

Afghanistan Research and Evaluation Unit  
Case Study Series

# Community-Based Dispute Resolution Processes in Nangarhar Province



Deborah J. Smith

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## Glossary

<i>baad</i>	the practice of compensating a murder (or even an accidental killing) by the family of the killer by giving either one or two never-married girls in marriage to the victim's family
<i>de gharo Shinwaar</i>	mountain Shinwaar
<i>da kuz Shinwaar</i>	lower Shinwaar
<i>diera</i>	area outside a house where guests are greeted and people will sit and talk
<i>enqelaab</i>	the Revolution; referring to the Soviet occupation and the Mujahiddin resistance
<i>ghaazian</i>	those fighting against infidels
<i>haram</i>	forbidden in Islam
<i>hojara</i>	<i>guest room</i>
<i>islah</i>	essentially means the promotion of peace and maintaining community social cohesion through negotiation and reconciliation; it is an Islamic principle
<i>jerib</i>	the unit measurement of land area equivalent to 2,000 m <sup>2</sup> (5 <i>jerib</i> = 1 hectare).
<i>jirga/jirgee(pl)</i> <sup>1</sup>	meetings held to resolve disputes which have an ad-hoc membership
<i>jirgamar/jirgamaran(pl)</i>	those who resolve problems in <i>jirgee</i>
<i>machalga</i>	deposit given or agreed to at the beginning of a <i>jirga</i> to guarantee the disputants will accept the final decision
<i>malik/malikan(pl)</i>	representative/ <i>qawm</i> or village leader
<i>mawad sang</i>	"stone material"; name given to an agreement between the Shinwaar and the government
<i>modir-i-huquq</i>	officer of the department responsible for civil law
<i>nanawati</i>	a formal apology

<sup>1</sup> "Pl" = plural (i.e., "jirgas").

<i>nasabi malik</i>	a <i>malik</i> whose forefathers were also a <i>malik</i>
<i>nerkh</i>	a fixed price of compensation for an injury
<i>padari</i>	in a position due to inheritance
<i>padari malik</i>	a <i>malik</i> who has inherited the position from his father
<i>Pashtunwali</i>	Pashtun code of conduct.
<i>pardah</i>	material that covers, often used in the context of women
<i>qawm/qawmmuna(pl)</i>	often translated as tribe or clan; essentially a kinship group that can range considerably in size and scope
<i>qanoon-i-urfi</i>	customary law
<i>spin-gerree</i>	“white-beards”; senior men
<i>spin-saree</i>	“white-hairs”; senior women
<i>shura</i>	council or group of people who discuss particular issues
<i>Shinwaar laar</i>	“way of the Shinwaar”
<i>shura amniyat</i>	security <i>shura</i>
<i>shura inkeshafi</i>	development <i>shura</i>
<i>teega</i>	“stone”; describes a process to put a halt to any conflict for a set period of time
<i>waak</i>	authority; includes the following forms:
<i>aam tam waak</i>	full authority given by disputants to <i>jirgamaran</i> to resolve the dispute in whichever way they feel is most fitting and most likely to end the dispute and bring peace (also known as <i>mad pad waak</i> )
<i>azaad waak</i>	refers to “free Sharia <i>waak</i> ” in which, in a similar way to <i>wad pad waak</i> , a disputant can take a decision to a second mullah if they are not happy with an initial outcome
<i>waak-i-asnad</i>	<i>waak</i> for which disputants should have documentation or land deeds
<i>wad pad waak</i>	form of <i>waak</i> in which decisions must be based on existing decisions and for which review is possible
<i>wakil</i>	representative
<i>woliswal/woliswal(pl)</i>	district governor
<i>woliswali</i>	<i>woliswali</i> literally means “district” but is used to refer to the central town of the district where the government offices are located and can also be taken to mean all departments of the executive and judicial branches of government in the district

# 1. Introduction

In 2006, the Afghanistan Research and Evaluation Unit (AREU) began researching community-based dispute resolution processes in Afghanistan. To date research has been conducted in Bamiyan, Balkh and Nangarhar provinces as well as in Kabul city. In Nangarhar Province, qualitative data collection was conducted in two district centres and in one village in each of these districts between January 2007 and January 2008. Prior to this work, relatively little has been written about how community-based dispute resolution processes operate, particularly in recent years, and little of this is based on in-depth data collection at the village or community level.<sup>1</sup> Nangarhar was chosen as one of the sites for this research because it was felt essential that research incorporating a study of customary law be conducted in an area that practices *Pashtunwali*.<sup>2</sup> Nangarhar was also primarily chosen due to its relative security at the time, compared to other Pashtun-dominated provinces.

Community-based dispute resolution refers to the processes used for resolving disputes within the community in which the dispute has taken place.<sup>3</sup> The parameters of the “community” from this perspective depend on the nature of a dispute. Within the context of this study, “community” most often refers to the residents of the village in which the dispute has taken place; the village is also the location in which most actors in the dispute, both disputants and those called on to resolve the dispute, reside, as well as the space in which the dispute is to be resolved. However, some disputes are contained within a particular *qawm*<sup>4</sup> community or extended family within a village. Still other disputes incorporate more actors from different geographical locations, such as disputes between villages. In some examples, actors from outside the immediate community may be drawn on to assist in resolving particular disputes, as is discussed in Section 5.

These processes for dispute resolution are also referred to as “informal justice”<sup>5</sup> or

1 Reports based on primary data collection, however, include: T. Barfield, N. Nojumi and J. A. Their, *The Clash of Two Goods: State and non-State Dispute Resolution in Afghanistan* (United States Institute of Peace, 2006); Norwegian Refugee Council, “Position Paper: The Relationship between the Formal and Informal Justice Systems in Afghanistan” (2007); Women and Children Legal Research Foundation, *Bad, Painful Sedative* (Afghanistan, 2004); N. Nojumi, D. Mazurana and E. Stites, “Afghanistan’s System of Justice: Formal, Traditional and Customary” (Medford: Feinstein International Famine Center, 2004); International Legal Foundation, “The Customary Laws of Afghanistan” (Kabul: 2004); T. Barfield, “Informal Dispute Resolution and the Formal Legal System in Contemporary Northern Afghanistan” (United States Institute of Peace Draft Report, 2006); Checchi and Company Consulting, Inc for USAID Afghanistan Rule of Law Project, “Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations between Formal Courts and Informal Bodies” (2005).

2 As is explored further later in this report, *Pashtunwali* should not be viewed as a homogeneous or unchanging code of conduct but instead is practiced differently by different Pashtun tribes and *qawmmuna*. Similarly, the application of *Pashtunwali* changes over time.

3 “Community” is an often used but rarely defined term. Drawing on Agarwal’s *A Field of One’s Own: Gender and Land Rights in South Asia* (Cambridge University Press: Cambridge 1994), 3, the definition of a community can be based on residency, (e.g., the village community) or on social grouping (e.g., a religious community or a *qawm* community). A person can simultaneously be a member of several different communities. For example, he or she can be a member of a particular *qawm* within a village, which also spreads across several villages. It is recognised that communities tend to not be homogeneous, but instead heterogeneous in terms of power, resources and interests.

4 *Qawm* is often translated as “tribe” or “clan,” and essentially means a kinship group that can range considerably in size and scope.

5 See: Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity Press, 2002), 36; Norwegian Refugee Council, “The Relationship between the Formal and Informal Justice Systems in Afghanistan”; and Barfield et al., *The Clash of Two Goods*.

“customary law.”<sup>6,7</sup> At the beginning of this research the term “customary law” was used to describe the subject for investigation. However, it was soon determined that a study which focused solely on customary law would be too limited, as it would only focus on those processes used for dispute resolution defined as *qanoon-i-urfi* (customary law), and fail to recognise other principles that are viewed by those implementing them as distinct from *qanoon-i-urfi*, primarily Sharia. Indeed, decision-makers in community-based dispute resolution processes, spoken to by the research team, often made a clear distinction between Sharia and *qanoon-i-urfi*, as is explored in Section 5.

Using the term “informal justice” when referring to these processes is also misleading as it sets them in an artificially dichotomous relationship to the state justice sector, and thus implies that they operate independently from state institutions. In reality, state actors may work in collaboration with actors in village level community-based dispute resolution processes, as is discussed in Section 4.

A wide variety of disputes are resolved at the community level; the most common among these are about access to and use of resources, particularly land. Certain disputes about land arose as a direct consequence of large-scale migration out of the villages during the Soviet-Mujahiddin War, followed by the return of these refugees, as is explored in Case 1, “Land Dispute between Kuchi and other Muhmand *Qawm*” and Case 2, “Inherited Land Dispute,” which are presented in Annex 1. Other disputes which may be resolved at the community level are both murder and accidental killings, disputes about marriage arrangements, disputes about sexual abuse or deviance, and other acts of violence. These disputes vary in size considerably, from those between neighbours over a land boundary to those between large *qawm* groups over access to and ownership of larger portions of land. They can be disputes between family members of both a criminal and civil nature, such as violence within the family and issues of inheritance. Disputes about inherited land were found to be quite common in the villages of Nangarhar Province where this work was conducted; for a detailed example of such a case see Case 2, “Inherited Land Dispute.” Disputes which come to community-based dispute resolution processes can be criminal *and* civil as well as criminal *or* civil. That is to say that while some disputes are purely civil in nature, others which may have begun as a civil dispute become violent, and as such become both civil and criminal. For examples of this phenomena, see Case 1, “Land Dispute between Kuchi and other Muhmand *Qawm*,” and Case 3, “Land Dispute between Two Shinwaar *Qawm* Living in One Village.” This recognition that criminal and civil disputes cannot be clearly delineated from one another takes account of the role community-based dispute resolution bodies have in resolving the causes of criminal actions and reconciling the families of those involved.<sup>8</sup> However, arguing that community-based dispute resolution processes have a role to play in criminal cases does not deny the duty or rights of the state to prosecute criminal cases.

In studying the processes used for dispute resolution, this research has focused on four central themes: the processes used in resolving or regulating disputes at community level; the relationships between these processes at the community level and state actors at district level; the principles underlying the outcomes of dispute resolution processes; and equity within these processes, with a particular focus on gender equity.

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6 “Customary law” can best be described as a non-codified system of laws or rules which is recognised by the community as a legitimate form of justice.

7 See Amy Senier, “Rebuilding the Judicial Sector in Afghanistan: The Role of Customary Law in al Nakhlah,” *The Fletcher School Online Journal for Issues related to Southwest Asia and Islamic Civilization* (Spring 2006).

8 The case can also be made for certain criminal cases to be resolved solely by a community-based dispute resolution mechanism, such as petty theft; see Barfield et al., *The Clash of Two Goods*.

Gender equity itself has been analysed in regard to four dynamics: first, women's ability to access dispute resolution processes which are dominated by men; second, women's contribution to these processes, in comparison to men's contribution; third, women's role as decision-makers in resolving disputes; and fourth, the outcomes for women as compared to men of the decisions made within these processes.

## Key arguments

The principle arguments this report makes are:

### *Potential for change in community-based dispute resolution processes*

- Community-based dispute resolution processes are not static and do not rest on an unchanging, imagined version of tradition and custom. They are instead continually revised over time to adapt to changing social relationships, political structures and new problems.
- The principles underlying and used to rationalise the outcomes of dispute resolution processes are complex, drawing on Islamic and customary ideals, negotiation, and pragmatism, and as such are not fixed but adapt to the changing dynamics of individual cases and wider societal influences.

### *Links and relationships between village-level community-based dispute resolution and the state*

- Community-based dispute resolution processes do not operate in isolation from state institutions, but instead frequently work in collaboration with them.
- Residents of villages make decisions based on experience and knowledge when choosing between taking a dispute to state institutions or those with the authority to resolve disputes in their villages. However, because individuals (women, men, young, old, wealthy, poor, etc.) face varying levels of social and practical restrictions that constrain their choices, they may come to different conclusions about which system is best for them.
- Disputes of both a criminal and civil nature are resolved at the community level. Indeed, often criminal actions have their root causes in civil disputes and it is therefore not always possible to make a definite distinction between civil and criminal cases.

### *The comparative advantage of community-based dispute resolution processes*

- Processes for resolving disputes are a key way for maintaining peace and social cohesion at the village level.
- While community-based dispute resolution processes may not always and immediately bring a resolution to a dispute, they may well regulate or contain the dispute, i.e., prevent a dispute erupting into violence.
- Community-based dispute resolution, as practiced in the villages of Afghanistan, not only offers a functioning alternative in light of a weak state justice system, but also has particular advantages over state or formal justice, such as its elements of distributive and restorative justice.<sup>9</sup>

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<sup>9</sup> Distributive justice seeks to address the underlying causes of conflict, and restorative justice involves a community-based model of justice that places strong emphasis on the restoration of dignity, peace, and upholding relationships between offenders and victims.

### *Gender equity and community-based dispute resolution processes*

- While women's access to and participation in these processes may be particularly constrained, spaces in which women do access and influence dispute resolution processes can be found.
- Although women's roles as decision-makers in dispute resolution processes are severely limited, women are recognised by community members to play a key role as decision-makers in disputes of a domestic nature.
- Contrary to common belief, decisions made through these processes can provide recourse for women to assert their rights.
- Women's access to these processes and participation in them is constrained and at times decisions are made which do not uphold women's human rights. However, this is not an outcome of community-based dispute resolution or customary law itself, but is instead a consequence of prevailing gender roles and relations in Afghanistan more widely.

The next section of this report provides an overview of the methodology used for both the collection and analyses of the data and details regarding the selection of the research sites, including an overview of their social, economic and geographical contexts. This provides an important background to the rest of the report, explaining not only why the research team was able to access and understand certain phenomena, but also why certain types of information are not available, such as quantitative information. Section 3 focuses on the roles, responsibilities and sources of power of decision-making actors involved in community-based dispute resolution processes. It also discusses how the operation of community-based dispute resolution has changed over time since the Soviet-Mujahiddin War. Section 4 discusses the relationships between state and village level actors, how and why people make the choices they do as to how and where to resolve their disputes, and the roles women play as both disputants and witnesses in these processes. Section 5 focuses on particular practices used for resolving disputes, the principles which underlie the decisions made, and the outcomes of particular dispute resolution processes. Finally, Section 6 is structured around the four key themes of the research and makes concluding comments on the processes used for resolving disputes in the community, the relationships between state actors and village-level actors, gender equity within community-based dispute resolution processes, and the principles underlying these processes.

## 2. Research Methodology and Site Selection

### 2.1 Research Methodology

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

The sites for data collection in Nangarhar Province were two districts with one village chosen from each district. At the district level, the following respondents were spoken to: district judges; *woliswalan* (district governors); the police commanders (heads of the district police department); prosecutors; and *modiran-i-huquq* (officers of the department responsible for civil law). Nearly all district-level respondents were interviewed twice. However, in some cases where the person holding the post changed during the course of the research and a second interview was not possible with the original respondent, their replacement was interviewed.

Across both the villages, 38 interviews with men and 34 interviews with women were conducted (a very small number of these were second interviews with the one respondent). These respondents were a mixture of people who are regularly involved in dispute resolution, those who have had or were having disputes themselves, and family members of disputants. Across the two villages, eight focus group discussions were held with men and seven with women. This data has been complemented by fieldnotes from observations and informal conversations.

All interviews were recorded using written notes which were then translated into English and transcribed as-close-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 to not only have a direct word-for-word translation but also to understand what is implied when certain words or phrases are used in Pashto compared to their English equivalents. As will be seen throughout this paper, specific words, particularly those used to refer to customary or Sharia practices and principles, are kept in the original Pashto with detailed explanations provided in the glossary, footnotes or parentheses.

The methodological approach incorporated collecting three types of knowledge from respondents. One, individuals were asked for generalised information as to types of disputes and how they resolve disputes in their communities; two, particular cases were investigated through interviews and informal conversation with disputants, their family members, and those involved in resolving the dispute; and three, opinions, thoughts and feelings about dispute resolution and suggestions for ways forward were sought from community members and district-level actors. Individual cases were explored alongside generalised information to avoid only receiving responses based on expected behaviours or normalised practices. For example, in many cases, when asking in a general manner the research team would be told that women do not participate in *jirgee* (meetings held to resolve disputes), and yet when exploring stories of particular disputes, women reported themselves or were reported to have been present and to have participated in a *jirga* held to resolve them. It was nevertheless important to collect this more generalised information to gain a historical perspective on dispute resolution in the area, broaden the understanding of how disputes are resolved for the types of cases that the research team were not able to directly explore, and to cross-check and compare individual

dispute information. The research team collected opinions, thoughts and suggestions for ways forward for dispute resolution as they believe that the communities themselves are able to understand and analyse their own lives, and are able to identify ways to improve things. Indeed, unlike the common practice of conducting focus group discussions at the beginning of a data-collection period, these were held at the end of the field work. The rationale for this was to present some of the research findings to community members to get their opinions on them, and to discuss potential ways forward for community-based dispute resolution once the researchers themselves had a good understanding of the ways in which these processes are working.

The analysis of the data has corresponded with this approach, exploring the differing descriptions and opinions regarding individual disputes and 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 the transcripts and fieldnotes in order to organise the text into sets of quotations about particular themes and subthemes. Detailed case stories were also brought together and summaries of some can be found in Annex 1.

## 2.2 Site selection: District and village context

Research was been conducted in two different villages of two different districts in the east of Nangarhar. One village is populated by Shinwaar people and one by Muhmand people. Each village can be further divided into different *qawm* groups and extended family groups.

The primary reason for selecting these two villages and districts was to capture the customary practices of two different groups of people living in Nangarhar Province. However, factors more practical in nature influenced the site selection considerably, in particular the deteriorating security situation in Nangarhar Province at the time of research. The research team discussed possible districts for selection with government representatives at the provincial level and then visited a number of districts, holding discussions with different district-level officials and village elders to inform a final decision on where to conduct the research. Factors such as the size of the villages, the variety of ongoing and past disputes, and the willingness of the district-level representatives and village elders for the research team to work in their district or village all informed the final selection of the sites.

### Shinwaar village

The Shinwaar village is roughly a 15-minute drive from the *woliswali* (district centre) and is comprised of approximately 600 households. The village is further divided into three subvillages in which separate sub-*qawm* of the Shinwaar live.

Between the *woliswali* and the village there is a large bazaar which sits on both sides of the main dirt road that leads to the village. An irrigation channel runs beside the road and into the village, dividing it in half. The water from this stream is used for drinking, cooking, watering animals, washing and irrigation.

While all residents of the village are Shinwaar, they make a clear distinction between the mountain-Shinwaar (*da gharo* Shinwaar) and the lower-Shinwaar (*da kuz* Shinwaar). Data collection focused only on the lower-Shinwaar because there was ongoing, and at times violent, conflict between these two groups (see Case 3, “Land Dispute between Two Shinwaar Qawmmuna Living in One Village,” presented in Annex 1). It was assessed by the research team that relations were so tense between these two communities that

it would have been difficult for them to work with both communities and still maintain the rapport and trust that they had already built with the lower Shinwaar peoples. The lower-Shinwaar *qawm* can be further broken down in smaller sub-*qawm*, each having their own *malik* (representative/*qawm* leader). There is a *nasabi malik* (*malik* whose forefathers were also *malikan*) who is the representational head for the other *malikan* and who as such has a stronger relationship with the district level authorities.

During the Soviet-Mujahiddin War (1979-1989), most of the village residents migrated to Pakistan. Some returned before or during the Mujahiddin government (1993-1996) only to have to leave again during civil war. Most residents have since 2001 returned, although some continue to have family members who live and work in Pakistan.

From informal conversations conducted in the village, the research team established that the majority of people own some land, with most owning no more than three *jerib*.<sup>10</sup> There are some larger landowners who own closer to 30 *jerib* of land and employ sharecroppers, often Kuchi people.<sup>11</sup> Some landowners rent their land to others for set periods of time. Crops grown include wheat, potato, onion, maize and oranges. Poppy is also a major crop in the village and provides a significant part of many villagers' incomes.<sup>12</sup> Many also work as drivers and traders and some own shops.

