't know	88

**Q67: If integrated do you think it could be plagued by the same weakness that afflict the existing formal justice system like the Supreme Court/High Court/Session Court ?**

Response	Code
<b>Yes</b>	<b>1</b>
<b>No</b>	<b>2</b>
<b>Don't know</b>	<b>88</b>

**Q68: Once integrated, would Jirga lose the advantages it has over the formal justice system like the Supreme Court/High Court/Session Court (less expensive, speedy, less corrupt, etc)?**

Response	Code
Yes	1
No	2
Don't know	88

**Q69: Is Jirga inherently unjust with class and gender biases?**

Response	Code	
Yes	1	Go TO Q70
No	2	Go to Q71
Don't know	88	Go to Q71

**Q70: If yes, should Jirga be abolished?**

Response	Code
Yes	1
No	2
Don't know	88

**Q71: How strongly do you agree/disagree with the statement: 'Jirga is a speedy and less expensive mechanism of dispute resolution'?**

Response	Code
Strongly agree	01
Somewhat Agree	02
Somewhat Disagree	03
Strongly Disagree	04
Don't know	88

**Q72: How strongly do you agree with the statement: 'One of the main outcomes of the Jirga decision is a fair compensation to victims'?**

Response	Code
Strongly Agree	01
Somewhat Agree	02
Somewhat Disagree	03
Strongly Disagree	04
Don't know	88
No response	99

**Q73: How strongly you agree/disagree with the following statements?**

Response	Strongly Agree	Somewhat Agree	Somewhat Disagree	Strongly Disagree	DK
a) Both parties are provided with equal opportunities to express their views in Jirga process	01	02	03	04	88

b)	Nepotism or favouritism influence the decision making process of <i>Jirga</i>	01	02	03	04	88
c)	Decisions given by <i>Jirga</i> are unbiased and free from all kinds of pressure from the economical and politically powerful section of the society	01	02	03	04	88
d)	Some decisions are harsh and not commensurate with the deed done	01	02	03	04	88
e)	<i>Jirga</i> verdicts come into conflict with modern notions of justice or human rights	01	02	03	04	88
f)	<i>Jirga</i> fails to resolve disputes effectively	01	02	03	04	88
g)	<i>Jirga</i> violates women's rights	01	02	03	04	88
h)	<i>Jirga</i> violates minorities' rights	01	02	03	04	88
i)	<i>Jirga</i> maintains social order and restores harmony in a village	01	02	03	04	88
j)	<i>Jirga</i> plays a role in conflict transformation and conflict resolution.	01	02	03	04	88
k)	<i>Jirga</i> plays a role in reducing the levels of militancy in the region	01	02	03	04	88
l)	<i>Jirga</i> is well placed to resolve civil disputes only	01	02	03	04	88
m)	<i>Jirga</i> reintegrates offenders into the community	01	02	03	04	88
n)	<i>Jirga</i> is well placed to resolve both civil and criminal disputes	01	02	03	04	88
o)	<i>Jirga</i> contributes to rule of law	01	02	03	04	88
p)	<i>Jirga</i> resolves some very serious crimes	01	02	03	04	88
q)	<i>Jirga</i> is organized, well established, transparent and an efficient institution in the Pakhtun society	01	02	03	04	88
r)	<i>Jirga</i> makes lasting Aman among disputants	01	02	03	04	88

**Q74: How strongly do you support the involvement of government officials in *Jirga* proceedings?**

Response	Code
Strongly Support	01
Somewhat Support	02
Somewhat Oppose	03
Strongly Oppose	04
Don't Know	88

#### 4. IMPLEMENTATION OF JIRGA VERDICTS

**Q75: How are the decisions of *Jirga* mostly implemented?**

Response	Code
a) Through community social pressure/ Riwaaj	1
b) Through raising Lakhkar	2
c) Through police and local administration	3
d) Other (specify)	88

**Q76: If the decision is not acceptable to a party, what happens? (Multiple responses is allowed)**

Response	Code
a) The accused party can take the case to another <i>Jirga/Nizam-e-Adl</i> or Qazi court	1
b) The accused party can take the case to the formal court	2
c) The accused party can appeal to the same <i>Jirga</i>	3

d) The accused party simply defy the <i>Jirga</i> decision	4
e) The accused party can take the case to the police	5
f) Other (specify)	77

