

Afghanistan Research and Evaluation Unit  
Case Study Series

# Community-Based Dispute Resolution Processes in Balkh Province



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## Acronyms

CBDR	community-based dispute resolution, see Page 2 for definition
NGO	non-governmental organisation
NSP	National Solidarity Program

## Glossary

Term	Definition given in text
<i>Amlak</i>	department responsible for land administration and policy implementation; part of the Ministry of Agriculture, Irrigation and Livestock
<i>arbab</i>	past name for <i>mesher</i> , still used in other areas of Afghanistan
<i>ariza</i>	official claim letter
<i>ashty</i>	conflict resolution practice in which whitebeards encourage disputants to seal forgiveness for one another through physical affection and celebration
<i>beswa</i>	land measurement; 20 <i>beswa</i> is equal to one <i>jerib</i>
<i>dastabashi</i>	elder responsible for the administration of village sub-units
<i>daulat</i>	state; includes legislative, executive and judicial branches
<i>ebra</i>	forgiveness; conflict resolution practice in which the aggrieved are expected to forgive those who genuinely offer <i>uzr</i>
<i>ebra kard</i>	forgave
<i>ekhtyar</i>	authority; agreement of the disputants granting resolution authority to specific resolution actors
<i>ghairat</i>	determined/upstanding

<i>gozar</i>	village subunit, generally demarcated by the presence of a mosque and represented by its own <i>mesher</i>
<i>hokumat</i>	executive branch of government, including ministries and independent agencies
<i>hokumati</i>	person affiliated with the government
<i>huq</i>	law
<i>Huqooq</i>	civil law department, part of the Ministry of Justice
<i>Inqelab</i>	era of Soviet occupation
<i>islah</i>	conflict resolution principle, in which peace and social cohesion are pursued through a process of negotiation and reconciliation
<i>izat</i>	honour, or respect
<i>jalasa</i>	meeting held to resolve disputes
<i>jalb</i>	summon (verb), summons (noun), also <i>jalb kardan</i> (to summon)
<i>jirga</i>	council that meets as problems arise to solve them; problems range from disputes to maintenance of communal land
<i>jerib</i>	land measurement, one <i>jerib</i> is equal to 2,000 square meters
<i>jeribgar</i>	representative of the Amlak department
<i>kalantar-e-kocha</i>	senior elder of the alley/village subunit
<i>khadim</i>	a special leadership position among women
<i>kocha</i>	alley
<i>kochagi</i>	village event
<i>mahram</i>	male chaperone
<i>maybakshan</i>	literally to forgive; used in the text to signify relinquishment of land rights
<i>mirab</i>	local actor specifically designated to deal with all issues pertaining to water distribution in the community
<i>mesher</i>	an elder selected by community members to represent the village at the district level and to perform district functions within the village
<i>modir-e-huqooq</i>	officer of the civil law department
<i>mui-e-safed</i>	literally “whitehair,” used to refer to female elders of the community
<i>mujahiddin</i>	Afghan resistance fighters to the Soviet occupation
<i>paikal</i>	non-irrigated land, generally a large parcel for farming of cash crops or grazing
<i>qanoon-e-urfi</i>	customary law
<i>qariadar</i>	past name for <i>mesher</i> , still in use in other areas of Afghanistan
<i>qawm</i>	a flexible concept used to denote a form of solidarity group
<i>qawmi</i>	of the qawm
<i>qeshlaq</i>	more remote sub-villages located higher up in hills and valleys, used for summer habitation; qeshlaqs may also be used in times of crisis
<i>rish-e-safed</i>	literally “whitebeard;” used to refer to male elders of the community

<i>sanad-e-Sharaae</i>	Sharia deed; refers to formal, state-issued land title; also used by respondents to refer to dispute-resolution agreement letters issued by district authorities
<i>sanad-e-urfi</i>	customary deed; used to refer to custom-based, non-state land title and other dispute resolution agreement documents
<i>sarparast</i>	male head of household
<i>shura</i>	council; sometimes equivalent to the term jirga, but sometimes with more persistent membership and ongoing governance roles rather than being for ad hoc problem solving
<i>solh konan</i>	to make peace
<i>taraka khat</i>	customary letters for land division
<i>tunban</i>	trousers worn by women under their outer clothes
<i>ulama</i>	a religious council
<i>urf</i>	custom
<i>urfi</i>	customary
<i>uzr</i>	apology; conflict resolution practice in which whitebeards encourage the wrongful party to apologise in person and often includes the gift of a goat or sheep to the aggrieved
<i>wakil</i>	representative in a legal proceeding or other negotiation
<i>wasiqa</i>	official letter
<i>woliswali</i>	literally “district;” used to refer to the district’s administrative centre

# 1. Introduction

In 2006, the Afghanistan Research and Evaluation Unit (AREU) began researching community-based dispute resolution (CBDR) in Afghanistan, with the goal of increasing knowledge of local mechanisms, practices and principles to support contextually informed justice sector reform across the country. Research has discovered various mechanisms, differences among regional practices, resolution principles from the general to the highly specific, and relationships between formal and non-state dispute-resolution bodies.<sup>1</sup> Deeper analyses of dispute resolution at the community level are, for the most part, less recent and tend to focus on the Pashtun-dominated south and east of Afghanistan.<sup>2</sup>

AREU has conducted research on the subject in Bamiyan, Nangarhar and Balkh Provinces as well as in Kabul City.<sup>3</sup> In Balkh, qualitative data was collected in a district centre and two rural villages within the district between August 2008 and February 2009. Balkh Province was chosen as one of the sites for this research because there is minimal data on the principles and practices of CBDR in northern Afghanistan, particularly among a primarily Tajik population.<sup>4</sup> Specifically, the research investigated how local users perceive the

1 Reports since 2004 include the following: Thomas Barfield, "Culture and Custom in Nation-Building: Law in Afghanistan," *Maine Law Review* 60 (2008): 347-; Thomas Barfield, Neamat Nojumi and J Alexander Thier, "The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan" (United States Institute of Peace, 2006); Thomas Barfield, "Informal Dispute Resolution and the Formal Legal System in Contemporary Northern Afghanistan" (Draft Report, United States Institute of Peace, 2006); Thomas Barfield, "Afghan Customary Law and Its Relationship to Formal Judicial Institutions" (Draft Report, United States Institute of Peace, 2003); Norwegian Refugee Council, "The Relationship between the Formal and Informal Justice Systems in Afghanistan" (Position Paper, Norwegian Refugee Council, 2007); Rebecca Gang, "Observations on NRC Client Choices of Forum in Pursuing Property Dispute Resolution in Kabul: A Case Study of Kabul's Courts and Jirgas" (Sophy Thomas ed., Norwegian Refugee Council Research Series, 2007); Neamat Nojumi, Dyan Mazurana and Elizabeth Stites, "Afghanistan's Systems of Justice: Formal, Traditional and Customary" (Tufts University, Feinstein International Famine Center, 2004); Christina Jones-Pauly and Neamat Nojumi, "Balancing Relations Between Society and State: Legal Steps Toward National Reconciliation and Reconstruction in Afghanistan," *American Journal of Comparative Law* 52 (2004): 825-; Karim Khurram and Natalie Rea, "The Customary Laws of Afghanistan" (International Legal Foundation, 2004); Checchi and Company Consulting, "Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations Between Formal Courts and Informal Bodies" (USAID Afghanistan Rule of Law Project, 2005).

2 Such analyses include the following: Lynn Carter and Kerry Connor, "A Preliminary Investigation of Afghan Councils" (Agency Coordinating Body for Afghan Relief (ACBAR), 1989); Ashraf Ghani, "Disputes in a Court of Sharia, Kunar Valley, Afghanistan 1885-1890," *International Journal of Middle East Studies* 15 (1983): 353-; Alef-Shah Zadran, "Socio-Economic and Legal-Political Processes in a Pashtun Village, Southeastern Afghanistan" (Ph.D. dissertation, State University of New York at Buffalo, 1977). For more recent work on dispute resolution in southeastern Afghanistan, see also Mohammad Osman Tariq, "Community-Based Security and Justice: Arbakai in Afghanistan," *Journal of the Institute of Development Studies* 40 (March 2009): 20-; The Liaison Office (TLO), "Linkages between State and Non-State Justice Systems in Eastern Afghanistan: Evidence from Jalalabad, Nangarhar and Ahmad Aba, Paktia" (The Liaison Office, May 2009); Masood Karokhail and Susanne Schmeidl, "Integration of Traditional Structures into the State-Building Process: Lessons from the Tribal Liaison Office in Loya Paktia" (*Heinrich Boll Publication Series on Promoting Democracy under Conditions of State Fragility* 1, 2006); Palwasha Kakar, "Tribal Law of Pashtunwali and Women's Legislative Authority" (Harvard Law School Islamic Legal Studies Program, Afghan Legal History Project, 2004); and Bernt Glatzer, "The Pashtun Tribal System," in *Concept of Tribal Society* (G. Pfeffer and D. K. Behera eds., 2002), 265-. Given the increasing presence of counter-insurgency operations in southern and southeastern Afghanistan, reports on Pashtun customary practices have begun to emerge from military sources. See, for example, Major Richard Tod Strickland, "The Way of the Pashtun: Pashtunwali," *Canadian Army Journal* 10 (2007): 44-.

3 See Deborah J. Smith, "Community-Based Dispute Resolution in Nangarhar Province" (AREU Case Study Series, December 2009); Deborah J. Smith with Shelly Manalan, "Community-Based Dispute Resolution in Bamiyan Province" (AREU Case Study Series, December 2009); and Rebecca Gang with Shelly Manalan, "Community-Based Dispute Resolution Processes in Kabul City" (AREU Case Study Series, forthcoming).

4 The exception to this is Barfield, "Informal Dispute Resolution."

legitimacy and efficacy of CBDR, gathered users' and practitioners' descriptions of the resolution process, and examined existing and potential linkages with the formal justice sector.

Community-based dispute resolution is often referred to as “customary law” or “informal justice,” but arguably neither of these terms is entirely suitable in the Afghan context. Customary law is the practice through which disputes are resolved or managed at the local level by reference to oral or written ethical and behavioural codes developed over time by community members.<sup>5</sup> The term “customary law” is often used to describe local dispute resolution practiced in the absence of or in opposition to state legal systems.<sup>6</sup> While a great deal of dispute resolution occurring at the community level is grounded in customary law (*qanoon-e-urfi*), Afghanistan has a plural legal system, wherein local practitioners commonly deploy customary law alongside Sharia and state law requirements. While the vast majority of actors at the village level are illiterate and do not have formal training in Sharia, most explicitly distinguish between state, *urfi* and Sharia principles and report that they draw from each in their decision-making depending on the subject matter.<sup>8</sup>

The term “informal justice” is regularly used to denote custom-based local dispute resolution practices, to distinguish them from formal, state justice mechanisms.<sup>9</sup> In the Afghan context, however, this term is inappropriate for two reasons: It suggests that local processes are ad hoc, when research reveals that they tend to follow relatively routinised sets of principles and procedures (albeit at the micro level); and it suggests a dichotomy between state and community-based actors and mechanisms that does not exist in practice.

For these reasons, AREU has chosen to refer to the processes used for resolving or regulating disputes within a particular community as “community-based dispute resolution” or CBDR. CBDR is used throughout the paper to describe a variety of dispute resolution practices used by respondents in the research areas. CBDR is practiced by village and district actors, at times in conjunction and at times in opposition, and is a

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5 Barfield, “Culture and Custom,” 351. See also Jones-Pauly and Nojumi: “In the customary system...it is not only the adjudicators who guard the understanding of rules, but also the participants, i.e., the parties, the witnesses, and the public audience attending the adjudication process...There is a larger vested interest in the process of the evolution [of rules] and a respect for the people’s expectations.” From “Balancing Relations,” 851.

6 Barfield, “Culture and Custom,” 351.

7 *Qanoon-e-urfi* is the English transliteration of the Dari expression for customary law. The word *urf* is defined as custom, while *urfi* means customary. *Urf* and *urfi* are used interchangeably by many interviewed for this research, while interviewees were generally more exacting in their use of *qanoon-e-urfi* to describe specific legal principles.

8 Sharia law has a somewhat double life in Afghanistan, complicating its classification as a distinct source of law. Sharia legal practice under state law is sophisticated in its use of evidence, consistency, jurisprudence, and procedure requiring extensive written submissions. At the same time, high rates of illiteracy among rural Afghans and inadequate training among the judiciary have meant that the application of Sharia law is more variable outside of the highest courts. Given their confidence in themselves as “good Muslims,” many Afghan villagers tend to ignore potential gaps between Sharia and local custom, resulting in a degree of conflation between the two; Barfield, “Culture and Customary Law,” 362-363. Thus, rather than conceptualise Afghanistan’s plural system as tripartite (state, Sharia and customary law), it may be more helpful to do so as a bipartite system (state Islamic law and customary Islamic law). For further discussion of this helpful analytic, see Clark Lombardi, “The Challenge of Creating an Islamically Legitimate Legal System: Lessons from Afghanistan’s Past and Present” (forthcoming).

9 See, for example, the titles listed in Footnote 1. See also, Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge, UK: Polity Press, 2002), 36, cited in Amy Senier, “Rebuilding the Judicial Sector in Afghanistan: The Role of Customary Law,” *Al Nakhlah* (Spring 2006), 1, 3.

melange of village custom, state and local understandings of Sharia law, state law and procedure and what might be called “district custom.”<sup>10</sup> The definition of CBDR has been kept somewhat fluid to reflect the lack of clear boundaries between state and non-state legal mechanisms, while highlighting how a fairly regularised set of procedures have emerged from this mix and are understood and deployed by local users.<sup>11</sup>

In many senses, CBDR in Afghanistan does serve as a gap-filler for weak state institutions, and its pragmatic orientation provides for a degree of flexibility in implementation not always available in a formal justice system. However, research reveals a much more complex relationship, wherein state- and community-based dispute resolution are often practiced serially or simultaneously according to shared ideas about appropriate spheres of authority, desirable outcomes and enforcement capacity. An array of disputes are resolved at the community level, with varying degrees and forms of interaction with a range of district-level actors. For the most part, disputants actively choose the resolution process they consider most appropriate. A high premium on local autonomy and the protection of family and community reputations means that community members state their preference for local mechanisms as the forum of first instance in almost all matters. When pressed, however, respondents describe a process in which forum decisions break down along loose jurisdictional lines. These decisions are greatly informed, and in many ways constrained, by a set of factors including local practice, social norms and expectations, dispute type and size, desired outcomes, documentation needs, enforcement capacities, and other practical considerations.

Respondents in the Balkh research sites most frequently delineate dispute types and thus appropriate resolution fora by describing them as “big” or “small.” In this rubric, small disputes do not generally require formal documentation or coercive enforcement and are experienced by respondents as most satisfactory when resolution is grounded in principles of social cohesion. Disputes in this category commonly include family conflicts (including minor or isolated cases domestic violence), petty crimes, inheritance claims, and land or water claims involving relatively few parties of equal status. Small disputes are principally resolved within the family or are referred to community elders selected for their capacity in dispute resolution.

In contrast, big disputes tend to require formal legal documentation and stronger enforcement mechanisms. Although social cohesion remains important for the sustainability of enforcement, disputes often become “big” because peace- and compromise-oriented decisions have not been successful or are not experienced as appropriate in the circumstances. This category of dispute includes serious crimes involving death or injury; land or water claims of long duration, between villages or involving multiple parties from within the village; protracted inheritance or land division disputes; divorces; and cases of severe or recurring domestic violence.

In many cases, disputes are not conceptualised as purely civil or criminal. Rather, there is recognition that criminal acts are often rooted in civil disputes. Similarly,

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10 District custom can be understood to mean processes used by district actors that may deviate from state procedure in order to meet local needs and legitimacy requirements. For example, where court proceedings are seen as too time-consuming and subject to corruption, a district actor might mediate a dispute in his office in cooperation with village elders. Although this practice might be in contravention to state legal requirements, its efficacy and legitimacy means that the process has become a regular feature of CBDR in the area.

11 This fluidity between state and non-state actors is a historical feature of local governance in Afghanistan, particularly in rural areas, and can also be found in realms of governance beyond dispute resolution. See Hamish Nixon, “The Changing Face of Local Governance?: Community Development Councils in Afghanistan” (AREU Working Paper Series, 2008), 16-17.

while respondents have developed a rough typology of cases and their appropriate jurisdiction, in most instances this does not mean that disputes are handled solely by the community or by the district. Rather, disputes of a variety of types commonly involve local and district-level practitioners working together serially or simultaneously to reach resolution, focusing on the aspects of a given dispute that are within their respective areas of authority and expertise.

Additional push and pull factors also influence disputants' decisions on how cases should be handled. Considerations of shame and honour work to keep disputes of a sensitive nature as close to home as possible; pressure to maintain community, neighbourhood or even family insularity and autonomy can heavily affect disputants' choice of forum.<sup>12</sup> Women's access to community, religious and district actors is often highly constrained for the same reasons, although mechanisms that enable women's participation and protect their rights exist within all levels of CBDR. In many cases, however, these protections hinge on women's awareness of these mechanisms and the willingness of their male counterparts to uphold them. Further, the research revealed that women's access to resolution actors and processes greatly varies depending on the type of dispute, with increasing space for women's participation in matters requiring formal documentation, particularly relative to land. At the same time, high levels of real and perceived corruption among district-level actors means that disputants who might have accessed state mechanisms choose instead to submit to community processes.

If CBDR is to be effectively understood as part of Afghanistan's plural legal system, then it is critical to examine the assumptions, principles, real and perceived costs, and benefits that contribute to local actors' decisions on dispute resolution. It is hoped that the following analysis will in this way contribute to current policy and programming initiatives seeking to bridge state and non-state dispute resolution mechanisms.

The remainder of this case study is organised as follows: Section 2 presents the key themes and findings that have emerged from the research; Section 3 discusses the methodology used for collection and analysis of the data, the selection of the research sites, and their social, economic and geographical contexts; Section 4 presents an overview of the historical roots of legal pluralism and CBDR in Afghanistan and highlights the conditions under which state and community actors are most likely to collaborate; Section 5 describes the prevalent CBDR mechanisms in the research areas, including community *jalasas* (meetings held to resolve disputes) as well as processes involving district actors, and highlights existing links between state and local practices, particularly through designated personnel at the community and district levels; Section 6 discusses how and why disputants make the choices they do regarding the appropriate forum, resolution principles, documentation and enforcement needs for various types of disputes. It also discusses land as an exceptional category providing higher levels of access for women, and addresses additional push and pull factors such as the value placed on community

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<sup>12</sup> The author's ideas regarding community insularity in Afghanistan are drawn from the work of anthropologist Louis Dupree. Dupree describes a common pattern witnessed in Afghan villages, where villagers cooperate with outsiders as necessary but in a way that remains protective of the group. In Dupree's words: "As a consequence [of the extractive tendency of outsiders], most villagers simply cannot believe that central governments, provincial governments, or individual local or foreign technicians want to introduce permanent reforms. Previous attempts have generally been short of duration and abortive, for once the "modernisation" teams leave, the villagers patch up the breaks in the "mud curtain" and revert to their old, group-reinforcing patterns" (Louis Dupree, *Afghanistan*, 249). While Dupree is speaking specifically relative to reform interventions, the same pattern can be seen in villagers' relations with state actors for purposes of dispute resolution. Further, the author suggests that patterns of insularity among villagers exist in concentric circles, starting with the family and rippling out from the village to the district to the state itself. See also the text accompanying Footnotes 27 and 28.

autonomy, notions of shame and honour, and the impact of corruption; and Section 7 offers concluding comments on the key themes of the research and suggests areas of opportunity and constraint relative to building new and more effective links between state- and community-based dispute resolution. Women's ability to access and influence CBDR processes, and the ways their rights are protected and their participation is constrained within CBDR, are discussed throughout the paper as well as in the conclusion.

## 2. Key Themes and Findings

As with the other AREU case studies on CBDR, this research has focused on four central themes: (1) the processes used in resolving or regulating disputes at the community level; (2) the relationships between community and state actors involved in dispute resolution and between dispute resolution processes at the community and district levels; (3) the principles underlying the outcomes of dispute resolution; and (4) equity within these processes, with a particular focus on gender. Gender equity itself has been analysed with regard to four dynamics: women's ability to access dispute resolution processes and key actors at the community and district levels, their ability to influence these processes, their role as decision-makers in resolving and managing disputes, and the outcomes of dispute resolution processes involving women. Principle findings are described below.

### 2.1 Adaptability and pragmatism

- CBDR processes are not static and do not rest on an unchanging version of tradition and custom. While adherence to a basic set of social principles and procedures legitimises CBDR decisions, other elements such as acceptable outcomes, demand for documentation and enforcement mechanisms are actively revised over time with respect to changing social relationships and political structures.
- The principles used to rationalise CBDR outcomes are complex, drawing on Islamic, state and customary rules, and mediation, negotiation and pragmatism. While these principles are somewhat fixed, CBDR still allows for adaptability based on the dynamics of individual cases and wider societal considerations.

### 2.2 CBDR and the state

- When choosing a forum for dispute resolution, residents of these research sites base their decisions on local practice, social norms and expectations, desired outcomes, documentation needs, and enforcement capacities, as well as financial and mobility issues. This creates a loose sense of jurisdiction<sup>13</sup> and regularised procedure among CBDR users and practitioners at the local and district levels.
- CBDR processes and practitioners are not isolated from district actors but instead regularly work in collaboration with them, serially or simultaneously. A range of cases are referred from the village to the district and back again, and vice versa. Likewise, district and community actors regularly work together to reach solutions that are sustainable at the community level and officially recognised at the district level.
- Local actors rely increasingly on formal state mechanisms, especially for documentation and enforcement. This interaction is facilitated by designated personnel at the community and district level, who bridge the procedural and substantive requirements of each system.

### 2.3 CBDR principles, legitimacy and capacity

- CBDR is often rooted in the Islamic notion of *islah*, in which peace and social cohesion are pursued through a process of negotiation and reconciliation. Although CBDR also

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<sup>13</sup> Jurisdiction is defined as the power or right of a legal entity to exercise adjudicative authority over a person. Jurisdiction can be allocated according to geographic area, dispute type, size of claim, phase of dispute or a number of other factors depending on the design of a particular legal system; jurisdiction can be exclusive to a single legal body or can be shared among legal entities.

places significant value on evidentiary considerations and local understandings of equity, outcomes that emphasise distributive and restorative justice<sup>14</sup> may sacrifice individual rights and entitlements for the sake of compromise and community harmony.