There is a school for both boys and girls in the village which teaches from grades one to ten. However, due to a lack of women teachers at the school, girls do not attend past the age of ten. The nearest health clinic is at the district centre and people also go to Jalalabad and Pakistan for healthcare.

Several NGOs have had a presence in the village and the National Solidarity Programme (NSP) was just being established there toward the end of the research team's data collection period.

### Muhmand village

This village is located relatively close to the *woliswali*<sup>13</sup>—roughly a ten-minute journey by car—and is made up of approximately 300 households. The population of the village is divided into three different sub-*qawm* groups who all identify themselves as Muhmand. These sub-*qawm* groups can then be further divided into ten smaller groups. The village itself is divided into ten subvillages which correspond to the *qawm* divisions. There are two *nasabi malikan* in the village who, like in the Shinwaar village, represent the village at the district level; each sub-*qawm* also has their own *malik*. The research team primarily worked in three of these subvillages, although some of the disputes affect residents of the other subvillages.

The village compounds are in most cases well spaced out with agricultural land lying between them. A river runs across the bottom of the village which often floods when the

10 "Jerib" is a unit measurement of land area equivalent to 2,000 m<sup>2</sup> (5 jeribs = 1 hectare).

11 The *Kuchi* are traditionally Pashtun nomadic pastoralists.

12 It should be noted that people talked about poppy cultivation extremely openly and did not hide this in any way. Indeed, the entire research team (including the international researcher) was told about the cultivation of poppy in the area in a very matter-of-fact way during an early visit to the village. During the time of data collection, there was an ongoing eradication campaign which contributed to insecurity in the village.

13 *Woliswali* literally means "district" but is used to refer to the central town of the district where government offices are located and is often also used to refer to all executive and judicial branches of government in the district.

rains come, causing damage to the land.<sup>14</sup>

The migration patterns of this village during times of war have been similar to that of the Shinwaar village, with most people leaving during the Soviet-Mujahiddin War (1979-1989) and returning during Najibullah's time (1989-1992), with many leaving again during the civil war (1992-1996). Most residents have returned since the fall of the Taliban, although some have family members who continue to work in Pakistan.

The village is reported to be and was observed by the team to be wealthier overall than the Shinwaar village. Virtually all the village residents are relatively economically comfortable. Like the Shinwaar village there is a mixture of rain-fed and irrigated land. Most households own some land which is used to grow a mixture of subsistence and cash crops; poppy is also grown in this village. Many families also have members who are involved in trading, particularly because of their location close to the Torkham border. Other work undertaken includes owning shops along the main road which intersects the village, driving taxis, and daily wage labour work.

There is a school for boys and girls in the village. Boys attend from grades one to ten and girls from grades one to five, with boys taking classes in the mornings and girls in the afternoon. There is a health clinic in the village, and people also seek healthcare in Jalalabad and Pakistan.

The village has had NGOs working there at different times and the NSP was just being establishing in the area toward the end of the research team's data collection period.

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<sup>14</sup> It was reported by one of the *malikan* that they had agreed to cooperate with the government over poppy eradication, and in exchange the government would build flood defences for the village. However, he said that these promises on the part of the government have not been kept.

### 3. Authority and Coercion: Exercising Power in Community-Based Dispute Resolution Processes

*If white-beards are themselves good, other people will also be good and respect them and obey their orders. But if the white-beards are not good, people will not behave well toward them.*

– A male farmer in his fifties who lives in the Muhmand village

This section discusses the roles, responsibilities, and sources of power and influence that different actors in community-based dispute resolution processes have. It discusses what different actors' power is based on and how they have been able to exert this power, or not, at different times during the past thirty years. Through this discussion of how community-based dispute resolution processes have changed over time, this section contributes to one of the key arguments of this report: that community-based dispute resolution processes are not and do not rest on an unchanging, imagined version of tradition and custom. They are instead continually revised over time to adapt to changing social relations, political structures and new problems.

When discussing the different actors in these processes, it is important to remember that an actor can be an individual, such as a disputant, village elder or district-level official, or an institution or body, such as a *jirga* or court. An individual may be a different type of actor at different times, for example a man may play the role of decision-maker in resolving certain disputes but at other times be a disputant himself.

This section is split into three subsections. The first discusses the different types of power actors in dispute resolution processes use. It then discusses the status, position and role of actors at village level who make decisions in dispute resolution processes. The second section introduces district-level actors, examining where their authority comes from. The final section of the chapter considers how dispute resolution processes have changed over time in the two communities, exploring how the changing regimes in Afghanistan over the past 30 years have interacted with community-based dispute resolution processes.

#### 3.1 Understanding power: Authority and coercive power

Central to this section is an understanding of how power is attained and exerted. Drawing on early conceptualisations of power by Lukes,<sup>15</sup> this report adopts a distinction between "power as authority," described by Lukes as compliance based on generalised values, and "power as coercion," being compliance where there is no choice to do otherwise. Having a more direct application for this study is how this distinction is expressed by Skalnik<sup>16</sup> between what he calls "authority as opposed to power." In his work, "*authority* is the right to act and make laws, *power* is understood as an ability to enforce obedience... . Thus *right* stands against *coercion*, recognised ability against force or the threat of it." (Author's emphasis.)

Although Skalnik is referring to power as exerted by the state the same distinctions between "power as authority" and "power as coercion" are useful for understanding how different actors influence and are seen as having both a right, or not, and a

15 Steven Lukes, *Power: A Radical View* (London: McMillan Press Ltd., 1974).

16 P. Skalnik, "Authority versus Power: a View from Social Anthropology" in *Anthropology of Power*, ed. A. Cheater (London and New York: Routledge, 1999).

responsibility to resolve disputes. This section argues that the right to be a decision-maker in community-based dispute resolution processes is based on being in a position of authority, rather than having coercive power, and that an individual's authority is achieved and held due to the level of respect they receive from others.

However, the idea that the *right* to be a decision-maker in dispute resolution is based on authority does not negate the reality that other manifestations of power, including more coercive forms, also influence these processes. Nevertheless, the community in general does not usually see actors, if they are using coercive power, as having a *right* to this influence. It should also be noted that coercive power and authority are not mutually exclusive; instead, an individual may be in a position of power because he or she is respected but also because they are able to wield coercive power and enforce obedience.<sup>17</sup>

### 3.2 Village actors in community-based dispute resolution processes

As is made clear in the cases presented in Annex 1, the primary institution used for resolving disputes is a *jirga*. A *jirga* is a highly flexible body which is formed on an ad-hoc basis to discuss and resolve particular problems and disputes. Those who attend *jirgee* in a particular village or area is not fixed, but instead vary from dispute to dispute, as might their roles. A *jirga* can also vary considerably in size from dispute to dispute; from those which four people attend to those which several hundred attend. A *jirga* can be held in different places, including at the office of the *woliswal*, on a piece of land whose ownership is being disputed, or at the *hojara* (guest room) or *diera* (area outside a house where guests are greeted and people will sit and talk) of one of those involved in resolving the dispute. For some disputes it may only be necessary to hold one *jirga* to reach a resolution while for others a series of *jirgee* may be held over a number of days, weeks, months or even years.

While in theory disputants can select anyone to represent them in a *jirga*, usually this authority is vested in a quorum of older men from the village and/or *qawm* community. This group of men are referred to as either *jirgamaran* (those who resolve problems in *jirgee*) or *spin-geree* (white-beards) and also includes the village and *qawm malikan*. These three terms (*jirgamar*, "white-beard" and *malik*) are used interchangeably by community members and district level actors; nevertheless there is a distinction. "White-beard" is the most general term and can be used for any elderly man in the community, even if they do not participate in *jirgee*, but it is also used to describe those who do. A *jirgamar* is used to refer to one who specifically participates in *jirgee*. *Malik* is the most specific term and refers to one who has been selected as a representative of the different *qawm*-groups in a village, and as such participates in disputes both in relation to those he represents and others. As is described in the context and site selection section of Section 2, each sub-*qawm* in the villages has a *malik* who has been selected to represent them. On occasions, influential men who have not been selected and do

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<sup>17</sup> While this section focuses on "power as authority" and "power as coercion," the authors recognise that other forms of power, which are often harder to observe, are also exerted within the communities. For example, resistance to dominant power dynamics (for a fuller discussion of these forms of everyday resistance see J.C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* [New Haven and London: Yale University Press, 1985]) and the Foucauldian conceptualisation of power as something which neither one person nor a group of people have over others but instead as something which is exerted in manifold and multiple forms of domination and subjugation within social organisms (M. Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972 -1977*, ed. Colin Gordon [London and New York: Prentice Hall, 1980]).

not have this representational role are still called *malik* because they play a leading role in dispute resolution. (Throughout this report the term *jirgamar* is used in general to describe someone who participates as a decision-maker in *jirgee*.)

Both the *jirga* system and those individuals who participate in *jirgee* as decision-makers are seen to have a *right* to make decisions and to implement them due to the position of authority they are held in by the community. The authority of the *jirga* system primarily comes from its comparative stability over time. While there have been periods of time, which are discussed below, when this authority has been challenged, it has remained a relatively consistent form of dispute resolution, justice and governance within the communities researched. This stability has resulted in trust in the system on the part of the community and is expressed in terms of it being part of the communities' customs or tradition, or as an essential part of Pashtun identity. Consequently, community members feel a sense of ownership of and loyalty to the *jirga* system.

The authority of those who make decisions in *jirgee* is based on both expectations of traditional role-fulfillment and individual standing in the community; older men are expected to play this role and be just. Particular older men are in a position in the community which makes this expectation stronger. The next section discusses what attributes are viewed by the community as putting individuals in this position of authority and what is expected of them.

### Authority: Right and responsibility in community-based dispute resolution processes

Certain attributes are seen as necessary for an individual to possess in order for them to have the right to resolve disputes. These attributes, as such, give authority to an individual. Respondents reported that these men should be trusted by the community and thought of as both being just and having the wider community's interests in mind.

#### Box 1: The desirable attributes for *jirgamaran*

*Those who are honest and know the Laar [referring to Shinwaar Laar; "the way of the Shinwaar"] become white-beards and jirgamaran.*

– A male farmer in his fifties speaking during a focus group in the Shinwaar village

*A white-beard should be a person who has not behaved badly and the village people are happy with. It is good for our people because they choose their white-beards themselves.*

– A woman in her sixties speaking during a focus group discussion in the Shinwaar village

*We select as malik, white-beard or jirgamar—those who are familiar to us and respected by the people—and they should resolve our disputes and problems honestly and respect the rights of the villagers.*

– A white-hair<sup>1</sup> in her sixties speaking during a focus group discussion in the Shinwaar village

*The malikan have a special sort of reputation. Although some malikan don't have any literacy, they are good at speaking and understanding the issues... The malik system has existed since the past and they play a key role in dispute resolution. The people also respect them and accept their decisions... The malikan are well aware about the disputes because they are from the same village.*

– Prosecutor

<sup>1</sup> A term used to refer to older women who are held in respect and who may, under certain circumstances, be involved in resolving disputes or provide advice to those who are responsible for dispute resolution.

Possessing two types of knowledge is also seen as essential to be able to effectively fulfill the role of a *jirgamar*: knowledge of community dynamics and the background to individual disputes; and knowledge of the customary practices, processes and principles used to resolve disputes. The quotations in Box 1 (previous page) illustrate the importance placed on these various attributes.

Age is seen as one of the key features most likely to ensure that a man possesses the above-listed attributes. Indeed, most *jirgamaran* are older men. There are, however, exceptions to this which are worth exploring. There are men in both villages who were significantly younger than most others when they started participating in *jirgee* as decision-makers.

In the Muhmand village, Abdul Khan,<sup>18</sup> who is now in his early fifties, explained that he has been a *jirgamar* since he was in his twenties, during the Soviet-Mujahiddin War. At that time he described how four of the most senior white-beards of the village came together to form a committee, with representatives from each of the *qawmmuna*, whose aim was to find ways to protect the village from both Soviet and Mujahiddin forces. When the village came together to appoint the representatives no one from Abdul Khan's *qawm* volunteered. He explained how he felt embarrassed by this and consequently volunteered for the role himself. The white-beards of his own *qawm* agreed to him being their representative, despite his youth.

Naeem, who lives in the Shinwaar village, is in his early thirties and like Abdul Khan is one of the most respected *jirgamaran* in his village. He was very young when his father, who was a *jirgamar*, died. At this time his family were involved in two ongoing disputes; one with the Alfridi<sup>19</sup> people over the ownership of land and another because a man had accused them of owing him money. In regard to these disputes, Naeem attended many *jirgee* and he explained how through this experience he learned about the processes and practices of the *jirga* system. Consequently, people started asking him to participate in *jirgee* on their behalf. He also explained how he gets called "*Malik* Naeem Khan" although he is not a real *malik*. This illustrates how the role of *malik* is seen as going hand in hand with participating in *jirgee* as a decision-maker.

These two examples of younger men participating in what is seen as an older man's domain demonstrates how exceptions can be made to the general rules governing dispute resolution so long as it is practical and fulfills the aims of the *jirga* system.

In the same way that being older is often a prerequisite for having sufficient authority in a village or within a *qawm* group to be a *jirgamar*, so too are a person's hereditary and *qawmi* status. This is expressed in the quotations in Box 2 (next page).

Most, if not all, *jirgamaran* and *malikan* in the villages inherited the position. A commonly given and very practical reason for a son or a grandson of a *jirgamar* becoming one himself is because they are exposed to the methods used for dispute resolution by observing the *jirgee* that their fathers and grandfathers take part in, as this white-hair from the Muhmand village explains:

*Usually the malikan take decisions in the jirga and the malikan learn from their fathers because their fathers were malikan in the past. For example, in my father's house there are always jirgee and my brothers and cousins are*

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18 To protect the identity of respondents, all names in this paper have been changed.

19 The Alfridi are a Pashtun tribe that straddles the border areas of Afghanistan and Pakistan.

**Box 2: Jirgamaran's authority coming from qawmi status and ancestry**

*If someone doesn't have qawmi status nobody will take their dispute to him and secondly disputants will not accept their decision if it is not according to their wish.*

– Jirgamar farmer and taxi owner in his fifties who lives in the Shinwaar village

*Malikan are not from yesterday or today they are from a very long time ago and they are not new to the people. They are the people whose fathers and grandfathers were malikan and ghaazian (those fighting against the infidels).*

– A woman in her sixties speaking during a focus group discussion in the Muhmand village

*Other malikan are the same in the village; most of them are selected because of their ancestry... If there was a malik that is not padari [in the position due to inheritance] they will not have a good reputation among the people and they will not have the power among the people and people won't rely on him as much as they do a padari malik (malik who has inherited the position from his father).*

– Abdul Khan, a jirgamar in his fifties who lives in the Muhmand village

*always serving tea and food for those who are participating, and so they are sitting in the jirga and they learn how they can resolve the disputes. And after they know about it, and when they become jirgamaran and malikan, they will resolve the disputes in the same way their fathers did.*

Despite the fact that most of the *malikan* and *jirgamaran* in the villages where the research was conducted were the sons of previous *jirgamaran* and *malikan*, respondents were keen to stress that the *malikan* and *jirgamaran* are selected by the people and that it is not automatic that a son of a *malik* or *jirgamar* will become one himself. As the quotation below illustrates, in order for a son of a *malik* or *jirgamar* to inherit the position, to gain the authority that his father has or had, he should also have the characteristics of justice, honesty, and a desire to serve his community.

*No, it [ancestry] is not important for someone to become a malik and it depends more on honesty and good character. Also it depends on the service of the person for their community. A person who wants to be a malik should see all people the same. But if someone is a good person and he is a malik and his son is not a good person, his son will not be selected as a malik and the people will select someone else... He should be a good Muslim and also he should be familiar with the jirga principles.*

– A man in his forties living in the Shinwaar village

It was reported that in the past it was more automatic for these positions in the villages and *qawm* to be inherited, and that now there is some flexibility as to who will become either a *malik* or a *jirgamar*.

**Women's role as decision-makers in dispute resolution processes**

Women having a decision-making role in the *jirgee* in these research sites is extremely rare; in fact it was reported that women do not play any role in resolving disputes in *jirgee*. However, when discussing disputes between family members (particularly those that involve women) or those between women in general, it was reported in both villages that there are a number of women who take a role in resolving such disputes. These women are referred to as white-hairs (*spin-saree*), and they are recognised for possessing similar attributes as the *jirgamaran*: being trustworthy, just, and having knowledge about the community. As such, they also have authority. They are all older women. The quotations in Box 3 (next page) provide examples of women reporting

themselves to resolve disputes either between their own extended family members or between other women in the village.

**Box 3: Women as decision-makers and dispute resolvers**

*If I hear that there is a dispute in our qawm between husband and wife or between mother-in-law and daughter-in-law so, in this case I will go and I will advise them. But it hasn't happened yet that a few older women have sat together and held a jirga. This custom is from the past times until now, that only men sit in jirgee and not women. But every household has an older woman in their family who can advise when people have disputes in their families.*

— A sister of a senior *jirgamar* who is in her forties and lives in the Muhmand village

*Yes, I have attended a lot of jirgee which were about family disputes. I went and advised as an old lady from the village. If I couldn't solve the dispute, then the dispute would be referred to the white-beards to resolve... Like Parwana's dispute, I tried with other women to solve her dispute with her daughter-in-law. Parwana is one of my husband's close relatives; she is my husband's aunt's daughter.*

— A white-hair talking about Case 4, "Exchange Marriage Dispute," presented in Annex 1

*It happened a few days ago in our neighbour's house. There was fighting between two daughters over their land and they had beaten each other. Their dispute got bigger and their mother also started and their voices were also raised, so I went to their house and I advised both of them.*

— A woman in her sixties who lives in the Muhmand village

Case 4, "Exchange Marriage Dispute," provides an example of how older women can have significant influence over the outcome of a dispute. In this instance of domestic violence within the context of an exchange marriage, older women from the *qawm* were called on to both advise the *jirgamaran* and to help persuade the disputants to accept the final decision, which was to return to their husbands homes. The husband who was being violent also had to agree to treat his wife better.

While women's decision-making roles are restricted to these types of domestic disputes or those involving family members, people's opinions on what role women should or could play is often more progressive. This topic was more often discussed in focus groups with women than in those with men. In these discussions, women responded that while it is not Pashtun culture for women to participate in *jirgee*, it would be good if they could have women-only *jirgee* for resolving disputes between women in addition to their role as decision-makers in disputes of a domestic nature. As this white-hair from the Shinwaar village said:

*If women sit in jirgee and solve women's disputes it is very good because women can understand women...they know each other's problems better. But unfortunately in the Pashtun area there is no custom for women to sit and solve problems.*

When the same issue was discussed with groups of men, at times they also gave responses in favour of women having a bigger role in dispute resolution. The quotation below is an illustration of how men may even see women's participation in more general *jirgee* as a good thing:

*During King Zahir Shah's kingdom in...[a nearby] woliswali there was a woman—she is still alive—who used to participate in jirgee, but she does not*

*participate now. Her name is Rehmani Jan. She is well-known in the area and she is still alive. She is a brave woman; she would talk against 50 malikan. She has lots of experience in this regard. This Rehmani Jan during Zahir Shah's kingdom was herself a malik. If there was a dispute in the village she herself would go to the woliswali and resolve the dispute for the people... She is a woman but she used to participate in jirgee.*

— A *jirgamar* in his sixties who lives in the Shinwaar village speaking during a focus group discussion

It is evident from the way that this man talks about Rehmani Jan that he respects her and sees her participation as positive rather than detrimental. However, he also presents her as an “exceptional woman” rather than an “ordinary woman.” Indeed, “ordinary women” can be presented by both men and women as not having the capabilities to participate in decision-making, as the quotation below illustrates:

*Yes, it is good [if women have their own jirgee] but mostly men have this role. And women can't make good decisions. They can't understand the goodness or badness; they are illiterate. So there aren't any women who can resolve these issues and make decisions.*

— An older woman who is the wife of a *jirgamar* and lives in the Shinwaar village

As the quotations in Box 4 demonstrate, women also reported their lack of participation as decision-makers in all-women *jirgee*, family *jirgee*, and in *qawmi* or village *jirgee* as being related to their status in society.