**Q77: Do you support the *Jirga* exiling the party defying the *Jirga* decision from the community?**

Response	Code
Strongly Support	01
Somewhat Support	02
Somewhat Oppose	03
Strongly Oppose	04
Don't know	88
No response	99

**Q78: Are there any instances of defiance of a *Jirga* decision?**

Response	Code	
Yes	1	Go to 79
No	2	Go to 80
Don't know	88	Go to 80

**Q79: If yes, how often does this happen?**

Response	Code
Very often	01
Somewhat often	02
Rarely	03
Never	04
Don't know	88

## 5. THE STATE OF FUNDAMENTAL RIGHTS THE JIRGA SYSTEM

**Q80: Do you agree/disagree that the *Jirga* process is at times in conflict with International Human Rights standards?**

Response	Code
Strongly Agree	01
Somewhat Agree	02
Somewhat Disagree	03
Strongly Disagree	04
Don't know	88

**Q81: Do you agree/disagree that the *Jirga* process is at times in conflict with Fundamental Rights given by the Constitution of Pakistan?**

Response	Code
Strongly Agree	01
Somewhat Agree	02
Somewhat Disagree	03
Strongly Disagree	04
Don't know	88



**Q82: Do you agree/disagree that the Jirga process is at times in conflict with rights given in Islam?**

Response	Code
Strongly Agree	01
Somewhat Agree	02
Somewhat Disagree	03
Strongly Disagree	04
Don't know	88

**6. The state of rights of minorities in the Jirga system.**

**Q83: How strongly do you agree/disagree with the statement that: 'ethnic minorities have not been given equal chance to participate in Jirga decision-making processes?'**

Response	Code
Strongly Agree	01
Somewhat Agree	02
Somewhat Disagree	03
Strongly Disagree	04
Don't know	88

**Q84: How strongly do you agree with the statement that: 'religious minorities have not been given an equal chance to participate in Jirga decision-making processes?'**

Response	Code
Strongly Agree	01
Somewhat Agree	02
Somewhat Disagree	03
Strongly Disagree	04
Don't know	88

**7. The state of rights of children and youth in the Jirga system.**

**Q85: Do you agree/disagree with the statement, that tribal elders take into account the rights of a child while making Jirga decisions?**

Response	Code
Strongly Agree	01
Somewhat Agree	02
Somewhat Disagree	03
Strongly Disagree	04
Don't know	88
No response	99

**Q86: Do you agree/disagree with the statement, that the Jirga effectively and fairly solves juvenile cases?**

Response	Code
Strongly Agree	01
Somewhat Agree	02
Somewhat Disagree	03
Strongly Disagree	04
Don't know	88
No response	99

**8. THE STATE OF RIGHTS OF WOMEN IN THE JIRGA SYSTEM.**

**Q87: Do you agree with the statement, that the Jirga at times is biased against women when resolving matrimonial disputes including divorce and custody of children?**

Response	Code
To a large extent	01
To some extent	02
Not to some extent	03
Not at all	04
Don't know	88

**Q88: Do you support/oppose the Jirga making decisions in favour of honour killing?**

Response	Code
Strongly Support	01
Somewhat Support	02
Somewhat Oppose	03
Strongly Oppose	04
Don't know	88

**Q89: Do you agree/disagree with the statement, that there is no representation of women in the Jirga system?**

Response	Code
Strongly Agree	01
Somewhat Agree	02
Somewhat Disagree	03
Strongly Disagree	04
Don't know	88
No response	99

**Q90: Do you agree/disagree there is indirect representation of women (through male relatives) in the Jirga system?**

Response	Code
Strongly Agree	01
Somewhat Agree	02
Somewhat Disagree	03
Strongly Disagree	04
Don't know	88
No response	99

**Q91: Do you agree/disagree that women should have a right of inheritance in your community/area?**

Response	Code
Strongly Agree	01
Somewhat Agree	02
Somewhat Disagree	03
Strongly Disagree	04
Don't know	88
No response	99



**Q92: Does Swara resolve some very complex disputes?**

Response	Code
Yes	01
No	02
Don't know	88

**Q93: Do you believe that Swara violates women's rights.**

Response	Code
Yes	01
No	02
Don't know	88

**Q94: To what extent do you support Swara as a way for resolving conflicts between two families/parties?**

Response	Code
Strongly Support	01
Somewhat Support	02
Somewhat Oppose	03
Strongly Oppose	04
Don't Know	88