- While CBDR processes may not always and immediately resolve a dispute, they are valued for their ability to regulate or contain disputes that could otherwise erupt into violence.
- CBDR remains prevalent in Afghanistan for many reasons, which may vary by location. Respondents in the research areas choose CBDR as it is low in cost, efficient, and seen as less prone to corruption; decisions are afforded a high degree of legitimacy as they are known to be based on socially meaningful, equitable and restorative principles.
- Weaknesses in the formal system may create push factors away from district mechanisms. These include the likelihood of delay, higher costs (legitimate and illegitimate), social and logistical constraints, and the idea that non-*islah* decisions may lead to hostility in the community. However, given the increasing significance of official documentation and the desire for state enforcement in certain cases, many respondents assert that they would choose district mechanisms for a large number of disputes that are traditionally handled at the village level if only government corruption could be eliminated.

## 2.4 Gender equity

- While access to and participation in CBDR may be more constrained for women than for their male counterparts, there are spaces in which women can access, participate in, and influence resolution outcomes.
- Mechanisms exist for the protection of women's rights and interests at the community and district levels. The instances in which these procedures failed were commonly the result of women's poor access to information, restricted physical and social mobility, bad reputations in the community or lack of actively protective male relatives.
- Women's access to community and district actors varied by dispute type and was strongest in household matters and issues pertaining to inheritance and land rights. When documentation was required to seal a claim, particularly related to land, women were permitted and even encouraged to access district authorities, albeit with appropriate male supervision. In almost all other arenas, however, it was considered gravely shameful for women to pursue dispute resolution at the district level. While this was highly constraining for many women, in some circumstances women were able to use the threat of going to district authorities as a tool to influence dispute resolution at the local level.
- At times, CBDR decisions do not adhere to notions of women's universal human rights. However, this is not a product of the design of Afghanistan's justice system or CBDR itself as much as it is a consequence of prevailing gender roles and relations in the country more generally.

<sup>14</sup> Distributive justice is concerned with the fair allocation of resources among community members, such that resolution seeks to address the underlying economic or resource-driven causes of conflict. Restorative justice places strong emphasis on the needs of both victims and offenders, such that resolution seeks to restore the dignity, peace and relationships of and between victims and offenders.

### 3. Research Methodology and Site Selection

#### 3.1 Research methodology

The primary methods used for data collection were semi-structured interviews, informal conversations and focus group discussions. These were used in a flexible and open-ended manner in order to give respondents the opportunity to define the issues that were most important for them.

The sites for data collection in Balkh Province were two villages within one district. At the district level, the following respondents were interviewed: the district governor, head of the district police department, prosecutors, the *modir-e-huqooq* (officer of the department responsible for civil law); the head of the primary court and the head of the *Amlak* (land administration department). Some of the district-level respondents were interviewed twice. In cases in which the person holding the post changed during the course of the research and a second interview was not possible with the original respondent, that person's replacement was interviewed instead.

Across the two villages, 34 interviews with men and 31 interviews with women were conducted. (In a very small number of cases, two of these interviews were with the same respondent.) Some respondents were regularly involved in dispute resolution, others had had or were experiencing disputes themselves, and others were family members or neighbours of disputants. Eight focus group discussions were held with men and seven with women. Interviews and focus group transcripts have been complemented by field notes from observations and informal conversations.

All interviews were recorded in written notes, which were then translated into English as closely as possible to verbatim. Translation itself presents particular challenges, and the research team continually discussed the translation of certain words and phrases. The team was keen not only to have a direct word-for-word translation but also to understand the finer nuance of certain Dari words and phrases. As will be seen throughout this paper, specific words, particularly those used to refer to customary and Sharia practices and principles, have been kept in the original Dari with explanations provided in English.<sup>15</sup>

Researchers collected three types of knowledge from respondents: (1) individuals were asked for general information on the types of disputes and processes for dispute resolution that existed in their communities; (2) particular cases were investigated through interviews and informal conversations with disputants, their family members and neighbours, and those involved in resolving the dispute; and (3) opinions, thoughts and feelings were invited about dispute resolution at the community and district levels and any recommendations as to what should and should not change as the development of Afghanistan's justice sector moves forward. Individual cases were explored alongside generalised information to avoid receiving responses based only on behavioural expectations or normalised practices. For example, in many cases, when asked in a general manner, respondents told researchers that women do not participate in *jalasas*. Yet when exploring stories of particular disputes, male and female respondents described a range of instances in which women participated in the resolution of their own and others' disputes.

It was nevertheless important to collect this more generalised information to gain a historical perspective on dispute resolution in the area, so as to broaden the understanding

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<sup>15</sup> Dari terms are pluralised throughout this study by adding the standard English "s"; for example, the plural of *qawm* is given as *qawms*.

of how disputes are resolved in the types of cases for which the research team was not able to directly explore, cross-check, or compare individual dispute information. The research team collected community members' ideas on the ways in which CBDR was effectively serving their needs as well as their perspectives on how CBDR, state mechanisms, and links between the two could be developed to improve access to and quality of dispute resolution services. For this reason, focus group discussions were held, not (as is common) at the beginning of a data collection period, but at the end of the fieldwork. In this way, research team members were able to review initial data analysis with respondents for clarity and accuracy, as well as to get their reactions and further input to the conclusions drawn therein.

Analysis of the data corresponded with this approach, exploring the differing descriptions and opinions regarding individual disputes while at the same time drawing out themes and subthemes across the data as a whole. ATLAS.ti qualitative analysis software was used to code the text of collected transcripts and field notes in order to produce sets of quotations about particular themes and subthemes. Detailed case stories were compiled from the interviews, and summaries of a representative selection of cases are included in the annex.

### 3.2 Site selection: District and village context

Balkh is one of the largest provinces in northern Afghanistan. Research was conducted in one district of the province, which is approximately 50 kilometres from Mazar-e-Sharif, Balkh's provincial capital and one of the five largest urban centres in Afghanistan. There are roughly 90 villages in the district; the majority of the population is Tajik, with Uzbek, Arab and Pashtun minorities. For the most part, ethnic groups are clustered in separate villages within the district; the research was conducted in two predominantly Tajik villages.<sup>16</sup>

For purposes of this analysis, "community" was defined as the respondents in the research areas defined it themselves. In the villages visited for this study, community was defined by reference to a *qawm* or group of *qawms* in the same geographical area. *Qawm* is a term used to describe a form of solidarity group. It is a flexible concept; in the research areas, it is used to describe a largely homogenous, nontribal population of ethnic Tajiks concentrated in a village or group of villages.<sup>17</sup> Depending on who is asking the question, however, *qawm* can be used to describe a range of identities expressed in ethnic, geographic, clan and family based terms.<sup>18</sup> Although small numbers of Pashtun, Sayed, Uzbek and Arab-descended families are also represented in the research sites, they may or may not be considered part of the majority *qawm* depending largely on how long they have been in the area. In both villages, there was evidence that although minority ethnic groups might describe themselves as being part of a different *qawm*, they still consider themselves and are considered to be part of the local community.

16 For a description of Afghanistan's various ethnic and tribal groups, see Thomas Barfield, *Afghanistan: A Cultural and Political History* (Princeton, N.J.: Princeton University Press, 2010), 18.

17 In contrast, among more tribe-oriented ethnic groups such as the Pashtuns, the notion of *qawm* is much more associated with tribal rather than geographic identity. For Pashtuns as well, however, *qawm* can be a somewhat flexible term used to denote a range of group affiliations. See Barfield, *Afghanistan: A Cultural and Political History*, 18, 22; for more on the Pashtun use of *qawm*, see also Karokhail and Schmeidel, "Integration of Traditional Structures."

18 In this sense, *qawm* holds conceptual value in that it can express a "portfolio of identities" based on the degree of local knowledge or political ideology held by the questioner, rather than one fixed identity. Thanks to Alessandro Monsutti for insight on this point.

Of the two villages selected for this study, one is about 15 minutes drive from the *woliswali*; the other is farther, about 30 minutes drive away. (The term *woliswali* literally means “district,” but is also used, as in this case, to refer to the district’s central town.) Villages with different accessibility to the *woliswali*, and therefore to district-level judicial, administrative and executive resources, were deliberately selected in order to investigate whether remoteness from state actors leads to less engagement between the community and the state. Although these villages are not dramatically different in their proximity to the *woliswali*, interviews revealed that the distance was enough to affect villagers’ choices about how often they travelled there for shopping and other services.

In the case of dispute resolution in the research sites, however, proximity to the *woliswali* seems to have had little or no effect on resolution choices. There was no evidence that differences in proximity created any differences in respondents’ perspectives on whether community- or district-level forums were more appropriate choices for dispute resolution. In both villages, such choices largely depended on dispute type, enforcement and documentation considerations, and other push and pull factors. Likewise, women and men in both villages had similar knowledge about and opinions on how disputes are, and should be, resolved in their communities. Where differences between the communities were noted, it will be specifically mentioned in the text.

The research team also used other criteria when selecting the research sites. It was important that, firstly, the villages were large enough to include several different extended families, and even *qawms*, and secondly, that it was known that disputes were ongoing and being managed within these villages. Villages were identified by talking to state actors and representatives of nongovernmental organisations (NGOs) in the area, as well as visiting several possible research sites and engaging in informal conversations with the residents to determine the availability of dispute-related information and villagers’ willingness to discuss such issues.

### **Cheshma (the near village)<sup>19</sup>**

Cheshma lies on the main road from Mazar city; it is a large village with approximately 600 households. (Households commonly contain two or three branches of one extended family.) This village is comprised of five *gozars*, subunits of the village containing about 50 to 200 extended families, demarcated by the presence of a mosque.<sup>20</sup> Each *gozar* is represented by its own *mesher*, who is selected by the inhabitants and endorsed by the district governor, to manage district-village relationships.<sup>21</sup> Cheshma depends on local elders to assist with local governance but does not have the more formalised structure of specific elders (*dastabashies*) responsible for the administration of village subunits, as is found in the second research village. In Cheshma, research was conducted in two neighbouring *gozars* with primarily Tajik populations.

A stream flows through the centre of the village, which people use for irrigation, cooking and washing. Although there is a hand pump for drinking water, most people continue to collect drinking water from the stream. Homes in the area are made of mud, are of older-looking construction and are situated close to domestic gardens. Most village residents own their own homes and gardens; as there are relatively few recent migrants into the area, most property has been passed down for several generations. Common

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19 Names and identifying details of these villages have been changed to protect the confidentiality of respondents.

20 Villagers in the research areas also commonly use the word *kocha* to describe an alley or a subunit of the village.

21 The role of the *mesher* is discussed in more detail in Section 5.

land holdings are between four *beswa* (20 *beswa* is equal to one *jerib*) and 20 *jeribs* (one *jerib* is equal to 2,000 square meters). A typical household garden contains basic food crops and a variety of fruit trees such as pomegranate, almond, melon and fig. Residents consume the food crops they raise and sell any surplus at bazaars in the *woliswali* and in Mazar-e-Sharif. A small number of villagers own larger parcels of non-irrigated land called *paikal*, which are commonly used for farming cash crops such as wheat. Many of the men from Cheshma village have small shops in the *woliswali*, while the remainder work in their own gardens or as sharecroppers within the village or in neighbouring areas. Overall, the economic situation in Cheshma compared to other villages in the district is relatively good because it has sufficient irrigation water and easy access to the city, where villagers can sell their produce.

The majority of village residents are Tajik, but there are also small numbers of Pashtun, Uzbek, Arab and Sayed families living in the area.<sup>22</sup> Villagers in Cheshma consider themselves to be well integrated, describing the village as unified. Neighbours often have family ties, and residents are predominantly descendants of the original inhabitants rather than recent migrants.

The village has good access to the *woliswali*, which is about 40 minutes walking distance, where most state and market resources are located. Services available in the *woliswali* include government schools (one each for boys and girls, grades one to 12), a major bazaar and a government hospital. In the village itself, there are no health services and only minimal market facilities. Villagers thus depend on access to the *woliswali* for goods and services beyond basic needs.

Two NGOs are active in the village. One is a national organisation which offers microcredit services; the other is the implementing partner for the government's National Solidarity Program (NSP), working to establish Community Development Councils (CDCs) in the village.<sup>23</sup> By the conclusion of the research, the CDC had not yet been established but elections were in progress.

### **Yakatoot (the remote village)**

Yakatoot, a more remote village to the west of the district centre, is also relatively large, with approximately 300 households, most comprised of two or three families each. Homes in the area are mud-constructed and older-looking, and are situated adjacent to gardens. Almost every family has its own land, usually between one and 40 *jeribs*, with

22 Afghanistan's Tajik and Uzbek populations have been present for hundreds of years, as members of ethnic groups that spread across what are now the state borders of Tajikistan, Uzbekistan and Afghanistan. More Uzbeks arrived as refugees during the Russian revolution and the Stalinist period. Pashtun families are not generally native to the area, but were resettled and given farmland in parts of the north beginning in the 1880s. Members of the Arab *qawms* in this area are thought to have descended from the invading Arabic armies of the eighth century, and are now fully assimilated Dari speakers. Often inaccurately described as Arabs, Sayed people are known as descendants of Prophet Muhammad. Sayeds occupy an interesting social role in the area: they are respected for their lineage but treated with some degree of ambivalence as they survive by collecting monetary and in-kind donations from other villagers. For more detail on Afghanistan's ethnic makeup, see Barfield, *Afghanistan: A Cultural and Political History*, 24-31.

23 The National Solidarity Program (NSP) is a national program initiated by the Ministry of Rural Rehabilitation and Development (MRRD) in 2003. The NSP seeks to "develop the ability of Afghan communities to identify, plan, manage and monitor their own development projects" through the election of Community Development Councils (CDCs). See the programme website, at <http://www.nspafghanistan.org>. For helpful background information on the NSP program, its achievements and constraints in Afghanistan, see Sarah Lister, *Caught in Confusion: Local Governance Structures in Afghanistan* (Briefing Paper, AREU, 2005); Nixon, "The Changing Face of Local Governance?"; and Hamish Nixon, *Subnational State-Building in Afghanistan* (Synthesis Paper Series, AREU, 2008).

the majority holding approximately four to five *jeribs*. Very few residents own more than ten *jeribs*, which would qualify them as large landowners.

More so than in Cheshma, production of food and other crops in Yakatoot is limited by lack of adequate water supply and irrigation systems. This was not always the case in Yakatoot, but is the result of redistricting. Villagers noted with much regret that since this change, access to water above all has been badly affected, thus greatly damaging the livelihoods of most residents. Although some families hold non-irrigated *paikal* land, poor weather frequently limits the harvest in these areas as well. Due to lack of irrigation and less regular access to district markets, the economic situation in Yakatoot is relatively weak. As a result, a majority of working-age men travel to Mazar, Kabul or Iran for employment; the remainder may work as shepherds or earn money by gathering dry bushes in the nearby mountains for sale in the bazaar. Both of these activities are labour-intensive with limited return, and involve being away from home for extended periods. A majority of the people maintain livestock for dairy and farm labour, including, on average, four to six sheep or goats, two cows and one or two donkeys.

Unlike Cheshma, Yakatoot has no subvillages; rather than being divided by *gozar*, villagers live as one extended community and are often connected by familial links. The village has one *mesher* as well as local elders who have been selected to serve as *dastabashies*, or local representatives, for subgroups of approximately ten families each. The role of the *dastabashi* is to represent families within his group to the *mesher* and to ensure that those families likewise cooperate with the decisions and activities of the *mesher* and contribute labour and funds to community projects.

Yakatoot has one school for students from grades one to seven, where boys and girls study in separate shifts. Yakatoot's NSP program had been operating for about two years prior to the research; at the time of the research, the CDC was beginning construction on a separate school for girls. Within the village there are a few shops selling basic goods; villagers travel about once a week to the *woliswali* to buy items unavailable in the village. The CDC has constructed a well for drinking water and a pool for rainwater collection; the construction of domestic water pipelines was just underway at the time of the research. Yakatoot has a clinic established jointly by the Ministry of Public Health and an international development NGO. Other NGOs are active in the village, including the NSP facilitating partner; NSP representatives occasionally gather women in the village to engage in microcredit activities, livelihoods programs, and health initiatives such as midwife training. The research team was present for the distribution of sewing machines to selected women in the village as part of a home tailoring project.

As is true in many parts of Afghanistan, residents of Cheshma and Yakatoot villages have survived a great deal of conflict. During the era of Soviet occupation (*Inqelab*), the area experienced a great deal of fighting between Russian forces and the *mujahiddin* resistance. *Mujahiddin* fighters frequently attacked Russian and government vehicles as they travelled on the main road; since Cheshma is situated just off this road, many villagers were killed and houses destroyed during these battles. Villagers in Yakatoot described frequent looting and hunger. Respondents cited the presence of the *mujahiddin* commanders as one of the greatest difficulties during this time, as commanders controlled the area through threats of violence and raided the villages to conscript working-age men to fight against the Russians. As a consequence, male villagers spent long periods of time hiding in the mountains, unable to work or maintain their farms. A number of villagers migrated to Mazar and to more remote summer villages (*qeshlaqs*), while those who could afford to sought refuge in Iran, Pakistan or other countries.

A small number of former commanders have returned to the area; those that were seen as well behaved during the conflict have been welcomed back as community elders, while most of those who committed violence against the villagers have been marginalised.<sup>24</sup> There are, however, one or two former commanders in the community who continue to wield disproportionate influence due to their government connections, ample funds and arms. During the Taliban regime, villagers were also subject to conflict-related violence. While levels of displacement were lower than in other parts of the country,<sup>25</sup> respondents do describe this as a time of fear and deprivation due to the Taliban's restrictive policies, beatings of villagers, and demands for food, weapons and other supplies. Villagers also had to contend with severe drought during this time.

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24 Research on how local reconciliation has functioned in practice after previous periods of violence in Afghanistan would be interesting in light of present-day policymaking on reconciliation and reintegration of former Taliban fighters.

25 Less extensive and less protracted displacement patterns in the research areas has likely led to a greater degree of continuity between past and present local CBDR practices. How displacement levels affect change within CBDR processes will be explored as part of the forthcoming (2011) synthesis of AREU's CBDR research in Balkh, Bamiyan, Kabul and Nangarhar.

## 4. Legal Pluralism and CBDR in Afghanistan

This section provides a brief background note on legal pluralism and the roots of CBDR in Afghanistan: why and how mechanisms of state, religious and community-based justice have come to co-exist and how this degree of pluralism continues to serve the country today. The section highlights the conditions under which the various components of Afghanistan's plural system have most effectively collaborated, thereby offering observations on how legal reform in this arena might best be communicated to variously situated actors.

As a direct product of political and economic choices and geographic and social conditions, Afghanistan has historically consisted of two kinds of societies: urban areas and swaths of irrigated agricultural land governed by formal, centralised systems of authority, and economically less productive and geographically less accessible areas governed primarily by regional and local power brokers through customary institutions.<sup>26</sup> Where state programs aimed at legal and social modernisation have traditionally been welcomed by those at the core (for example, the development of Sharia courts, the building of a multi-tiered independent judicial sector, and the development of constitutions and civil and penal codes<sup>27</sup>), such interventions were frequently seen as intrusive by the relatively independent ethnic and tribal groups in Afghanistan's rural areas. This was particularly the case as successive regimes sought to replace localised, customary mechanisms with centralised, code-based formal justice, often containing provisions directed at altering social and behavioural norms.<sup>28</sup> While legal reforms rarely made it as far as rural communities for purposes of implementation, the symbolic value of these initiatives was often interpreted by rural communities as the encroachment of direct rule by a government that did not share its mores or recognise its mechanisms of self-governance.<sup>29</sup> Further, state-building demands did not typically include offers of services that might have made social and governance changes otherwise palatable to

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26 Barfield describes this as the "Swiss cheese" model of state-consolidation, in which state actors do not seek or expect uniformity of control. Rather, control is sought over population centres, with the understanding that "holes" of varying shapes and sizes will be scattered in between. Afghan state-building has traditionally focused on controlling those "best bits" while leaving the sparsely populated, less productive areas to themselves. See Barfield, *Afghanistan: A Cultural and Political History*, 68-69. See also Bernt Glatzer, *War and Boundaries in Afghanistan: Significance and Relativity of Local and Social Boundaries* (2001), 4; and Barnett Rubin, *The Fragmentation of Afghanistan* (2<sup>nd</sup> ed., 2002), 28. Note that state-building in Afghanistan has traditionally been oriented to gaining control over and the ability to exploit segments of the population, rather than to provide the range of services considered to be essential state functions by many interlocutors. Thanks to Nazif Shahrani for this insight.

27 For a historical overview of Afghanistan's legal development, see: Christina Jones-Pauly and Neamat Nojumi, "Balancing Relations"; "A Guide to Researching the Law of Afghanistan at the University of Michigan Law Library" (University of Michigan Law Library, 2003), <http://www.law.umich.edu/library/students/research/Documents/afghanistan.pdf>; S.H. Amin, *Law, Reform and Revolution in Afghanistan* (3<sup>rd</sup> rev. ed., 1993); Bruce Etling, "Legal Authorities in the Afghan Legal System (1964-1979)" (paper produced for the Harvard Law School Islamic Legal Studies Program, Afghan Legal History Project), <http://www.law.harvard.edu/programs/ilsp/research/etling.pdf>; Amalendu Guha, "The Economy of Afghanistan During Amanullah's Reign, 1919-1929," *International Studies* 9 (1967-68): 161-; Mohammad Hashim Kamali, *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary* (1985); Mohammad Hamid Saboor, "The Progress of Constitutionalism in Afghanistan," in *The Sharia in the Constitutions of Afghanistan, Iran and Egypt: Implications for Private Law* (Nadjma Yassari ed., 2005), 5-.

28 For an overview of how periodic legal reform initiatives have impacted attempts at state-building in Afghanistan, see Barfield, *Afghanistan: A Cultural and Political History*, Chapter 4. Also see: Barfield, "Culture and Customary Law," 349; Kamali, "Law in Afghanistan," 4; Rubin, *The Fragmentation of Afghanistan*, 56-58; and Charles H. Norchi, "Toward the Rule of Law in Afghanistan: The Constitutive Process," in *Beyond Reconstruction in Afghanistan: Lessons from Development Experience* (John D. Montgomery and Dennis A. Rondinelli eds., 2004), 115-116.