#### Box 4: Women's lack of participation as decision-makers

*Men wouldn't accept a women's jirga and here there isn't value given to women. If women fight with each other it is good if women can bring peace between these neighbours. But they can't resolve big disputes and men won't accept women's ideas.*

— A woman in her forties who lives in the Shinwaar village speaking during a focus group

*Now we don't have jirga for women. If we made a women's jirga, I am sure no one would accept women's ideas and decisions.*

— A woman in her fifties who lives in the Shinwaar village speaking during a focus group

*I am supporting this [that women themselves should resolve their disputes and hold jirgee]. This will help them and this will be to their benefit. They can exchange their ideas in a jirga. It is a big failure in our area that women aren't allowed to go to school and they are not allowed to have a jirga... Now if we look at foreign countries, a woman can be president of a country like in Bangladesh. Her name is Khalida Zia and the foreign minister of America is a woman, [Condoleezza] Rice. It is very developed. Now it is getting better. In Kabul, there are a lot of girls and women who are doing higher education. In different organisations there are lots of women. This is good that women are active in everything.*

— A *jirgamar* in his fifties who lives in the Shinwaar village speaking during a focus group

The previous discussion illustrates that while women have an extremely limited role as decision-makers in the *jirga* system, not all men or women were opposed to them playing a larger role than they currently do. Although some people expressed the opinion that women are incapable of making “good” decisions, others recognised that it is their position in society that may curtail this ability, rather than anything innate. Women's participation as disputants and witnesses in *jirgee* is discussed further in Section 4.

### 3.3 District-level actors in community-based dispute resolution

While Section 4 discusses in detail the relationships between state actors and village-level actors in dispute resolution processes, this section introduces the key actors at the district level: principally the *woliswal*. It should be noted that this paper does not aim to describe what these different actors roles are according to Afghan law, but instead what their roles and responsibilities are perceived to be by themselves and the communities in the districts where they work.

The *woliswal* is the most influential actor in dispute resolution at district level and the most commonly mentioned by respondents. He plays three primary roles. First, he acts as a gatekeeper to other district level actors, such as the police, *modir-i-huquq*, prosecutor and courts.<sup>20</sup> Second, he can be a decision-maker in particular disputes. Third, he acts as a point for registering the outcomes of some dispute resolution processes conducted in the villages. The second and third roles are discussed in Section 4 in more detail. The importance of the *woliswal*'s position as gatekeeper and his ability to wield so much influence over the processes used for dispute resolution are explored here.

The *woliswal* exerts both legal authority and other forms of more coercive power. The *woliswal*'s authority, rather than resting in the character or behaviour of the individual holding the position, is to a large degree rooted in the relative stability of the position itself over time.<sup>21</sup> The post of *woliswal* has existed throughout the different periods of conflict and the different regimes in this area (and so too in many areas of Afghanistan), dating at least to the expansion of the state at the end of the nineteenth century under the Emir Abdur Rahman Khan.<sup>22</sup> In a similar way to how the historic role of *jirgee* gives them authority, respondents explained that it is the custom of the area to approach the *woliswal* for all official business or when referring a dispute to government officials. Similarly, the role the *woliswal* plays as gatekeeper to other officials was also explained as being a custom of the area. This perspective can be seen in the quotations in Box 5 (next page).

As with the man speaking in the last quotation, some people believe that it is the law to first go to the *woliswal* with any problems or disputes. For many, the *woliswali* is seen as "the government" and the *woliswal* is the most senior or important person within it. The role of gatekeeper played by the *woliswal* was also accepted by other district-level state-actors as the quotations in Box 6 illustrate.

However, not all district-level respondents support this point of view. For instance, in the quotation below, the police commander who was posted to the district where the Muhmand village is located argues:

*The criminal cases should come to the police first and also other related cases, and the police will do their job and investigate about the matter and after analysing they would send it to the right department. But what should I do?*

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20 Hamish Nixon, *Subnational State-Building in Afghanistan* (Kabul: Afghanistan Research and Evaluation Unit, 2008), states that he found the same for the twelve districts where he conducted research on subnational state building. Nixon emphasises how the *woliswal*'s influence "extends well beyond his formal powers."

21 It should also be noted that there is often very little stability as to the individual who holds this post. Nixon, *Subnational State-Building in Afghanistan*, found that, for the districts he studied, the *waliswals* on average had only been in post for eight months.

22 Asta Olesen, *Islam and Politics in Afghanistan* (Richmond: Curzon Press, 1995), cited in Nixon, *Subnational State-Building in Afghanistan*.

**Box 5: Why approach the *woliswal* first**

*It is a custom from the previous times that people take their disputes directly to the *woliswal* and not to other departments, but I don't know about the law of government or how it works. The *woliswal* himself commands other departments.*

– A man in his forties who lives in the Muhmand village speaking during a focus group

*We don't have the authority because all the authority is with the *woliswal*. If the *woliswal* wants it he can refer to the white-beards as he has transferred many cases to the white-beards.*

– Prosecutor

*It is obvious that when the disputants go to the *woliswali*, first they go to the *woliswal* because the *woliswal* is the emir of the area. Without the consultation of the *woliswal* no other department can do anything. This is the role from the past which is running in our area... It is from the past that whenever any claim letter comes to the *woliswali* it should first be read by the *woliswal*. After reading the claim letter he sends that case to the *jirgamaran* or to the relevant department and this is the legal way that things should be done in the *woliswali*.*

– Naeem Khan, a *jirgamar* in his early thirties of Shinwaar village

**Box 6: Acceptance of the *woliswal* as gatekeeper by other district level officials**

*The *woliswal* is the emir of the whole area; that's why people first go to the *woliswal* to claim. Like in the province there is a governor, all the staff who are working in the province are working in his hands and plans... When a person is boss, he can do anything and everything is in his hands. Now, here, the *woliswal* is the head of the whole district; he is the leader and can do what he wants.*

– *Modir-i-huquq* from the district in which the Muhmand village is located

*The claim letter goes to the *woliswal* because he has the authority in this area; he has that power. The others are below him. Even our work is under his oversight and without his orders we can't do any work.*

– Assistant Police Commander

*At the beginning, they will take their complaint letter to the *woliswal*, and we are the staff of the *woliswali* also and it should come that way. At first the *woliswal* sees it and then refers it to the related department; maybe it is criminal or maybe it is civil... It is the government law and rule that all branches should be under the control of the *woliswal*.*

– *Modir-i-hoquq* from the district in which the Shinwaar village is located

*No one cares about the terms and conditions of the law and people take their disputes and criminal cases to the *woliswal*. When the disputants take their claim letter to the *woliswal* he puts the claim letter under his cushion and writes another letter and sends that letter to our department.*

While the stability of the position of the *woliswal* and the position being seen as the most important and influential government position at district level gives the *woliswal* authority, he is also seen to have coercive power, primarily due to his control of the police.

While it is the position of *woliswal* which gives a person power, who the individual is can have considerable influence too. For instance, it was reported in the Shinwaar village that when the *woliswal* changed (as happened while the research was ongoing in the area), things greatly improved in regard to dispute resolution, as this woman who is the wife of a *jirgamar* explains:

*In the past, Shinwaari had a lot of disputes among themselves. Our people every day went to the government, but the past woliswal was not a good person, he could not solve the disputes. Since the new woliswal came the disputes have lessened. Our people are happy with the new woliswal.*

Case 3, “Land Dispute between Two Shinwaar *Qawmmuna* Living in One Village,” presented in Annex 1, also shows how a new *woliswal* coming to this district was a major factor in this long-running dispute finally being resolved.

The other key actor at district level involved in community-based dispute resolution is the district-level *malikan's shura*.<sup>23</sup> These bodies were reported to have disputes referred to them by the *woliswal*, however, the research team came across very few examples of this in practice. The *malikan's shura* operates quite differently to village level *jirgee*; for instance, they have a fixed membership which is elected to represent the different villages in the area, and members of the *shura* are also *jirgamaran* and *malikan* in their own villages.

It was reported that the district-level *malikan's shura* had been formed relatively recently, at least since the fall of the Taliban. In at least one of the districts they had been allocated their own office space in the *woliswal's* building. District-level respondents described these *shuras* as being a link between the government and the villages, including advising external organisations about project implementation, verifying villagers' identities for their national identity cards and in relation to dispute resolution, both in regard to civil and criminal cases, and bringing disputants to the *woliswali* from their villages.

While most district-level respondents spoke very positively about these *shuras*, some villagers were more sceptical about their ability to resolve disputes. Some felt that the *shura* was too closely linked to and influenced by the *woliswal*. Indeed, some respondents from both districts made allegations of the district-level *malikan's shura* being involved in corrupt activities in partnership with the *woliswal*, as this quotation illustrates:

*If someone has clean and white clothes and the woliswal knows he can pay something, then the woliswal refers his case to the shura people, and if the woliswal sees that the disputant can't pay anything he will send the case back to the village's white-beards.*

— Naeem Khan, a *jirgamar* in his early thirties living in Shinwaar village

Others are more concerned about the *shura's* ability to actually resolve disputes. It is believed that because all the members of these *shuras* are from different villages they would not be able to fully understand a dispute and the background to it, as this quotation from an older man in the Shinwaar village expresses:

*I don't think having shuras in the woliswali improves the jirgee work because when someone goes to the woliswali, the woliswal refers their case to the shura. Since all shura members aren't from the same village, how can they make a decision? Cases which go to the woliswali should be sent back to the villages and then decisions which are made in the villages should be supported by the woliswal.*

Other *shuras* also exist at district level, including the *shura amniyat* (security *shura*) and *shura inkeshafi* (development *shura*); however, they do not play a role in dispute resolution.

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<sup>23</sup> While the word *jirga* is always used for meetings to resolve disputes which have more of an ad-hoc membership, the word *shura* tends to be used for a body of people whose membership is fixed and have some official recognition in this area. Hence, the district-level *shuras* have fixed membership.

### 3.4 Change over time: How corruption, insecurity and coercive power restrict the exercising of authority

*The jirgamaran have a very long history among the Pashtun people but under different regimes the role of the jirgee changes. If there is a good government then the jirgee will have a good role in the villages of the Pashtuns.*

– A modir-i-huquq

As with other aspects of people's lives in Afghanistan, community-based dispute resolution processes have been influenced by the different periods of conflict and the changing regimes in Afghanistan. This section discusses how different regimes and political and social upheavals in Afghanistan have impacted on the *jirga* system in the two research sites. The section uses the distinctions expressed by respondents to define different phases in Afghan history, such as the time of Zahir Shah (1933-1973); the period of the *Enqelaab* (revolution), which is the term used to refer to the time of Soviet occupation and Mujahiddin resistance to it (1979-1989); Najibullah's time (1989-1992); the Mujahiddin time (1992-1996); the Taliban government (1996-2001); and finally Hamid Karzai's time (2002-present). Looking at these different regimes and the impact they have had on dispute resolution highlights how coercive power has been exerted at different times in order to influence the outcomes of community-based dispute resolution processes and diminish the ability of the *jirgamaran* to exercise the authority they have in their communities.

It should be noted from the outset that the ways this history is presented here is how respondents reported their own understandings of it to the research. It should also be noted that there are differences in the accounts and opinions respondents gave regarding how dispute resolution processes took place and the levels of influence *jirgamaran* were able to maintain at different times.

#### Increasing levels of corruption: State actors corrupting the *jirga* system

The most common perspective on change over time expressed by all was that of growing corruption within the *jirga* system. Respondents from the villages described how state actors are creating certain forms of corruption within the *jirga* system. This was particularly the case in the Muhmand village, as the quotations in Box 7 (next page) illustrate.<sup>24</sup>

Links between state corruption and corruption in the *jirga* system were also recognised in the Shinwaar village as this man, who is a shopkeeper and a farmer, expresses:

*Corruption in the jirgee is the result of corruption in the government offices. Because the woliswal himself is corrupt, he can't question anyone when they make bad decisions. The woliswal himself has his share in the bribes which are taken from the disputants.*

Most of the comments about the state's corrupting influence on the *jirga* system came from village residents, including the *jirgamaran* themselves. However, the police commander who took up his post in one of the districts while the research was underway concurred with these opinions and explained in detail how the system works:

*The white-beards' decisions are generally good, but they have many shortcomings. When a disputant comes to the woliswali, the woliswal himself sends the dispute to the white-beards and writes the names of his agents who*

<sup>24</sup> General accusations of corruption against the *woliswal* of this district were common.

### Box 7: State actors corrupting the *jirga* system

*There is a representative of the woliswal in every village and when the cases are referred to the woliswal, he writes the name of his agent first on the list to attend the jirga [to resolve the case]. Then the agent takes a double bribe from both sides of the dispute and finally he decides the jirga in favour of the one who has paid more to him. The money he takes from the disputants is divided between him and the woliswal.*

– Labourer and farmer in his thirties from the Muhmand village speaking during a focus group

*See, the woliswal of our district persuades disputants in the woliswali to resolve their disputes through their elders... When the disputants agree to resolve their disputes through elders then the woliswal tells them to select white-beards for the jirga. After the disputants select the white-beards, then the woliswal also introduce two white-beards from his own side... He introduces the white-beards to fill his own stomach. The white-beards who are introduced by the woliswal try to get something from the disputants. I think the corruption which is in the jirgee these days is the woliswal's fault because he is saying to his white-beards, "go and resolve the dispute and take as much money as you want, then we will divide the money."*

– A *jirgamar* living in the Muhmand village

*are in the village. In addition, the woliswal says that these malikan, whose names are on the letter, have full authority to make a decision... If you ever have a dispute and you resolve it with the help of the woliswal, it can take a very long time, and there would be lots of going back and forth, and the disputants will finally be very disappointed. The disputants are, therefore, compelled to accept the decision of the woliswal's agents. And the agents make the decision in the favour of the one who gave them good bribes... When the agents make the decision, the woliswal agrees with it. They all become happy because they expect something and all of them are partners. I might tell you that the woliswal has created new terms and conditions... If there are malikan in the village and they have no connection with the woliswal and they make a decision about some dispute, it will be accepted by the woliswal. But as the woliswal doesn't get anything like money, the woliswal makes difficulties, saying that there should be signatures of all the malikan who were present at that time and to bring a copy of the signature letter. And even after they have completed all these steps, the woliswal nevertheless doesn't issue the decision letter.*

While the corrupting influence of state actors was presented as an important factor increasing levels of corruption in the *jirgee*, blame was also put on individual *jirgamaran* by village residents, district-level actors and *jirgamaran* themselves. The reason for this increase in corruption among the *jirgamaran* is perceived to be related to two things. First, that there has been a general move to a more materialistic society which in turn has increased greed, as the quotations in Box 8 (next page) explain, and second, exposure to different styles of living and corrupt practices in Pakistan are seen to have influenced these changes in the *jirgee*, as the quotations in Box 9 (next page) explain.

The research team were provided with some very clear examples of what types of corruption take place in the *jirgee* and among the *jirgamaran*. One example was reported by a *jirgamar* in regard to a *jirga* he participated in to decide what price a piece of land was worth. He explained how the other *jirgamaran* told the buyer of the land that the price was fixed at Pakistani Rs 100,000<sup>25</sup> more than they told the owner of the land, hoping to keep the extra amount themselves. It was reported that the *woliswal* was also involved in this deception. The man reporting the story to us explained that when

25 The Pakistani Rupee is commonly used as currency in many areas of Afghanistan that border Pakistan.

**Box 8: A more materialistic society creates corruption**

*In the past, the people used to take their disputes to the jirgamaran and not to the woliswali, but now the jirgamaran have become bribe-takers and wrong people; but they were good in the past. Let me tell you one thing: that while there is a role for money, the jirgamaran are not honest and the system of jirgee is worsening. Money has destroyed everyone's house.*

– A *jirgamar* in his forties who lives in the Muhmand village speaking during a focus group

*The only change in the work of the jirgee is corruption... One thing for sure is that there is somehow corruption in the jirgee. For example, if the jirgamaran don't take money as a bribe they will ask for top-up cards for their mobile phones. I am lucky I don't have a mobile phone and I don't need any money for top-up cards [laughing].*

– A *jirgamar* in his fifties who lives in the Shinwaar village speaking during a focus group

**Box 9: Learning corruption from Pakistan**

*Yes, why not? In the past, people had a very simple life and hadn't gone outside of their villages. When they went to Pakistan they saw buildings and modern life. Everyone in their villages wanted to have modern houses and better life; even white-beards want to gain money for a better life. Therefore, these kinds of corruptions started even in the jirgee.*

– A farmer in his forties who lives in the Shinwaar village speaking during a focus group

*When people have returned to Afghanistan, they are different. They brought the entire culture of Pakistan to Afghanistan, and before, malikan didn't have these cultures. Cultures like bribes, robbery, fraud, and making decisions in someone's favour. We didn't used to have things like this in our culture and malikans didn't have this culture in the past. They used to be very honest and faithful.*

– A *malik* and *jirgamar* who is in his fifties speaking during a focus group

he found out, he confronted the other *jirgamaran*, but he did not want to “ruin the reputation of the *jirga*” and therefore did not tell the disputants what had happened; instead he insisted that all the money taken from the buyer be given to the person selling the land.

However, both district- and village-level respondents reported that while there is some corruption in the *jirga* system, not all the *jirgamaran* are corrupt. Indeed, some *jirgamaran* were keen to point out how they would not even take tea or food in a disputant's house as this could be perceived as a form of bribery. It was reported that in the “past,” *jirgamaran* would have never eaten or drunk in a disputant's home.

Overall, respondents would talk about a past golden age for the *jirga* system, as the quotations in Box 10 (next page) express.

The “past” that is being talked about here appears to be the time before the Soviet occupation of Afghanistan, and indeed this period of time is presented as a golden age for the *jirga* system. Some respondents also referred to the Najibullah government as a positive time for the *jirga* system. There is, however, likely to be some romanticising of the past or a selective remembering of the more positive sides to social organisation in the villages prior to the outbreak of war. Occasionally, a less-positive picture would be presented. For example, two women speaking during a focus group in the Shinwaar village stated that during Zahir Shah's time the *malikan* were too wealthy and powerful. One example given to illustrate this by the group was that a person had to ask permission to get their children married, or if someone had a dispute, they would have to give food to the *malik* to have it resolved.

**Box 10: It was better in the past**

*People were good in previous times. They used to listen to the decision of the jirgamaran and jirgamaran were faithful and honest people. Jirgamaran of that time didn't want the dispute to get any bigger. They always tried to resolve it in the village.*

– A farmer in his thirties who lives in the Muhmand village speaking during a focus group

*In the past there were some honest people in the jirga and we had very honest white-beards who even didn't drink in the disputants' houses, but nowadays there are some white-beards who are corrupt and they take bribes from the disputants. There are also some white-beards who became white-beards using the force of their money.*

– A malik from the Muhmand village

*In the past the white-beards and the malikans resolved the disputes. In the past the malikans were very good and they did good work. But then during the war they hid because they were afraid of the regime.*

– A man in his mid-forties who lives in the Shinwaar village speaking during a focus group

A number of women, in particular, reported that dispute resolution had become less autocratic in recent years. They argued that previously only the *malikan* had been involved in dispute resolution and that now other white-beards from the village were involved. They saw this as both a fairer system and one ending in better dispute resolution outcomes because more people were able to give their opinions and suggestions for solutions.