**Q95: What are the main cases of violence against women in your community/area? (Multiple-choice response is allowed)**

Response	Code
a) Accusations	1
b) Acid throwing	2
c) Burning	3
d) Mental abuse	4
e) Physical abuse	5
f) Restricting mobility	6
g) Indifferent attitude	7
h) Denial of conjugal rights	8
i) Family honour issues	9
j) Forced marriages	10
k) Other's Specify	77

**Q96: Does the Jirga fairly and effectively resolve these issues? (Ask for only circled in Q95)**

Circle from Q95	Response	Strongly Agree	Somewhat Agree	Somewhat Disagree	Strongly Disagree	Don't Know
A	a) Accusations	1	2	3	4	88
B	b) Acid throwing	1	2	3	4	88
C	c) Burning	1	2	3	4	88
D	d) Mental abuse	1	2	3	4	88
E	e) Physical abuse	1	2	3	4	88
F	f) Restricting mobility	1	2	3	4	88
G	g) Indifferent attitude	1	2	3	4	88
H	h) Denial of conjugal rights	1	2	3	4	88
I	i) Family honour issues	1	2	3	4	88
J	j) Forced marriages	1	2	3	4	88
K	k) Other's Specify	1	2	3	4	88

## 9. RECOMMENDATIONS FOR REFORMS

Q97: How strongly do you agree/disagree with the statements listed below?

Response	Strongly Agree	Somewhat Agree	Somewhat Disagree	Strongly Disagree	DK
a) <i>Jirga</i> decision should be recorded officially	01	02	03	04	88
b) <i>Jirga</i> decision should be enforced officially	01	02	03	04	88
c) Provision of a right to appeal to the Courts against <i>Jirga</i> decisions	01	02	03	04	88
d) Final <i>Jirga</i> decision need to be subject to the approval of appropriate Pakistan Human Rights bodies	01	02	03	04	88
e) Women should be given the right to sit in the <i>Jirga</i> proceedings	01	02	03	04	88
f) Women should be given representation in the decision-making body of a <i>Jirga</i> as member	01	02	03	04	88
g) Religious and ethnic minorities should be allowed to sit in the <i>Jirga</i> proceedings	01	02	03	04	88
h) Religious minorities should be given a fair chance to resolve their disputes according to their customs and religious believes	01	02	03	04	88
i) <i>Jirga</i> can be integrated into formal justice system	01	02	03	04	88
j) <i>Jirga</i> members should be elected through a proper electoral process	01	02	03	04	88
k) <i>Jirga</i> members should be sensitized through an educational programme on Human Rights, Women Rights, <i>Shariah</i> , and Constitution of Pakistan	01	02	03	04	88
l) Women <i>Jirga</i> institutions should be formed to resolve women issues	01	02	03	04	88
m) <i>Jirga</i> should be utilized effectively to bring reform in the customs and to ban traditional practices such as <i>Swara</i> , Bride price and <i>Khag</i> .	01	02	03	04	88
n) <i>Jirga</i> institution should play a role in conflict transformation/resolution	01	02	03	04	88
o) <i>Jirga</i> should play its role in reducing the level of militancy in the area	01	02	03	04	88

## 10. DEMOGRAPHICS

D10.1: Gender of respondents:

Male 1

Female 2

D10.2: Age group of respondent

Response	Code	Response	Code
18 – 29 years	1	50 – 65 years	3
30 – 49 years	2	65+	4

D10.3: Education level of respondent

Response	Code	Response	Code
Not schooled	1	Schooled up to Bachelor level	7
Religious education only	2	Master degree	8
Schooled up to Primary level	3	Those up to professional education (Doctors, Lawyers and Engineers)	9
Schooled up to Middle level	4		

Schooled up to Secondary Certificate level (Metric)	5		
Schooled up to Intermediate level	6		

**D10.4: Education level of head of the household**

Response	Code	Response	Code
Not schooled	1	Schooled up to Bachelor level	7
Religious education only	2	Master degree	8
Schooled up to Primary level	3	Those up to professional education (Doctors, Lawyers and Engineers)	9
Schooled up to Middle level	4		
Schooled up to Secondary Certificate level (Metric)	5		
Schooled up to Intermediate level	6		