29 Barfield, "Culture and Customary Law," 350.

rural inhabitants.<sup>30</sup> For this reason, even as the Afghan state has periodically attempted to expand its governance capacity beyond urban centres, levels of local autonomy have remained high and CBDR mechanisms well developed.<sup>31</sup>

Afghanistan's state-building enterprises, political economy, geography and ethnic and tribal make-up have produced a plural legal system, wherein state, religious and customary legal orders exist simultaneously.<sup>32</sup> Each system contains its own normative order, consisting of rules, regulations, procedures, resolution principles and compliance mechanisms, developed through and expressive of the needs, mores and self-conceptions of a particular society. In the Afghan context, state, religious and community-based legal mechanisms overlap; each responds and adapts to changes within and demands from the others.<sup>33</sup> While each sector has enjoyed periods of heightened power, none has ever been able to establish complete supremacy over the others.<sup>34</sup> Rather, each has and continues to perform unique and evolving functions within and between one another.<sup>35</sup> At maximum levels of cooperation, state, religious and community-based legal orders legitimise and reinforce their counterparts, for example, rendering state decisions sustainable at the community level and community decisions authoritative before state officials. These relationships evolve, often rapidly, in response to conditions on the ground, such as patterns of conflict, the strength of state governance, the relative legitimacy of community, regional and central power brokers, and even environmental conditions.

In the research areas, the two factors that have had the greatest impact on links between state and community dispute resolution mechanisms are the periods of conflict that have dominated Afghanistan's recent history and the degree to which various political regimes respected the autonomy of community actors.<sup>36</sup> As expressed by respondents

30 Barfield, *The Central Asian Arabs of Afghanistan*, 140.

31 Barfield, "Culture and Customary Law," 354; see also Barfield "Afghan Customary Law," 3.

32 There is an extensive body of literature on the notion of legal pluralism. For classic examples, see Sally Engle Merry, "Legal Pluralism," *Law and Society Review* (1988): 869-; John Griffiths, "What is Legal Pluralism?," *Journal of Legal Pluralism* 24 (1986): 1-; and Marc Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law," *Journal of Pluralism and Unofficial Law* 19 (1981): 1-. More recent and more critical articles include: Mitra Sharafi, "Justice in Many Rooms Since Galanter: De-Romanticizing Legal Pluralism through the Cultural Defense," *Law and Contemporary Problems* 71 (2008): 139-; Ihsan Yilmaz, "The Challenge of Post-Modern Legality and Muslim Legal Pluralism in England," *Journal of Ethnic and Migration Studies* 28 (2002): 343-; Margaret Davies, "The Ethos of Pluralism," *Sydney Law Review* 27 (2005): 87-; Emmanuel Melissaris, "The More the Merrier? A New Take on Legal Pluralism," *Social and Legal Studies* 13 (2004): 57-; and Brian Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Global to Local," *Sydney Law Review* 30 (2008): 375-.

33 Legal anthropologist Sally Falk Moore has described this type of interaction between social mechanisms as the functioning of "semi-autonomous social fields." Moore defines the semi-autonomous social field as a normative order that "generates rules and customs and symbols internally" but "is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded." The concept is helpful in analyzing how state, religious, and customary law play off of one another in Afghanistan in various ways over time, as well as bringing into question the extent to which the concepts of Afghanistan's "core" and "periphery," in terms of the reach of state governance, can be cleanly demarcated as separate spheres. Sally Falk Moore, "Law and Social Change: the Semi-Autonomous Social Field as an Appropriate Subject of Study," *Law and Society Review* 7 (1973): 719, 720. See also Sally Falk Moore, *Law as Process: An Anthropological Approach* 54 (1978) and Werner Menski, *Comparative Law in a Global Context* (2006): 104-08.

34 Barfield, "Afghan Customary Law," 1.

35 Examples of this interaction from the case studies are offered later in the paper. For further examples, see Norwegian Refugee Council, "The Relationship Between the Formal and Informal Justice Systems in Afghanistan," and Gang, "Observations on NRC Client Choices of Forum."

36 For detailed analysis of how the mujahiddin and Taliban periods affected CBDR processes, see Smith, "Community-Based Dispute Resolution in Nangarhar" and Smith with Manalan, "Community-Based Dispute

in both villages, when local actors perceive that a regime is demonstrating respect for community autonomy in dispute resolution and local governance, their willingness to engage with state government systems and requirements tends to be much higher. This pattern is evident in respondent comments describing regimes spanning from King Zahir Shah (1933-1973) to the present day.

Local actors in the research areas are thus protective of community processes, but at the same time they desire interaction and consultation with, and recognition by, state administrative, judicial and executive entities. This will to collaborate is evident in the extent to which local actors are prepared to alter CBDR practices if such changes increase opportunities for meaningful involvement at the district level; likewise, community practices are significantly influenced by changes in formal judicial and administrative process. Still, collaboration rests on a sense of respect for community autonomy rather than coercive force.

Currently, there is evidence of heightened collaboration between state, religious and community-based resolution actors in the areas researched in this study. This is possibly due to increasing consolidation of the central government, the formalisation and professionalisation of certain elements within state administrative systems, and the willingness of state actors to engage with and respect the legitimacy of local processes. Thus, more than ever, it is important to understand how dispute resolution is pursued at the community level.

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Resolution in Bamiyan.” While there may be some differences in how these periods were experienced in Balkh, characteristics of the mujahiddin and Taliban regimes are generalizable across Afghanistan to the extent that Balkh respondents express similar perspectives on this issue to those of their counterparts in other regions.

**Box 1. Plural systems, regulated by autonomy and respect**

*As I know, during the time of King Zahir Shah the whitebeards<sup>1</sup> had a good role in dispute resolution. Also, during the mujahiddin time they respected the whitebeards and their jalasas. But the Taliban didn't respect the whitebeards' jalasas; they tortured a lot of people without any reason, and at that time we couldn't even talk with others in our woliswali openly about any dispute. But the current government is better than all the other regimes about respect for the whitebeards. Nowadays we can talk openly even in the woliswali about any dispute.*

– Meshher, Yakatoot

*If we faced any dispute during the [civil] war, mostly we resolved our disputes inside the village by the whitebeards. We didn't like either the daulat<sup>2</sup> [state] or the mujahiddin because if we wanted to go to the daulat for resolving our disputes, the mujahiddin wouldn't let us, and if we wanted to go to the mujahiddin for resolving our disputes, then the daulat wouldn't let us. We didn't have any power because we were poor people.*

– Whitebeard in his 70s, former *dastabashi* of Yakatoot

*During the mujahidin time our disputes were resolved by commanders and the daulat didn't have authority, but nowadays if our villagers have any dispute the whitebeards are resolving them. If they cannot resolve the dispute then the meshher puts his stamp on the paper and the dispute officially goes to the daulat. In the past the whitebeards didn't have any role in the daulat, but now the daulat respects the whitebeards and the jalasas.*

– Whitebeard in his 70s, former *meshher* of Yakatoot

1 Respondents in the research area use the term *rish-e-safed*, or whitebeard, to refer to male community elders while female elders are referred to as *mui-e-safed*, or whitehairs. While specific terminology differs by regional language and dialect, the practice of describing elders by reference to their physical characteristics is common throughout Afghanistan. Other terms can be used to connote elder status, while whitebeard/hair is generally reserved for signifying particularly respected elder status.

2 *Daulat* is defined as “state” and includes the three branches of government. This can be contrasted to *hokumat*, which refers specifically to the executive branch, including government ministries, agencies and departments, such as the cadastral. While some respondents used the terms according to their specific meanings, *daulat* and *hokumat* were often used as synonyms, both signifying government. Respondents' word choice is included in the text.

## 5. CBDR Mechanisms

This section introduces the processes and actors involved in CBDR in the research sites, how they are selected and the bases for their authority. The section offers observations on the role of women in CBDR, the ways in which women are able to access local- and district-level resolution mechanisms,<sup>37</sup> the protections afforded to them within each system and the ways these protections can fail due to social and informational constraints. It also examines the role of the *mesher*, who represents the village at the district level. The *mesher* has perhaps the most dynamic of all roles explored in this paper, as recent developments in the *mesher's* function reflect changing local demands and administrative procedures regarding documentation of dispute resolution outcomes.

There are three primary modes of dispute resolution in the research areas. Firstly, disputants can choose to keep dispute resolution within a family or community *jalasa*. This would involve some or all of the following local authority figures: elder family members, whitebeards, *dastabashies*,<sup>38</sup> the mullah (community religious leader), and the *mesher*. Secondly, if disputants are unwilling or unable to reach a mutually acceptable outcome at the local level, or if community decisions require official recognition, local CBDR practitioners can refer the case to district officials such as the district governor, judge, head of police or *jeribgar* (representative of the Amlak). Thirdly, disputants or CBDR practitioners can refer a dispute directly to the district if so required by the severity of the dispute or the parties' needs for documentation or enforcement. Where disputes were referred to district authorities, resolution generally became a collaborative CBDR process involving district and local practitioners rather than a clean transfer of authority between two distinct systems.

### 5.1 The whitebeards' *jalasa*

The most common mode of dispute resolution at the village level is the *jalasa*, or community meeting.<sup>39</sup> *Jalasa*s are widely utilised in the research areas, likely because low-level disputes such as those involving family members, neighbours, or claims over relatively small portions of land are much more prevalent.<sup>40</sup> At the same time, community members typically strive to minimise conflict by resolving disputes according to notions of *islah* through local mechanisms rather than risk exacerbating hostilities by appealing to external bodies.<sup>41</sup>

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37 As discussed above, CBDR mechanisms draw from a range of state and non-state sources and cannot be conceptualised as a binary. However, for purposes of analysis, the author will use the term “local” to describe aspects of resolution processes that occur primarily within the two research villages or involving village actors while the term “district” will signify processes that take place primarily in the *woliswali* or involving state actors.

38 In Yakatoot, whitebeards commonly participate in addition to the *dastabashies*, who are responsible for dispute resolution in specific areas of the village. In Cheshma, a similar pattern is seen, where whitebeards who live closest to or are most familiar with parties to a dispute tend to participate in dispute resolution, although there are no formal area designations as there are in Yakatoot.

39 *Jalasa* is primarily used in the research sites to describe meetings for dispute resolution. *Jirga* is a synonym for *jalasa*, although it is used more frequently by Pashto speakers. *Jalasa*s are different from *shuras*, which are larger meetings convened regularly to discuss issues that affect the entire community, such as resource distribution or development projects.

40 How disputes are classified as small or big is key to decision-making on appropriate forums for dispute resolution. A loose typology of common dispute types is presented in Section 6.

41 *Islah* is a dispute resolution principle meaning to restore community harmony and social cohesion through mediation, negotiation and reconciliation. While *islah* is likely derived from Sharia, in the research sites it has come to be widely used as a mechanism of customary law. Use of the concept in the resolution of disputes in the research sites is explored in depth in Section 6.

In the research sites, *jalasas* are commonly either arranged specifically to address a particular dispute, or held weekly after Friday prayers in the mosque to manage a docket of issues accrued during the week. Depending on the complexity of the issue and the willingness of parties to reach a compromise, an issue may be resolved in one *jalasa* or may require many, held over the course of months or years. In the research areas, generally, if a dispute cannot be resolved in around four meetings, it is commonly considered time to refer it to specific actors in the district or to a different configuration of local actors (such as from a family group to one that involves other whitebeards, the mullah or *mesher*), although this may vary depending on the issue.

### Selecting whitebeards for dispute resolution

In Cheshma village, *jalasas* are commonly convened by elders called *rish-e-safed* (whitebeards) for disputes that arise within the confines of the village. In Yakatoot, which is broken down into administrative subunits, *dastabashies* are largely responsible for managing the *jalasa* processes of their constituents.<sup>42</sup> While many whitebeards in both research areas suggested that today's young people often have good ideas about how a dispute should be resolved given their access to formal education, most see youth as a time to observe and to develop knowledge and experience in order to perform the function when their time comes. As described by the *mesher* of Cheshma:

*Yes, we accept the participation of young people in the jalasas. We know that the future belongs to young people and actually they are the men of the next years and all the village will belong to them. They should find enough experience in their life and when they participate in these kinds of meetings it is good for them. Soon it will be the turn of these young people to guide the community and help people regarding their disputes.*

In both villages, *jalasa* leaders are selected for their capabilities specific to dispute resolution.<sup>43</sup> When describing how a whitebeard is selected for CBDR, respondents emphasised that this was not a hereditary assignment but rather contingent on the possession of certain characteristics, such as knowledge of local custom and Sharia law, decision-making ability, fairness, honesty and respectability. Dispute resolution experience and good standing in the community are consistently valued over social and financial status and formal education.<sup>44</sup>

Additional CBDR actors, such as the mullah and the *mesher*, are invited to participate, given their roles in the community as well as their specific expertise, be it local knowledge or familiarity with state or religious requirements. Today, many villagers in the research areas (although not all) see the mullah as more of an informal mediator, a conduit to the whitebeards or a resource on Sharia rules rather than as a decision-making authority.<sup>45</sup> The mullah's role in CBDR has decreased over the past several years

42 A *dastabashi* represents the needs and interests of individuals in a village sub-unit to the *mesher* and the larger group of community elders and relays the decisions of community and district actors to the sub-unit. *Dastabashies* are also expected to serve in CBDR processes involving members of their sub-unit, given the degree of knowledge and authority *dastabashies* have relative to their unit members.

43 Because whitebeards in Cheshma and *dastabashies* in Yakatoot perform the same dispute resolution function, for the purposes of this paper the term "whitebeard" is used to refer to both.

44 The priority given to skills and reputation possibly has to do with the fact that the majority of villagers from the research sites are from one *qawm*, populated by an ethnic group that assigns significance to locality rather than tribal affinity. Hence, unlike in other groups in Afghanistan that emphasise ancestry and tribal hierarchy in their choice of CBDR practitioners, whitebeards in Balkh appear to be selected according to a more merit-based process. For contrasting practices in another part of Afghanistan, see Smith, "CBDR in Nangarhar," 12.

45 This observation is supported by Barfield: "While most Afghan villages had a local mullah, these men

as village preferences have shifted from customary to formal documentation.<sup>46</sup> While many continue to rely on the mullah for Sharia-based inheritance division, the mullah has no authority to issue legal documentation such as formal deeds.<sup>47</sup>

### Box 2. Characteristics of whitebeards in CBDR

*People respect their whitebeards because they are knowledgeable and because they have good relations with the people. The main thing isn't money. We don't have rich whitebeards. All the whitebeards are poor but respected.*

– Woman in her late 50s, secretary of the NSP *shura*, focus group discussion, Yakatoot

*He should be experienced, knowledgeable in *jalasas* and also in dispute resolution through our customs, values and tradition. And also he should know about Sharia as well for dispute resolution in the village.*

– Whitebeard in his mid-80s, focus group discussion, Cheshma

*The person that can act as a whitebeard is someone who always says the truth and he doesn't take bribes and he should always work without a salary, I mean as a volunteer, for his village. He should not resolve the dispute in the favour of his relatives—he should resolve the dispute in favour of those people who are in the right.*

– Farmer in his early 50s, focus group discussion, Cheshma

Direct participation by women in *jalasas* as disputants or witnesses was extremely rare in the research areas; rather than being particular to these villages, this is likely due to social norms on women's participation in Afghan society more broadly. However, when discussing disputes between family members (in particular those involving women), elder women known as *mui-e-safed*, or whitehairs, are regularly relied on to mediate given their proximity and detailed knowledge of events and behavioural expectations in the home. Because there is a strong impulse among families in the research area to keep domestic disputes out of the public eye, even the most respected of whitehairs are treated with increasing ambivalence as they move farther away from their immediate family.<sup>48</sup>

In a case that offered an exception to this pattern of insularity, a family dispute had become so severe that resolution did not seem possible without inviting other members of the community to assist. A woman had run away from her husband's home multiple times, alleging increasingly severe domestic violence. When the woman's mother- and sisters-in-law were unable to persuade her to return, the woman's husband and mother-in-law called on an elder woman from outside of the immediate family to assist.<sup>49</sup>

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generally had only a minimal amount of education and were considered employees of the community so that they had little prestige or influence." Barfield, "Custom and Customary Law," 364.

46 The issue of shifting demand for documentation is examined in detail in Section 6.

47 Sharia is often used by villagers to describe elements of both state and customary practice, and it is consistently used to refer to formal, state-issued documentation. While the mullah is integral in issuing Sharia-based agreements on issues such as inheritance division, he has no role in drafting state-issued Sharia documents such as formal land deeds. The complex ways in which Sharia is conceptualised and deployed in Afghanistan is introduced above, Footnote 8.

48 This pattern of insularity can be connected to Dupree's concept of the "mud curtain," discussed in Footnote 12.

49 See "Nazia Refuses to Return to her Husband" in the annex.

**Box 3. The role of the mullah in CBDR today**

*Mullahs have a good and key role in villages because the mullahs know about Sharia and religious issues. For that reason people have respect for the mullahs in the rural areas.*

– Male NSP assistant, Cheshma

*When people have a dispute, sometimes they go to the mesher and some people go to the mullah. It depends on the person who chooses to go to the mesher and who goes to the mullah. It is not clear.*

– Woman in her early 40s, Cheshma

*When the whitebeards make jalasas, they will call the mullah to participate in the jalasa. The mullah doesn't go to the daulat. He only goes to the whitebeards' jalasa. If there is a dispute in the village, a jalasa is held and the mullah will be there.*

– Whitehair in her 50s, Yakatoot

*In the past people mostly went to the mullahs and whitebeards and resolved their disputes using their urfi deeds. Now people want Sharia. They don't want urfi because if someone has just an urfi deed then one day, after ten years, they will have a big dispute over that.*

– Whitehair in her 50s, Yakatoot

**Box 4. Women's role in family mediation**

*[Laughing] There are lots of issues every day among the women in a family which last for a few minutes and then are resolved by themselves. The elder [woman] in the family will advise them not to fight.*

– Woman in her late 30s, Cheshma

*We don't have an old woman who resolves women's disputes or issues. In each house there is an old person to resolve issues within the family. Family issues don't go out.*

– Whitehair, Cheshma

*From the past till now it is the same. People resolve their disputes by the elders and whitebeards of the area and at that time the women didn't participate in the jalasa or resolve a dispute. It is not the custom. If an old woman of the neighbourhood goes to another house and resolves issues, then people or the disputants would say, "Who are you, making judgment among us? We know ourselves better."*

– Female teacher, 35 years old, Cheshma

In both Cheshma and Yakatoot, there is also a special leadership position among women, known as the *khadim*. Traditionally, the *khadim*'s role is to circulate news among village women, largely related to weddings, births, deaths, and distribution of resources. The *khadim* is selected by community whitebeards according to a similar set of characteristics as those applied to men: upstanding moral character, work ethic, trustworthiness, community knowledge and communication skills. Because it is inappropriate for men to speak to other men about their women, it is likely that whitebeards choose the *khadim* based on information provided by their female relations, affording women a certain degree of control over the selection of their own representative. Like her male counterparts, the *khadim*'s term is bound by her ability to perform. Based on interviews in both villages, the *khadim*'s role seems amenable to social change as evidenced by increasing openness to her participation in dispute resolution and development activities involving women.

### Box 5. The *khadim*: An evolving leadership role for women

*The people choose a khadim who can serve the people well and who has a good reputation and has been good in the village. She should also be active. Our khadim is very good, she can do the work of ten women! As long as she can do her work she will be the khadim. If she can't do it, then they will choose another khadim.*

– Housewife in her mid-40s, focus group discussion, Yakatoot

*First of all the khadim tries to resolve women's disputes, and if she can't, then she sends that dispute to the whitebeards for solving.*

– Dastabashi in his mid-50s, Yakatoot

*The women don't have a mesher, but they have an elder woman called khadim. If there is any wedding party or funeral she informs all of the women villagers regarding the khairat, khatam, funeral or wedding party. Sorry to say our community is not so developed that our women have a women's mesher. In the current situation the whitebeards are resolving the people's small disputes in the village.*

– Mesher, Cheshma

*If there is a dispute among the women of the village, the khadim cannot resolve it. The whitebeards will resolve the women's disputes through their jalasa in the village.*

– Whitebeard, Yakatoot

The conflicting opinions regarding the *khadim's* role in CBDR illustrate the tenuousness of women's authority in a social structure dominated by elder males. At the same time, most respondents (although assuredly not all) see a place for female leadership in the community and have largely welcomed recent changes in the *khadim's* role as community leader, for example as the head of the local women's NSP *shura*, the lead in microcredit group arrangements and the coordinator for women's livelihood and development activities within the village. Still, even the most vocal village women know that their authority rests on the approval of their men. As the *khadim* of Yakatoot village explained:

*[Laughs.] Of course I can make a decision, but I have to ask permission from my husband. We cannot do anything without our men's permission. If we do anything without our husband's permission, then he would say to us, "You don't value and respect me." We women have to ask our husbands over everything.*

Women's subordinate status is not solely a product of community norms in the research sites, however, but rather is consistent with prevailing gender roles and relations in Afghanistan more generally.

### The *jalasa* process

When a dispute is of a more personal nature, elders of the family involved commonly try to resolve it among themselves so as not to reveal their home as disunified to the community. In the research areas, it is much more common for disputes involving women to be categorised as sensitive, whereas those involving only men are much more likely to be referred to a broader group of community elders. Where internal resolution of family disputes is not successful, generally the elders will arrange a *jalasa* to be held in the family home. Respondents in disputes such as these tend to select whitebeards for this type of *jalasa* based on their prior connection to the family, the goal being to keep the dispute as quiet and close to home as possible. Likely participants would include one or two respected neighbours, the neighbourhood mullah, the *mesher* or the senior elder of the family's alley (*kalantar-e-kocha*).

**Box 6. Keeping family disputes out of sight**

We have small disputes within the families like fighting between two brothers, wife and husband, brothers and sisters, but these are always within the families. If they can't resolve it within the family, they resolve it through the neighbours. There is no need for the whitebeards and the *mesher* to get involved.

– *Mesher*, Cheshma

Women will resolve family disputes among themselves. They are embarrassed if they take their issue to the whitebeards. Sometimes the husband resolves it, and sometimes the mother-in-law or father-in-law resolves it.

– Wife of the former *mesher* of Yakatoot

Women are also *ghairat* [determined/upstanding] like men. They don't want to shame themselves among the women of the village or do any action to insult their husbands in the village. That is why women in the village are trying to resolve their disputes within their families.

– Man in his 30s, focus group discussion, Cheshma

Disputes of a less personal nature, typically those not involving women, are usually managed in weekly *jalasa* sessions at the local mosque. This type of *jalasa* commonly involves four to five whitebeards chosen for their dispute resolution skills or specific knowledge of the topic, history or parties to a dispute; other participants may include the mullah, *mesher*, *dastabashies* of the area, disputants' witnesses, family members or others they wish present.