### **Declining influence of the *malikan* and *jirgamaran* from the Soviet-Mujahiddin War through to the Taliban era**

*Lots of changes came during the different regimes; like during the Khalqis (a particular communist party but used here to refer to the communist era) the jirga system was totally destroyed, there wasn't even a name for the jirga; it was totally removed from the community. During the Mujahiddin time, the situation was worse than the Khalqi time. There were more restrictions and people didn't like the Mujahiddin; there was a lot of cruelty during the Mujahiddin time. After the Mujahiddin time, the Taliban came to power and they were also not good for the people because they did not give any authority to white-beards to resolve the issues and disputes in the village. But the jirga system was good during Zahir Shah's and Daoud's time.*

– A farmer in his forties who lives in the Shinwaar village and occasionally acts as *jirgamaran* for small disputes

The above quotation provides a summary of most people's perspectives on the effects of the different regimes on the *jirga* system. However, there is some disagreement between respondents as to the *jirgamaran's* ability to exercise their authority during these different periods. Two different perspectives were presented as to the power of the *malikan* and *jirgamaran* during the Soviet-Mujahiddin War. It is likely that these two perspectives, to some degree at least, are referring to different periods during the conflict. One confirms the perspective of the man cited above. During the Soviet-Mujahiddin War, the elders, and specifically the *malikan*, had to flee their villages, as these two women explain further:<sup>26</sup>

*At that time there were no malikan because all the malikan hid from the government. If the government knew about them, the government would kill*

<sup>26</sup> It was pointed out that the undermining of the *malikan* and *jirgamaran's* authority by the Soviets and the Soviet-backed regime was one of the important reasons for people's resistance to them.

*them. At that time a lot of people disappeared from their houses; people said the government had taken them and killed them. When the situation became bad then all the malikan ran away from here and went to Pakistan. Some of them returned back but some of them are still there.*

– A white-hair who lives in the Shinwaar village

*No, there were not malikan at that time [Soviet-Mujahiddin War]; many people were killed, and the government did not want malikan and many malikan were killed. No young people or white-beards were left... Many of the malikan ran away and they went to Pakistan. It was Russian time and if someone was knowledgeable and well-known in their area, they would be taken and killed.*

– A woman in her sixties who lives in the Muhmand village speaking during a focus group

The second version of events explains how the *jirgamaran* and *malikan* were actually able to increase their authority at certain times during this period. In the Muhmand village, a clear explanation for how and why they did this was provided. As described in Section 3.2, which discussed younger men who are *jirgamaran*, in the Muhmand village a committee was formed by the elders with the aim of protecting the village from both Mujahiddin and Soviet forces, as is explained by *jirgamar* Abdul Khan:

*During that time we wanted to save our villagers from both Khalqis and Mujahiddin; we didn't let anyone come to our village. We told the Khalqis we didn't need anything from them and we told the Mujahiddin the same thing. The main purpose of the committee was to keep the villagers united. Another purpose of the committee was to prevent the villagers from doing bad things and to resolve their disputes and problems. I can say that the committee resolved very big problems and disputes in the village and no one had to go to the Khalqi's government or the Mujahiddin for resolution of their dispute.*

This committee also prevented people from shooting in the air at weddings, playing volleyball, or doing anything else which would lead to groups of people gathering in the open, in case they were mistaken for Mujahiddin and attacked by the Soviet forces. This example shows how villages are able to self-govern at times of conflict. These actions on the part of the *malikan* and *jirgamaran* as well as the fact that they were specifically targeted by the Soviets could in some cases be seen to have increased their authority.

It was also reported that, during this time, because of conflict and mass migration, people did not have disputes with one another as they were only concerned with survival and were constantly on the move.

### ***Mujahiddin time***

Many expressed the opinion that the period of Mujahiddin rule was when the *jirgamaran* lost all ability to exercise their authority; instead, armed groups used coercive power to take over the *jirga* system and implement decisions that were in their favour, as the quotations in Box 11 (next page) explain.

### ***The influence commanders have had and continue to have today***

Despite these opinions of the Mujahiddin time, there is a slightly mixed story as to how much influence commanders have had and continue to have in these two villages. While it is clear from the discussion above that they wielded considerable power during Mujahiddin rule and that they were generally perceived to have overridden the authority of the *jirgamaran* in the villages, others did take another perspective. They stated that

**Box 11: Coercive power in the *jirgee***

*In the Mujahiddin time, issues were accepted by force because they had guns. The malikan and white-beards who were in the jirgee were afraid of the guns so they didn't make decisions according to people's rights.*

– A woman in her forties who lives in the Shinwaar village speaking during a focus group

*During the Mujahiddin time, commanders were very ignorant about everything and they used guns and implemented their wishes over the people. What they wanted done was done by the force of Kalashnikov over malikan.*

– A *jirgamar* and *malik* who lives in the Muhmand village speaking during a focus group

*During the Mujahiddin time, people had very big problems. Everyone had guns and the commanders behaved cruelly to the people. In the Mujahiddin time, all the work was done by force. Under every stone there was a commander.*

– An older woman who lives in the Shinwaar village speaking during a focus group

**Box 12: Commanders as part of wider *qawmi* dynamics**

*No [commanders didn't have influence in our jirgee], our commanders were also Shinwaar; I mean they were our sons, so no, I haven't seen their influence over the jirga.*

– Senior male elder from the Shinwaar *qawm*

*No [during the civil war they didn't have influence in the jirgee], because the commanders were also from Shinwaar; if they committed anything wrong the elders of the qawm wouldn't let them do so.*

– A *modir-i-hoquq*

*[Commanders] couldn't put influence on our village jirga's decisions at that time because all the villagers were very united and loyal to their elders and white-beards. So we weren't afraid of them nor were we threatened by them. So I can say that white-beards were fully independent and made decisions without any influence of commanders. To tell the truth we cooperated with the Mujahiddin. I mean we gave them food and accommodation when they came to this village at night.*

– Abdul Khan, a *jirgamar* in his fifties in the Muhmand village

the commanders were also members of the *qawm* and so had to obey their elders, as the quotations in Box 12 describe.

It is worth noting here that while the word “commander” may summon an image in some people’s minds (particularly among the international community working in Afghanistan) of a brutal person ruling by the gun and abusing people’s rights, people also honour their Mujahiddin commanders for protecting their villages and fighting against the Soviets.

Most people reported that the power of commanders in their villages is now minimal, as this woman from the Shinwaar village does:

*During the Najib and Mujahiddin governments, the white-beards didn't have any responsibility. They couldn't make a decision by themselves. Those people who had guns and power blackmailed the white-beards to make a decision in their favour. But now it is good, all the white-beards are free to make the decision they want and there is no one to break the white-beards' decision.*

– A woman in her thirties who lives in the Shinwaar village speaking during a focus group

In some ways, it is quite surprising that someone from the Shinwaar village would make this statement, because of the large dispute between their village and a commander, Sarajudeen, which is relayed in Case 3, "Land Dispute between Two Shinwaar *Qawmmuna*," presented in Annex 1 (although the case had been resolved by the time this focus group was undertaken). Throughout the research this was the only current or recent case that the research team came across in which there was substantial commander influence.

Many people, including former commanders themselves, reported that the commanders recently had lost their influence and that the disarmament, demobilisation and reintegration (DDR) process had had an effect in this regard. These two quotations below argue this point:

*When I was the woliswal, at first there was the influence of the commanders in jirgee. Especially in this woliswali, everyone was showing their power. Most of the people didn't observe the law of the government and most of the people were armed. Now all the people have come under the process of DDR and have returned to their normal lives.*

— A woliswal

*There is not an influential commander in the village and jirgee; if there is some, it is less than 15 percent, not more than that. They don't have a role over the jirgee.*

— A jirgamar who lives in the Muhmand village

### *The Taliban period*

There is a distinct difference in response to the Taliban between women and men. All the men spoken to were very negative about the Taliban, seeing them as taking power away from *malikan* and *jirgamaran*, interfering in the *jirga* system, and resolving disputes using coercive power. The quotations in Box 13 illustrate this perspective.

#### **Box 13: Men's perspectives on Taliban dispute resolution**

*During the Taliban's regime they [the Taliban] didn't give credit to the white-beards' decisions. They were saying that in every jirga there has to be a Talib, and they didn't respect the white-beards' decisions.*

— A malik and jirgamar speaking during a focus group

*The Taliban time was different to all the other times and regimes because when people faced some problems in their villages they were compelled to inform the Taliban administration. When the Taliban were informed about the dispute they sent their police to the village and they took both sides of the dispute to the woliswali and they waited for the decision. When they made the decision against the disputants they didn't have the right to complain or defend their rights. If the people didn't accept the Taliban's decision they were compelled by the force of cables to accept it. All the people were scared of the Taliban.*

— An man in his thirties who lives in the Shinwaar village speaking during a focus group

*During the Taliban government, they had another system and they did not accept the jirgamaran's decisions, even the malikan's, and they avoided the jirga system and did not let a malik sit in a jirga and solve people's problems. The Taliban were solving the disputes and issues through their own system; it was according to the Emirate Islam, which was based on their ideas of Islam, but they didn't know the Islamic doctrines and their Islam was full of terrors and trouble.*

— Prosecutor

Women, on the other hand, were far more positive about the way in which the Taliban resolved disputes; they saw the Taliban's particular form of quick and brutal dispute resolution as maintaining the peace, as the quotations in Box 14 demonstrate. They make clear that the Taliban's ability to maintain peace and resolve disputes quickly appealed to these women, especially in comparison to the time of the Mujahiddin, which is more known for the abuse of women than that of the Taliban. Similarly, compared to other provinces such as Kabul and Bamiyan, women's freedom in Nangarhar was more curtailed prior to the Taliban anyway. In the case of men, particularly the *jirgamaran* and *malikan*, they lost their power in the communities, whereas few women were in a position to influence *jirgee* anyway.<sup>27</sup>

Despite the assertion that the Taliban completely undermined the *jirgamaran* and resolved all disputes themselves, examples were found of the *jirga* system still resolving disputes during this time period. One such example comes from the Muhmand village in regard to a land dispute. One of the disputants was beaten in the *woliswali* until he agreed to give the land to the other side. However, on returning to the village he told the villagers that he had been forced to accept the Talib's decision and then he started to argue with his

#### Box 14: Women's perspectives on Taliban dispute resolution

*During the Taliban time all the people were happy because they were afraid of the Taliban. They didn't fight with each other. If they fought with each other the Taliban resolved it very well. During the Taliban time there was justice. During the Taliban time there were no robberies and no lootings... During the Taliban time if anyone committed a robbery their hands would be cut off. During the Taliban time if someone killed someone the Taliban would kill the murderer. If someone committed adultery they stoned the couple. People took their disputes to the government; if someone was guilty they, the Taliban, beat them until the person confessed and told the truth. The Taliban didn't eat people's rights. A person who dared to give a bribe would be imprisoned.*

— A woman in her late-twenties who lives in the Shinwaar village speaking during a focus group

*At that time, whoever complained about a dispute, they [the Taliban] would arrest the person and punish them and after one or two days the problem was resolved. But now it takes a long time to resolve disputes.*

— A woman in her mid-forties who lives in the Shinwaar village speaking during a focus group

*The Taliban were good people; they were Muslims and they didn't ask for bribes. The Taliban brought all the people together for prayers. They were with the law with people and they were harmless for people. They punished those people who were guilty. During that time there was no murder—no one could make disputes. All the people were afraid of the Taliban. If people had a dispute then the Taliban would call both sides and they would beat the person who made the mistake until he said to the Taliban that he had done it.*

— White-hair who lives in the Shinwaar village speaking during a focus group

*People could resolve their disputes very easily with the Taliban and the people could not continue their dispute for a long time or take revenge. I mean, if there was a murder case, the people couldn't fight or kill each other. The government [Taliban] was moving in all the villages and if they had information about a dispute they were taking both sides to investigate. They would resolve the dispute according to the law of the Taliban. People were accepting the decisions of the Taliban. For example there was a rule about robbery. The Taliban would cut robbers' hands off. It was a very good rule, and the people did not rob. I think the time of force was a good time and the people became peaceful.*

— A woman in her forties who lives in the Muhmand village speaking during a focus group

<sup>27</sup> In response to those who conflate Taliban justice with the *jirga* system and customary law, the Taliban are actually opposed to these systems, viewing them as un-Islamic and as a challenge to their own power.

opponent again. At this point a group of *jirgamaran* became involved and held a *jirga* to resolve the dispute in a way that would satisfy both sides.

#### 4. Processes, Relationships and Participation: Between the State and the Community

*The government cares about their fighting and their issues and doesn't care about the people in this country. The government can't resolve their own problems so how can they resolve the problems of others? Everyday there is a suicide bombing—the government can't get on top of that; what can they do?*

— A woman in her sixties who lives in the Muhmand village speaking during a focus group

*Because the woliswali can't resolve the issues, that's why they resolve it at a jirga. The government is concerned with the bombers and the cultivation of poppy and they have lots of work to do.*

— A woman in her forties who lives in the Shinwaar village speaking during a focus group

This section focuses on the processes undertaken for resolving disputes in the villages. It discusses the relationships between village-level dispute resolution processes and district-level state representatives. It examines why people choose to resolve disputes in the village rather than through state justice mechanisms. It also discusses the limitations of village-level dispute resolution processes as perceived by the community. The section further addresses one of the key themes of the research: gender equity in community-based dispute resolution processes. Whereas Section 3 considered the role women play as decision-makers, this section discusses women's access to, participation in and influence over community-based dispute resolution processes as compared to men.

The section contributes to four of the key arguments of this report:

- Community-based dispute resolution processes do not operate in isolation from state institutions, but instead frequently work in collaboration with them
- Village residents most usually make decisions based on experience and knowledge when choosing between taking a dispute to state institutions or to the *jirgamaran*
- While women's access to and participation in these processes may be particularly constrained, spaces in which women do access and influence dispute resolution processes can be found
- Where there is a lack of women's access to and participation in these processes, it is not necessarily an outcome of community-based dispute resolution or customary law itself, but is a consequence of prevailing gender roles and relations in Afghanistan more widely

##### 4.1 Relationships between district- and village-level actors

This section discusses the relationships between district-level state actors, village-level disputants, and *jirgamaran*, and it considers what role district-level state-actors play in community-based dispute resolution processes. As the previous section argued, the *woliswal* is the key state actor in community-based dispute resolution. This section demonstrates this point further and argues how, primarily through the *woliswal*,

strong links exist between the state at the district level and the *jirga* system and the *jirgamaran*. Indeed, the *woliswal* is an important actor in community-based dispute resolution processes, rather than being a separate entity. The research has identified four very specific ways in which this relationship between the state and the *jirga* system operates:

- Disputes that are brought to the *woliswal* are usually referred back to the *jirgamaran* for resolution, and *jirgamaran* refer disputes that they have been unable to resolve to the *woliswal*
- Decisions made by the *jirgamaran* are at times registered with the *woliswal*
- Representatives from the district administration attend *jirgee* in the villages
- At times *jirgee* are held at the office of the *woliswal*

This section also argues that these links are not new but instead have existed and been accepted since at least the time of Zahir Shah.

### Cases going back and forth between the village and the *woliswali* for resolution

The quotations in Box 15 illustrate that when disputes are taken to the office of the *woliswal*, in most cases they are referred by the *woliswal* back to the *jirgamaran* in the village for resolution.

#### Box 15: The *woliswal* referring disputes back to the village for resolution

*No, the woliswali doesn't resolve disputes. They refer them to the elders and the malikan of the disputant's community to solve the issue. The woliswal himself asks the white-beards from both sides to the woliswali office and then he gives a letter about the dispute, instructing the white-beards to resolve it through a jirga.*

— A *jirgamar* who lives in the Muhmand village

*The malikan and white-beards are so important for the village; the government also respects the white-beards and malikan of the village. If people bring their disputes to the government, the government will give a letter for the malikan and white-beards asking them to resolve the dispute in the village.*

— A woman in her sixties who lives in the Shinwaar village speaking during a focus group

*Sometimes when the disputants ask me to refer the case to the village white-beards, I send it. It is absolutely up to the disputants where they want to take the case and who they want to solve it.*

— A *woliswal*

While the referring of cases back to the *jirgamaran* is common, some people raised objections to it, believing that *jirgee* operate more justly if the *woliswal* is not involved in any way, as this *jirgamar* from the Muhmand village explains:

*As I told you, when in a jirga two white-beards are from one side and two white-beards are from the other side, they mostly make a decision in favour of their client. I am totally against the jirgee which are referred to white-beards by the woliswal, but nowadays it is very common. Most of the time disputes are referred by the woliswal to the white-beards who go to the woliswali frequently—I am totally against that... I don't mean that they don't have the*

*experience of jirga but they are like a group, who are in close relation to the woliswal and they share bribes and machalga<sup>28</sup>... Those white-beards who are in the woliswal's group almost all of them are corrupt and they are doing jirgee to fill their pockets and the woliswal is supporting them.*

– A malik and jirgamar who lives in the Muhmand village

Another man from the same village talks about the importance that can nevertheless be placed on these individuals who are representing the *woliswal* in the *jirga*:

*The woliswal says that so and so should sit in the jirga and resolve the dispute between the disputants. Once that man is appointed and his name is written by the government, no one has the right to reject that man because he is selected by the government... In every jirga there is a representative going to the jirga and the name of someone is written... He takes the decision letter to the woliswal.*

– Man in his thirties from the Muhmand village

These quotations also describe how the *woliswal*, when referring disputes back to the *jirgamaran*, documents this process by writing a referral letter. This letter not only outlines the nature of the dispute and who the disputants are but also includes the names of the *jirgamaran* who are to resolve the dispute. In theory, and ideally, disputants can choose whomever they want to represent them in the *jirga*, but as was also discussed in the previous section, the *woliswal* can have considerable influence over which *jirgamaran* are chosen to resolve a particular dispute.

Once the *jirgamaran* have resolved a dispute, they will return a decision letter to the *woliswal* which outlines the outcome of the dispute resolution process. Both the *jirgamaran* and the disputants either sign or put their thumb prints on these letters, as the quotations in Box 16 explain.

#### Box 16: The recording of dispute outcomes

*Once the decision is made I will call upon both sides of the dispute and ask them whether they agree to the decision that was made by the white-beards or not. If they agree then I will sign the decision paper. On the decision paper the white-beards also write that once both sides of the dispute accept the decision they cannot refuse it.*

– A woliswal

*When the jirga decides about a dispute they take a copy of that to the woliswal and the woliswal accepts and confirms it; he signs that it is acceptable to both sides.*

– A jirgamar in his fifties from the Shinwaar village

*If the jirgamaran resolve the issues in the village then the decision letter will be sent to the woliswali and they will keep it in the woliswali register. The original copy of the decision letter made in the jirga will be kept in the woliswali and the two other copies will be with the disputants.*

– A modir-i-huquq

The *jirgamaran* generally draw up these decision letters even when no state actor has been informed of the case. Where this happens the *jirgamaran* and the disputants keep copies of the decision letter in case the dispute should be raised again.

<sup>28</sup> *Machalga* is the deposit paid or promised to *jirgamaran* by the disputants at the beginning of the *jirga* which is not given back if the disputants do not accept the *jirga's* decision. A discussion of *machalga* is presented in Section 5.

Case 1, “Land Dispute between Kuchi and Other Muhmand *Qawm*,” Case 2, “Inherited Land Dispute,” and Case 5, “Dispute Over an Engagement,” are very clear examples of how referral letters are used by the *woliswal* when referring a dispute back to the *jirgamaran* for resolution and of how decision documents are drawn up after a case is resolved with copies given to all concerned parties and the *woliswal*.