**D10.5: Monthly income of respondent's family in PKR? If respondent refuses to disclose the income of the household, ask for overall expenses and circle the appropriate code.**

Response	Code	Response	Code
Upto Rs 3000	1	Rs 7001 – Rs 10000	4
Rs 3001 – Rs 5000	2	Rs 10001 – Rs 15000	5
Rs 5001 – Rs 7000	3	More than Rs 15000	6
		Refuse to answer	7

**D10.6: Occupation of respondent**

Response	Code	Response	Code
Agricultural labourer	1	Provincial civil servant	12
Chowkidar (watchman)	2	Skilled labourer	13
Civil servant	3	Small business owner	14
Clerical employee	4	Teacher	15
Farm owner	5	Technician	16
Home-based worker	6	Unskilled labourer	17
Lady health worker/Visitor (LHW/V)	7	Student	18
Large business owner	8	House Wife	19
White colour employee	9	Unemployed	20
Management/supervisor	10	Other (specify)	77
Military, police, security personnel	11		

**D10.7: Marital status of respondent**

Response	Code	Response	Code
Married	1	Single	4
Widowed	2	No response	99
Divorced	3		

**D10.8: How many people live in your household/compound?**

Number of People: \_\_\_\_\_

Male (adult)	Code	Female (adult)	Code	Male children	Code	Female children	Code
1-2 persons	1	1-2 persons	4	1-2 children	7	1-2 children	10
3-5 persons	2	3-5 persons	5	3-5 children	8	3-5 children	11
6 and above persons	3	6 and above persons	6	6 and above	9	6 and above	12

**D10.9: Religion of respondent**

Response	Code	Response	Code
Christian	1	Hindu	4
Sikh	2	Other (specify)	77
Muslim	3	No response	99

*(Ask if answer is 3 in D10.9)*

Shiite 1                  Sunni 2

*(Ask if Answer is 3 in D10.9)*

**D10.10: Please tell me whether you regularly, sometimes, or never engage in the following religious practices**

Response	Regularly	Sometimes	Never	Not Asked	No Response
Pray five times a day	1	2	3	4	99
Fast during Ramadan	1	2	3	4	99

*(Ask if Answer is 3 in D10.9)*

**D10.11: How often do you pray at the mosque?**

Response	Code	Response	Code
Five times a day/daily	1	Monthly	5
Less than five times/daily	2	Several times a year	6
Several times a week	3	Never	7
Once a week	4	No response	99

**D10.12: Would you be willing to participate in another survey later in this year?**

Response	Code
Yes	1
Don't know	88
No Response	99



## Read Closing Statement

**To the Respondent:**

*“Thank you for participating in our survey. Do you have any questions? In the next few days my supervisor may contact you to evaluate the quality of my work and answer any other questions you may have about the interview. To help him do that, could I have your telephone number?”*

**Respondent Information:**

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Tel No. \_\_\_\_\_

NIC Number \_\_\_\_\_

**Interviewer Certification:**

*“I certify that I have completed this interview according to the instructions provided to me.*

Name: \_\_\_\_\_

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

**To be completed by the Supervisor:**

-----

**Interview subject to Back-check/Control**

1. Yes
2. No

**Method of Back-check/Control**

1. Direct supervision during interview
2. Back-check in person by supervisor
3. Back-check by telephone by supervisor or the central office
4. Not subject to back-check

**Initial Questions (for Interviewer only)**

Name of surveyor ----- Date of interview -----

Province ----- District ----- Tehsil -----

[1] Rural.

[2] Urban

ANNEX II  
TARGET DEMOGRAPHICS

## ANNEX II TARGET DEMOGRAPHICS

### Gender of the respondents

The survey was planned to incorporate men and women's perceptions on different aspects of dispute resolution mechanisms affecting the life of the people of KP and the Pukhtuns of Balochistan. The following statistics show that the survey interviews included 50.27% men and 49.8% women.

Gender	Frequency	Percent
Male	1205	50.2
Female	1195	49.8
<b>Total</b>	<b>2400</b>	<b>100.0</b>

### Age group

The survey aimed to interview respondents between 18 years of age and above. The data shows that the survey mostly interviewed middle age group (30-49 years old) respondents, compared with the youth and old age respondents. Nevertheless, considering the population pyramid the middle age is not over-represented nor the older cohorts under-represented as shown by the average number of interviews by year in the table below.