In all *jalasas*, no matter where they are convened, all parties to a dispute must be present or represented to ensure that the issue is fairly negotiated and thus legitimate. Further, disputants are required to grant authority (*ekhtyar*) to their selected whitebeards to mediate; this is generally done through a written document that is torn up when the resolution is finalised. In the research area, unlike in some other areas of Afghanistan, submission to the whitebeards' *jalasa* is voluntary; while local elders may try to pressure parties not to take disputes outside the community, there is no fine or other routine penalty if disputants choose not to accept the whitebeards' decision.<sup>50</sup>

If disputants cannot be physically present in the *jalasa*, they must secure representation in the form of a *wakil* (literally, "representative"). The *wakil*, preferably a close male relative, serves as advocate on behalf of the disputant to ensure a satisfactory agreement that is protective of the person's lawful rights. Although it is common for *wakils* to take a small fee for services rendered, this fee is ideally minimal so as not to create a burden for the disputant.<sup>51</sup> *Wakils* do not require a license when representing family members, but are required to hold a written power of attorney.<sup>52</sup>

50 In other areas of Afghanistan, parties to a dispute may be asked to submit a deposit (*machalga*) at the start of the resolution process, which can be kept as a fine (*jirmonha*) if parties do not accept the decision of the community elders. *Jirmonha* and *machalga* are not practiced in the research areas, and are described by respondents as a Pashtun practice. See Smith, "CBDR in Nangarhar," 51-53.

51 Fees are generally only taken by *wakils* who are less closely connected to the individual they represent. It would be rare for a brother or father to take a fee, while more distant relatives might find it more appropriate.

52 This practice is common across Afghanistan and is likely derived from the Sharia framework that rendered the judge a neutral arbitrator of a non-adversarial process; while defense attorneys were not considered necessary to this process, representatives were always permitted to explain or advocate on behalf of parties to the dispute. Thanks to Nazif Shahrani for this insight. That the *wakil* is a deeper part of Afghan legal culture is reflected in Article 34 of the *Advocates Law* (Official Gazette no. 934, 2007), which states that an individual may serve as legal representative for relatives up to one third removed without holding license to practice law. It is likely that the legal rules pertaining to non-licensed advocacy are not always followed, sometimes resulting in representation without power of attorney or the creation of

### Box 7. The *jalasa* process

*The number of the meetings depends on the dispute. Sometimes a dispute can be solved in one meeting, and sometimes it needs more. Whitebeards always want to solve it quickly, peacefully, and without hostility between the people.*

– Khadim, Yakatoot

*Everyone has whitebeards and mesher in their own alley. They collect the whitebeards, mullah and mesher from their own alley and resolve the problem with them.*

– Mother of mesher, focus group discussion, Cheshma

*When whitebeards are making the decision they need to take ekhtyar first from both disputants. Then they make the decision in front of both sides of the disputants in the whitebeards' jalasa. If any one of the disputants is not present in the jalasa, then the whitebeards cannot make a decision. And if the whitebeards make a decision, it will never be accepted by those disputants who are not present in the whitebeards' jalasa.*

– Mesher, Cheshma

*Anybody can join and take part in the whitebeards' jirga [jalasa] from the villagers, but the whitebeards, the mullah and the mesher have to be there.*

– Whitebeard, Cheshma

*Wakils* are particularly important in creating access for women at almost every level of CBDR, from *jalasas* held outside the family to processes involving district actors.<sup>53</sup> Women in the research areas may be able to approach individual community elders personally or by proxy through a male relative, but for the most part, women are not permitted to be physically present in places where males outside their immediate families are gathered. Prohibitions against women's access to district actors are even more stringent, as it is seen as the height of shameful behaviour for women to take their disputes out of the community.<sup>54</sup> This shame is experienced on two levels: firstly, by physically revealing the women of the community to male strangers and, secondly, by revealing male community members' inability to resolve the disputes of their women.<sup>55</sup> Exceptions may be made for older or widowed women who do not have access to a trusted *wakil*, but even then, women may only participate if they are shielded from male participants by a door, wall or curtain. For younger women, often even this type of indirect access is prohibited.

Most women in the research areas have limited access to information on the extent of their rights or how to enforce them. Female respondents report that their knowledge of CBDR processes beyond family disputes depends on the willingness of their male relatives to share such information. Women thus often rely on trusted men to make dispute-related decisions on their behalf. At the same time, women are commonly expected to defer to the decisions of their male relatives given their higher position in the social hierarchy.

At the local level, social norms and Sharia-based rules generally work to protect the interests of women. Examples of such rules include inheritance norms that require male family members to see to the needs of their female relatives (Jamila's Case), customary norms that preclude a woman from being forced to return to an abusive environment

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professional *wakils* in some areas.

53 Representation by *wakil* is just as important for other vulnerable or physically constrained members of the community, such as the disabled, the elderly and minors, although none of these populations were mentioned by respondents in the research areas.

54 An exception to this can be seen in the case of land claims, which are examined separately in Section 6.

55 See Section 6.2 for more discussion of this point.

against her will (Nazia's Case), *jalasa* rules that require a woman to be represented in her own claim if not physically present, and codes of shame and honour that insist upon the protection of a woman's modesty and bodily integrity even where her claim might not be otherwise valid (Nader's Case). Likewise, at the district level, legal rules require all interested parties' authorisation before land is transferred (Gulalai's Case, Aziza's Case), and mechanisms exist for the care and acknowledgement of severe cases of domestic violence (Susan's Case).

**Box 8. Women's access to outsiders and the role of the *wakil***

*There are only men in the jalasa. Women don't have anything to do with the jalasa, only men can sit there. There was my husband instead of me, and my cousin was the wakil for all of us in the jalasa.*

– Female disputant in a land claim, Cheshma

*Women don't sit in the jalasa. It is shameful. They will select their wakil to sit in the jalasa for them.*

– Mother of the *mesher*, Cheshma

*Those women who have male relatives take their disputes through their men in the whitebeards' jalasa. Those women who don't have male relatives, like a widow, first of all they inform the mullah of our village. Then the mullah informs the mesher, the mesher informs the whitebeards of the village, then the whitebeards will come together in the mosque and make a jalasa for resolving the dispute. Then that widow can defend her right. She can talk in the whitebeards' jalasa from behind the wall, door or curtain. Then the whitebeards make the decision.*

– *Mesher*, Cheshma

**Box 9. Women's access to information and expectations of deference**

*We didn't ask anything about the jalasa because my elder brother was there, he knew what to do better than us. In our area women have nothing to do with the jalasa and disputes.*

– Whitehair, claimant in a land division, Yakatoot

*Actually, it was Iqbal's wife who wanted to get the Sharia deed. My brother gave them the urfi deed, but she knew that in the future the children might make an argument again. If she is not educated herself, then her husband is knowledgeable, and maybe he told her. Now people have become knowledgeable, and now they know about the Sharia deed.*

– Woman in her mid-40s, Yakatoot

*Some women can go to the whitebeards or the *woliswali* if they want to claim their rights. People who are knowledgeable and literate and are aware of their rights, they can go and ask for them. Mostly the men are involved in the disputes, but we don't know.*

– Temporary *khadim*, focus group discussion, Cheshma

*If the man is angry then he will not tell his wife anything that happened in the jalasa, he would say, "You would have gone to the jalasa if you could resolve disputes." The happy man will tell all about the jalasa to his wife, he will explain the issue and how they resolved it. It depends on the different men.*

– Housewife in her late 50s, focus group discussion, Cheshma

These protections, however, are grounded in a highly conservative social environment, and their realisation depends on women's knowledge of them and men's willingness to uphold them. Women are expected to tolerate a certain amount of domestic violence as normal, and to acquiesce to social expectations that can be physically and psychologically

constraining; when they eschew these norms, they risk loss of rights (Raihana's Case), physical punishment or even social death (Susan's Case).

While protections for women exist and may be upheld by authorities at the local and district levels, a woman's lack of access to information, expectations of deference and limited physical mobility can combine to deprive her of rights that would otherwise be protected by state, Sharia or customary law, with little if any recourse. One respondent described her experience as follows:

*If those people hadn't asked for the deed, maybe our brother would never have told us about the sale. We agreed to put our thumbprints because we thought Sahil was on our side. He promised that he would take our money from our brothers, but he lied to us.<sup>56</sup>*

## 5.2 From the whitebeards to the *woliswali* and back

When disputants do not agree with the resolution suggested by the whitebeards, or when community practitioners are unable or unwilling to reach a solution or feel that the dispute is too big for them to manage, cases are referred to the *woliswali* for resolution. While district officials have greater access to mechanisms of coercive enforcement they do not always have the capacity or the will to apply formal enforcement tools in the villages, or they don't see them as appropriate. District officials thus frequently do not adhere to state procedural requirements, choosing instead to work with whitebeards to resolve disputes through *jalasas* and using *islah*-based decision-making.

In an example described in the annex,<sup>57</sup> a labourer from Yakatoot sought to claim his inheritance right from his uncle. Stating that they did not want to foment hostility in the village, the local whitebeards rejected his requests for a *jalasa*. The claimant took the issue to the district judge, who refused to hear the case, determining it to be a matter best resolved by the *qawm*. The judge then referred the case back to a specific group of whitebeards, who eventually agreed to mediate the dispute according to *islah*.

Cases like this illustrate the fluidity of process between village and district actors, making it difficult to clearly distinguish between cases that are referred from the whitebeards to the *woliswali* and those that originate in the *woliswali* but are referred to the whitebeards. Although this back-and-forth cannot be classified as a product of state or customary law, for consumers of CBDR in the research areas, it is a semi-regularised procedure that everyone seems to understand and consider legitimate. As described by the district governor:

*There was one claim that the head of police referred to me, one water dispute from nearby. That case was 60 percent resolved by the whitebeards of the village, 20 percent resolved by me and the other 20 percent by the mesher. I received the official claim letter (ariza), then I referred the case to the mesher and the whitebeards of the village for resolution. After that, when they resolved the dispute, the whitebeards put their thumbprints on the decision letter and the mesher put his stamp on that letter in the presence of both disputants. Then the mesher brought me the letter and both disputants. I asked the disputants, "Do you both agree with this decision of the whitebeards and the mesher?" They said yes, so we put a copy of the original claim letter with a copy of the decision letter in our records in case anything happens*

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56 See "Gulalai is Tricked Out of Her Land Rights" in the annex.

57 See "Shirali Relinquishes His Land Claim."

*again in the future. If they said no, then we would have resolved it ourselves in the woliswali.*

When disputes become too big for local processes alone, they are commonly referred to a selection of dispute resolution actors at the district level. The vast majority of respondents were not able to identify the officials who make up district executive, administrative and judicial structures, the services each provides or how they might be differentiated from the nebulous body of the *woliswali* itself. Most respondents had a vague sense that through the district centre, they could access tangible solutions to disputes beyond the remit of CBDR practitioners, such as formal deeds for land, divorce decrees, or police power against domestic violence. In other areas of Afghanistan, the most influential district-level actor in dispute resolution and the one most commonly mentioned by respondents is the district governor.<sup>58</sup> This was not the case among respondents in the Balkh research areas. While a few people in Yakatoot and Cheshma could distinguish between district actors (these were community leaders frequently invited to assist in dispute resolution at the *woliswali*), the remaining respondents referred not to the district governor himself but to the *woliswali* generally.

There were noticeable exceptions to this pattern, however. The most frequently mentioned district-level actor among respondents in both areas was the *jeribgar*, the representative of the Amlak (land administration department) whose function is to help determine boundaries, measure land parcels and issue and register formal deeds. Men and women had near universal knowledge of the role and importance of the *jeribgar*, suggesting that he is the official most commonly summoned to the area or sought out by villagers who travel to the *woliswali*.<sup>59</sup>

Also mentioned by villagers was the head of police, known to be the appropriate resource for criminal cases. Domestic violence survivors and women who did not feel they had community backing described the head of police as one who could punish abusers by summoning them (*jalb kardan*) to the *woliswali* for arrest or a warning. In two cases described in the annex,<sup>60</sup> women chose to seek out the head of police when their options for support in the community had run out due to bad reputations, feelings of shame or a deficit of family support. Unfortunately for both women, relying on the head of police as a way to bypass local decision-makers came with significant social and economic costs resulting from their heavily decreased bargaining power.

Villagers in both villages made sporadic mention of the judge as the appropriate resource in complex land cases or those involving divorce, as these were generally understood as purely legal issues that only a judge could resolve. In the case of divorce, the judge was also sought out by whitebeards as a way to pass off these exceedingly shameful disputes to an outsider or to head off disputants' attempts to secure a divorce.

Finally, district-level actors discussed the existence of the NSP *shuras* (CDCs), the *ulama* (a religious council) and women's *shuras* in the research areas and their role in CBDR, but none of these bodies were mentioned by more than a handful of respondents at the village level.

<sup>58</sup> See, for example, Smith, "CBDR in Nangarhar," 16, and Smith with Manalan, "CBDR in Bamyan," 19. See also Nixon, *Subnational State-Building in Afghanistan*.

<sup>59</sup> This is likely also due to the high prevalence of land-related disputes, which are common throughout Afghanistan, where decades of regime change and conflict have resulted in a high number of competing claims to land. For further reading on this topic, see Colin Dechamps and Alan Roe, "Land Conflict in Afghanistan: Building Capacity to Address Vulnerability" (AREU Issues Paper Series, April 2009).

<sup>60</sup> See "The Shepherd and his Wife, Susan" and "Raihana's Reputation."

### Box 10. Differentiating between district actors

*If anyone has a problem over land they will go to the hokumat [executive branch<sup>1</sup>] and they will resolve it by the government. The hokumat finds from the land registration book who the land belonged to in the past. When people want to sell or mortgage they bring the jeribgars and the land is measured. Then the people give a letter to the hokumat to say that they agree to sell their land to another.*

– Whitehair, Cheshma

*I don't know who at the woliswali I saw. There was a judge or someone. I don't know, but there was some hokumati [person affiliated with the government] there. Actually I don't know about that. After that my brother took the jeribgar and then they measured the land and made the division.*

– Woman in her 50s, Cheshma

Question: *If the people go to the woliswali then who do they go to?*

Answer 1: *They will go to the head of police.*

Answer 2: *They will go to the judge.*

Answer 3: *I don't know.*

Answer 4: *There is the judge and the woliswali and the head of police. The men know better about this. The women don't know because the men go to the woliswali and the women don't. It is better to talk to the men.*

– Women's focus group discussion, Cheshma

Question: *Why did you first go to the head of the police; why not to the district governor or the judge?*

Answer: *I wanted the head of the police to bring my husband in the woliswali and jail him. Since the head of the police is the one who could do that, I went to him first. But the government couldn't summon him since he ran away to the mountains.*

– Disputant in domestic violence case, Yakatoot

<sup>1</sup> Here, the respondent is using *hokumat* to refer to the executive ministries housed in the woliswali. This is clear from the respondent's reference to the cadastral department, by way of the land registration book and the *jeribgar*.

Based on respondent interviews in both locations, by far the most important local actor in the management of links between the community and the district was the *mesher*, the community's representative to the district. Previously referred to as the *arbab* or *qariadar* in these villages, *meshers* today are selected according to the same set of moral and experiential characteristics as other community leaders, but in addition must possess effective communication skills in order to negotiate on behalf of the community with the government.<sup>61</sup> The role and responsibilities of the *mesher* appear to have undergone significant transformation as a result of initiatives taken by the new district governor, who had been in office for approximately six months at the time of the research.<sup>62</sup> Whereas in the past the *mesher* was selected by the district and expected to

<sup>61</sup> *Mesher* is a Pashto word meaning elder; among Pashtun speakers, "*mesher*" is used as a generic term to signify any elder, such as an older brother or village whitebeard, as well as decision-making bodies such as the Meshrano Jirga. In the surrounding provinces, the terms *arbab* and *qariadar* are most commonly used to refer to the community representative called *mesher* in the research areas. It is uncertain as to why these Tajik villages would deviate from regional practice by using Pashto terminology, but it is likely due to some historical circumstance in the area.

<sup>62</sup> While evidence of similar shifts has been observed in other parts of the country, it is unclear whether this is a process taking place at the district level or whether it is the product of changes in law or policy. Although it is outside the scope of this case study, the dynamic role of the *mesher* or *qariadar*, is an important topic for further investigation (this will be discussed by Douglas Saltmarsh in the forthcoming

simply implement orders from the state government, today the *mesher* is considered an authority figure in the district and in the research villages, with a specific mandate to serve as a conduit between the two. This transition is best described by the new district governor:

*In the past, the mesher went by the name of “qariadar” in the villages. The qariadar managed development and dispute resolution in the village, but now the role of the government is starting from the community level. The daulat doesn’t interfere in the mesher’s responsibilities about small dispute resolution. We gave that authority to the meshers to resolve small disputes within their villages amongst themselves, and the NSP shura should work separately. There is no need for the NSP to be involved in the whitebeards’ jalasas in the villages. That is why when I came as the district governor, I first selected meshers in the villages according to the choices of the people in those villages. We provided the wasiqa (official letter) and official stamp to have an official person in the village. That is a very good step for the betterment of security and development in the area.*

Related to the *mesher*’s expanded governmental responsibilities and authority, the district governor has declared that *meshers* are now required to be literate and as such, whitebeards’ choice of *mesher* must be approved by the district.<sup>63</sup> Again, in the district governor’s words:

*We have this plan that the mesher should be a graduate of at least 12th grade. This is a big change from the past. Because the government activity is now starting with the mesher, we need an educated and experienced person to show that this person is the government’s official and authorised person in our village. We also need this person to be strong because the implementation of law and other principles are very weak in the government’s court.*

Villagers generally welcome this approval process, as it legitimises and empowers their selected representative. Like other community leaders, yet perhaps more so given the governance-oriented nature of his role, villagers in both research areas discuss the *mesher* as someone who is chosen and retained for his ability to perform. Likewise, as expressed by the district governor, sufficient education and experience are essential in someone who must be relied on to navigate around district-level weakness and corruption. In an attempt to avoid similar patterns of corruption at the local level, the district governor has also established a monitoring mechanism whereby *meshers* are required to submit weekly logbooks of their activities.

While whitebeards commonly derive legitimacy from multiple ties to the village, the *mesher*’s authority rests on his ability to effectively connect the community to the district. Because of this, the *mesher*’s authority appears to be more aligned to capacity than reputation in the research areas. Individuals who would likely otherwise be sidelined as outsiders can therefore be selected for the position if they possess appropriate criteria. As explained by the wife of the former *mesher* in Yakatoot, although her husband is originally from the area, they lived away for many years while he worked for the Najibullah and mujahiddin regimes. Upon their return to the village, he was ostracised

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AREU publication, “Local Governance: A View from the Ground”).

63 The literacy requirement is difficult for both villages, given that most of those considered eligible for the position are too old to have gone through formal schooling. Villagers and district officials are finding solutions to the problem, however, such as choosing an otherwise qualified *mesher* with a literate son, or relying on the mullah to transfer written messages between the *mesher* and district officials. At the time of the research, the head of the NSP *shura* was selected to serve temporarily until someone else could be identified.

by the other whitebeards for having cooperated with so many different political groups. Once they realised the strength of his communication and administrative skills and familiarity with government personnel and operations, however, the whitebeards chose him as *mesher* and kept him in the position for many years.

Today, the *mesher* performs several functions related to dispute resolution in the research areas, including helping to resolve disputes at the local level either directly or by organising a whitebeards' *jalasa*, referring cases that cannot be resolved locally to the appropriate district actors, and bringing relevant village actors to the *woliswali* for dispute resolution requiring local knowledge. Given the increasing value placed on formal documentation, the rising authority of the *mesher* also likely has something to do with his capacity to assist in the formalisation of *urfi* documents through use of the *woliswali*'s official stamp.<sup>64</sup> In the research sites, the *mesher* appears to have taken on the gatekeeping role performed by the district governor in other areas of Afghanistan; both village and district actors see this as an appropriate and effective advance in local governance.<sup>65</sup>

#### Box 11. The *mesher* as gatekeeper

*It is a new system in our woliswali that the district governor doesn't take the claim letter without informing the mesher first. I think it is very useful and beneficial for the people in dispute resolution.*

– *Mesher*, Cheshma

*The woliswali will never accept any disputant to go directly to the woliswali without the permission of the mesher. It is a big change regarding the mesher's authority in our district's villages.*

– Whitebeard in his 60s, focus group discussion, Yakatoot

*The new district governor said that people should not send their dispute directly. They should bring it through their mesher and the mesher should put his thumbprint on the [referral] letter. Without the mesher's thumbprint the district governor doesn't accept the letter. If there is any problem, the district governor will ask the mesher about the dispute. In the past the district governor asked the people, but now the district governor just asks the mesher, because he is the elder.*

– Farmer in his 50s, Cheshma

In the research areas, the *mesher* thus performs a critical role in managing disputes being resolved serially or simultaneously by village and district actors. Procedures are somewhat regularised, known and accepted by all parties; disputants generally approach the *mesher* directly, or whitebeards refer cases through the *mesher* for resolution at the district level. The *mesher* assists community members by determining which district actor is the appropriate resource in the circumstances. Most commonly, the *mesher* brings the case, and often the disputant, to the district governor, who refers the case to the courts, police, property department, or other district authority. The *mesher* is

<sup>64</sup> Although it would be fascinating, it is outside of the scope of this research to analyse the full extent of the *mesher*'s role in the community or the legal and administrative changes in municipal governance that led to the *mesher*'s expanded authority.

<sup>65</sup> The greater role of the *mesher* in the research sites, compared to common practice in other parts of the region and the country, could also be due to the negative reputation of this area's former district governor, who was believed to be highly corrupt and unconcerned with meeting the needs of the local population. The current district governor, who was new at the time of the research, was therefore likely looking for opportunities to change the pattern of governance and of communication between the *woliswali* and district villages. This change in the role of the *mesher* appears to have been such an initiative.

also the focal point for facilitating requests for information (oral or written) between district and community actors; this is done by transferring claim letters back and forth or communicating such requests over the telephone. To have these services performed by a trusted member of the community is particularly important for women, whose access to and knowledge of district actors is limited.

This section examined the types of dispute resolution forums available at the local and district levels in the research areas, and the key players operating within and between them. The next section examines various factors that influence respondents' choice of resolution forum in a range of cases.