On occasions, when disputes do get referred by the *woliswal* to other departments of the *woliswali*, other district-level actors also reportedly encourage disputants to take their cases back to the village for resolution, as this district judge explains:<sup>29</sup>

*If they [the disputants] want to take their case to the shura or jirga we don't have any objection. Even we advise them to take their disputes to the shura or jirga. We tell them that you are poor people and making a decision in the court is a long process. If they accept our suggestion we send them to the jirga or shura; if they don't then we will resolve the case. When disputants accept our suggestion we ask them to write an authority letter saying that they have agreed to solve their dispute using the village white-beards or the shura... When the decision is made we don't ask them about it but if they come back to the court and tell us then we will register that decision.*

This was an opinion shared by a district prosecutor, who expressed specifically that he does not mind if even criminal cases are resolved in the village:

*When a criminal case comes to me I don't tell the disputants to take their cases to a jirga or to the white-beards, but if they themselves want to withdraw the case or take their case to the jirga I don't have any objections. Sometimes in a criminal case, when they resolve their differences in a jirga they come and waive their case.*

The *modir-i-huquq* from the same district explained how even when civil disputes are referred to him by the *woliswal*, many of them will be sent by his department back to the villages for resolution:

*From the time that I have been working here, I mean for the past six months, the *woliswal* has referred nine disputes to my department. We have sent four of them back to the village white-beards; two were referred to the court and three disputants have never come back.*

### Why disputes get referred to the *woliswali*

Since it is well known by all that most disputes are referred by the district level authorities back to the villages for resolution, it is important to consider why any disputes come to the *woliswali* at all. Two reasons have been identified for this. Firstly, if the *jirga* has not been able to reach a resolution or the disputants do not accept the decision made by the *jirgamaran*. Secondly, at times it is felt that a dispute is too big for the *jirgamaran* to resolve without the permission of the *woliswal*.

As the quotations in Box 17 (next page) illustrate, “big” disputes are sent to the *woliswal* not because they will necessarily be resolved by the government but so that the *jirgamaran* are given permission by the government to resolve the dispute. What is defined as a “big” dispute and what is defined as a “small” dispute varies slightly from respondent to respondent. Table 1 (next page), however, provides a guide as to what people generally consider to be a big or a small dispute. The rationale for referring

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<sup>29</sup> It should be noted that the district judge speaking in this quotation acts as a *jirgamar* in his home village.

these “big” disputes to the *woliswal*, even when it is known that the dispute will be referred back to the *jirgamaran* for resolution, has two related aspects. Firstly, having the *woliswal* refer the case to the village for resolution, particularly as this is somewhat formalised by the referral letter, adds legitimacy to the *jirga* process. Secondly, the *jirgamaran* believe they can call on the *woliswal* for support if needed in implementing their decision. An interesting example of a case being referred to the *woliswal* because the *jirgamaran* felt it was too serious for them to deal with alone is that of Case 6, “A Case of Child Abuse.” In this example, a mother-in-law accused her very young daughter-in-law of having had an affair with a boy prior to her engagement. At the same time the daughter-in-law’s mother approached the *jirgamaran* because it was clear to her that her daughter’s in-laws and husband had been abusing the daughter verbally, physically and sexually. The *jirgamaran* informed both the mother and mother-in-law that the case was too serious for them to deal with alone and referred them to the *woliswal*. He then discussed the case with the *jirgamaran* and eventually referred it back to the village for a final *jirga*. The outcome was that the mother-in-law’s accusations were found to be lies and that the girl had indeed been severely abused and could come back to live with her mother. The *jirga* also decided that the girl’s husband should divorce her and they should pay her compensation for her injuries. Unfortunately the husband and his family went to Pakistan, and neither a divorce nor compensation was secured.

**Box 17: “Big” disputes are first referred to the *woliswal***

*If a dispute is big and the white-beards don’t want to resolve that dispute, then the white-beards send the dispute to the woliswali because big disputes are the government’s responsibility to resolve. The white-beards say that when people take their disputes to the woliswali, if the woliswal sends a letter for the white-beards then they can resolve the dispute.*

– Woman in her forties who lives in the Shinwaar village speaking during a focus group

*I think that the small disputes should be resolved by the white-beards and the big ones, like between two qawm, should be resolved by the woliswali. If the big dispute is over land it will go to the government and the woliswal, then the woliswal gives a letter to the white-beards and malikan and the white-beards sit together and hold a jirga and resolve it.*

– Woman in her twenties who lives in the Shinwaar village speaking during a focus group

*If they have a dispute and the dispute is big then they go to the woliswali... The disputants go to the woliswali then their case will come back to the jirga. The jirgamaran also don’t solve the people’s disputes without the permission of the woliswali. If the woliswal refers the case to the jirgamaran they will have a jirga. So the woliswal is aware of the process. So we can say that the people take their small cases to the jirga and the big cases first go to the woliswali and are then referred back to the jirga.*

– A *jirgamar* who lives in the Muhmand village

**Table 1. Big and small disputes**

Big Disputes	Small Disputes
Dispute between two different <i>qawmmuna</i> or between two different villages	Fighting that does not result in death or serious injury
Large land disputes, usually related to more than one <i>qawm</i> or village	Small land disputes, those between just two families from the same <i>qawm</i> or between relatives
Murder and manslaughter	Disputes over animals or irrigation water between two families or two individuals
Extreme violence toward women in the family	Fighting between adults caused by children fighting with each other
When people take up arms in a dispute	

## The *woliswal*'s motivations for referring disputes back to the village for resolution

It is clear that the majority of cases that come to the *woliswal* are referred back to the village-level *jirgee*. It is important therefore to understand what motivates the *woliswal* to do this. Three primary reasons have been identified: Firstly, it was expressed by some respondents that the *woliswal* does this for altruistic reasons, knowing that if the disputants take a case through the court system it will take a long time to resolve and be expensive for them. Secondly, respondents reported that the *woliswal* understands that the *jirgamaran* know more about the dispute than district-level actors and are therefore in a better position to find a resolution (this is explored further in Section 4.2). Thirdly, some held the belief that the *woliswal*'s reasons for doing this are less altruistic and more pragmatic in nature, stating that the district-level officials would simply not be able to cope with the workload if all the disputes of the area were to be resolved by them, as this man from the Muhmand village explains:

*It is trouble for the woliswal if a dispute comes from every village, those villages which are under the sovereignty of the woliswal. You know that there are lots of villages under the woliswali, we can't count them all, so there might be lots of disputes. Therefore, the woliswal tries his best to convince the disputants to resolve their disputes in the village.*

## Disputes being resolved between the *woliswali* and the *jirgamaran*

Some cases are not as clear cut as the *jirgamaran* referring a case to the *woliswal* and him sending it back to the village for resolution. Instead, it is common that the case will be jointly resolved by the *jirgamaran* and the district-level authorities. This works in three main ways. First, cases may go back and forth between the *woliswali* and the village. A clear example of this Case 2, "Inherited Land Dispute," in which a disputant took a case to the *woliswal* who then referred it to the *jirgamaran*. However, the disputant was not happy with the outcome of the *jirga*, and so returned to the *woliswal*, who would not refer it on to other state actors but instead told the disputant to go back to the village and hold more *jirgee*. Eventually this dispute was resolved by a *jirga* and the decision document was given to the *woliswal* and the disputants. In this case the *woliswal* also attended some of the *jirgee* as an observer.

This is the second way in which the state works together with the *jirgamaran* to resolve disputes: state actors attending *jirgee* in the village, be this the *woliswal* himself or another state representative from the *woliswali*. In most examples, like in Case 2, the state actor attends merely as an observer. As with registering the outcomes of *jirgee* in the offices of the *woliswali*, and as the quotation below describes, a state actor attending a *jirga* is seen by some to give it further legitimacy or authority, increasing the chances of it being implemented successfully:

*If the dispute is resolved in the village and in a jirga, we send a representative from the woliswali during the resolution. When the dispute is resolved then our representative brings the decision letter to me and I sign that decision letter and verify the dispute resolution made by the jirgamaran. Our signature helps the people, especially the disputants, to not have disputes in the future; they will never have that dispute again because it was resolved by the jirgamaran in the presence of the our representatives.*

— A *woliswal*

In Case 1, “Land Dispute between Kuchi and Other Muhmand Qawm,” the provincial governor of Nangarhar at the time acted as a *wakil* (representative) and *jirgamaran* for one side in the dispute in a very large *jirga* that was held to resolve it. However, this is unusual and happened in this case because the dispute was very large and well-known and had been ongoing for considerable time. It also involved opposing *qawm*, and had erupted into serious violence.

The third way in which the *woliswal* and *jirgamaran* may act together to resolve a dispute is that *jirgee* will be held at the office of the *woliswal*. This is most likely to be the case in larger disputes between different *qawm* or village communities. Case 3, “Land Dispute between Two Shinwaar Qawmmuna Living in one Village,” is a clear example of this. Many of the *jirgee* held to resolve this dispute were conducted at the *woliswal's* office.

This dispute was one between two Shinwaar *qawmmuna* over three to four hundred *jerib* of land and involved a significant commander who had intimidated the opposing side in the dispute. It can be seen quite clearly therefore, why, in this case, those opposing the commander would want some kind of government support in resolving the dispute.

It is important to recognise that these relationships between the state and the *jirga* system are not new and have also been formalised on occasion. A very senior member of the Shinwaar *qawm* reported that at the time of Zahir Shah, the Shinwaar *qawm* had an agreement, which he called *mawad sang* (“stone material” agreement). He said this agreement gave the Shinwaar a free hand in resolving their disputes, whatever the case may be about, including murder.<sup>30</sup> He went on to explain that early in the Karzai government, it renewed this agreement with the Shinwaar *qawm*, or as appears from the signatures on the agreement, those living in this particular area and the *woliswal* at the time (a translation made from a photocopy of the agreement is presented in Box 18, next page). He said that the articles in the new agreement are the same as the previous ones, but the amounts of the fines has changed.

The *woliswal* of the Shinwaar district also referred to the agreement. However, he did not refer to its renewal. It should be noted that none of the *jirgamaran* spoken to referred to this agreement, although they were never directly asked about it. Cases were not found that conformed exactly to the articles outlined in the agreement. As is explored further in Section 5, *jirgamaran* prefer to be pragmatic in their decision-making, finding it the best way to maintain peace and social cohesion in the communities, rather than keeping to rigid codes.

## 4.2 Choosing between the state and the village

While the relationships between the *woliswal* and the *jirgamaran* are strong, it is clear that most people, under present conditions, ultimately choose to resolve their disputes in the village. There are several reasons for this, which are a mixture of positive factors that encourage people to choose to resolve their disputes through a *jirga*, and negative factors that push people away from using the state institutions.

### Valuing insider knowledge

One of the key reasons for choosing village-level dispute resolution rather than state

<sup>30</sup> He also reported that the Shinwaar were exempt from national service by the King because they lived in the border areas.

**Box 18: Translation of *mawad sang* agreement between the Shinwaar *Qawm* and the *woliswal***

In the Name of Allah

We the Shinwaari *Qawm*, for each kind of incident, civil and criminal, which take place in our related areas, explain *Qawmeza Teega*<sup>1</sup> as the following:

1. If a person is killed by another person, the fine is 180,000 Afs. One third of the mentioned fine is for the murdered person's family, another part is for the white-beards of the *Qawm*, and the last third is for the government.
2. If a person is killed in a mountain, forest or desert and the killer is not known; and if the murdered family sues any person as killer, six *Tawan Sharek*<sup>2</sup> should swear on behalf of the suspect that he did not commit murder, if they do not swear they should pay the mentioned fine.
3. If a killer disappears from the area, his legal relatives or *Tawan Sharek* should pay the fine.
4. If a man is accused of adultery, and the woman consented, in that case both of them should be sentenced to death and there is no fine. If the woman did not consent, the man is sentenced to death and the woman will be *Da Manza*.<sup>3</sup>
5. If anyone takes revenge on behalf of the woman, that person should pay the mentioned fine of 180,000 Afs and the woman will be *Da Manza*.
6. If a person injures another person with a gun in relation to an old conflict, he has to pay 50,000 Afs as a fine; but fights in bazaar do not have any fine.
7. If a person becomes injured or killed committing a robbery, his killing or injuring is *mubah*<sup>4</sup> and the thief must pay 100,000 Afs as a fine, but if he refuses to accept his crime then four people from the injured party have to swear that it was him.
8. If a person is attacked by another person trying to kill him but he is rescued, there is no fine for the person who attacked the attempted murderer. If both parties are not killed then the person who attempted murder should pay 50,000 Afs as a fine. If he refuses to accept his crime then the victim has to swear that it was him.
9. If a person is imprisoned by another person the prisoner should be released without any terms and conditions and should be guaranteed his security on the way to his home, and the person who put him in jail should pay 30,000 Afs as a fine.

1 "Tribal Stone:" *qawmi* or tribal code of conduct used for resolving disputes.

2 *Tawan Sharik* are members of a village or *qawm* who share in one other's losses and benefits. For instance they may share land or water resources, or fight together to protect such resources.

3 *Da Manza* means that a woman should go to a "third house"; the first house is her father's and the second is the accused person's. The third house is like her own, where she stays until her engagement and marriage with another man.

4 *Mubah* is an Arabic term which means an activity which does not have rewards or punishment.

10. In *Huquqi Mamelat* (civil legal issues) the disputes should be resolved by four mediators.
11. If without any reason, day or night, someone opens fire, he should pay 1,000 Afs as a fine, and if someone opens fire at a wedding party, the groom's family or the man who opened fire should pay 5,000 Afs as a fine.
12. All heavy weapons belong to the government; each person who has them should hand them over to the government. Individual guns for personal and household security can be kept, but people should not carry them when going to government offices.
13. If a person from one district commits a crime in another district, the guilty person should be handed over to the district in which the crime was committed. It means, according to the 118<sup>th</sup> article of Court's Law, the claimant should be subordinate to the defendant.
14. All mentioned articles are also to be implemented over *jihadi* commanders, official people, and common people.
15. Except for *Merasee*<sup>5</sup> murder, if a murder or crime takes place and the injured party forgives him or does not sue there is no fine.
16. We the whole *qawm* agree with the policies of the government; if someone opposes the policies of the government, we the Shinwaari Qawm support the government and we are standing behind the government.
17. The mentioned articles can be implemented in five districts and each district has responsibility to implement it in its own district.
18. After the placements of this new *Teega* on 6-7-1381 (2002), all *Teega* which were placed in districts by Shinwaari *Qawm* are not valid.
19. Gambling, music, dancing by dancers at wedding parties, selling of alcohol in shops, drinking of alcohol, VCR shops, and also all other prohibited things, if any one engages in these prohibited things they should pay a fine of 20,000 Afs.
20. If anyone does not sit for the resolution for four months, the government should imprison him but if government does not imprison him... [unclear on document]

*[Signatures and fingerprints of various white-beards and malikan from different villages in different districts, including the district research was conducted in]*

It has been checked  
15-7-1381 (2002)

Twenty articles decided as *Teega* of Shinwaari *Qawm* which is acknowledged by \*\*\*\*\* district governor and can be implemented.

*[Name and position of waliswal]*  
*[Signature of waliswal]*

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5 *Merasee* is a woman who does not have a male family member to take revenge on her behalf.

machinery is the *jirgamaran's* insider knowledge of the disputes. It was felt that because *jirgamaran* are from the villages and know everyone well, they are in a better position to resolve a dispute than an outsider. For example, in relation to land disputes where documents are limited, forged, or fake, or existing from different regimes, the collective memory of elders in a community is recognised to be the most reliable way of determining ownership and rights to use and access. This insider knowledge is valued in relation to many types of disputes, as the quotations in Box 19 argue. As these remarks make clear, the *jirgamaran's* subjective insider knowledge of the community and its history is valued more highly than the supposed objectivity that a court might provide.

**Box 19: Choosing a *jirga*: *Jirgamaran's* insider knowledge of disputes**

*The jirga is very good for people to solve their disputes. In this way no one's right will be ignored, with the elders in the community solving the dispute. The elders in the village know who is guilty and who is not because they are informed about the issues quickly and clearly.*

– Older woman who lives in the Muhmand village

*This is our custom from the past times, that people first go to the white-beards to resolve their disputes because they know better than the government and they always witness everything in the village.*

– A teacher who lives and works in the Muhmand village

*I agree with the jirga decisions 100 percent because jirgamaran and white-beards are living in the same area and they know about the reality better than we do as outsiders who came from other districts. For example, the dispute I just told you about, which was about irrigation, we don't exactly know who is right who is wrong because neither of them can produce a deed... but white-beards know about this because they are living together and know one another.*

– A *modir-i-huquq*

## State justice taking time and money

As indicated by the quotations in Box 20 (next page) from two village residents and a member of the judiciary, the appeals system, which can make a dispute go on for a long time, as well as the bureaucracy of the state system, were commonly cited as reasons for not taking a dispute to the state justice system.

The amount of time disputes can take to resolve in the state justice system relates to another practical concern for respondents: the costs associated with taking a dispute to the state justice system. These costs are seen as both legitimate and illegitimate. Although both of the villages where the data was collected are relatively near the *woliswali*, legitimate costs, such as transport expenses, were cited. However, other expenses, which were not necessarily seen by the community as totally illegitimate but neither are they seen as legitimate, were also raised as a restriction for being able to resolving disputes using state authorities, as the quotation below explains:

*It is difficult for poor people to go to the woliswali because most of the people do not have money, not even the fare of the car. Although our village is very near, if they bring the police to solve their issue the disputants will have to pay fuel money to the police and they will have their dinner and lunch in the disputants house because they will say that they came to resolve the persons case.*

– Naeem Khan, a *jirgamar* in his early thirties, living in Shinwaar village

While some expenses are viewed as legitimate, such as travel costs, or normalised, such as having to pay expenses to the police, other costs, such as having to bribe officials,

**Box 20: State justice takes too long**

*I told you before, people do not go to the woliswali. If someone goes to the woliswali first he has to go to the huquq department and after that he should go to the primary court. If the primary court makes a decision and if one side of the case doesn't accept the decision then the primary court will send the case to the provincial court. The provincial court has another set of procedures and they have to study the whole case from the beginning to end. After this court makes a decision...if one side is not satisfied then the provincial court sends the case to the high courts.*

– Man in his thirties who lives in the Shinwaar village speaking during a focus group

*The case we mentioned before about fighting between a husband and wife, which a jirga made a decision on, I can say that if such a case had come to court it would take three or four months as we would have to send it to the prosecutor's office and it takes two to three days to send a case from the court to the prosecutor although we are working in the same building. Another thing which I want to mention is that, most of the time, when we make a decision, the disputants don't accept it and they ask us to refer the case to the high court and they appeal there. Even sometimes the case reaches the Supreme Court; it takes a long time.*

– Member of the judiciary

*Through the jirga, our disputes are resolved quickly but if we go to the woliswali to resolve our disputes or any kind of problems, it will take time and the people at the woliswali create problems for us and it might take a long time to resolve our disputes and they will take bribes too.*

– Woman in her forties who lives in the Shinwaar village speaking during a focus group

which are seen as wholly illegitimate, were also commonly referred to as a reason for not taking disputes to the *woliswali*. It was argued that only those who have a false claim but can afford to pay bribes will take a dispute to the state for resolution, as this quotation illustrates:

*To be honest, the poor people who don't have money for the expenses of the woliswali, they are very keen to resolve the disputes in the jirga. The people who have money or they have false claims on someone else's land, they are very keen to resolve the disputes in the court...because they can bribe the officials in the court and the woliswali.*

– A *jirgamar* who lives in the Shinwaar village

**The state does not create peace between disputants**

A further concern with taking disputes to the state justice system is the perspective that disputes will become larger in nature and that the hostility among the disputants will increase if a dispute is taken out of the village. The *modir-i-huquq* from one of the districts expressed the belief that only those wanting to create trouble would take a dispute to the courts:

*If the disputes are not so big and complicated, they are resolved in the villages, and if there is someone who is a troublemaker, who wants to make a dispute very big, they refer it to the woliswal.*

The *woliswal* from the other district was sure that hostility could not be ended through the courts:

*Anyhow, most of the time, they [jirgamaran] can persuade the disputants by making a decisions and most of the time the disputants accept the jirgee decisions. Jirgee decisions are made in a short time and it ends animosity*

*between disputants.... I am quite sure that the animosity will not be ended by the courts' decision.*

As Section 5 explores in more detail, the essentially different aims of the state justice system and the *jirga* system also contribute to the perception that taking disputes to the state justice sector can increase hostility among disputants. Restoring peace and social cohesion is a priority of the *jirga* system, whereas finding who is guilty or who has legal ownership to a piece of land, for instance, takes greater priority within the state justice system.