Age Group	Frequency	Percent	No./Year
18 – 29 years	793	33.0	66
30 – 49 years	1172	48.8	59
50 – 65 years	369	15.4	23
65+	66	2.8	
<b>Total</b>	<b>2400</b>	<b>100.0</b>	

The age group 30-49 made up the larger group of the interviewees, because this age group is the most involved in *Jirga* proceedings.

### Education

The following table shows statistics for the educational level of the respondents. The survey results show that 32.5% of the respondents had not attended school while only 10.3% have primary level education. The table shows that only 9.3% of the respondents received middle level schooling, while 14.4% are those respondents have Secondary Certificate level education. Moreover, only 3.5% of the respondents received religious education. There are other categories explained in the table below.

Education of Respondent	Frequency	Percent
Not schooled	779	32.5

Religious education only	83	3.5
Schooled upto Primary level	247	10.3
Schooled upto Middle level	223	9.3
Schooled upto Secondary Certificate level (Metric)	345	14.4
Schooled upto Intermediate level	269	11.2
Schooled upto Bachelor level	232	9.7
Master degree	196	8.2
Those upto professional education (Doctors, Lawyers and Engineers)	26	1.1
<b>Total</b>	<b>2400</b>	<b>100.0</b>

If we analyze the entire data set, we can conclude more than 60% of the sample is literate, even if we exclude the 'religious education only'-category. This is higher than the Census Report data of 1998 for Pakistan. This could be because the respondents gave incorrect information or it could be because of the sampling bias toward families closest to the center of towns, hence more urban and better off who would have both access and have taken advantage of educational opportunities.

### Education of the head of the family

If the respondent was not the head of the family himself/herself, they were asked about the education level of the head of the family. (Note: there are hardly any female heads of families in Pakhtun society overall). In general, the survey has sampled more literate people than the general population for the given age group.

Education Head of the Household	Frequency	Percent
Not schooled	793	33.1
Religious education only	168	7.0
Schooled upto Primary level	201	8.4
Schooled upto Middle level	205	8.5
Schooled upto Secondary Certificate level (Metric)	363	15.1
Schooled upto Intermediate level	206	8.6
Schooled upto Bachelor level	203	8.5
Master degree	211	8.8
Those upto professional education (Doctors, Lawyers and Engineers)	50	2.1
<b>Total</b>	<b>2400</b>	<b>100.0</b>

### Occupation

In the table below the occupation of male and female respondents shows 81% of the females identified themselves as house wives (83%). The remaining 17% of the women carried on specialized roles such as teachers and health workers as well as shopkeepers. The younger women identified as students. The predominant male roles were shopkeepers and labourers, but men were distributed over a wider range of occupations than women.

Occupation	Male		Female		Overall	
	No.	%	No.	%	No.	%
Agricultural labourer	182	15.1	2	0.2	184	7.7
Chowkidar (watchman)	26	2.2	0	0.0	26	1.1
Civil servant	5	0.4	0	0.0	5	0.2
Clerical employee	29	2.4	0	0.0	29	1.2
Farm owner	4	0.3	0	0.0	4	0.2

Home-based worker	9	0.7	5	0.4	14	0.6
Lady health worker/Visitor (LHW/V)	0	0.0	20	1.7	20	0.8
Large business owner	39	3.2	1	0.1	40	1.7
White collar employee	28	2.3	1	0.1	29	1.2
Management/supervisor	13	1.1	0	0.0	13	0.5
Military, police, security personnel	29	2.4	1	0.1	30	1.3
Provincial civil servant	45	3.7	1	0.1	46	1.9
Skilled labourer	122	10.1	21	1.8	143	6.0
Small business owner	206	17.1	33	2.8	239	10.0
Teacher	75	6.2	43	3.6	118	4.9
Technician	28	2.3	2	0.2	30	1.3
Unskilled labourer	65	5.4	2	0.2	67	2.8
Student	96	8.0	53	4.4	149	6.2
House Wife	0	0.0	992	83.0	992	41.3
Unemployed	91	7.6	18	1.5	109	4.5
Other (specify)	84	7.0	0	0.0	84	3.5
Not Answered	29	2.4	0	0.0	29	1.2
<b>Total</b>	<b>1205</b>	<b>100.</b>	<b>1195</b>	<b>100</b>	<b>2400</b>	<b>100</b>

### Marital status

Early marriages are common in the Pakhtun areas, which is mainly tribal in characteristics. Not surprisingly for the population sampled, 81.9% of the women were married and the proportion of single men to single women was almost twice the proportion. The practice of divorce is very rare and is considered a sin in Pakhtun society, a fact that can also be inferred from the data results. The number of widows is also very low and because men readily remarry, the number of widowers is very small compared with females.