## 6. Choosing a Forum

This section highlights the ways in which disputants in the research areas approach choice of forum in dispute resolution. The vast majority of respondents in both locations reported that they typically take disputes to family elders or community whitebeards in the first instance; only if CBDR practitioners were unable, unwilling, or did not have the authority to resolve a particular dispute would disputants venture out of the community to district authorities. This pattern was well expressed by a young farmer from Cheshma village:

*If we face any small disputes like fighting between two people or over water or land within the family, then we resolve them within the family. If we can't resolve the disputes within the family, then we resolve them through the whitebeards' jalasa in the village. If the whitebeards can't resolve them, then we resolve them through the daulat in the woliswali. We send the big disputes like murder and divorce to the daulat for resolution.*

In defining what constitutes a big or small dispute, CBDR users and practitioners in the research areas have developed a loose jurisdictional model based on the degree of insularity, resolution principles, and documentation and enforcement mechanisms required for various dispute types.<sup>66</sup> Forum choices are equally influenced by push and pull factors, including community notions of autonomy, insularity, shame and honour, and real and perceived levels of corruption among district actors. Respondents also have well-developed ideas about choice of law (customary, religious and/or state) based on the relationship between the type of law and the type of documentation that can be attained through it.

### 6.1 Big and small cases

According to respondents in both Yakatoot and Cheshma villages, small disputes generally include family conflicts (ranging from passing arguments to cases of isolated but severe domestic violence), petty crimes, non-contentious land division, inheritance claims, and land or water claims involving relatively few parties of equal status. In contrast, respondents describe big disputes as those involving serious crimes (leading to death or injury); land or water claims of long duration, between more than one village or multiple parties from within a village; protracted inheritance or land division disputes; severe, repeated domestic violence; or divorce. Small disputes pursued but not resolved through CBDR mechanisms are also understood by respondents as having “become big” once they are referred to district authorities.

Besides classifying cases as big or small, respondents further break down dispute types according to a range of needs associated with resolution outcomes, including what principles should dictate the terms of the agreement, whether a more-or-less restorative solution is required,<sup>67</sup> what sorts of documents are needed to support the claim, and what enforcement mechanisms are most appropriate in the circumstances.

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<sup>66</sup> The jurisdictional model expressed by respondents in the research areas closely resembles the “courts of reconciliation” that existed in Afghanistan in the 1920s under King Amanullah and again in 1974 under the government of President Daoud. These were forums authorised to produce voluntary, case-by-case agreements for civil disputes and misdemeanors as a gatekeeping and case-shedding mechanism for the formal justice system. Reconciliation courts were convened in the local mosque or meeting space by elders who sought to mediate or arbitrate disputes according to sources of law deemed legitimate in the local environment. See Jones-Pauly and Nojumi, “Balancing Relations,” 833; Barfield, “Afghan Customary Law,” 43. Very little research exists on this topic, which would be an important and fascinating one to explore.

<sup>67</sup> For a definition of restorative justice, see Footnote 14.

**Box 12. Determining jurisdiction: Big and small cases**

*When there is a big dispute then it can't be resolved by the whitebeards and it will go to the woliswali. And if a dispute is small, not big, then it can be resolved by the whitebeards' jalasa.*

– Middle-aged woman, Cheshma

*If there are any big disputes, like murder, divorce or robbery, such kind of disputes should be resolved by the government because our whitebeards don't have that much authority to resolve such disputes.*

– Whitebeard in his mid-60s, focus group discussion, Yakatoot

*The resolving of small disputes over land, gardens or water should be by the whitebeards, and the resolving of the big disputes like murder or divorce should be by the government.*

– NSP assistant, Yakatoot

*The small disputes that have been resolved by the whitebeards' jalasas in the village have been about fighting between two people, or over water, disputes over animals, or fighting between husband and wife. The disputes which should be resolved by the daulat are the big ones, like murder, divorce and big land disputes.*

– Farmer in his late 40s, Yakatoot

**Small disputes**

Small disputes are typically characterised as such because, as respondents explained, the ideal outcomes of these types of conflicts are rooted in principles of *islah*, a process that uses mediation, negotiation and compromise to restore social cohesion in the community, thereby preserving the peace, unity and reputation of the village. Small disputes are thus primarily kept within the family or are referred to community *jalasas* for resolution. Disputes of a more sensitive nature, such as those flowing from marital discord, are generally subsumed under the category of small disputes given that parties strive to keep resolution within the family.

Resolution principles that flow from *islah* include *solh konan* (to make peace); *uzr* (apology), in which whitebeards encourage the wrongful party to apologise in person and, commonly, to present a goat or sheep to the aggrieved party; *ebra* (forgiveness), in which the aggrieved are expected to forgive those who genuinely offer *uzr*; and *ashty*, in which whitebeards encourage disputants to seal their forgiveness for one another through physical gestures of affection and celebration once a dispute has been resolved. The significance of these principles among CBDR users can be seen in respondents' comments.

While *islah* utilises compromise to reach solutions perceived as fair and thus restorative to all involved, it does not rest on soft notions of peace alone, but must account for local standards of justice through consideration of relevant facts, fair compensation and the avoidance of unjust enrichment.<sup>68</sup> It can even be the recognition of rights by community members, rather than delivery of tangible outcomes associated with those rights, that provides a sense of justice among disputants.

<sup>68</sup> For a discussion of the different assumptions and principles that inform Islamic and Western understandings of justice, see Mohammad Abu-Nimer, "Conflict Resolution in an Islamic Context: Some Conceptual Questions," *Peace & Change* 21 (January 1996): 22.

### Box 13. Social and personal significance of *islah*

*After the accident, the whitebeards brought my son's dead body home. I will catch the person who killed my son at any cost, at any time. If he came for uzr, though, I would forgive him, but he hasn't come. In case he comes to me with his own family, I will probably forgive him.*

– Father of a victim of a traffic accident

*My uncle finally said in the jalasa three times that the land right was mine [according to Sharia]. Then, according to urf, because I was feeling ashamed in front of my whitebeards and out of respect for them, I relinquished [maybakshan<sup>1</sup>] my rights to the land to the son of my uncle. All the whitebeards told me, "Well done. You did a very good thing within the qawm." Then the whitebeards gave a letter to my uncle and made us do ashty and hug each other. Everybody was happy with the decision, and I wasn't upset by doing this, but I didn't take what was mine by rights. Still, I stick by what I said, and I haven't taken back the land I gave to him.*

– Party to an inheritance dispute

<sup>1</sup> The literal translation of the word *maybakshan* is to forgive. While the respondent in this case referred to his actions in reaching resolution as "gifting" or "forgiving" his rights to the land in dispute, this might be better understood among some readers as relinquishing his rights.

When asked whether whitebeards make peace or justice in their decision-making, one whitebeard from Cheshma answered as follows:

*The whitebeards will consider both: justice and peace. The whitebeards cannot decide just like that. If two people have a dispute about land, then the whitebeards cannot make a decision where one just gives a part of the land to the opposite side. The decision will be made according to the documents and witnesses also. The whitebeards cannot make a decision without consideration of the truth.*

CBDR practitioners typically consider a range of evidence, including personal accounts, whitebeards' own knowledge of the history of the area, and physical documentation such as a deed, a bill of sale, or previous whitebeards' decisions. Although whitebeards in the past tended to rely solely on oral testimony or customary (*urfi*) documents, this is becoming less the case as community and district ideas on the evidentiary weight of various forms of documentation have begun to shift.

As the availability, reliability and value of formal documentation rises, whitebeards in the research areas have become less likely to base decisions on *urfi* documents that cannot be supported by contemporary witnesses. Likewise, an increasing number of whitebeards and disputants (male and female) now seek what they refer to as Sharia documentation, which includes both purely Sharia-based decisions (such as divorce and inheritance claims) and decisions rooted in state law codes (such as criminal, property, or commercial cases).<sup>69</sup> Given the increasing evidentiary weight of formal documentation within state mechanisms, customary documents are no longer considered sufficient for many disputes, particularly those involving tangible entitlements; respondents repeatedly express fears that customary agreements will lead to revival of the conflict in the future, while formal documents are believed at this point to be more durable.<sup>70</sup> This also likely reflects an increasing awareness and acceptance of state authority

<sup>69</sup> See Footnote 8 for a discussion of the relationship between Sharia, state and customary law.

<sup>70</sup> This is, in effect, a discussion about how best to establish *res judicata* within the Afghan legal context. *Res judicata* is a legal rule applicable within both civil and common law jurisdictions which states that a matter, once judged on its merits, is considered final and is no longer subject to appeal in the future. Thanks to Sally Falk Moore for this observation.

at the village level. Still, at the community level, whitebeards continue to issue *urfi* documents for a range of small disputes, while the mullah frequently drafts Sharia-based agreements on matters of inheritance. In an increasing number of cases, the *mesher*, in his capacity as the link between village and district authorities, assists whitebeards or disputants in the formalisation of *urfi* documents through use of his official stamp or by referral to appropriate district actors.<sup>71</sup> Whitebeards may also be asked to attend a *jalasa* in the district along with the disputants to give witness that an agreement was voluntarily mediated and mutually satisfactory, at which point the relevant official will produce a formal document reflecting the terms of the *urfi* agreement.

**Box 14. From *urfi* to Sharia: The shifting value of documentation**

*In the past, people mostly went to the mullahs and whitebeards and resolved disputes using their urfi deeds. Now people want Sharia. They don't want urfi because if someone has just an urfi deed then one day, after ten years, they will have another dispute over that.*

– Whitehair in her 50s, Yakatoot

*In the past people accepted urfi letters about their property but now people don't accept the urfi letters. In the past a father could say to his children, this land belongs to this son or that son. There was no need for any official letter or deed about that. Now, if there is no official letter or deed about a property, people don't accept it.*

– Whitebeard in his 50s, Yakatoot

*A Sharia letter is a strong letter. After 100 years a Sharia letter will be acceptable for the daulat, but an urfi deed is not acceptable to the daulat because it does not have the stamp of the daulat on it. The whitebeards who put their thumbprints on the urfi deed, maybe all of them have died and there is no one left to prove the urfi deed as a witness.*

– Farmer in his 50s, focus group discussion, Cheshma

*According to my point of view, a Sharia deed is better than urfi because the Sharia deed is registered in the daulat. If you lose the urfi decision letter there is no other opportunity to have a duplicate of that one, but if you lose the Sharia decision letter you can take the duplicate copy from the court. A Sharia letter is also better than urfi because it doesn't create any dispute in the future.*

– Teacher in his 30s, focus group discussion, Cheshma

Customary agreements (*sanad-e-urfi*) are still used in a variety of small disputes, however. A statement by the *mesher* of Yakatoot was echoed in numerous other interviews:

*Small disputes like fighting between two people or over water in the village should be resolved by the whitebeards in the village by urf because there is no need for an official decision letter.*

*Urfi* documents generally include a detailed description of the dispute, the parties, those present in the *jalasa*, the terms of the agreement and a commitment not to resume the hostilities in the future. These types of *urfi* agreements are regularly used, for example, in minor domestic violence cases. Once *islah* is restored between the family members, the whitebeards and the victim generally hold copies of the agreement as evidence of the abuser's guilt and their promise to desist. If the abuser resumes the violence, the survivor can present the agreement as evidence of her right to return to the whitebeards for further negotiation or, in the most severe cases, can approach district authorities for assistance with a divorce. This option remains theoretical and was not witnessed or reported during the research; researchers suspect that doing so might generate further social repercussions for an already vulnerable community member.

<sup>71</sup> See Section 5 on the role of the *mesher*.

*Urfi* decisions are also frequently used in cases of land division among family members. In such cases, family members may approach local elders to assist in negotiations or to memorialise an inheritance division upon which the parties have already agreed. The mullah is usually involved in drafting these types of agreements, called *taraka khat* [land division letters], because of his knowledge of Sharia inheritance requirements. Because inheritance division involves the distribution of tangible assets, respondents are increasingly seeking formal recognition of customary agreements on land. This is often done by involving the *jeribgar* in the division process or pursuing formalisation of *urf* agreements at the district level. At the same time, there are also reasons to choose memorialisation through *urf* as opposed to Sharia. One respondent's choice of *urf* documentation reflected his desire to resolve his family dispute according to local custom and *islah* rather than Sharia law:

*If I had taken my right it would have been Sharia. But it became urfi because I gifted the land to my cousin because the whitebeards wanted to resolve it based on urfi so that there wouldn't be hostility among the people.*

Enforcement mechanisms are likewise derived from the community's moral and behavioural mores; as such, they appear to vary considerably across the country,<sup>72</sup> ranging from acts of apology, forgiveness and affection to threats of social alienation, whitebeards' refusal to mediate future disputes, complete ostracism from the community, and public beatings designed more to embarrass than to physically harm. There was some evidence from respondent interviews in both villages that whitebeards at times utilise a community "jail" where disputants may be held to calm them down, prevent them from taking their disputes to the district, or protect those accused of serious offences from angry community members until they can be transferred to district officials; but this does not appear to be common practice in the research areas.

## Big disputes

Disputes characterised as big are typically seen as too severe, long-standing, or rooted in formal law to be resolved at the community level. Big disputes are understood to require formal legal solutions, described as Sharia-based decisions, including documentation issued by and registered with district officials, as well as the more coercive enforcement mechanisms of the state.<sup>73</sup> This pattern is reflected in the comments of a farmer from Cheshma village:

*Everyone knows that Sharia is better than urf in these cases. Those disputes like land, property, gardens, murder and divorce should be resolved through Sharia law in the daulat because we need the official decision letter or deed from the government on these issues for the future.*

As such, big disputes are considered beyond the authority of community actors alone, and are thus commonly referred to district actors for resolution. One farmer in Cheshma village stated:

*If the whitebeards can't resolve a dispute in the village, then they will refer it to the daulat for resolution. In the daulat there is law for dispute resolution,*

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72 See for example Smith, "CBDR in Nangarhar," 51-53, on the use of fines, penalties and other punitive measures for enforcement in CBDR processes.

73 As discussed earlier, respondents tend to conflate state and religious law, such that decisions based on Sharia are seen to include both purely Sharia-based decisions, such as those on divorce and inheritance, and state-based decisions derived, for example, from the criminal, property or commercial code. While the local mullah is able to issue certain Sharia agreements on matters such as inheritance division, only state actors are authorised to issue code-based decisions such as criminal sentences or official deeds. In the case of big disputes, respondents in the research areas predominantly referred to official, state-issued Sharia documentation.

*and the daulat has the authority to implement decisions on disputants. The daulat has power these days, and we are all under the influence of that power.*

**Box 15. Whitebeards' enforcement mechanisms**

*Three times the whitebeards went to their house and they brought islah among them, and the man's family told the whitebeards they wouldn't fight again about this in the future. When they had that fight for the fourth time and they went to the whitebeards to help them in resolving it, the whitebeards didn't go to their house...because the whitebeards became tired of that and they rejected the man's request.*

– Mullah of a village near Cheshma

*If the disputant doesn't accept the decision of the whitebeards, then the whitebeards should ignore their dispute. We have one proverb in Dari: Dard-e-dandan kandan ast (if you have a toothache it is better to pull out the tooth and throw it away)!*

– Whitebeard, focus group discussion, Cheshma

*Whoever doesn't accept the whitebeards' decision, the whitebeards won't keep them in their qawm.*

– Khadim, focus group discussion, Cheshma

*We whitebeards are trying to resolve the disputes in the village. Sometimes we keep people in their houses like a jail; we don't let them go to the government to resolve their disputes. If disputants don't accept the decision of the whitebeards, then we whitebeards slap them like our children so they don't do this action in the future. We especially slap children when they are fighting with each other.*

– Former mesher, Yakatoot

**Box 16. Cases involving water**

Water disputes between neighbours or involving only a few parties are also generally managed through CBDR. Such cases are managed by the *mirab*, a whitebeard specifically designated to deal with all issues pertaining to water distribution in the community. Where small disputes arise, the *mirab* generally organises *jalasas* to explain to each party their water entitlement, based on the size, location and hereditary rights afforded to particular parcels. When the *mirab* is not successful in reaching a resolution, he typically refers the dispute to the *woliswali*; at the district level, mediation is assisted by water records outlining water entitlements in each village. In the words of a mullah from another part of Cheshma village:

*If someone turns the water toward his land or garden, then the mirab and the whitebeards ask him, "Why did you turn the water to your land?" Then they say to that person, "You turned others' water to your property," and "It is not your right to eat others' rights to the water." If he accepts the mirab's advice it is good, otherwise if he makes a dispute about that he can go to the government. In the government, there is the register of land and deeds. From that register they know how many days' water rights he has. When the government and judge know about how many hours or days water rights he had in the past, and when the judge sees the deed, he knows the reality. Then the judge will make a decision and resolve the dispute.*

Big disputes, such as one between Cheshma and a neighbouring village over changes to water access following regional redistricting, are beyond the *mirab*'s remit yet also seemingly beyond the enforcement capacity of the state.<sup>1</sup> Although the neighbouring villagers received a decision from Afghanistan's Supreme Court stating that their water allotment was adequate under the law, the decision was not accepted by those affected and has therefore not been implemented to date.

<sup>1</sup> For further reading on water conflicts in Afghanistan, see Dechamps and Roe, "Land Conflict in Afghanistan," 21-22; see also AREU's selection of publications on water management, irrigation systems and the *mirab* system, available online at [www.areu.org.af](http://www.areu.org.af).

A mix of state, religious and local customary resolution principles are deployed at the district level. In the research areas, instances of purely code-based adjudication were not reported. Rather, in the resolution of big disputes, district-level actors often either ignored state procedure or presented likely outcomes of state legal rules in order to push disputants back in the direction of community-based practitioners and principles. This was done either independently by district actors or at the behest of community whitebeards.

**Box 17. Whitebeards in the district: Sharing local knowledge and enforcement capacity**

*My husband went with the whitebeards to the police department in the woliswali when we could not convince our son's wife to come back. The head of police told them to again go and resolve this in your area by the elders. "If you can't, then come and we will send a summons to bring your wife's father and brother and ask them why they are not allowing her to return home." When they tried again to resolve it with the elders and couldn't, my son went to the head of police, who again said, "send the elders so I can talk to them."*

– Mother-in-law of disputant in domestic violence case, Cheshma

*I had a dispute with my uncle over land and I ran back and forth for 20 days in the woliswali. In the end the judge told me, "We cannot resolve your dispute here; go back to resolve it by your qawmi whitebeards because the whitebeards are from your village. They know if the right is yours or not; we cannot resolve it." Then the judge and head of police gave me a letter and the judge wrote the names of some whitebeards and told me to go to resolve it by these whitebeards.*

– Disputant in inheritance rights claim, Yakatoot

*There is still need for the whitebeards in the woliswali. Without them, how will the woliswali know this land belonged to my father? How can I take the land back without the whitebeards? They are very useful whether you are resolving your dispute in the jalasa or in the woliswali by the government.*

– Whitehair and wife of former *mesher*, Yakatoot

Although formal decisions are believed to be more durable, in the sense that they are registered with district authorities and come with the promise of state enforcement, district actors are often unable or unwilling to enforce an unpopular decision. This is particularly the case where the adversarial state system has produced a clear "winner" and "loser," and where tangible interests are at stake as a result. At the same time, while local actors have concerns regarding the sustainability of custom-based decisions and documentation, the fact that these decisions are based on voluntary negotiation grounded in micro-local values lend them a legitimacy and, accordingly, a self-enforceability that formal decisions may lack.<sup>74</sup> This tension has a considerable impact on choices made by CBDR consumers and practitioners in the resolution of disputes. These at times competing interests are captured in the examples below, which are discussed in more detail in the annex. The issues were well expressed by the head of the district primary court:

*I think it is good if all disputes are resolved through the court, because then it is legal and it becomes difficult for disputants to raise the dispute again in the future. If a dispute is resolved by the elders in the community, then the*

<sup>74</sup> While respondents' perspectives on the issue are presented here, it would be interesting to conduct further research specifically on the relative durability and enforceability of state- and community-based dispute resolution. For an initial exploration of this topic see Sarah Callaghan, "An Assessment of the Durability and Enforcement of Decisions in the Informal and Formal Justice Systems in Kabul: Based on NRC's Case Work in Kabul" (NRC Unpublished Report, 2007).

*disputants can raise it again any time, so actually the dispute is not ended. It is good if a dispute is resolved through the court as long as people have access to that, but these days the elders know better about a dispute because they live in that village so they have more information. On the other hand, most of the people in rural areas are illiterate, so if the judge makes a decision then it is a little hard for them to accept, because according to law one of the disputants is right and the other side is guilty. The law will make one of them happy and the other one will lose, but if the elders make a decision in favour of both of them then they can accept it.*

In the case described in the annex as “Snakebite or Murder?” the accused, despite ample evidence that he was not guilty of his partner’s murder, was unable to secure his release from jail because the deceased’s brothers had declared that the conflict would not rest until they received compensation. In order to prevent future hostilities, the head of police drafted community whitebeards to hold a *jalasa* to reach a compromise on the amount of compensation to be given. Thus, for the sake of community stability, the head of police referred a death that state law could not prosecute back to the whitebeards for resolution according to *islah* and other CBDR principles.

In “The Mesher’s Brother Is Killed in a Traffic Accident,” the driver who killed a young man in Cheshma was not prosecuted; respondents said they suspected that this was due to the driver’s ability to bribe district officials. Rather than helping the father of the victim to prosecute his son’s killer, community elders encouraged him to drop the case and accept the apology of the elders sent to represent the driver. In this example, religious ideas about calming the soul after death were deployed alongside concepts of community harmony and avoiding hostility.

In “The Shepherd and his Wife, Susan,” local whitebeards made repeated attempts to end a pattern of domestic violence, making it clear that they would not support district involvement given the shameful nature of the issue. When local whitebeards were unable to halt the abuse, however, Susan approached the *woliswali* to seek a divorce. At the request of the whitebeards from her village, district officials informed Susan that resolution would not be possible at the district level, as this was an issue for the *qawm*. The judge also explained that according to Sharia rules on divorce, Susan would lose custody of her children and receive no maintenance payments from her husband. Susan was therefore left with little option but to return to live with her husband, her only recourse an *urfi* agreement promising that the violence would not resume.

In the instances described above, no formal documentation was issued because the cases were effectively transferred back to community-level actors for resolution according to local understandings of *islah*. Demands for formal documentation are primarily seen in cases involving land or other tangible assets, although this is not always the case.<sup>75</sup>

Technically, district enforcement mechanisms are those required by state-based criminal and civil codes. These include incarceration, fines, transfer of title, and other penalties commonly seen in a formal, adversarial justice system. However, as with resolution principles, no instances of purely state-based enforcement were reported. While respondents reported that big disputes require district level enforcement because whitebeards do not have adequate coercive authority, this does not mean that they are demanding outcomes derived from state rules. Instead, similar enforcement mechanisms are applied as in small disputes, but in these cases the enforcement authority of local CBDR practitioners is magnified as a result of their collaboration with district officials.