### Disputes around poppy cultivation

Disputes which have anything to do with the cultivation or sale of opium poppy, which as this *jirgamar* explains, have to always be resolved through *jirgee* because there is no option of going to the state:

*You see, for the resolution of such disputes there is just one way which is the jirga, because [opium] traders and farmers cannot take such disputes to the woliswali and the courts because there is a ban on the business in and cultivation of opium poppy.*

– A *jirgamar* who lives in the Shinwaar village

### Shame and social expectations

The last two reasons for not taking disputes to the state are both closely related and less practical in nature than those given previously, relating more to social norms and expectations. It was reported on several occasions that it is shameful to take a dispute out of the village and share the internal difficulties being experienced. Similarly, there is a social expectation that people will always go to their white-beards first with their problems and it would be disrespectful not to do so. This is illustrated in Case 7, "Interlinked Land and Water Disputes," when one disputant says that he will not go to the *woliswali* to

#### Box 21: Shame and social expectations constraining access to the state justice sector

*It is considered a shame to take disputes to the woliswali here...because we have white-beards and jirgee and a jirga can resolve a dispute better than the woliswali.*

– Woman in her twenties who lives in the Shinwaar village

*People are not interested to refer their cases to the woliswali and it is shameful. If someone goes to the woliswali, people of the qawm say, "We have our own qawm, why should you go to the woliswali? We should resolve it within our own qawm."*

– Woman in her forties who lives in the Muhmand village speaking during a focus group

*This is a Pashtun custom, that they don't take their claims to the government and they want to resolve it by elders and jirga, however big the dispute gets. If they take it to the woliswali, other people will say bad things and taunt them, like the son of Nassem who went to the woliswali to resolve a dispute.*

– Woman in her fifties who lives in the Muhmand village speaking during a focus group

*Women don't have big disputes. If they do, then they will tolerate the situation because they have to. Women here know about their husband's habits and behaviours, and for a Pashtun, it is very shameful to ruin their husband's reputation. We Pashtun women value and respect our husbands because they are the ones who work and bring us food and support their families.*

– Woman in her forties living in the Muhmand village speaking during a focus group

resolve his dispute, despite having a document from the court regarding his ownership rights, until the *jirgamaran* have failed to resolve dispute. He says this is because it is expected that he approach the *jirgamaran* for a resolution first. The quotations in Box 21 (previous page) illustrate these two reasons further, and as the last quotation indicates, there is an expectation that women, and particularly young women, should keep quiet about any problems they might be having. At the same time, the case study evidence does show that women do not always conform to this social norm, as is explored in the following section.

### 4.3 Gender determining access to and participation in dispute resolution bodies

In comparison to men, women's access to the *jirga* system is constrained, as is their participation in *jirgee* as either disputants or witnesses. Despite this, case study evidence demonstrates that certain women under certain circumstances do bring cases to the *jirgamaran* for resolution and participate in *jirgee* as both disputants and witnesses. Regardless of these exceptions, this section explores how women's participation in community-based dispute resolution processes is not always acknowledged by those in the community. This section therefore explores respondents' opinions regarding women's levels of participation and their reasons as to why women do or do not access and participate in *jirgee*. It describes and discusses examples found of women who have brought their cases to a *jirga* and how they have participated as disputants. Finally, the section explores men's and women's opinions on what role women *should* have in community-based dispute resolution processes.

Opinions regarding the extent to which women take disputes to *jirgamaran* and then participate in a *jirga* to resolve their dispute, and whether women are called upon as witnesses, vary significantly. They not only vary from person to person, but different opinions were also given by the one respondent throughout the time they spent talking with the research team. In some cases, at the beginning of an interview, a woman might say that women in her community never participate in *jirgee* and then later in the same interview give an example of a woman from the village who has played a role either as a disputant or a witness in a *jirga*.

One example of this is the wife of a *malik* who discussed Case 5, "Dispute Over an Engagement," with the research team. In this case, Jamila, the mother of the girl who was engaged, took the dispute to the *jirgamaran* and the *woliswal* and participated in the *jirga* to resolve it. This information was relayed by the wife of the *malik*. However, when asked later in the interview if women generally participate in *jirgee*, she responded:

*No, it is bad and people will say bad things about it if women sit in the jirgee where there are strange people. Pashtun people don't like women to sit in the jirga. Jirgee are men's work and women don't know what they should do in the jirga.*

The quotations in Box 22 (next page) present examples of people denying that women ever access the *jirgamaran* or participate in *jirgee*. The first two quotations in this box also point to women's inability to take their disputes to the *woliswali*. Indeed, it was evident that women's access to the state justice system is at least as restricted as their access to the *jirgamaran* in their own villages.

Respondents provided explanations as to why women do not participate in *jirgee*. Most prominent among these was that it is shameful for women to attend *jirgee*. It was reported that this shame is something that men from women's families and the *jirgamaran* themselves feel. The quotations in Box 23 (next page) illustrate this.

**Box 22: Respondents reporting women's lack of access to and participation in *jirgee***

*No, it's not possible for women to go to the jirga, so how can women go to the woliswali? I told you that in our place women can't go out. Men don't allow their women to go out; to go to the government or to the white-beard.... [If they go] to the woliswali or white-beards, then their husbands will send them to their father's house or they will divorce their wives and say, "Go! I do not need you anymore! What should we do with a woman who has ruined her husband's reputation?"*

— Woman in her forties who lives in the Muhmand village speaking during a focus group

*No, overall the women don't go to the woliswali or the white-beards. I told you that in our watan [homeland], there is no custom for the women to make a claim against someone by themselves and make a jirga.*

— Wife of a *jirgamar* who lives in the Shinwaar village

*To be honest, let me tell you that among Pashtuns, especially Muhmand, women don't sit in a jirga; I don't remember such a case.*

— A *jirgamar* who lives in the Muhmand village\*

\*(It should be noted that this *jirgamar* has been involved in at least one dispute, Case 3, "A Case of Child Abuse," which is presented in Annex 1, in which women directly participated in the *jirgee* to resolve it.)

**Box 23: Shameful for women to attend *jirgee***

*Here, there is no system of women participating in jirgee; it is shameful for their husbands and families. Here are Pashtun people and they will not allow their women to take part in jirgee.*

— Man in his forties who was previously in the police and lives in the Shinwaar village

*In our area, women do not have a role to play in jirgee and they are not allowed to sit in the jirgee. If women sit in jirgee, it is shameful for men and people will taunt them.*

— A man in his forties who lives in the Muhmand village

*Malikan feel shame if a woman from their village sits in a jirga with malikan from other areas. Malikan tell woman to tell them her problems and say that one of her relatives, maybe her father, her husband, or brother, should come in the jirga as her representative.*

— A woman in her forties who lives in the Muhmand village

Women's lack of capabilities to participate in *jirgee* was also given as a reason for them not playing a role. This was discussed in terms of their inability to talk "properly" or to understand anything beyond the confines of their houses. The research team was told that women are uneducated or illiterate and so cannot participate effectively in a *jirga*. However, since many men are also uneducated and illiterate, it can be surmised that these are terms used to imply a general ignorance rather than being literal reason for not permitting women's participation, as is illustrated in the quotations in Box 24 (next page).

This lack of capability is not necessarily viewed as an innate weakness of women but something that is a consequence of the gender roles prescribed in these communities. Gender norms in themselves were presented as a reason for women not being permitted to participate. Indeed, when the woman speaking in the last quotation in Box 24 was questioned on her opinion, she explained why women do not know things:

*All the time men are outside and sit with lots of people and they learn things from outside; but women are in the house all the time and busy with the children and the family.*

Women's lack of access to and participation in community-based dispute resolution processes is not caused by anything unique or specific to the *jirga* system, but is instead rooted in prevailing gender norms, particularly sex segregation, and perceptions of women's capabilities stemming from these.

It needs to be highlighted that these reasons were in the main provided by women for their lack of participation, and to a certain degree, women were more negative than men about their ability to participate.

However, as the research team explored women's access to and participation in *jirgee*, and identified and spoke to women whose disputes had been taken to a *jirga*, it became apparent that there are exceptions to the cultural expectation that women do not participate in *jirgee*. Three specific situations were identified by respondents which can allow women to access and participate as disputants in *jirgee*. These situations relate to both individual women's personal and family situations and the nature of the *jirga* itself.

The most commonly given reason for women being permitted to bring their disputes to a *jirga* and then participate as a disputant is when a woman has no male family member who can act as her representative. It was pointed out that the women who are most likely to be in this situation are widows. The quotations in Box 25 (next page) explain this.

As the last quotation in Box 25 (next page) illustrates, age is a particularly important factor in determining a woman's access to a *jirga*. The main examples identified by the research team of women who had taken a dispute to a *jirga* and then argued their case for themselves were older women. Frequently, women who do not have male family

**Box 24: Women are not capable of participating in *jirgee***

*Our women are not clever or knowledgeable and they don't know how to talk. Also, in our community women wear hijab; they cover themselves. They don't sit with strange men so I think holding a *jirga* is men's work.*

— Young woman who lives in the Muhmand village

*Even if we find an intelligent woman to sit in the *jirga* —it is a shame for women—people say bad things. Anyway, we don't have intelligent women who could attend *jirgee*.*

— Woman in her twenties who lives in the Muhmand village

*There is no need for women to attend the *jirga*; it is the men's job. Our village women are uneducated; when they attend a *jirga* they cannot talk very well. The *jirga* belongs to men and doesn't belong to women. Women can talk well among themselves but they won't talk in front of men and *wolis* (family *qawm* group) *white-beards*.*

— Woman in her fifties who lives in the Muhmand village speaking during a focus group

*One man is more intelligent and talented than 100 women; they [women] are not intelligent. A woman cannot keep quiet about an issue; once a woman knows about one issue she will tell everyone else about it. But men are not like women; they can keep secrets. Men think deeply about the future of an issue, then tell people.*

— A woman in her fifties who lives in the Shinwaar village speaking during a focus group

**Box 25: Women without male family members who can represent them in a *jirga***

*Yes, but it is not very common [for a woman to bring her dispute to the jirga]. Occasionally women who don't have brothers or a father, and widows will bring their disputes to the jirga.*

– A senior *jirgamar* and *malik* who lives in the Muhmand village

*Women can give witness in a jirga and if she doesn't have anyone to bring her dispute to the white-beards, then she herself can go to her white-beards.*

– Woman in her mid-sixties who lives in the Shinwaar village speaking during a focus group

*Old women can go to the jirga. If she is a widow and doesn't have anyone to sit in place of her, the malikan and white-beards give permission to her; but for young women there is no chance to attend the jirga. Young women can't even go outside.*

– Woman in her thirties who lives in the Muhmand village speaking during a focus group

members to represent them are older women. Older women's ability to participate is also greatly determined by the make-up of the *jirga* itself, with respondents reporting that women have far greater ease of access to a family or *qawmi jirga* than if there are "strange men" in the *jirga*. Since women, and particularly older women, are permitted within the bounds of *pardah* practices in this area to associate with men from their own natal or marital family, gender norms of sex segregation do not restrict their participation in such *jirgee*. However, at times, the data as to which *jirgee* women can participate in is a little unclear. When the term "family" is used, it obviously means the *jirga* only contains men and women who are related to one another. However, a *qawmi jirga* can include people who are only distantly related and may have the potential to include all those who live in the entire village or the subvillage.

*Yes, I sat [in the jirga] when they selected Abdul and Abdul Khan to resolve the dispute because they are all my cousins. Actually we are all one qawm living in [this area]. All the people in [this area] are relatives and there are no strangers living in [this area]. Yes, I sat with them.*

– Woman in her sixties who lives in the Shinwaar village

Others stressed that even in the case of family *jirgee* it is only permissible for older women to participate, as this woman reports:<sup>31</sup>

*Pashtun people don't let their women attend jirga. If it is a qawm jirga then women can attend if they are old, but not young women. It is shameful for us.*

– Woman from Muhmand village

Many *jirgee* are, in fact, what can be described as a *qawmi* or family *jirga*, in which, according to some, *pardah* norms do not prevent women from playing a role. Therefore, while some respondents argued that women do participate in these types of *jirga*, it is implied by those respondents who asserted that women do not participate at all that this would include family or *qawmi jirgee* in their assessment. This woman, who lives in the Muhmand village, does this more explicitly:

*In family jirgee, only men sit in the jirgee and not women. Nobody gives any importance to women and they don't give any value to their advice. Men say that jirgee are men's work and that women have no role in a jirga.*

<sup>31</sup> It should be noted, as is explored in Section 3, that age is also an important factor in men's ability to participate in *jirgee* and particularly in the role of a *jirgamar*.

Others respondents were keen to assert that women are listened to and taken notice of. For instance, one older woman from the Shinwaar village seemed quite perturbed when members of the research team asked her if people listen to what women say in the *jirgee*. She responded with: “Why would people not ask what women’s opinion is?” In another example, a young man talking in a focus group in the same village explained that when he had a dispute over the inheritance of his father’s land, his sister was a witness in the *jirga* and the *jirga* made its decision based on what she told them.

So far, this section has considered women’s participation in terms of their actual attendance and participation in a *jirga* in front of the *jirgamaran*. However, with gender norms, particularly *pardah* practices and sex segregation, being particularly restricting in terms of women’s access to and participation in *jirgee*, communities find ways for women to still bring their problems to the attention of the *jirgamaran* and influence the outcomes of *jirgee* without transgressing these gender norms. It was reported that women can speak to a female relative of a *jirgamar* in order to bring their dispute or difficulty to the attention of the *jirgamaran* in the village. In one example related to the research team, the wife of a *jirgamar* explained how she knew a young girl was being treated badly by her in-laws and so spoke to her own husband about it. He then got the other *jirgamaran* involved and they were able to improve the situation for the woman. It was also reported that women can go directly to the *jirgamaran* of their *qawm*—presumably men they are related to—and raise their disputes in this way.

It was found that women can influence the outcomes of *jirgee* without actually being physically present at the meeting. The most obvious way this takes place is through the influence they may have on sons, brothers or others who are acting as their representative in the *jirga*. Women’s potential for this is obviously determined by the individual relationship between the woman and the family member acting as her representative.

Another commonly used method for women to influence the outcomes of disputes is for them to, either as disputants or witnesses, sit in a room separately to that of where the *jirga* is taking place and tell their side of the story or act as a witness by speaking to one of the *jirgamaran*—most likely one who is related to them—who will then present what they have said to the rest of the *jirga*.

While these methods for influencing the *jirga* processes and decision-making are not ideal, they do show that women are not simply passive in these processes. Instead, women and the community more generally find ways for women to have a role in *jirgee* without transgressing socially defined gender norms.

### Evidence from Case Studies

Cases 4, 5 and 6, which are presented in Annex 1, provide evidence of the ways in which women participate quite directly in *jirgee* in the villages. In Case 4, “Exchange Marriage Dispute,” Parwana, the mother of one of the sons who was married through the exchange, brought the dispute to the attention of the *jirgamaran* and both she and her daughters’ mother-in-law participated in the *jirgee* to resolve their dispute. Both of these women are older and grandmothers, and Parwana is also a widow. In this case, recognised white-hairs of the village were involved in finding a resolution to the dispute and persuading both parties to accept it.

In Case 5, “Dispute Over an Engagement,” Jamila, the mother of a girl who was meant to be engaged to her cousin, took her grievance initially to the *woliswal* who referred the case to the *jirgamaran* in the village. Jamila also attended the *jirga* and presented her

case that her daughter was not engaged to her cousin. Again, Jamila is an older woman and also a widow.

In Case 6, "A Case of Child Abuse," both the mother and the mother-in-law of the girl, Janwara, who was being abused by her in-laws, brought the dispute to the attention of the *jirgamaran* in the village, participated in the *jirgee*, and also accompanied the *jirgamaran* when they took the case to the *woliswali*. The girl who had been abused also went to the *woliswali* with her mother and the *jirgamaran*. It is because she was physically present at this meeting at the *woliswal's* office and was therefore able to show her physical scars from the abuse that the *woliswal* and the *jirgamaran* believed her version of events. Other women spoken to in the village about this case used it to illustrate the importance of women attending *jirgee* when they are involved in the case. In this example Janwara's mother is neither particularly old nor a widow.

Cases such as these, in which women are very involved as disputants in the *jirgee*, are not particularly common. Nevertheless they are important as they provide evidence that there exists the potential for women to bring their cases to the attention of the *jirgamaran* in their villages and to participate as disputants in *jirgee*.

## 5. Practices, Principles and Outcomes: Resolving and Regulating Disputes to Keep the Peace

This section is primarily concerned with the practices used to resolve disputes and the outcomes of community-based dispute resolution processes. It discusses how decisions are made and how they might be implemented. The section contributes to six of the key arguments of this paper:

- Community-based dispute resolution processes are not static and do not exist in an unchanging version of tradition and custom. They are instead continually revised over time to adapt to changing social relationships, political structures, and problems
- The principles used to rationalise the outcomes of dispute resolution processes are complex, drawing on Islamic and customary ideals, negotiation and pragmatism
- Processes for resolving disputes are a key way in which peace and social cohesion are maintained at the village level
- While community-based dispute resolution processes may not always and immediately bring a resolution to a dispute, they may contain or regulate it
- Decisions made through these processes can provide recourse for women to assert their rights
- Not only is community-based dispute resolution, as practiced in the villages of Afghanistan, a functioning alternative in light of a weak state justice system, but it performs particular functions that would never be possible for the state justice system to fulfill

The section begins by returning to the idea of change, specifically considering the difference in the way that community-based dispute resolution is practiced among different *qawmmuna* and villages. Within this discussion, the practice of *baad*,<sup>32</sup> its prevalence, and perceptions from the community regarding its appropriateness and effectiveness for resolving disputes are examined. The next subsection explores key practices used for resolving disputes in the two villages where the research was conducted. It highlights how the importance placed on maintaining peace and social cohesion determines how disputes are resolved. The third subsection of the chapter examines the intersection between the use of Sharia, state law, and *urf* (custom) in resolving disputes. The final subsection discusses the outcomes of the cases presented in Annex 1.

### 5.1 Change in practices and principles across time and space

As explained in Section 2, the research team deliberately chose to work in two different districts in order to conduct the research among two different *qawm* groups: the Shinwaar and Muhmand. The rationale for doing this was to explore the differences in the practice of community-based dispute resolution between these different groups. Respondents also pointed to how other *qawmmuna* are applying certain practices in different ways, as the quotations in Box 26 (next page) illustrate.

A senior elder of the Shinwaar *qawm* pointed to the way in which murder is dealt with as a significant difference between the Shinwaar *qawm* and others. He reported that the

<sup>32</sup> *Baad* is the practice of compensating a murder (or even an accidental killing) by the family of the killer by giving either one or two never-married girls in marriage to the victim's family.

**Box 26: Differences in how *pashtunwali* is practiced**

*Shinwaar laar is a bit cheaper than the Ahmad Zai and Muhmands. As I have heard, Ahmad Zai have to pay a lot of compensation for injuries to the face or head and for breaking a tooth. I don't exactly know the amounts among those qawmmuna, but among Shinwaar it is compensated by taking a sheep and white-beards as nanawati (apology) for both injuries to the head or face and for breaking a tooth; it is enough.*

– Assistant head of district *malikan shura*

*Every village has their own culture... like Ahmad Zai qawm in regard to machalga, they take more machalga than us as a guarantee... I mean if our qawm would take Rs 50,000, the Ahmad Zai qawm would take about Rs 150,000.*

– *Jirgamar* in his fifties who lives in the Muhmand village

Shinwaar do not use *baad* to resolve murder cases as other *qawmmuna* do. The *modir-i-huquq* in this area supported this statement, reporting that within the Shinwaar *qawm*, there is only one solution to a murder case: taking revenge by murdering the murderer or a male member of his family. The research team did not find any cases of *baad* in the Shinwaar village, but did in the Muhmand village.