Marital status	Male		Female		Overall	
	No.	%	No.	%	No.	%
Married	894	74.2	979	81.9	1873	78.0
Widowed	3	0.2	41	3.4	44	1.8
Divorced	0	0.0	2	0.2	2	0.1
Single	302	25.1	168	14.1	470	19.6
Not Answered	6	0.5	5	0.4	11	0.5
<b>Total</b>	<b>1205</b>	<b>100.0</b>	<b>1195</b>	<b>100.0</b>	<b>2400</b>	<b>100.0</b>

### Religion

Generally, non-Muslims make up less than 3% of the population of Pakistan. However, the survey result shows that the survey could not interview non-Muslims proportionately. There could be several reasons to this un-proportionality. In addition to Muslims, there are Christians, Hindus, and Sikhs. Although very few in number, they may be even fewer as many became displaced during the continuing crisis.

Religion	Frequency	Percent
Christian	2	0.1
Sikh	1	0.1
Muslim	2396	99.8

Hindu	1	0
<b>Total</b>	<b>2400</b>	<b>100.0</b>

#### Shia-Sunni proportion

Respondents who identified themselves as Muslim were subsequently asked which sect they belonged to. As per the data sets, the ratio for Shia and Sunni is 1.5% and 98.3% respectively.

Sect	Frequency	Percent
Shiite	37	1.5
Sunni	2359	98.3
Not Applicable	4	0.2
<b>Total</b>	<b>2400</b>	<b>100.0</b>

Shiites are mainly concentrated in Peshawar and Quetta districts of LP and Balochistan, respectively, and therefore, the survey could only access them in these districts mainly.



## GLOSSARY

<i>Adl</i>	Justice
<i>Awami</i>	For public
<i>Ghairat</i>	Honour
Hadith	Sayings of Prophet Mohammad (SWA)
<i>Hujra</i>	A place for guests and gatherings for the male population in the community. Hujra is usually attached to the house of a local leader.
<i>Huquq</i>	Rights
<i>Jirga</i>	Refers to the practice and to the institution. A <i>Jirga</i> is a gathering of elders, convened by an intermediary ( <i>Jirgamaar</i> , see below) between contesting parties, to hear the arguments of the parties
<i>Jirgamaars</i>	The leader of a <i>Jirga</i> who hears the arguments of the plaintiffs
<i>Khasadar</i>	Tribal Policemen
<i>Loya</i>	Large
<i>Maliks</i>	Tribal elders
<i>Musalihati Anjuman</i>	The institution of <i>Musalihati Anjuman</i> (literally meaning conciliation forums) has been provided at the level of Union Councils for dispute resolution through ADR (including conciliation, mediation and arbitration).
<i>Nang</i>	Honour
<i>Nizam-e-Adl</i>	Justice System based on <i>Shairah</i> law in the Malakand division
<i>Olas</i>	National
Pakhtun	Ethnic group
<i>Pakhtunwali</i>	The inherited moral and social code of Pakhtun society
Pashtu	Language
Pathan	Cast
<i>Qazi</i>	Judge
<i>Qazi courts</i>	an Islamic court headed by a Qazi (Judge)
<i>Qaumi</i>	National
<i>Riwaj</i>	Tradition
<i>Sarkari</i>	Official
<i>Shariah</i>	Islamic code of life
<i>Shariat</i>	Islamic code of life
<i>Swara</i>	The giving of young women and girls in marriage as a method of resolving conflict, this is also known as <i>Badal-i-Sulh</i> and <i>Vani</i>
Tehsil	Administrative units in cities and towns (a district subdivision)
<i>Tigah</i>	Guarantee
Union council	Elected group of people for administration in cities and towns. The territory of a union council is usually part of tehsil
<i>Waak</i>	Consent
<i>Walwar</i>	Bride price
<i>Khag</i>	Man's declaration of claim over a woman for marriage.
<i>Zakah</i>	Obligatory payment made annually under Islamic law on certain kinds of property

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# Understanding Justice Systems

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