<sup>75</sup> As land is something of a special case in this regard, it is discussed separately on the next page.

In many cases, the threat of being turned over to the state system for adjudication and enforcement is enough to secure agreement among disputants for a CBDR outcome.

### The special case of land

Disputes related to land are special for two reasons: (1) While they are generally categorised as small disputes,<sup>76</sup> they require district involvement for purposes of formal documentation; and (2) land claims afford women access to CBDR processes and practitioners which would otherwise be considered shameful.

The shift in demand from customary to formal documentation in land cases may be the result of ongoing state efforts in land reform, the increasing authority and capacity of Amlak and its staff to determine land entitlements and issue and register formal titles, and a general sense that the government is beginning to extend its reach to the villages.<sup>77</sup> While women are still expected to use a *mahram* (male chaperone) or *wakil* for face-to-face meetings with district officials, they are not seen as violating social and behavioural norms when they seek enforcement of their land rights. Likely because land is such a vital resource in Afghan society, community actors in the research areas do not seem to question state legal rules that require all parties, including women and in some cases children, to personally sign or stamp land-related documents such as titles and bills of sale.

Although Cheshma and Yakatoot villages share quite similar perspectives on dispute types, forum choices and other matters of jurisdiction, respondent interviews suggest that it is more acceptable for women to access the *woliswali* in land cases in Yakatoot than in Cheshma.<sup>78</sup>

In one case,<sup>79</sup> two men contested their female cousin's ownership rights to a large piece of land in Yakatoot. They offered to drop the dispute in exchange for a piece of the land, but the woman refused, deciding to pursue the claim in court if necessary. Fearing that her actions would create hostility in the village, the local whitebeards refused to step in until she could demonstrate that she had paved the way for a peaceful resolution. When the woman was finally able to identify a witness to support her claim, the whitebeards agreed to convene a *jalasa* in which the cousins were pushed to accept that their claim was baseless. A *sanad-e-urfi* (customary deed) was prepared to reflect her entitlement. Understanding that a judge might feel uncomfortable in her presence, the woman sent her husband to secure a formal deed from the district court to protect herself from future disputes.

In contrast, in another case<sup>80</sup> a woman's land claim gave local whitebeards a perfect excuse to remove her from the village. The woman, a widow, had a reputation for being

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76 Big land claims involved large parcels, such as pasture; multiple parties, such as two villages or *qawms*; or powerful people, as in the case of land grabbing by former commanders or government officials. Land disputes in the research areas were most frequently defined as small, likely due to the fact that disputes involving small parcels or occurring between villagers were much more common in the lives of most respondents.

77 As one Amlak official interviewed for this research reported, however, Amlak officials are not always able to perform these functions due to the destruction of countless land and title records during the various periods of conflict.

78 It is unclear why this is the case, particularly as Yakatoot is farther from the *woliswali* and accessing it thus involves greater travel. It could be the result of discrepancies in interview questions and personnel, or it could simply be a difference in attitudes in the two villages regarding women's participation.

79 See "Aziza Organises Her Own *Jalasa*" in the annex.

80 See "Raihana's Reputation" in the annex.

overly independent. Having sold a portion of her land, the woman sought assistance from the mullah and other community elders when the buyer refused to pay her the promised amount. The elders refused to help her, calling her a dishonourable woman. When the woman went to the *woliswali* for support, the head of police told her that the only solution was to remarry or to marry off her daughter so that they could have a *sarparast* (male head of household) to support them in instances like this. No respondent was able to report the outcome of the woman's land claim, but it was assumed that she did not receive assistance in recovering the outstanding payment.

### Box 18. Women's access in land disputes

*If a woman has a dispute about inheritance, then no one can make a decision when she is not there. The whitebeards have to make the decision in her presence, not in her absence.*

– Man in his 30s, focus group discussion, Yakatoot

*Yes, I will go to the jalasa or the woliswali. For as long as I don't get my rights and resolve this issue, I will not leave it alone. My husband will not say anything about me going there because if he does then the land will go from our hands.*

– Disputant in land claim, Yakatoot

*Men don't give women permission to go, and the whitebeards don't like for women to go to the woliswali. Except for any land issue, then they can go. But not for any other thing.*

– Whitehair in her 50s, focus group discussion, Yakatoot

*I think the judge himself said to our brother that "your sisters should be present to give their thumbprints." Then my brother took us and we gave our thumbprints and we left.*

– Disputant in land claim, Cheshma

*If a woman has an inheritance dispute she can go to the woliswali to take her inheritance right, but a woman as a witness is never acceptable to the hokumat or the whitebeards.*

– Whitebeard in his mid-60s, focus group discussion, Cheshma

One woman's ability to organise *jalasas* on her own, to move relatively freely to find witnesses, and to advocate strongly on her own behalf to the whitebeards, was likely due to the subject matter of the dispute. At the same time, it is almost certain that this woman would not have had the same degree of success if she had not already demonstrated her respect for Yakatoot's social and behavioural norms by fulfilling her role as the upstanding wife of a respected whitebeard, asking permission for her activities, and dressing according to conservative community standards. For the other woman, the fact that her dispute was over land was probably less important than the fact that her behaviour had offended local standards of propriety.

## 6.2 Other factors affecting forum choice

Choices of dispute resolution forum in the research areas are further influenced by push and pull factors leading disputants away from the district and toward the community.

### Factors encouraging use of community forums

In addition to the value placed on local resolution principles, CBDR is prioritised for practical reasons: It is fast and entails little or no expense. At the same time, CBDR practitioners may exert a tremendous amount of pressure on disputants to seek resolution within the community for social and ideological reasons. Whitebeards' tools for administering such pressure include tales of high expenses in the district, threats to refuse assistance to the disputant in the future, or, in the worst cases, complete

ostracism.<sup>81</sup> Most community members are so steeped in the values of community autonomy and respect for the whitebeards that those who choose to access district officials against such advice may be considered disrespectful, unintelligent or of bad character.

**Box 19. *Islah* by coercion**

*If I hear that someone has a dispute, then I try to resolve it, and I don't allow people to go to the government. I explain to them that if you go to the government then you have to spend a lot of money and finally you will come back to the whitebeards, so it is better if you don't go to the woliswali and we will resolve your dispute.*

– Whitebeard, Cheshma

*All the village whitebeards were angry with them, about why she went to the hokumat and didn't listen to the whitebeards' words. Even when my brother gives his greetings to the whitebeards in the alley, they don't reply. They talk about why he let his wife go to the woliswali. They don't invite my brother and his wife to any kochagi [people of the same alley] houses anymore.*

– Sister in family involved in a domestic violence and divorce dispute

*The intelligent people solve their problems through the whitebeards, and those who are ignorant resolve their problems by going to the government.*

– Male resident, Cheshma

Also significant in keeping disputes within the community are local concepts of shame and honour, as they relate to community autonomy and the fact that community leaders in part derive and maintain their authority based on their ability to resolve disputes.

Ideas about shame are applied even more stringently to women in the research areas, curtailing women's access to district officials in all but the most egregious circumstances (or relative to land claims). This is likely due to social norms dictating that masculinity hinges on men's ability to effectively control female relatives and community members.

The flip side of this social construct, however, is that women are at times able to use notions of shame to force CBDR decisions that might otherwise be considered inequitable. In one case, after being accused of inappropriately touching a female neighbour, a boy was immediately ordered to the mosque for a public beating. Although many respondents believe that the woman's complaint was false, they also believe that the whitebeards submitted to her demand due to the woman's threats to take the issue to the *woliswali*. As reported by the boy's mother:

*She told the mesher, "If you don't punish him and don't beat this boy with a stick, I will go to the woliswali and hokumat and make a complaint against him to send a summons to bring the boy to the hokumat." Then the mesher, who is also the qawmi elder, was afraid of this woman and said that if she goes to the woliswali it will make a bad name for us and ruin the village's reputation. Our men are afraid because their abro [eyebrow or face] and izat [honour] will be ruined when the village women go to the woliswali.*

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<sup>81</sup> In practice, this is not so different from the motivations to settle a dispute through arbitration or negotiation in western jurisdictions. Similarly, reasons of cost, time and loss of reputation are often deployed to encourage parties to settle for a decision that might not be considered ideal in all respects. Thanks to John Leslie for this important insight.

**Box 20. Accessing the district as a violation of community autonomy**

*I think the jalasa is good to resolve disputes among the people in the area. If the issue goes to the woliswali and court, then the people will talk badly that they didn't listen to the elders and went to the woliswali and the government.*

– Housewife in her late 30s, Cheshma

*The whitebeards don't let the people go to the hokumat from this village. The whitebeards say we are one people. Our whitebeards feel shame if someone goes from the village to the woliswali and hokumat. They say if we resolve it within the qawm it will be better because if it goes out, it looks like the people don't respect their elders and whitebeards and the whitebeards cannot resolve the issues of the people.*

– Whitehair in her 70s, Yakatoot

*Our people don't go to the hokumat or the daulat. These four whitebeards of ours resolve their problems. Here it is shameful for those who go to the hokumat. Then the whitebeards say, "What are we here for if you go to the hokumat?"*

– Widow in her mid-40s, focus group discussion, Yakatoot

**Box 21. Women's access to the woliswali**

*I went to the whitebeards first about these beatings from my husband. If he found out about me going to the whitebeards then he would have told me, "Whatever cruel behaviour I do to you, you still shouldn't inform the qawm and the people." But the issue was not resolved. I was afraid of him, what if one night he kills me and tells the people that I died myself? So I went to make a claim in the woliswali.*

– Disputant in domestic violence and divorce claim, Yakatoot

*It is not allowed for women to go to the woliswali. If they go they will get a bad name and bad reputation. If the women have a problem, in place of them the men will go to the hokumat. The women don't go out of the house.*

– Disputant in land claim, Yakatoot

*If the woman's qawm or relatives are living near the woliswali then they will go to the relative's house. Then their men will go to the woliswali while the women sit in the house. The judge will give the men a letter to bring back to the women so the women can put their thumbprints on that letter and send it back to the woliswali. The women won't go to the court house.*

– Khadim of Yakatoot, focus group discussion

**Factors discouraging use of district forums**

Corresponding push factors discouraging the use of district conflict resolution mechanisms include villagers' perceptions and experiences of them as slow, expensive (involving both legitimate and illegitimate costs), and based on principles that create or exacerbate hostility between parties. Almost universally, male and female respondents in both research sites complained about high levels of corruption in the *woliswali*. Respondents consistently reported that the *woliswali* could not be accessed without some form of illicit payment, often at multiple steps along the way. Likewise, the available processes were seen as inherently unjust, given that parties who were willing and able to pay would always have the advantage.<sup>82</sup> For many, excessive corruption was a definitive push factor away from resolution at the district level, both financially and morally. This perspective was shared by many in the *woliswali*, including the district governor

<sup>82</sup> See for example "The *Mesher's* Brother is Killed in a Traffic Accident" in the annex.

himself, who described referring cases to the whitebeards as a way to circumvent corrupt practices among district actors.

**Box 22. Corruption among district officials**

*In the hokumat everyone takes money. The judge, the police, everyone. Everyone eats money and then makes a decision.*

– Whitehair, Cheshma

*What can I say? It started from the soldier at the door to the head of police. Every time someone asks for something. The soldier told me, “Buy me a mobile card and I will take you to the head of police quickly.” You think, except for the district governor, all of them take money to finish their work.*

– Labourer in his mid-30s, Yakatoot

*We never go to the woliswali to resolve our disputes because there is bribery at the woliswali and our purpose is to end bribery.*

– Former *mesher* of Yakatoot, currently working in the *woliswali* as head of the livestock department

*We want that the disputes should be resolved by the whitebeards in the village. I mean, we don’t want to resolve the disputes officially, because then we have to send the disputes to the court, and those who are in the court will take a bribe from the disputants. Taking bribes is a kind of custom in the court.*

– Head of district police

*Actually, the courts cannot decide to end a dispute. I have told people many times when they come to me for help, “You will spend a lot of money and a lot of your time. It is better to resolve your dispute through the community elders.” I told them they should make *islah*.*

– District governor

At the same time, disruption of community cohesiveness due to conflict-related displacement, the influence of former mujahidin commanders, a rapid influx of cash into the economy, and a general rise in the culture of corruption across the country has created concerns regarding community-level actors. These concerns are less common in the research areas, however, which experienced significantly lower levels of displacement.<sup>83</sup> When respondents did raise concerns regarding community actors, these were commonly about whitebeards’ capacity to be objective given their many personal, familial and financial connections to disputants. Instances of bribery among whitebeards were also mentioned by a few respondents, but this was quite rare. In most cases, CBDR practitioners were considered able to negotiate fairly with regard to both parties, although some community actors were known to abuse their authority.

In one case,<sup>84</sup> the *mesher* recused himself from participating in the resolution of a domestic violence case. Respondents suspect that his recusal was due to the fact that the disputants had reneged on an agreement the *mesher* negotiated for them years earlier and because the *mesher* was related to parties on one side and did not want his further involvement to cause problems in his own family. While disputants on both sides saw this as disloyalty given his central role in previous negotiations, most in the village respected the *mesher*’s choice as fair.

83 In other areas of Afghanistan, evidence suggests that concerns regarding corruption among community actors are much more common. See for example Smith, “CBDR in Nangarhar,” 19.

84 See “Nazia Refuses to Return Home” in the annex.

In another case, however,<sup>85</sup> a woman was subjected to fairly severe abuse of authority by both the local mullah and the district head of police; having refused marriage proposals from both of them, she was ultimately forced her to marry off her daughter to a district policeman and relocate to another village. This woman was likely more susceptible to such abuses than other women in her village due to her deviance from social and behavioural norms, compounded by her lack of familial backing.

**Box 23. Abuse of authority by community elders**

*Sometimes the whitebeards also take bribes from the disputants secretly and make their decisions in favour of the one who paid a bribe.*

– Female teacher in her mid-30s, Cheshma

*Iqbal is a rich man in our village. He used to be a mujahiddin commander in this area and for that reason the qawmi elders can't say anything to him. The temporary mesher in our village is a cousin of Iqbal, but we do not mention this amongst ourselves.*

– Whitebeard in his early 60s, Yakatoot

*The neighbours and the whitebeards didn't take Qader's grandsons' side. They took the neighbours' side because they are related to each other, from one alley and one village. Qader wasn't in the village for a long time and people didn't know his children. In the past the whitebeards were very good, better than today's. In the past they resolved disputes by law, but now they see the face of their qawmi people.*

– Whitehair, Cheshma

*There is an old man in a nearby village, and there is someone who has registered part of that old man's land for himself. The old man does not have any documents, and now the land is registered in the other man's name in the Amlak. I have not decided whether I will send this case back to the whitebeards in the old man's village. The old man says all of the villagers will support his opponent and he does not have anyone who can help him because his opponent is a rich man.*

– Head of the district civil law department

It is clear from respondent comments in both villages that choices regarding dispute resolution forums would shift considerably if corruption among district actors could be eliminated. Those expressing a desire to pursue district-level resolution are largely involved in land disputes, but it is likely that a range of disputes would migrate to the formal system if conditions changed. Still, there are many in both communities who believe that the values of *islah*, autonomy and insularity would continue to outweigh the perceived durability and enforceability of district-level dispute resolution even if corruption were eliminated.

Users of CBDR mechanisms engage in a complex decision-making process when selecting the appropriate forum for dispute resolution, although a clear pattern of acceptable approaches is evident. Factors affecting the decision include local mores, the social and personal value of non-adversarial resolution principles, and the type of documentation and enforcement desired. There are also, however, practical considerations including the high costs (legitimate and illegitimate) of engaging in dispute resolution at the district level. Respondent interviews suggest that, in many cases (particularly those related to land and other issues outside the home), accountable government would encourage more CBDR users to engage with state mechanisms than are currently doing so despite oft-stated concerns regarding autonomy and respect for local values.

85 See "Raihana's Reputation" in the annex.

**Box 24. If there were no corruption...**

*It is my idea that if there is no bribery in the hokumat then people will resolve their disputes by the hokumat because they will give the official decision letter to the disputants.*

– Whitebeard in his 60s, focus group discussion, Cheshma

*If there is no bribery in the daulat then people should resolve their disputes there. It is good to resolve in the daulat because they will give you the sanad-e-Sharaee. The big reason for resolving disputes by the whitebeards' jalasa is that it takes a short time and there is no bribery. People are afraid of long dispute resolution times and bribery expenses in the daulat.*

– Labourer in his 30s, focus group discussion, Yakatoot

*If there were no expenses or bribery in the woliswali, still the people would be happy to resolve their disputes among themselves. The whitebeards are better for the people to resolve their issues because it is easier, and then the issue doesn't go out of the village. If the people go to the woliswali then there may also be some hostility and grudges among the disputants.*

– Whitehair, focus group discussion, Cheshma

## 7. Conclusion

As with the other case studies in AREU's CBDR series, the research conducted in Balkh focused on four central themes: the processes used in resolving or regulating disputes at the community level, the relationships between dispute resolution actors and processes at the community and state levels, the principles underlying the outcomes of dispute resolution, and equity within these processes, particularly equity for women.

The cases detailed in the annex, as well as the discussion throughout the study on how respondents in the research sites experience and make decisions relative to dispute resolution, demonstrate that these processes are highly dynamic in a number of ways: the CBDR mechanisms themselves, the way in which village- and district-level actors collaborate within them, and the spaces available for women to pursue their own claims. The most significant observations gathered from the research, particularly those that hold potential for developing more effective and sustainable links between state- and community-based dispute resolution, are presented here.

- General agreement on and awareness of a loose jurisdictional and procedural model:* Within the research areas, CBDR users and practitioners at the local and district levels expressed similar opinions on which types of cases were appropriate for village versus district resolution and how to proceed in each case type. The jurisdictional model was consistently broken down by dispute type and size, desired resolution principles and outcomes, and disputant needs for documentation and enforcement. The procedural model included whom to approach for CBDR assistance at each stage of the dispute, relevant evidentiary requirements and what to expect at each stage of negotiation. At the same time, choice of forum was affected by additional push and pull factors away from the district and toward the village. These included pragmatic concerns such as expenses, time, and travel; real and perceived levels of corruption among district actors; and prevalent social and behavioural expectations concerning community autonomy, insularity and the protection of family and community honour. While there are strong opinions about which types of cases should be resolved within the community, forum decisions on the entire range of cases found in the research villages would likely change were corruption to be eliminated at the district level.
- Increasing reliance on formal documentation:* While respondents in the research villages confirmed that customary documents are still acceptable for a range of disputes, particularly those that do not involve tangible entitlements, the vast majority of both male and female respondents expressed an increasing demand for formal, state-issued documentation. Despite evidence of irregular state enforcement, formal documentation is seen to be more durable, more readily enforced, and more likely to prevent future conflict. Respondents derive confidence from the belief that when their dispute outcomes and legal entitlements are registered with the government they are unalterable, no matter what might occur politically. This demand for documentation has created a trend at the village level toward formalising existing agreements recorded in customary (*urfi*) documents, thereby presenting new opportunities for village-district collaboration in the production and registration of CBDR decisions.
- Evolving role of the mesher as a bridge between the district and village:* Within the research areas, male and female respondents demonstrated a great deal of interest in and approval of the increasing authority of the *mesher* as a vital and effective link between the village and district authorities. Recently “promoted” by the district,

the *mesher* is now authorised to hold the official stamp of the *woliswali* and to perform a range of administrative functions in this regard. Significant functions of the *mesher* include managing the referral of disputes from the village to the district, thereby ensuring that disputants access appropriate district authorities and are prepared with the correct documentation, witnesses, and other components that have complicated or precluded use of the district for (predominantly illiterate) villagers in the past; managing requests for dispute-related information from the district to the village; assisting in the resolution of local-level disputes; and lending official sanction to customary documents through use of the *woliswali* stamp. Villagers universally appreciated these services as well as the higher level of respect and autonomy granted to the village through the person of the *mesher*. For villagers this was seen as a striking development in good governance, and something that could be further built upon in coming years.

- *Openness to expanded roles and opportunities for women:* The research villages selected for the Balkh study remain a product of a social system that is, to a large extent, highly conservative in its treatment of women. That being said, social and behavioural mores in the research areas dictate a range of protections for women's rights and interests, as well as a welcome respect for protections that exist in state law. These protections include Sharia-based inheritance norms that require male family members to ensure that their female relatives are cared for financially; a requirement that women be present or meaningfully represented in all CBDR processes in which their interests are implicated; a prohibition against forcibly returning a woman to an abusive home; notions of shame and honour that demand preservation of a woman's modesty and bodily integrity; state legal requirements that all parties, including women, articulate their explicit authorisation in any case of land conveyance; and state mechanisms to investigate and provide medical care in cases of severe domestic violence. It is important to acknowledge, however, that to access these mechanisms in such a conservative social environment, women must be able to demonstrate that they are worthy of protection through their adherence to strict social and behavioural expectations.

Respondents in the research areas also reported openness to increasing opportunities for women to access information on their rights, livelihoods and development programs and to participate in the making of decisions that affect their lives. This is exemplified in the development of a special leadership role for women at the village level, embodied in the person of the *khadim*. Traditionally used as a messenger among women in the community, in recent years the *khadims'* role has gradually transformed as they have taken on activities such as facilitating development activities among women and leading microcredit groups. Interviews with male and female respondents in both villages confirmed that in many cases the *khadim* is also taking on more of a role in dispute resolution among women. Although respondent reactions to this development remain somewhat mixed, there is a critical mass of positive feedback on the idea of developing a "female *mesher*" or women's *shuras* at the village level, suggesting that this concept warrants further exploration.

Through the collaboration of national and international stakeholders, a draft law and policy have been produced in an effort to define the scope of CBDR mechanisms in Afghanistan and to improve and create sustainable and regularised links between CBDR and state justice systems. While the law and policy remain in draft form at the time of publication, the continued commitment of national and international stakeholders to this phase of justice-sector reform reflects a timely and important recognition of Afghanistan's justice system as strongly, and appropriately, plural. There are still many questions to answer in terms of how links between state and non-state dispute

resolution mechanisms and actors can best be formed and maintained, but the research in Balkh reveals some instances of existing collaboration and possible opportunities for facilitating further and more systematised links, as well as areas in which reform efforts will likely be met with resistance. These observations are presented with the hope that they might inform policy and programming in this regard in the future.