In regard to change over time, a common statement in both villages was that aspects of community-based dispute resolution processes had changed, as discussed in Section 3, but the practices used and the principles supporting them had remained the same, as the quotation from a *jirgamar* who lives in the Shinwaar village illustrates:

*As was said by Rasool, there hasn't been any kind of change in our jirgee and jirga principles since the previous times. Regarding the practices, we still use nanawati [apology]. This is a practice we have been using for a very long time.*

Despite this generalised perspective, certain practices were reported to have changed. Of those changes reported, the most common (in fact virtually the only form of change reported) was in reference to practices which most directly affect women as a group. The strongest or most often cited example of this was in regard to *baad*. Both men and women from the Muhmand and the Shinwaar villages reported that there has been a decrease in the use of *baad* over time. As mentioned above, many respondents reported that *baad* is no longer practiced at all among the Shinwaar. The quotations in Box 27 (next page) refer to the decline in the use of *baad* in both villages.

It should be noted that despite the assertions of the woman speaking in the last quotation, the research team are aware of two disputes over the last few years which had been resolved using *baad* in the Muhmand village. These cases are described in Case 8 and 9, "Dispute Resolved using *Baad*," and "Multiple Murders in One Family Dispute Resolved using *Baad*." Case 8 describes a dispute in which some time after a fight between two men, one man died and his family made the accusation that his death was the result of the fight. The dispute was resolved by the family of the man who is still alive agreeing to exchange a daughter to one of men in the family of the man who has died. Case 9 describes the murder of two boys by their uncle, and the subsequent murder of one of the uncle's brothers as an act of revenge by the brother of the two boys who were killed. The dispute is resolved by the uncle's family engaging two girls to the nephew's family and the nephew's family engaging one girl to the uncle's family.

It was revealed through discussions with respondents about both cases that the *jirgamaran* were aware of the potential risks to girls and women who were married as *baad*. In both

**Box 27: The declining use of *baad***

*The positive change is what I told you before. Before there was the custom of baad to compensate a murder, and now it is not so because the people are educated now and also the migration to neighbouring countries made them wise. Therefore they don't want to put their daughter or sister in trouble for the whole of her life.*

– A malik and *jirgamar* who lives in the Muhmand village

*Since the Khalqi period, approximately 23 years ago, until now, I did not see anyone give his daughters in baad. In the past there was the custom of baad, to give their daughters in those circumstances, nowadays it isn't in our [Shinwaar] area but in some Shinwaar mountainous area like Naziyan Woliswali [they still practice this custom]. I think [baad] is not a good system among our people. At the moment, a little bit, people are practicing the customs which aren't lawful in Islam. And those customs are the ones which people abhor them doing. This is my personal idea. Everyone has their own ideas, if someone else wants to add something for this point.*

– Man in his fifties who lives in the Shinwaar village speaking during a focus group

*People before used to give baad but now there isn't the custom anymore to give girls. This ended a long time ago. In place of baad, people pay money, compensation. If people accept the money and sheep they say they want, they will decide to give this instead of the girl. This depends on people's agreement. If they agree, then this will forgive the blood. If they don't accept, they will take revenge. In my opinion, this custom is very good and baad is not a custom now. Now white-beards and elders and malikan try to resolve the disputes like this by *jirga* and by *nanawati* and with money because the people from the past have experience that when girls are given in baad, they have a bad life and the in-laws taunt them for coming to their house as baad. Thanks to God this hasn't happened in our village.*

– Woman in her fifties from the Muhmand village speaking in a focus group

these examples, the *jirgamaran* drew up a set of conditions to which the in-law families would have to agree. These conditions stated that the girls not be treated badly or abused by their future husbands and in-laws. This was all in written documents which the *jirgamaran* and the girls' future in-laws had to sign or put their thumb prints to. As one *jirgamar* talking about Case 9 explained, it is also the *jirgamaran's* responsibility to ensure no harm comes to the girls. He also provided a rationale for why *baad* was used in this case even though many people in the community were very opposed to its use.

*In my opinion it is not good to exchange girls in such cases, but the elders wanted to bring unity between the nephew and paternal uncle's families. I have heard about bad results from giving or exchanging girls in a murder case. But in my opinion, as they are close relatives, their daughters and sisters would not be in big trouble in each other's houses after marriage. But yes, elders exchange girls in order to keep people united.*

Not only did people report a decrease in the use of *baad*, but they reported this to be a positive change in the practice of community-based dispute resolution. Nearly all of the discussants viewed using *baad* to resolve disputes as highly problematic and also recognised it to be un-Islamic.

The quotations in Box 28 (next page) provide an overview of people from both villages' opinions on the practice of *baad*. As can be clearly seen from the last two quotations, while people are fully aware that *baad* is not an Islamic practice and that it can have detrimental consequences for the girls or women involved, at times the keeping of peace in the community overrides these concerns. Virtually all those who spoke to the research team about this had the desire for the community to find alternative ways to maintain

### Box 28: Opinions on the use of *baad*

*In my opinion, I am against giving girls in baad. Big cases should be resolved in the court. If land disputes are resolved in the jirgee it is good... It's right that Shinwaar elders can even resolve a murder case, but it is not fair to give an innocent girl as baad.*

– Older farmer who lives in the Shinwaar village speaking during a focus group

*In the past, people didn't have enough information about Islam. According to Islamic rules, such kinds of compensation [baad] for a murder are totally wrong. I think this is the time to bring some changes in the Shinwaar laar (the way of the Shinwaar), especially regarding compensation for murder and the selling of women.*

– Man in his mid-forties from the Shinwaar village

*I agree with you in this regard; [baad] should be removed from our society. This is a bad custom. Thanks to God that this custom is not running here right now. Slowly it is going to be finished.*

–Naeem, younger *jirgamar* discussed in Section 3

*It is good if someone forgives someone. But if they don't forgive the killer then the best way is to take girls as baad. It is good because their hostility will change to a relationship.*

– Woman in her forties from the Shinwaar village

*No, people don't accept baad; if people accepted baad, it would be good in place of revenge taking. The people's hostility becomes more and more with taking revenge. Baad is good; it finishes all the hostility and the killings. But our people don't accept baad; now it is not in use.*

– Woman in her sixties from Shinwaar village speaking during a focus group

peace and resolve the hostility between families so as to stop using the practice of *baad* altogether.

These changes in the practice of community-based dispute resolution in regard to the treatment of women are a reflection of the gradual change in perceptions of women's status and position in Afghan society.<sup>33</sup> Consequently, it can be argued that practices like *baad*, which are detrimental to women within community-based dispute resolution processes, are not a symptom of the process itself but rather an outcome of gender dynamics in Afghanistan more broadly. As such, as gender dynamics and the status of women in Afghan communities change, so does the treatment of women within these processes.

The changes over time that this section has discussed, such as the decrease in the use of *baad* combined with the differences identified between Pashtun *qawmmuna*, illustrate that *Pashtunwali* itself should not be thought of as a homogeneous fixed set of customs. Instead it should be seen as one that is practiced differently from *qawm* to *qawm*. It should also be noted that, in these research sites, it was also rare for respondents to describe their own customs and practices as *Pashtunwali*. Instead they referred to them as practices of their own *qawm* group. For example, Shinwaar respondents use the term "Shinwaar *laar*" (the way of the Shinwaar).<sup>34</sup> These changes across space and time also demonstrate that community-based dispute resolution is not based on fixed unchanging

<sup>33</sup> For further discussion of changing gender dynamics in Afghanistan see Deborah J. Smith, *Decisions, Desires and Diversity: Marriage Practices in Afghanistan* (Kabul: AREU, 2009).

<sup>34</sup> One of the AREU researchers in Nangarhar Province went on to work in southern Pashtun areas and was surprised to see how differently community-based dispute resolution is practised in these areas.

customs and traditions but is adaptable to and reflective of broader social and political changes within Afghan society.

## 5.2 Key practices used in community-based dispute resolution processes

Certain key practices were, however, found to be in regular use in both villages. These were the giving of *waak* (authority) at the start of the dispute resolution process; the paying of *machalga* (a deposit); the use of *nanawati* (apology); and the use of *teega* (literal translation is “stone,” but describes a process to put a halt to any conflict between the disputants for a set period of time). As these practices were those most commonly referred to by respondents, they are discussed in further detail below.

### *Waak* (authority)

As argued in Section 3, the *jirgamaran*'s power to resolve disputes lies in the authority they have in their communities. The literal “giving of authority” to the *jirgamaran* in the form of *waak* is something undertaken at the beginning of every dispute resolution process. It can even be given to one *jirgamar* alone who has been asked to resolve a small dispute. There are several different kinds of *waak* that respondents can agree to. The two most commonly used are *aam tam waak* (sometimes also called “*mad pad waak*”) and *wad pad waak* (also referred to by the Shinwaar as “*Shinwaar laar*”).

When using *aam tam waak*, the disputants give full authority to the *jirgamaran* to resolve the dispute in whichever way they feel is most fitting and most likely to end the dispute and bring peace between the disputants. This is the most commonly used form of *waak* in both villages. It was reported by some that this is the only form of *waak* that *jirgamaran* will agree to use, as it allows them to use their discretion to resolve the dispute and be pragmatic in their decision-making.

In *wad pad waak*, authority is given to the *jirgamaran* but their decisions must be based on previously-made decisions, known as the *laar* (“the way that things have always been done”) of the *qawm*. This *waak* also encompasses the concept of *nerkh*, which is a fixed price of compensation for every injury, such as a certain price for damaging someone's eye or for breaking someone's arm. If a disputant feels that a decision does not comply with previously-made decisions or the *laar* of the particular *qawm* group, he can ask for another group of *jirgamaran* or white-beards to decide if the first decision made was correctly. Naeem, one of the younger *jirgamaran* who was written about in Section 3, gave a clear explanation of this process.

*In the Shinwaar qawm, we have a laar which is called “Shinwaar laar” that we use for resolving disputes and problems. When a case is resolved by jirgamaran or white-beards through laar, there is a procedure. After the decision, jirgamaran say to the disputants, “We have resolved your dispute using this laar.” If the disputants agree with the decision, then that is good. But if they do not agree with the decision, then the disputants can take their cases to other white-beards and malikan of the Shinwaar qawmmuna and the disputants can ask them [about the decision]. If other white-beards say, “Yes the decision is good,” the first decision is correct and that becomes the final decision in the case. If the second jirgamaran do not accept the decision of the first jirgamaran, in that case the first jirgamaran should convince the second jirgamaran about how they made the decision. If they can't convince them, then the decision is void.*

Disputants can also choose *jirgamaran* from other villages in the first instance if they wish to. The research team did not find examples of this happening, except in the case of a large dispute between two different *qawmmuna*, which is presented in Case 1, “Land Dispute between Two Different Muhmand *Qawmmuna*,” in Annex 1.

As is illustrated in Case 7, the *waak* chosen by the *jirgamaran* and disputants can have a significant influence over how the process for resolving the dispute will operate and the options open to disputants if they do not agree with the decision.

*Wad pad waak* (also called “*laar wak*”) is far less commonly used than *aam taam waak*. One of the reasons given for this is because it is thought that this kind of *waak* can cause further conflict between the disputants. For example, in a case where it is the word of one disputant against another, one or both the disputants will have to swear on the Quran that what they are saying is true, and consequently it is believed that someone is going to lie. The *jirgamar* quoted below explained this in relation to Case 5, “Dispute Over an Engagement,” presented in Annex 1. This dispute was between Jamila and her nephew, Jalil. Jalil argued that he had been engaged to Jamila’s daughter as a child. Jamila argued that they were never engaged and she would not have her daughter married to him:

*Because we know if we have a laar waak jirga, one side of the dispute has to swear. Jalil was claiming that he was engaged to the girl and that [Jamila]... was munker (difficult/lying) and she was denying her daughter’s engagement with him. In such cases, jirgamaran have to tell one side of the dispute to swear because there is no other way of knowing the reality in order to resolve the dispute...and as I said before, swearing in a jirga brings conflict and no jirgamar wants conflict between two disputants...In aam taam wak, jirgamaran have free hands in resolving the dispute. The white-beards will make a decision which is suitable for them. In aam taam wak, disputants cannot take the decision anywhere else to see if it is right or wrong according to the laar.*

While respondents in the Shinwaar village only referred to these two forms of *waak* (*aam tam waak* and *wad pad waak*), respondents from the Muhmand village described other types of *waak*. For instance, two forms of Sharia *waak* were referred to (for these a mullah has to be present in the *jirga*). *Azaad waak* refers to “free *waak*” for Sharia cases, in which, in a similar way to *wad pad waak*, a disputant can take a decision to a second mullah if they are not happy with an initial outcome. Another is *waak-i-asnad*; to use this *waak* the disputants should have documentation and deeds.

In many cases a document will be drawn up which the disputants sign stating they have given *waak* to the *jirgamaran*. A translation of an example of such a document, which was shown to the research team and photographed, is provided in Box 29:

**Box 29: Example of *waak* letter**

*We, both Loqman, son of Ali Mohammed, and Farooq Khan, son of Hameed Khan, are giving waak to the malikans and representatives of the qawm for the resolution of our dispute. Whatever is the decision of these malikan we will accept, and in case we do not accept the decision, we both disputants will pay 10,000 Afs as machalga to the malikan and will be seen as the disobedient people of the village.*

*This waak letter is written in front of two malikan and other white-beards in regard to a land dispute: Date 1364 (1985)*

*Signatures*

*1.....2.....3.....4.....5.....*

### ***Machalga* (Deposit)**

The paying of *machalga* (a deposit) at the beginning of a dispute was also identified as one of the key practices the *jirga* system has at its disposal for ensuring decisions are accepted by disputants. The *jirgamaran* fix a certain amount from each side as *machalga* and if the disputants do not agree to accept the decision of the *jirga*, they will not have their *machalga* returned to them at the end of the *jirga* process. This was recognised by community members as one of the strongest instruments the *jirgamaran* have at their disposal for ensuring their decisions are implemented, as this *jirgamar* from the Muhmand village explains:

*This is the rule of the jirga: to take machalga from both sides of the dispute and for the white beards use machalga as an implementing force, since jirgamaran don't have any soldiers or any other power to implement their decisions.*

*Machalga*, however, is not always paid in cash. Instead, there are different options available. Firstly, if people cannot afford to pay the *machalga* which is asked for, someone else who is wealthier may stand as guarantor for them, often a local shopkeeper or trader. This happened in the dispute presented in Case 7; in this example, however, when one disputant did not agree with the decision he refused to pay the *machalga* that someone else had stood guarantor for. It seems in this case that there was little the *jirgamaran* could do about this; the disputant in question is from quite an influential family and this may have had some impact, as may have the fact that the disputant is now bringing other *jirgamaran* together to resolve his dispute with one of the *jirgamaran* who went against him when making the decision. Secondly, people may put up property, such as a car, as *machalga*. Case 2, "Inherited Land Dispute," provides an example of this. In other cases, disputants may put up a portion of their harvested opium as a guarantee to be taken if they do not agree to the decision the *jirga* makes. Case 5, "Dispute Over an Engagement," provides an example of this. The quotation below demonstrates the flexibility in how *machalga* is paid to the *jirgamaran*. In this example, the disputant did not want to sell his opium to raise the amount of *machalga* requested in cash because opium prices were low at the time. Therefore, it was agreed that he could give his opium to a third party who would hold on to it and only sell it to raise cash if the disputant did not accept the decision of the *jirga*:

*I didn't have any cash so I told Muhammad that I would put three seers (a unit of measurement roughly equal to seven kilograms) of opium as my machalga. But Ali Muhammad said, "No sell your opium and bring us cash as machalga." As the opium prices were not good at that time I didn't want to sell my opium. I told Yasser that I will put my opium with someone else in the village and ask them to stand as guarantor for the machalga and stand for me in the jirga. Yasser and Ali Muhammad agreed to my suggestion. I gave my opium to Akbar Khan, one of our villagers, and asked him to stand for machalga money in the jirga. Akbar Khan accepted that and said, "OK, bring your opium I will keep it with me and I will stand as guarantor for machalga in the jirga."*

— Jalil

The amount for *machalga* requested vary considerably depending on the size of the dispute. For example, the *machalga* paid by both sides in the large land dispute between the different Muhmand *qawmmuna* described in Case 1 was Rp 10 million paid by both sides (this amount of money was raised through contributions from all the households in the village), whereas the *machalga* paid for the resolution of a land dispute between two cousins as described in Case 2, "Inherited Land Dispute," was roughly Rp 300,000 between both sides.

While this money serves mainly as a deposit, it is also used to cover the expenses of the *jirga*, such as food and tea. *Jirgamaran* can incur larger expenses in their investigations to resolve a dispute. For example, as explained in the quotation below, it was necessary for two *jirgamaran* to travel to Pakistan for a dispute:

*One of our villagers' houses was in Pakistan and he was the one who had information about the dispute. Therefore we went to him in Pakistan to collect accurate information... The white-beards will keep the record that how much they spend, then they will deduct that money from the machalga. Some of the white-beards have this habit: when they take the machalga money and after the decision is made, they will ask the disputants to gift the machalga money to them... We spent around 800 rupees from machalga. It was only the fare of the transport. We spent our own money for food.*

Jamila, in relation to her dispute with her nephew over a claimed engagement with her daughter, provided in Case 4, explained how she gave Rp 20,000 as *machalga* but at the resolution of the dispute she only received 14,000 back. The *jirgamaran* told her they had spent the rest of the money on a sheep for eating and to pay a man at the *woliswali* offices who took her thumb print on the decision letter and recorded it.

Although it is rare for disputants not to accept the final decision in a *jirga* process, the research team were keen to know what happens to the *machalga* if it is not given back to the respondents. One respondent, a *jirgamar*, reported that the *machalga* will be used on development works for the village or will be used if the village has guests from the *woliswali* that it needs to entertain. However, since this was only reported once it is likely that this is an ideal rather than something that actually happens.

The most common response was that the *jirgamaran* will divide the money among themselves, as the quotations in Box 30 explain:

**Box 30: *Jirgamaran keeping machalga***

*If one of the disputants doesn't accept the decision of the white beards, then his money, which will be about Rp 30,000-50,000 will be divided among the malikans and they will put the money in their pockets.*

— Malik and *jirgamar* living in the Muhmand village

*There are no benefits. They [jirgamaran] are doing this for the sake of Allah. The only benefit for the white beards is that when the disputants don't accept the decision, the machalga money will be for the white beards.*

— *Jirgamar* living in the Shinwaar village.

It was also mentioned that on occasions some of the *machalga* will be shared with the *woliswal*, as this quotation from a *jirgamar* living in the Muhmand village explains.

*If a disputant doesn't accept a jirga decision, then he will be deprived of his machalga. But nowadays the white-beards distribute the machalga among themselves and they even give some money to the woliswal as his share. White-beards don't give the machalga back to the disputants even if the disputants accept the decision. They tell the disputants that they spent the money on food, like slaughtering sheep, and transportation, but white-beards divide that money between them. But sometimes the white-beards take some of the machalga money and give some of it back to the disputants.*

This quotation also explores the potential for corruption that exists as a result of

*machalga*. One disputant reported that he believed the *jirgamaran* would deliberately make a decision that was not acceptable to him in order to keep their share of the *machalga*. However, as noted, it is very rare for disputants not to accept a decision made by the *jirga*, and as such in reality there exists little opportunity for the *jirgamaran* to keep the *machalga*, beyond what they spend during the course of resolving a dispute.