## Annex: Case Summaries

This annex contains a series of illustrative case summaries that emerged during interviews and focus group discussions with respondents in the research areas. Once details of a dispute was presented by a respondent, researchers worked to identify a network of parties involved with the dispute in question in order to secure multiple perspectives from which a case summary could be drawn. Where this was not possible, it is specified in the head note to the case.

### – Nazia Refuses to Return to Her Husband (Cheshma)

Nazia, a woman in her mid-30s, says that her husband, Farid, is physically abusive, and for this reason she has repeatedly fled to her family home. Nazia is no longer willing to return to her marital home and is seeking a divorce. This case illustrates the following:

- Family disputes that may require intervention by a range of community and state actors
- Cases that are beyond the authority of whitebeards
- Conditions under which community actors may refuse involvement in dispute resolution
- Women’s ability to influence dispute resolution at the community level
- The degree of women’s participation in and access to dispute resolution processes at the district level
- The existence of mechanisms to protect women’s rights in CBDR

#### Background to the dispute

Nazia and her husband, Farid, were married nine years ago. Nazia and her family report that a few years into their marriage, Farid, his mother and sisters became physically abusive. Farid denies this; according to Farid, Nazia injures herself and blames him because she is mentally ill. Many in the area know of this dispute, since it has been going on for a long time in a somewhat public manner. Nazia has run away to her family home a number of times to escape the violence, only to return to her marital home, where the cycle begins again.

After receiving a particularly bad beating, Nazia now refuses to return to her marital home and is seeking a divorce with the help of her father. During previous incidents, Nazia’s father agreed with the local elders that she should return to her marital home if her husband promised not to beat her again. Since she has returned many times, Nazia’s father is no longer willing to send her back. Although he feels shame about pursuing the divorce and airing family problems outside of the community, he recognises that the *woliswali* must become involved if the families cannot reach agreement.

Respondents including neighbours, family members and local whitebeards offer mixed accounts of why Nazia is being physically abused by Farid and his family: She is childless; she beats her adopted daughter; she has been wrongly accused of dressing inappropriately; she is beaten for no reason whatsoever; she provokes abuse from her in-laws because she is angry about their interference; or she injures herself to secure her release from the family.

## Resolution process

No *jalasa* was held for this dispute, but the case reveals family-based practices of CBDR. On previous occasions when Nazia fled to her family home, whitebeards from within her natal and marital families (as well as the mullah from her neighbourhood mosque) visited to speak with Nazia and her father to encourage her to return to her marital home. Speaking from behind a closed door, Nazia told the elders that she would only return if she was able to live independently from her in-laws. The elder women of the village were also sent to bring Nazia home, and many times this was successful. Since the last beating, however, Nazia is no longer willing to listen to the requests of the female elders, particularly her mother-in-law. The whitebeards said that since she had not been expelled from her marital home, she would have to return to her in-laws of her own accord. They refuse to assist any further.

Farid's mother says that after Nazia and Farid's last big fight, Nazia's brothers came to take her back to her family home and beat Farid while they were there. After this, Farid went to the police for help in bringing Nazia back but was told to try to resolve their issue within the family or through the whitebeards.

After the most recent incident, Nazia's father approached the *mesher* for help in attaining a divorce on her behalf through the *woliswali*. However, the *mesher's* parents discouraged him from further involvement in the case, since Nazia's in-laws are relatives of the *mesher's* father and a decision against them might cause a rift in the family. Respondents from the village offer another explanation for the *mesher's* non-involvement: the *mesher* was angry that the couple had not stuck to the resolution agreement he had negotiated for them three years before.

## Outcome and its rationale

The case had not been resolved at the time the research team finished the fieldwork. Nazia was still living in her family home, and her father had not yet taken the case to the *woliswali*. Nazia has said repeatedly that she will return to the marital home only if she and her husband live separately from his family, but this is unacceptable to Farid's mother as she depends on his care. According to Sharia law, Nazia cannot get the divorce without Farid's approval, yet his family refuses to grant the divorce. They are waiting for Nazia to regret her decision and return on her own.

Several attempts have been made to resolve the dispute within the community, because it is seen as shameful for the families as well as the whitebeards to have to seek district involvement in this type of case. However, as the dispute has gone on for so long, many of the family members on each side feel there is little option but to take it to the district.

## – Jamila's Inheritance (Cheshma)

Jamila formalised a non-contentious inheritance division with the help of CBDR practitioners. This case highlights the role of community-level actors in land distribution as well as the role community decision-making plays in preventing disputes from arising. This case illustrates the following issues:

- The degree of women's participation in and access to dispute resolution processes at the community level

- The existence of legal mechanisms to protect women's rights in state law and CDDR
- The role of community-level actors in the division of inherited land
- The role of district actors in securing formal land entitlements

### **Background to the dispute**

Jamila wanted to secure her rights to inherited land from her brother. Many years ago, Jamila's father died, leaving two *jeribs* of land to Jamila's mother until such time as Jamila and her one brother were ready to inherit. Jamila's brother took possession of the land and became the caretaker of their mother after Jamila married and moved away. As she was dying, Jamila's mother devised a will. According to Sharia inheritance norms, Jamila was to inherit one-half *jerib* and her brother one *jerib*; the mother gave the remaining half *jerib* to the son to be sold to pay for her medical expenses and funeral. The brother also took over the family compound for himself and his family. Because of her poverty, Jamila felt compelled to ask for her inheritance rights soon after the death of her mother.

### **Resolution process**

Jamila felt embarrassed to go directly to her brother to ask for her inheritance, so she approached the local mullah to speak to her brother on her behalf. Her request included the half *jerib* described in the will, as well as three additional *beswa*, which was half of the area of the house compound. Jamila's brother was happy to give his sister her share of the inheritance, including the three *beswa*; both parties agreed that the land should be distributed in the presence of a *jalasa*. The *jalasa* for the land distribution was held in the mosque; those present included the mullah, two whitebeards from the area and several local elders. The *jalasa* members also brought the *jeribgar* from the *woliswali* to officially divide the land and provide documentation to ensure that the land division would be recognised by the state. Jamila herself was not present in the *jalasa*, but was represented by her husband and son.

### **Outcome and its rationale**

Jamila was able to make her inheritance request through the local mullah, while her brother was happy to complete his responsibility (*gardan basta mebasha*). The half-*jerib* and three *beswa* were transferred to Jamila, and the families are now living as neighbours.

### **– Nader's case: Pulling *tunban* (Yakatoot)**

Nader, a 16-year-old boy, was accused of inappropriately tugging at the *tunban* (trousers) of the woman next door. The woman threatened to take the issue to the *woliswali* if the local elders did not punish Nader with a public beating. Although this story is told from the point of view of a single, interested respondent, it illustrates the following points:

- Women's ability to influence dispute resolution at the community level
- How concerns regarding shame, honour and the protection of a community's reputation can compel resolution outcomes that might otherwise be considered illegitimate

## Background to the dispute

The neighbour accused Nader of inappropriately tugging at her trousers when they were in the alley near their homes, and of threatening to beat her. Nader's mother believes the reason behind these allegations is that Nader had slapped one of the woman's sons in public for using foul language. The neighbour reported the incident to the village's *mesher*, demanding that Nader be punished immediately and threatening to take the case to the *woliswali* if he was not.

## Resolution process

Upon hearing the woman's complaint, the *mesher* called Nader to the mosque. He decided that Nader should be beaten on the bottom of his feet with a stick in front of the village to set an example for others not to behave this way toward women. Nader's mother states that the *mesher* was pressured into ordering the beating because of the neighbour's threats to raise the issue with the *woliswali* if he did not. Nader's mother says that the *mesher* had personally told her that he and the other village elders knew her son was not guilty, but they felt compelled to go through with the beating lest the woman bring shame to the village by taking the case to the district.

## Outcome and its rationale

Nader received a public beating on the bottom of his feet from the village *mesher*, although there was no further investigation as to whether the incident actually took place. Nader's mother feels that the *mesher's* priority in this case was to protect the reputation of the community by preventing the woman from taking the dispute to the *woliswali*.

## – Gulalai is Tricked Out of Her Land Rights (Yakatoot)

Gulalai was manipulated out of her lawful inheritance rights by her male family members. Although the dispute has been resolved, Gulalai remains unsatisfied with the outcome. This case illustrates the following issues:

- How Sharia-based documents are seen as more valuable than customary documents
- The degree of women's participation in and access to dispute resolution processes at the district level
- Women's increased access to a variety of dispute resolution mechanisms in land-related disputes
- The existence of legal mechanisms to protect women's rights in state law and CBDR
- How lack of access to information can lead to the deprivation of women's rights

## Background to the dispute

Many years ago, Gulalai's father died. The inheritance he left was divided between the children of his two wives, and Gulalai inherited a large portion of *paikal* and garden land. Although many years had passed, neither Gulalai nor her sisters had requested their portion of the inheritance from their elder stepbrothers as, according to local inheritance norms, they did not yet need it. The sisters believed that, as part of their

brothers' responsibility, they would be able to collect their portion whenever they needed it.

Recently, Gulalai and her sister discovered that in fact the land had been sold more than 16 years ago to Iqbal, a powerful landowner in the village. Gulalai learned about the sale when her stepbrothers ordered her to go to the *woliswali* to sign a Sharia deed for the property. Iqbal had requested the conversion of his *urfi* land deed to a formal Sharia deed (at his wife's prompting), for which the law requires the signatures of all individuals with an interest in the land. When Gulalai and her sister refused, the stepbrothers sent Sahil, an elder of the *qawm*, to convince them to go to the *woliswali* and sign the deed over to Iqbal, knowing that the sisters would not refuse the request of a family elder.

### **Resolution process**

Gulalai and her sister attended a *jalasa* in the family home on the issue. From behind a closed door, Gulalai and her sister were told by Sahil that because the land had been sold so long ago there was nothing the women could do to oppose it. They were told to inform the district judge that they had received their fair portion of the sale price and sign the Sharia deed. If they did so, they would receive a large portion of the 100,000 Afs Iqbal had agreed to pay for the conversion of the deed. Believing that they would receive their rightful share if they did as they were told by their brothers and Sahil, the sisters told the judge they had been paid and signed the deed. Thereafter, the sisters received only 7,000 Afs each, significantly less than their rightful share of the original value of the land and of Iqbal's additional payment.

### **Outcome and its rationale**

Gulalai and her sister were denied their rightful inheritance through the unlawful sale of their land and subsequent manipulation by their male family members. Although Gulalai and her sister both have husbands, the husbands did not have the social standing to successfully challenge Gulalai's stepbrothers in a dispute over family land. Gulalai and her sister remain frustrated over the outcome of the case, but feel there is nothing to be done now that the sale is final and evidenced by a Sharia deed.

### **– Aziza Organises Her Own *Jalasa* (Yakatoot)**

Aziza was involved in a land dispute with her cousins. This case illustrates the following issues:

- How CBDR outcomes can protect the rights of women
- How Sharia-based documents are seen as more valuable than customary documents
- Women's ability to influence dispute resolution at the community level
- The degree of women's participation in and access to dispute resolution processes at the district level
- Women's increased access to a variety of dispute resolution mechanisms in land-related disputes

### **Background to the dispute**

Twenty years ago, Aziza's father purchased a large plot of land (*paikal*) from his brother. When her father died, he left the land to his surviving heirs: Aziza, her sister, and their

deceased brother's two sons. Aziza and her sister were given unusually large portions of the inheritance because they had no brothers.

One year ago, two of Aziza's cousins (sons of her maternal uncle) came to make a claim for the land, arguing that their father had never sold the land and thus they were the true owners. Aziza explained to her cousins that she had the *urfi* deed to prove her father's purchase of the land. The cousins told Aziza that they would drop the dispute if she gave a portion of the land to them; Aziza decided that she would either keep all of the land or give the whole parcel to her cousins if they were successful in their claim against her.

### Resolution process

Aziza went on her own to the *mesher*, the mullah and a few of the whitebeards in her area to discuss the issue. Realising that Aziza would not be willing to compromise and thus fearing that the dispute would become a significant conflict, the whitebeards (including her husband) told Aziza that they would only join her in a *jalasa* if she was able to reach a peaceful solution with her cousins beforehand. The cousins refused to attend the first *jalasa* organised by Aziza. Aziza worked for several months to identify old men who were witnesses to the original sale. She then asked the whitebeards to go to her cousins and explain that she had witnesses and an *urfi* deed evidencing the sale, and that it was not proper behaviour to make a false claim against members of one's own *qawm* (here, family). The cousins accepted the advice of the whitebeards and agreed to attend the next *jalasa*.

Because Aziza had been able to arrange a peaceful resolution, the whitebeards, *mesher* and mullah agreed to attend the second *jalasa* along with the cousins. After hearing the witnesses, all agreed that the land had been sold to Aziza's father and thus rightfully belonged to Aziza. The whitebeards prepared an agreement letter to be taken to the *woliswali* stating that Aziza was the lawful owner. Aziza sent her husband to the *woliswali* to serve as her representative (*wakil*) to get an updated *sanad-e-Sharaee* (formal deed) to prevent any disputes from arising in the future.

### Outcome and its rationale

The testimony of living witnesses provided adequate support for Aziza's *urfi* document; the cousins were also encouraged to accept this out of respect for the advice of the whitebeards. Although Aziza had been deeply involved in the dispute resolution at the community level, she asked her husband to represent her at the district level as she did not feel it was appropriate for her to appear at the *woliswali*. Representatives from both sides of the dispute were required to provide their thumbprints on the formal deed proving Aziza's ownership, including the cousin's children, to prevent disputes from arising in the future. Aziza received the *sanad-e-Sharaee* and now has secure title to her land.

Aziza believes that the cousins tried to take a portion of the land because they did not believe that she would be able to provide witnesses to corroborate the *urfi* deed. Aziza believes that had she already had the *Sharia* deed, the cousins would not have attempted the claim.

### – Raihana's Reputation (Cheshma)

Raihana is a widow in her mid-30s. At the time of the dispute, there was no male head of her household. Raihana sought the assistance of the local whitebeards to resolve a

land-related dispute with her cousin, but was turned away due to her bad reputation and has since been forced out of the village. This case illustrates the following issues:

- How concerns regarding shame, honour and the protection of a community's reputation may subsume other issues in dispute resolution processes
- Abuse of authority by community elders
- The collaboration of community- and district-level actors in dispute resolution

### **Background to the dispute**

Raihana has been a widow for about seven years; she inherited between five and seven *jeribs* of land from her natal and marital families and has three children (two older daughters and one young son). Respondents describe Raihana as beautiful, fashionable, concerned with her appearance, independent, a spendthrift, and interested in living like a woman in the city. Although several men in the village and the district have asked her to marry them, Raihana refused to remarry because she didn't want to risk losing control over her land or children. Because of her independence and willingness to associate with male villagers who are not her relatives, Raihana has developed a very dishonourable reputation in the village. This concern extends to her family members: because Raihana had allowed men who were not relatives onto her portion of the family land, the brothers built a wall dividing the compound to protect their daughters.

About two years ago, Raihana sold a portion of her land to cover some personal expenses. She contacted her maternal cousin and offered to sell him the land, as he was the neighbour to the land and thus had first right of purchase. Two of Raihana's brothers, Samim and Yasin, advised her not to sell and told her that in any case, the price the cousin offered was far below market value. Raihana ignored their advice and went through with the transaction, which included the sale of Raihana's portion and the mortgaging of her childrens' portion of the land (according to Sharia rules on inheritance property). Since that time, Samim and Yasin have refused contact with their sister.

When Raihana's cousin failed to pay her the full amount promised for the land, Raihana went by herself to seek the help of the local mullah and other whitebeards. The mullah and whitebeards refused to assist Raihana, however, telling her that her behaviour had brought dishonour to the village. Raihana took her claim to the head of police in the *woliswali*. He sent Raihana back to the village with an official letter to the whitebeards ordering them to resolve the dispute. It is rumoured that Raihana received a marriage proposal from this police chief during her meeting with him, which she refused.

Upon receiving the letter, about 60 whitebeards from the surrounding area gathered to send a letter back to the *woliswali* accusing Raihana of adultery and requesting the *woliswali's* help in removing her from the village. Upon hearing this, Raihana physically attacked the local mullah in front of the other whitebeards, accusing him of tarnishing her reputation without any proof of wrongdoing. Respondents say that previously Raihana had also refused a marriage proposal from this mullah and for that reason he was trying to get her out of the village. Raihana's sister-in-law says that the accusations against her were unfounded, that Raihana was being persecuted because many villagers were alarmed by her independence and that the dispute was a ploy for other people to get possession of Raihana's land.

## Resolution process

Because the issues in this case were so highly charged, accounts of the resolution process vary according to respondents' ideas regarding Raihana's rights and behaviour. Overall, however, the descriptions of what took place are similar: After rejecting the *woliswali's* order to resolve the dispute, a group of whitebeards went to the government (*hokumat*) to describe the problem. Thereafter, the police department sent Raihana a summons to come to the *woliswali*.

Because Raihana had presented her complaint to the police chief and district governor rather than the court, the resolution process consisted of a meeting in the offices of the *woliswali*. Raihana chose one soldier who was working for the head of police to serve as her *mahram* (male chaperone) in the proceedings. During the meeting, the head of police and governor told Raihana that either she or her daughter should be married to this soldier so that in the future she would have a male family member to represent her.

## Outcome and its rationale

Raihana married her daughter to the soldier within six months of the meeting. Raihana and her children, along with one of Raihana's unmarried brothers, are now living with her daughter and son-in-law in a nearby village. It is unclear what happened with regard to her land dispute with her cousin, but it seems that Raihana was not successful in securing the full value for her land. Raihana still owns the remaining portion of her natal land.

Although many of the respondents stated that in fact Raihana was not a bad woman, all seemed to understand why her independent behaviour in the village had led to such a negative reputation and ill treatment. Raihana's sister-in-law told the research team that she felt the whitebeards' involvement and actions toward Raihana had made matters worse. She said that if the whitebeards had taken their concerns about Raihana's actions directly to her brothers, they could have explained the situation to her and the issue could have been resolved peacefully. As it was, the conflict was permitted to escalate in a way that was shameful for the village and unfortunate for Raihana.

## – Snakebite or Murder? (Cheshma)

Shafiq was accused of murdering his business partner, Rahman. Although medical examination proved that Rahman was killed by snakebite, Rahman's family was still able to get compensation for the death from Shafiq's family by threatening to draw out the conflict. The case took place outside of the research site, but individuals from one side of the dispute are residents of one of the research villages. This case illustrates the following issues:

- How concerns about social cohesion can lead to opportunistic claims or the sacrifice of individual rights
- How district actors do not always follow standard procedures
- The collaboration of community- and district-level actors in dispute resolution

## Background to the dispute

Approximately eight months prior to the interview, Shafiq entered into a business partnership with Rahman, a man otherwise unrelated and unknown to his family. Shafiq and Rahman sought to expand their fruit-selling business by purchasing a field for

growing watermelons (*faliz*). As both partners had limited funds, they took the land on mortgage. Twenty days after making this agreement, but before the partners could make any payment on the mortgage, Rahman was bitten by a snake and died while in the field. Shafiq was in Mazar-e-Sharif at the time, having gone to buy some items needed for the business.

As soon as Shafiq heard about the death, he returned to the area. Rahman's body was taken to the hospital for an autopsy; Shafiq also went to the hospital, where he was met by Rahman's father. That evening, the hospital issued a report stating that the death was caused by snakebite. Rahman's father accepted this report and told Shafiq that he had no claim against him. The two men travelled together to Rahman's village to deliver his body to the family home; as it was late, Shafiq stayed the night with Rahman's family.

During the funeral the next day, Shafiq was summoned out of the house to find that Rahman's brothers had initiated a murder case against him. He was taken to the district police station in the area in which the incident occurred for questioning about his relationship with Rahman. Although the police were shown the hospital's report, Shafiq was held in the district jail for nine days while the police investigated Rahman's brothers' claim. Shafiq states that during this time, the police beat him in an attempt to elicit a confession. When he did not confess after three days, the head of the district police called Rahman's brothers to determine why they had demanded Shafiq's arrest. Arguing that there was no evidence of murder, the head of police convinced Rahman's brothers to resolve the dispute through a *jalasa* in their home village. Shafiq was to be kept in jail until the local whitebeards could reach an agreement with the brothers on a reasonable amount of compensation for Rahman's death.

### Resolution process

Although the police accepted that Shafiq was not at fault for the death, Rahman's brothers remained unwilling to settle the dispute without compensation. *Jalasa*s were held at Rahman's family home and in the head of police's office in an attempt to resolve the dispute.

The first *jalasa* was held in the guest room of Rahman's family's home. Both sides collected the senior elders of their alley and their respective *meshers*. Only Shafiq himself was not present for the meeting. At the beginning of the *jalasa*, Rahman's brothers demanded 300,000 Afs from Shafiq, arguing that this was the amount in Rahman's pocket before he left home on the day of his death. Shafiq's father, representing him, objected that his family did not have this much money; further, he argued that Shafiq had taken no money from Rahman, and that Rahman had in fact been in debt to him. The whitebeards worked hard to resolve the issue and bring peace to the two families. Both sides finally agreed that Shafiq would have to pay 143,000 Afs to Rahman's brothers to end the hostility between the families.

The whitebeards reported their final decision to the *woliswali* in the area where the incident took place. The head of police called the *jalasa* members to the district police station for a second meeting, this time including Shafiq. The head of police prepared an agreement letter for submission to the authorities in the area where the incident occurred and where Shafiq lives, stating that the conflict was resolved and would not be revisited in the future. After Shafiq's father was able to collect the money required for compensation, Shafiq was released after nine days in custody under the guarantee of his local whitebeards that there would be no further violence.

## Outcome and its rationale

Rahman's father accepted that Shafiq had not killed his son and forgave him during the funeral. Although almost everyone involved agreed that Shafiq was in no way implicated in Rahman's death, Rahman's brothers were unwilling to let the dispute go without some sort of payment from Shafiq. In order to preserve peace and social cohesion in the community, the whitebeards and head of police agreed that that Shafiq should pay compensation for the death so that Rahman's family would not reactivate the dispute in the future.

After the resolution of this dispute, Shafiq's father kicked him out of the family house due to his anger over Shafiq's business activities with unknown parties and over being forced to take out a loan to cover the compensation payment. Shafiq and his wife are now living with his uncle. Shafiq continues to be angry about having this money taken from him when he was not at fault.

## – The *Mesher's* Brother is Killed in a Traffic Accident (Cheshma)

The *mesher's* brother died after being hit by an allegedly drunk driver. This case illustrates the following issues:

- How prioritisation of *islah*-based principles such as apology and forgiveness can influence dispute resolution
- How serious cases can be taken directly to the *woliswali*
- How district actors do not always follow standard procedures
- The collaboration of community- and district-level actors in dispute resolution, specifically in preventing further hostilities

## Background to the dispute

While managing a road-building project for an international company between Kabul and Mazar-e-Sharif, the *mesher's* brother was hit and killed by a driver who was allegedly drunk at the time. Following the accident, the driver (who was believed to be an influential person from Kabul) attempted to flee the scene, but was detained by local residents who surrounded the car. Local police, along with the prosecutor, arrived to arrest the driver; but by that time, the actual driver had switched places with another person in the vehicle. This person was arrested by the authorities instead of the actual driver. Many respondents believe that the actual driver paid the other man to take responsibility in order to protect his own reputation, and that this is a common form of corruption. All respondents anticipated that the actual driver would secure the release of the other man by bribing the police.

On the day of the accident, whitebeards from the driver's area came to the *mesher's* home to accept responsibility for the accident and offer their apologies (*uzr*) and compensation for the death. Many respondents noted that the apology was less valuable because the actual driver did not attend. The *mesher's* father rejected the apology, arguing that his son's blood was not for sale. The *mesher* and his father thereafter approached the head of police for help in prosecuting the driver.

## Resolution process

The head of police told the *mesher* and his father that since the driver was from outside the area, it would not be possible to find him (although this is contradicted by the fact

that the village whitebeards were able to contact the driver to arrange for the offering of apologies to the family). The police also asserted that because the death was not intentional, there were no grounds to prosecute.

After the funeral, whitebeards from the *mesher's* area encouraged the family not to pursue the issue further. The whitebeards stated that taking the case to the *woliswali* would bring no benefit to the family, would destroy the eternal peace of the dead son by inflaming hostility between the families, and was without reason given that the death was accidental. The *mesher's* father accepted the whitebeards' advice, even though he was dissatisfied with the apology offered by the driver's whitebeards.

### **Outcome and its rationale**

The whitebeards discouraged the *mesher's* father from pursuing the case through state mechanisms, as they wanted to maintain the peace and end hostilities between the two families. One respondent stated that the *mesher's* father wanted the driver to be punished according to the law, but that he felt pressured to drop the dispute out of respect for the whitebeards and out of concern for his son's well-being in the afterlife. Although the dispute itself was dropped, another of the *mesher's* brothers stated that the family would be willing to forgive the driver if he came to apologise in person.

### **– The Shepherd and His Wife (Yakatoot)**

Susan, the wife of a shepherd, sought the help of the local whitebeards and the *woliswali* to divorce her husband, due to repeated bouts of severe domestic violence. While the case remains unresolved, it illustrates the following issues:

- Women's access to and participation in dispute resolution processes at the community and district levels
- The repercussions of taking marital disputes outside the household in a community with strong values and behavioural rules regarding shame and honour
- State and community rules on divorce and child custody
- The collaboration of community- and district-level actors in dispute resolution
- How village elders can influence decision-making among disputants and district-level actors

### **Background to the dispute**

Susan and her husband have been married for about 17 years and have five children. Susan's husband is a shepherd, which keeps him away from home for about three months at a time. Susan and her husband are known by many in the village to be having marital problems and are often heard fighting when he returns from the mountain; many in the village say that these fights result from Susan's complaints that he does not provide adequately for the family. Susan and her husband were not able to rely on their family members for help in solving the problems as they were already in a separate household from his family.

As the fighting became increasingly violent over the last year, Susan approached the local elders for their help in ending the beatings. The whitebeards organised a *jalasa* in Susan's home with her husband and counselled the couple to resolve the problem between the two of them. This cycle occurred several times; each time the husband

agreed to stop the abuse but resumed the next time he came home from the mountain. Finally, after a particularly severe beating, Susan took herself to the mosque to show the mullah and some of the elders her injuries and shame them into helping her. She told them that she could no longer stand to live with her husband and that she wanted to seek a divorce. The elders persuaded her to return to the house for another *jalasa*, during which they strenuously advised the couple to avoid divorce at all costs and to keep the dispute within the *qawm*. They warned Susan that if she sought a divorce it would destroy the village by setting a bad example for other wives. The elders also threatened that if Susan's husband did not find a way to stop her from taking her complaint to the *woliswali*, they would throw both of them out of the *qawm*.

Convinced that this would not be the end of the violence, however, Susan left for her mother's house and the same day went to the district police headquarters to report the abuse and claim for a divorce. Susan reports that she decided to approach the head of police first because she wanted her husband arrested and punished. The head of police referred Susan to the judge, who ordered her to see the female doctor at the district hospital for examination and documentation of her injuries. The doctor treated her injuries, but her report did not seem to factor further into the proceedings. The judge issued a summons and told Susan that he could not make a decision until he spoke to her husband.

### **Resolution process**

When her husband next came down from the mountain, Susan met him at the court. Before he would hear the claim, the judge requested the appearance of some of the elders who had been involved in previous *jalasas* on the matter. The judge stated that because this was an issue between husband and wife, only the elders of the *qawm* would be able to solve it. Susan's husband told the judge that because Susan had now ruined his reputation by taking the dispute out of the *qawm*, he no longer wanted her and would give her a divorce. The judge informed Susan that she could take her divorce, but since she had been the one to initiate it she would not be able to bring any of the children or household items with her and would not be able to request maintenance costs from her husband.

Unwilling to give up her children, Susan did not accept the terms of the divorce. She returned to the village with her husband and an agreement letter promising that he would not beat her in the future.

### **Outcome and its rationale**

There are conflicting accounts of how, or even whether, this dispute was resolved. All respondents agree that once Susan heard the child custody terms, she immediately terminated her request for a divorce. Some state that the agreement letter issued by the court was in Susan's favour, threatening her husband with divorce and awarding full custody to Susan should she report further violence. Others, however, state that the agreement simply reflects a promise by Susan to drop the matter and by Susan's husband to cease the abuse, as well as a reminder of the legal rules on custody should she seek a divorce again in the future. It is unclear whether the abuse remains ongoing.

Susan and her husband now face problems among many of the members of their community. Susan is seen to have ruined her own reputation by talking about her marital problems with the elders, and to have tarnished the reputation of the village by taking her divorce claim to the *woliswali*. Likewise, her husband has lost respect in the community for

allowing his wife to go to the *woliswali*; he is no longer invited to village events since the whitebeards no longer see him as a member of the *qawm*. Family members on both sides, including Susan's mother, no longer maintain relations with the couple.

## – Shirali Relinquishes His Land Claim (Yakatoot)

Shirali approached the whitebeards for resolution of an inheritance dispute with his uncle, but was forced to take the case to the *woliswali* when they refused to help. Although this story is told from Shirali's point of view, it illustrates the following issues:

- The importance of community knowledge in land disputes
- How family disputes may require intervention by a range of community and district actors
- How prioritisation of *islah*-based principles such as apology and forgiveness can influence dispute resolution
- The collaboration of community- and district-level actors in dispute resolution, specifically in preventing further hostilities

### Background to the dispute

This dispute occurred about two or three years prior to the interview in which it was described. Shirali is a poor man who works as a labourer with a handcart in Mazar-e-Sharif. His maternal uncle lives in the same village, in a large house on good land left to him and his three sisters by his father (Shirali's grandfather). In accordance with Sharia law, Shirali was left a portion of this land following the death of his mother four years ago; however, Shirali had never asked for his mother's land out of respect for his uncle.

Two winters ago, Shirali was temporarily unable to work. Seeking to feed his family, he asked his uncle for a loan of 5,000 Afs. The uncle refused, arguing that Shirali was too poor to ever be able to pay him back. Knowing that his uncle had plenty to share, Shirali decided in his anger to claim his portion of the inheritance land. He confronted his uncle outside the mosque after Friday prayers, when about 40 whitebeards were gathered. Shirali announced his intention to take his portion and reminded the whitebeards of his lawful right. Incensed, Shirali's uncle threatened him with a knife, punched him and refused in front of the others to grant his claim. Many of the whitebeards counselled Shirali to drop the claim out of respect for his elder and to avoid bringing hostility into the village. Shirali was insistent, however. He told the whitebeards that if they did not help him he would be forced to go to the *woliswali* for resolution. If he did not seek his right, he told them, he would be less of a man.

### Resolution process

Shirali asked several of the local whitebeards to convene a *jalasa* on the matter, but they refused, asserting that it was more important for Shirali to respect his uncle and to avoid creating hostility in the village. For this reason, Shirali felt forced to make the dispute "bigger" by taking it to the *hokumat* for resolution.

Shirali first approached the district governor, who referred him to the judge. Upon hearing his story, the judge agreed that Shirali was entitled to his mother's portion of the land and summoned the uncle to the court. In front of the judge, the uncle still refused to give Shirali his portion, arguing that as he had built on and improved the land it would not be just for him to have to give a portion away. The judge and head of

police appealed to the uncle's status as an elder to encourage him to make a reasonable compromise, but still he refused any change to his holdings. After another three weeks of bureaucratic hassle in the *woliswali*, the judge eventually referred the case back to the whitebeards, telling Shirali that it was a *qawmi* issue and only the elders would know best how to solve it. The judge gave Shirali an official letter addressed to specific whitebeards in the village, assuring Shirali that if he had a lawful right to the land then surely these whitebeards would give it to him.

When Shirali returned to the village, the whitebeards were waiting to scold him for taking his dispute out of the village and showing such disrespect to his uncle and to the *qawm*. Shirali apologised and explained that it had been his wish to have the dispute resolved by the *qawm* in the first place; after seeing the judge's letter, the whitebeards agreed to resolve the issue following Friday prayers the next day.

After prayers, the elders invited Shirali and his uncle to sit and discuss the issue. One of the whitebeards suggested to the uncle that according to Sharia law, Shirali did in fact have a lawful claim and that the uncle should "empty his shoulders" (*gardan basta mesha*) of the duty to divide the land. Embarrassed by his prior refusal, the uncle agreed to give Shirali his right. In accordance with Sharia practice, Shirali asked his uncle three times whether he had a rightful claim to the land; once his uncle affirmatively answered the question three times, Shirali's right to the land was official.

### **Outcome and its rationale**

Shirali's uncle finally admitted that according to Sharia law, Shirali had a rightful claim to the land. Once Shirali knew that he had won the argument, he began to feel shame about taking away any portion of the land upon which his uncle's wife and children were living. Shirali decided to relinquish his right to the land owed to him and instead to gift it to his uncle's eldest son. Shirali also wanted to avoid conflict among his family members, and felt satisfied just knowing that his uncle had admitted his right.

As Shirali explained, the decision that the land was his was made according to Sharia law, while his decision to give the land to his cousin was based on local custom and therefore only needed to be recorded in an *urfi* document. Shirali, his uncle, and the whitebeards all put their thumbprints on the agreement letter and gave it to the cousin. The whitebeards told Shirali that he had done a good thing for the *qawm* by reaching such a peaceful solution. They asked Shirali and his uncle to do *ashty* (forgive and hug each other), and the dispute was resolved.

## Bibliography

“A Guide to Researching the Law of Afghanistan at the University of Michigan Law Library.” University of Michigan Law Library, 2003. <http://www.law.umich.edu/library/students/research/Documents/afghanistan.pdf>.

Abu-Nimer, Mohammad. “Conflict Resolution in an Islamic Context: Some Conceptual Questions.” *Peace and Change* 21 (1996): 22-.

Amin, S. H. *Law, Reform and Revolution in Afghanistan*. 3<sup>rd</sup> rev. ed., Glasgow: Royston, 1993.

Barfield, Thomas. *Afghanistan: A Cultural and Political History*. Princeton, N.J.: Princeton University Press, 2009.

Barfield, Thomas. “Afghan Customary Law and Its Relationship to Formal Judicial Institutions.” Draft Report, United States Institute of Peace, 2003. <http://www.usip.org/files/file/barfield2.pdf>.

Barfield, Thomas. “Culture and Custom in Nation-Building: Law in Afghanistan.” *Maine Law Review* 60 (2008): 347-.

Barfield, Thomas. “Informal Dispute Resolution and the Formal Legal System in Contemporary Northern Afghanistan.” Draft Report, United States Institute of Peace, 2006. [http://www.usip.org/files/file/barfield\\_report.pdf](http://www.usip.org/files/file/barfield_report.pdf).

Barfield, Thomas, Neamat Nojumi and J Alexander Their. “The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan.” United States Institute of Peace, 2006. [http://www.usip.org/files/file/clash\\_two\\_goods.pdf](http://www.usip.org/files/file/clash_two_goods.pdf).

Callaghan, Sarah. “An Assessment of the Durability and Enforcement of Decisions in the Informal and Formal Justice Systems in Kabul: Based on NRC’s Case Work in Kabul.” NRC unpublished report, 2007.

Carter, Lynn and Kerry Connor. “A Preliminary Investigation of Afghan Councils.” Agency Coordinating Body for Afghan Relief (ACBAR), 1989. [http://repository.forcedmigration.org/show\\_metadata.jsp?pid=fmo:504](http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:504).

Checchi and Company Consulting, “Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations Between Formal Courts and Informal Bodies.” Report, USAID Afghanistan Rule of Law Project, 2005. [http://www.usip.org/files/file/usaaid\\_afghanistan.pdf](http://www.usip.org/files/file/usaaid_afghanistan.pdf).

Davies, Margaret. “The Ethos of Pluralism.” *Sydney Law Review* 27 (2005): 87-.

Dechamps, Colin and Alan Roe. “Land Conflict in Afghanistan: Building Capacity to Address Vulnerability.” AREU Issues Paper Series, April 2009. [http://www.areu.org.af/index.php?option=com\\_content&task=view&id=42&Itemid=76](http://www.areu.org.af/index.php?option=com_content&task=view&id=42&Itemid=76).

Dupree, Louis. *Afghanistan*. 3<sup>rd</sup> ed., Princeton, N.J., 1980.

Etlings, Bruce. “Legal Authorities in the Afghan Legal System (1964-1979).” Harvard Law School Islamic Legal Studies Program, Afghan Legal History Project, 2003. <http://www.law.harvard.edu/programs/ilsp/research/etling.pdf>.

Galanter, Marc. "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law." *Journal of Pluralism and Unofficial Law* 19 (1981): 1-.

Gang, Rebecca. "Observations on NRC Client Choices of Forum in Pursuing Property Dispute Resolution in Kabul: A Case Study of Kabul's Courts and Jirgas." Norwegian Refugee Council Research Series, 2007.

Ghani, Ashraf. "Disputes in a Court of Sharia, Kunar Valley, Afghanistan 1885-1890." *International Journal of Middle East Studies* 15 (1983): 353-.

Glatzer, Bernt. "The Pashtun Tribal System." *Concept of Tribal Society*. G. Pfeffer and D. K. Behera eds., New Delhi: Concept Publishers, 2002: 265-.

Glatzer, Bernt. "War and Boundaries in Afghanistan: Significance and Relativity of Local and Social Boundaries." *Weld de Islams* 41 (2001): 379-.

Griffiths, John. "What is Legal Pluralism?" *Journal of Legal Pluralism* 24 (1986): 1-.

Guha, Amalendu. "The Economy of Afghanistan during Amanullah's Reign, 1919-1929." *International Studies* 9 (1967-68): 161-.

Jones-Pauly, Christina and Neamat Nojumi. "Balancing Relations Between Society and State: Legal Steps Toward National Reconciliation and Reconstruction in Afghanistan." *American Journal of Comparative Law* 52 (2004): 825-.

Kakar, Palwasha. "Tribal Law of Pashtunwali and Women's Legislative Authority." Harvard Law School Islamic Legal Studies Program, Afghan Legal History Project, 2004. <http://www.law.harvard.edu/programs/ilsp/research/kakar.pdf>.

Kamali, Mohammad Hashim. *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary*. Leiden: E.J. Brill, 1985.

Karokhail, Masood and Susanne Schmeidl. "Integration of Traditional Structures into the State-Building Process: Lessons from the Tribal Liaison Office in Loya Paktia." *Heinrich Boll Publication Series on Promoting Democracy under Conditions of State Fragility* 1, 2006. <http://www.tlo-afghanistan.org/about-tlo/integration-traditional-structures-state-building-process>.

Khurram, Karim and Natalie Rea. "The Customary Laws of Afghanistan." International Legal Foundation, 2004. [http://www.usip.org/files/file/ilf\\_customary\\_law\\_afghanistan.pdf](http://www.usip.org/files/file/ilf_customary_law_afghanistan.pdf).

Lister, Sarah. *Caught in Confusion: Local Governance Structures in Afghanistan*. Briefing Paper, AREU 2005. [http://www.areu.org.af/index.php?option=com\\_content&task=view&id=39&Itemid=73](http://www.areu.org.af/index.php?option=com_content&task=view&id=39&Itemid=73).

Lombardi, Clark. "The Challenge of Creating an Islamically Legitimate Legal System: Lessons from Afghanistan's Past and Present." Forthcoming.

Mani, Rama. *Beyond Retribution: Seeking Justice in the Shadows of War*. Cambridge, UK: Polity Press, 2002.

Melissaris, Emmanuel. "The More the Merrier? A New Take on Legal Pluralism." *Social and Legal Studies* 13 (2004): 57-.

Menski, Werner. *Comparative Law in a Global Context*. 2<sup>nd</sup> ed., Cambridge, U.K.: Cambridge University Press, 2006.

Merry, Sally Engle. "Legal Pluralism." *Law and Society Review* (1988): 869-.

Moore, Sally Falk. *Law as Process: An Anthropological Approach*. Boston, M.A.: Routledge and K. Paul, 1978.

Moore, Sally Falk. "Law and Social Change: the Semi-Autonomous Social Field as an Appropriate Subject of Study." *Law and Society Review* 7 (1973): 719-.

Nixon, Hamish. "The Changing Face of Local Governance?: Community Development Councils in Afghanistan." Working Paper Series, AREU 2008. [http://www.areu.org.af/index.php?option=com\\_content&task=view&id=39&Itemid=73](http://www.areu.org.af/index.php?option=com_content&task=view&id=39&Itemid=73).

Nixon, Hamish. *Subnational State-Building in Afghanistan*. Synthesis Paper Series, AREU 2008. [http://www.areu.org.af/index.php?option=com\\_content&task=view&id=39&Itemid=73](http://www.areu.org.af/index.php?option=com_content&task=view&id=39&Itemid=73).

Nojumi, Neamat, Dyan Mazurana and Elizabeth Stites. "Afghanistan's Systems of Justice: Formal, Traditional and Customary." Tufts University, Feinstein International Famine Center, 2004. <http://www.gmu.edu/depts/crdc/neamat1.pdf>.

Norchi, Charles H. "Toward the Rule of Law in Afghanistan: The Constitutive Process." *Beyond Reconstruction in Afghanistan: Lessons from Development Experience*. John D. Montgomery and Dennis A. Rondinelli eds., New York: Palgrave Macmillan, 2004: 115-.

Norwegian Refugee Council. "The Relationship between the Formal and Informal Justice Systems in Afghanistan." Position Paper, Norwegian Refugee Council, 2007. [http://www.rolafghanistan.esteri.it/NR/rdonlyres/5C5153EF-E1E0-42CD-B143-1B1B3CF1F379/0/NorwegianrefugeecouncilRoLpositionpaper270607\\_2\\_.pdf](http://www.rolafghanistan.esteri.it/NR/rdonlyres/5C5153EF-E1E0-42CD-B143-1B1B3CF1F379/0/NorwegianrefugeecouncilRoLpositionpaper270607_2_.pdf).

Rubin, Barnett. *The Fragmentation of Afghanistan: State Formation and Collapse in the International System*. 2<sup>nd</sup> ed., New Haven, C.T.: Yale University Press, 2002.

Saboory, Mohammad Hamid. "The Progress of Constitutionalism in Afghanistan." *The Sharia in the Constitutions of Afghanistan, Iran and Egypt: Implications for Private Law*. Nadjma Yassari ed., Tübingen: Mohr Siebeck, 2005: 5-.

Senier, Amy. "Rebuilding the Judicial Sector in Afghanistan: The Role of Customary Law." *Al Nakhlah* (Spring 2006). [http://fletcher.tufts.edu/al\\_nakhlah/archives/spring2006/senier.pdf](http://fletcher.tufts.edu/al_nakhlah/archives/spring2006/senier.pdf).

Sharafi, Mitra. "Justice in Many Rooms Since Galanter: De-Romanticizing Legal Pluralism through the Cultural Defense." *Law and Contemporary Problems* 71 (2008): 139-.

Smith, Deborah J. "Community-Based Dispute Resolution in Nangarhar Province." AREU Case Study Series, December 2009. [http://www.areu.org.af/index.php?option=com\\_content&task=view&id=27&Itemid=32](http://www.areu.org.af/index.php?option=com_content&task=view&id=27&Itemid=32).

Smith, Deborah J. with Shelly Manalan. "Community-Based Dispute Resolution in Bamiyan Province." AREU Case Study Series, December 2009. [http://www.areu.org.af/index.php?option=com\\_content&task=view&id=27&Itemid=32](http://www.areu.org.af/index.php?option=com_content&task=view&id=27&Itemid=32).

Strickland, Major Richard Tod. "The Way of the Pashtun: Pashtunwali." *Canadian Army Journal* 10 (2007): 44-.

Tamanaha, Brian Z. "Understanding Legal Pluralism: Past to Present, Global to Local." *Sydney Law Review* 30 (2008): 375-.

Tariq, Mohammad Osman. "Community-Based Security and Justice: Arbakai in Afghanistan." *Journal of the Institute of Development Studies* 40 (2009): 20-.

The Liaison Office (TLO). "Linkages between State and Non-State Justice Systems in Eastern Afghanistan: Evidence from Jalalabad, Nangarhar and Ahmad Aba, Paktia." The Liaison Office, May 2009. <http://www.tlo-afghanistan.org/publications/working-paper-series/linkages-between-state-and-non-state-justice-systems-eastern-afgha>.

Yilmaz, Ihsan. "The Challenge of Post-Modern Legality and Muslim Legal Pluralism in England." *Journal of Ethnic and Migration Studies* 28 (2002): 343-.

Zadran, Alef-Shah. "Socio-Economic and Legal-Political Processes in a Pashtun Village, Southeastern Afghanistan." Ph.D. dissertation, State University of New York at Buffalo, 1977.

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