Some *jirgamaran* and other respondents expressed the belief that it is wrong for them to keep the *machalga*, describing it as *haram* (forbidden in Islam), and reported that they do not keep their share of the money, as the quotations in Box 31 illustrate:

**Box 31: Keeping *machalga* is viewed as *haram***

*The white-beards who participate in the jirga divide the money between them, but some people say this is haram for the jirgamaran and they have to give back the money to the people.*

– Woman in her forties who lives in the Shinwaar village

*The machalga money will be divided among the elders who were in the jirga. If there was one person or ten people the money will be divided among them. The money will not go back to the disputants if they don't accept the decision; they will lose their money. Sometimes the elders in the jirga don't want to take the machalga money; they say it is not halal and that it is haram. So then the share of the elder who doesn't take it is divided among the others.*

– *Jirgamar* who lives in the Muhmand village

It was reported that in certain types of disputes, *machalga* will not be asked for. This includes very small disputes that can easily be resolved by one or two *jirgamaran*, or cases in which the main aim of the *jirga* is for one group to give *nanawati* to the other. In Case 10, "An Accidental Killing," no *machalga* was given because the group of elders from the village of a boy who had accidentally killed his friend came offering *nanawati* without asking the *jirgamaran* to resolve the dispute.

## Implementation

Both *waak* and *machalga* are mechanisms within the *jirga* system for ensuring that the decisions made by the *jirgamaran* are accepted and implemented. However, there are other factors that contribute to ensuring the implementation of decisions. Firstly, there is the ever present threat that if a dispute is not solved in the *jirga*, the disputants will have to resort to solving it through a state body, with all the associated factors that make people not want to use state justice mechanisms, as discussed in Section 4. Secondly, due to the authority the *jirga* system has within these communities, people risk being ostracised by both the *jirgamaran* and other members of the community if they fail to accept or implement a decision made within the *jirga* system. The quotations in Box 32 (next page) explain this. A third motivation for accepting and implementing the decisions of the *jirgee* relates to the maintenance of the *jirga* system itself. Most people have respect for and value the role that the *jirga* system and the *jirgamaran* play in their communities. Therefore, it is felt that if people do not accept and implement the decisions made, this will lead to the breakdown of these valuable processes.

## 5.3 Keeping the Peace

This section argues that the primary aim of the *jirga* system is maintaining peace and social cohesion in the community. Certain practices are specifically used for this purpose, notably *teega* and *nanawati*.

**Box 32: *Jirgamaran's* authority for implementing decisions**

*If the people accept the elder's word then it is good, but if the people don't accept it then the white-beards won't be able to stand the person who didn't accept their decisions and if at any time that person has a dispute [it will be difficult for them].*

— Young woman who lives in the Shinwaar village speaking during a focus group

*The man who accepts the decision at first and then breaks the decision will lose trust in the community; the people will not trust him anymore. He will be left alone and the people will not help him in resolving his disputes in the future.*

— One of the daughters-in-law from Case 4, "Exchange Marriage Dispute"

*When the jirga resolves a dispute, it is lawful and legal. When the jirgamaran resolve the dispute it will hold for thousands of years and no one has the right to break the jirgamaran's decisions. If someone breaks the decisions of the jirgamaran, then the whole qawm will tell the person who disobeyed that he is guilty.*

— Young man who lives in the Shinwaar village speaking during a focus group

*No, [losing the machalga] is not the only punishment. The one who doesn't accept the decision will be recognised as a guilty person by the white-beards and then the white-beards will write on the decision paper and send that to the woliswali. They will write, "We made a decision on this issue and this man doesn't accept the decision, therefore from our point of view he is the guilty side." The woliswali will also consider this man guilty.*

— Jirgamar who lives in the Shinwaar village

*Teega* is mainly used to halt a dispute until the *jirgamaran* can find a solution. The disputants are instructed to not do anything about their dispute for a specific period of time. Members of the Shinwaar *qawm* reported that *teega* could not be longer than six years. During this period, the disputants are expected to behave as if they do not have a dispute with one another. The quotation below explains how *teega* can be used to allow time for the parties to a dispute become less angry:

*My daughter (addressing the focus group facilitator), it is the culture among Pashtun people. White-beards make a teega when they want to bring peace between people and just finish the dispute. When a person kills a person, they—the family that lost a person—become so angry. If the white-beards don't make a teega, they will also kill someone. It is good for people that when the teega is finished, the people will have become less angry. During that time the white-beards try to find a better way to solve the dispute.*

— A white-hair who lives in the Shinwaar village speaking during a focus group

A very senior elder of the Shinwaar *qawm* reported that during times of war, *teega* was used to protect the community and prevent disputes with one another.

*During the war years when everyone had weapons we, the Shinwaari, put a teega among ourselves for our past hostilities that had happened before the communist revolution.*

*Teega*, like many other aspects of community-based dispute resolution practices, is enforced through the *jirgamaran's* authority. It was reported that if a disputant were to break a *teega*, he would also be ostracised by the *qawm*. People also reported that *machalga* or fines were being used to enforce the *teega*. The *woliswal* reported that such was the case in a large land dispute between the Muhmand and Shinwaar *qawmmuna* over the construction of a mosque. The *jirga* put a *teega* on the dispute. The Muhmand

*qawm* were told that that if they continued building the mosque before the dispute was fully resolved, they would have to pay a fine of 1,000,000 Afs. Eventually this dispute was referred to the provincial council for resolution.

*Nanawati* (giving apology) is a very common practice to resolve disputes. It is mostly used in cases of accidental killing or where physical fighting has taken place and people have been injured. It is an overt peacekeeping method which aims to reconcile the two parties. Those responsible for harm will give *nanawati* to the aggrieved party. It usually involves providing food, including slaughtering animals, for the aggrieved party and other members of the community, such as the *jirgamaran*. In many cases, the *jirgamaran* go on behalf of the guilty party to ask for forgiveness. How many people go and who goes will depend on the nature of the dispute and how angry or upset the aggrieved party is. The assistant head of the Shinwaar district-level *malikan shura* explains:

*Before going for nanawati, we investigate the degree of anger of the injured person. If he is very angry, we take more white-beards. Sometimes, even we white-beards from other districts or villages go for nanawati. Sometimes a mullah accompanies the nanawati team.*

In some instances, the giving of *nanawati* is the outcome of one or a series of *jirgee*. In other examples, after an incident has happened, the responsible party may, along with elders from their *qawm*, take it upon themselves to offer *nanawati* to the aggrieved party. This is what happened in Case 10, "An Accidental Killing." In this example a boy from a nearby village accidentally kills his friend who lives in the Shinwaar village while cleaning his Kalashnikov. The elders from the nearby village came to the Shinwaar village to offer *nanawati* to the dead boy's village and family. Everyone knew that the boys were good friends, therefore it was easily accepted that it was an accident. The dead boy's family and community agreed that they would not take revenge and instead accept the *nanawati*. Unfortunately, three years later, the dead boy's brother got into a fight with a boy from the nearby village, who teased him for not taking revenge for his brother's death. As a result, the dead boy's brother killed a man from the killer's family. At that time the elders tried to give *nanawati* to the family and community of the boy who was killed, but it was not accepted and the family said they would take revenge. This happened over six years before the research and the family still had not taken revenge, but the brother continued to fear for his life.

In another example relayed to the research team, there had been a traffic accident and a boy from the area of the Shinwaar village had been seriously injured. The driver of the vehicle approached one of the *malikan* explaining that he had already tried to offer the father of the injured boy *nanawati* but he would not accept it. He asked the *malik* to go on his behalf to offer *nanawati* and try to mediate. Three white-beards went to the hospital where the boy was being cared for to offer *nanawati*, arguing that, "It was your son's fate and nobody could save him from this accident, so please accept our *nanawati* and forgive the driver." The father then accepted the *nanawati* and the driver agreed to also pay a portion of the hospital fees.

The practices of *teega* and *nanawati* are particularly important peacekeeping measures among the Pashtun *qawmmuna* where taking revenge for murder by killing the murderer (or a male member of his family) is the accepted and even expected conduct on the part of the victim's family. Many respondents reported how these cycles of revenge can go on for years and through generations of families. There is no time limit on when revenge has to be taken, and people will wait for years to act. The prosecutor in the quotation below explains how a victim's family will wait until a murderer is released from state prison to take revenge:

*In murder cases, the disputants will not come to the woliswali because among the Shinwaar, if someone murders someone else, the murderer should be killed. And when the disputants come to the woliswali, the judge will put the murderer in jail. After he has passed years in jail and comes out, the victim's family will kill him because it is the custom of the area that the murderer be killed.*

Case 9, “Multiple Murders in One Family: Dispute Resolved using Baad,” provides an example of revenge-taking within one family, which without the interjection of the *jirgamaran* may have continued further with more deaths occurring. Unfortunately, it was *baad*, essentially another peacekeeping practice, which was used to resolve this dispute.

It can be seen in this section that customary practices such as *nanawati* and *teega* are used to control or mitigate the effects of other customary practices such as revenge taking. It is highly unlikely that these peacekeeping and reconciliation aspects of community-based dispute resolution could be replicated by a state justice system, however efficient and effective it might be. This was recognised by actors working in the state justice sector with whom the research team spoke. One judge reported how after sentencing a murderer to prison, he called the elders of the village to his court and instructed them to go back to their village and resolve the dispute which had led to the murder in the first place.

### Sharia, *Urf* and *Islah*

Both *qanoon-i-urfi* (customary law) and Sharia<sup>35</sup> are used in resolving disputes within the *jirga* system. As expressed above, maintaining peace and social cohesion are the primary objectives of the *jirgee* when resolving disputes. This is the main reason that *qanoon-i-urfi* is preferred over Sharia. *Qanoon-i-urfi* is viewed as a process of negotiation which creates peace between the respondents wherein the reputation of both disputants remains intact. State justice and Sharia are seen as only finding out who is guilty and punishing them. Therefore, state justice and Sharia are seen as systems for only creating winners and losers rather than resolving disputes, as the quotations in Box 33 (next page) illustrate.

While *qanoon-i-urfi* is chosen over Sharia and state justice because it better serves the function of maintaining peace and social cohesion, there are also more practical reasons. The *jirgamaran* and other community members reported that the *jirgamaran* are not qualified to make Sharia-based decisions, and that if a disputant does want a Sharia-based decision then a mullah will need to be present at the *jirga*. The quotations in Box 34 (next page) support this argument.

The quotation below explains how it is very unusual for mullahs to have any decision-making role in the *jirgee* in this area.

*The mullah just prays at the beginning and end of the jirga. They usually don't interfere in jirga issues and they just hope and pray that the jirga has a good result in the future... They resolve it according to urf. Mullahs are more formal and they don't have any effect. Mullahs are also not interested in participating in the jirga decision-making and they avoid being decision-makers.*

— A *Modir-i-huqoq*

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35 It should be stressed that the understandings and interpretations of Sharia and Islamic principles presented and discussed in this section are based on the data provided by community members rather than the author's own interpretations of Sharia or Islam. As such, what are discussed are community members' perceptions, understandings, and interpretations of Sharia and Islamic principles.

**Box 33: Choosing *qanoon-i-urfi* for keeping the peace**

*In fact the majority of decisions are according to urf because it is a Pashtun custom. We want to save both sides' honour and our reputation... The jirgamaran try their best to find the guiltiest person but they consider both sides' situation.*

– Malik of Kuchi qawm in Muhmand village

*The decisions in the jirga are based on urf and it brings peace between the people. If the jirga really punished the criminal and said to the criminal, "You have committed the crime and therefore you should be punished," the other side of the dispute will be happy, and we will also be pleased that the guilty party has been punished by the jirga. But then it won't create peace.*

– Prosecutor

*In jirgee, the decisions are based on roghar (peacemaking). Jirgamaran try to negotiate and convince both sides of the dispute. They choose the middle way; it is not like the courts that make a clear-cut decision and make one side winner and another side loser.*

– Jirgamar who lives in the Muhmand village

*Because the decisions which are made in the jirga are based on qanoon-i-urfi, the white-beards make decisions in the interests of both sides. However, in the courts the decisions are one-sided and the judge will make one side guilty and one side innocent.*

– Modir-i-huquq

**Box 34: Needing a mullah to be able to use Sharia**

*Usually when we make decisions among the people, we make urfi decisions. If we need to make a Sharia-based decision, a mullah from the mosque needs to be called to tell us about Sharia law. We don't know about Sharia law.*

– Malik who lives in the Muhmand village

*The malikan and jirgamaran are trying to resolve the cases as Islahi (see footnote 36), and not by Sharia because Sharia needs mullahs as well and sometimes it is difficult to find some.*

– Malik who lives in the Muhmand village

*When the malikan in our village decide, it is urfi. These people do not know about Sharia laws. Only the mullahs and the judges and the people who are working in the court know about Sharia, but the malikan don't know about the Sharia law.*

– Man in his forties who lives in the Shinwaar village speaking during a focus group

Although respondents made a very clear distinction between decision-making according to *qanoon-i-urfi* and Sharia, the basic underlying principles for *qanoon-i-urfi* are considered to be Islamic and many of the decisions made are seen as in accordance with Islam. As the man below explains, Shinwaar *laar* is seen as having much in common with Islam.

*The court makes a decision but it can't end the hostility and animosity, while in a jirga the decision also ends the hostility and animosity... I don't think that there is a big difference between the decision made in the court and in a jirga. I mean, their decisions, which are according to Shinwaar laar, are not far from Sharia.*

– Judge

The underlying principles of *qanoon-i-urfi*—keeping the peace, and maintaining social cohesion by using negotiation and mediation to resolve disputes—are seen as being *Islah*.<sup>36</sup>

<sup>36</sup> *Islah* is essentially the promotion of peace and the maintaining of community social cohesion through negotiation and reconciliation; it is an Islamic principle.

Two quotations from district judges explain this:

*If the accuser and the defendant agree, we don't have any objection to white-beards and jirgee decisions and we accept them. Actually, according to Sharia, peace is allowed between disputants and a judge can ask disputants for peace. If both sides agree, they can go to the Muslehs (peacemakers) for resolution of their dispute. Muslehs can make a decision and decisions are acceptable according to Sharia and for a judge, on the condition that they don't make halal haram and haram halal (make the acceptable forbidden and the forbidden acceptable).*

– Judge

*I don't have any objection to qanoon-i-urfi, because the white-beards decisions are based on Islah and according to Sharia that isn't a problem. Even in the Holy Quran it is written to make Islah between two Muslim brothers. In feq (Islamic jurisprudence) books it is written that if disputants are willing to bring Islah, the case should be resolved through Islah, and Sharia doesn't have any objection to Islah. If a dispute is resolved in a jirga and disputants are happy with the decision we don't have any objection.*

– Judge

Others referred to how certain specific practices for resolving disputes in the *jirga* are very close to Sharia law anyway—this was particularly made in relation to disputes regarding the inheritance of land. Certain other practices, notably *baad*, are recognised as not being in accordance with Islamic principles. The quotation below from a *jirgamar* who lives in the Shinwaar village explains this.

*See, land disputes for which we give waak to white-beards to resolve are almost the same as Sharia. The white-beards divide the land equally among brothers. This is something which Sharia says, but there are some things which are not in accordance with Sharia... I feel ashamed to tell you, but this is the reality. See, when a woman is accused of having an affair with a man in the village, the man has to be killed and the woman has to be sold. This is a laar which is not according to Sharia. In Sharia, when such kind of things happen there should be some witnesses... This is an example I give you, which shows Shinwaar law against Sharia.*

## 5.4 Outcomes of Dispute Resolution Processes

This section provides a summary of the outcomes of the various dispute resolution processes which are presented in Annex 1. These cases are divided into four different categories.

- Large land disputes between different *qawmmuna*: Cases 1 and 3, “Land Dispute between Kuchi and Other Muhmand *Qawm*” and “Land Dispute between Two Shinwaar *Qawmmunna*.”
- Disputes over resources including land disputes involving smaller amounts of land: Cases 2 and 7, “Inherited Land Dispute” and “Interlinked Land and Water Dispute.”
- Cases related to marriage arrangements: Cases 4, 5 and 6, “Exchange Marriage Dispute,” “Dispute Over an Engagement,” and “A Case of Child Abuse.”
- Disputes in regard to murder or accidental killing: Cases 8, 9, and 10, “Dispute Resolved Using *Baad*,” “Multiple Murders in One Family: Dispute Resolved using *Baad*,” and “An Accidental Killing.”

The outcomes of the cases in the category of large land disputes show that it is essential that representatives of the state are involved even if state law is not actually used to resolve the dispute. Consequently, it is clear that state representatives play a role in community-based dispute resolution processes, and who these state representatives are has a significant impact on the outcomes of cases. While both these disputes have been resolved for now, tension still exists between the different groups and there is the possibility in both examples that the disputes could re-emerge in some way or another. These cases also show that while some cases are resolved extremely quickly through the *jirgee*, others can take a long time, as both of these cases did. However, it is possible to see how despite this, the processes of holding *jirgee* themselves can regulate the dispute, by keeping hostilities between the different parties and violence to a minimum.

The outcomes of the cases in the second category of disputes (those over resources including small amounts of land) demonstrate that *jirgamaran* are well-equipped to resolve these types of cases. The reaching of an outcome to which both disputants will agree can, however, involve a great deal of mediation and persuasion on the part of the *jirgamaran*, and this may at times take place outside the arena of the *jirga* itself. Case 7 provides an example of a dispute over resources that had not been resolved when research in the village was completed. The fact that this case involved two disputes that had become intertwined may have made the demands on the different *jirgamaran* particularly difficult.

The outcomes of the third category of cases are, in some ways, the most interesting to consider. Not only do all three of these cases illustrate how women bring disputes to community-based dispute resolution forums and how they participate as disputants and witnesses in *jirgee*, they also demonstrate how the outcomes of these processes can be in women's favour and protect their rights. In Case 4, "Exchange Marriage Dispute," for one woman whose husband was previously being violent to her, the process and outcome of the dispute resolution initiative was clearly to her advantage. She now reports that her husband treats her well. The agreement, which was drawn up by the *jirgamaran*, specified that this man should stop beating his wife. In Case 5, the young woman and her mother, who brought the case to the attention of the *jirgamaran* and argued against the man who said he had been engaged to the young woman, ultimately won the case. There were, however, some sanctions placed against them: that they would have to pay the man's bride-price as a form of compensation and the young woman would have to marry outside of the village. Both of these decisions were part of a mediation processes in order to have both sides accept them and ensure that there would be no further hostility between these families. Case 6 provides a very clear demonstration of how the processes of dispute resolution can protect women and girls from violence in marital homes and keep them safe. In this case, a very young girl was being severely abused—tortured, in fact—by her in-laws and husband. Both the *jirgamaran* and the *woliswal* were involved in reaching a decision in regard to this case. They all agreed that the girl should be able to return to live with her mother and that she bore no guilt at all in what had happened to her. Her husband was also ordered to divorce her and her in-laws were told to pay her compensation. Unfortunately, her in-law family returned to Pakistan, and the last time the research team spoke with the girl, she had neither received the divorce or compensation. Despite this, she reported herself to be happy living back with her own family.

The cases in the fourth category, those of murder or accidental killing, most importantly illustrate how re-establishing social cohesion and maintaining peace between families and the wider community takes precedence. While the practices of *nanawati* and *teega* are effective in doing this at times, women are also used as tools to resolve disputes and

to end the hostility between two families, specifically through the practice of *baad*, as Cases 8 and 9 show. There is recognition among many in the community that the practice of *baad* is un-Islamic and detrimental to girls who are married in this way. Despite this, *baad* was used to resolve disputes in this category because it was seen as the best or only way to bring peace between the families involved and stop the cycle of revenge taking.

## 6. Processes, Principles, Choices and Gender Equity: Concluding Comments

As was outlined in the introduction, this case study has been structured around four key themes: the processes used in community-based dispute resolution; the links or relationships between dispute resolution processes at the village level and state actors at the district level; the principles applied in community-based dispute resolution processes; and gender equity in these processes.

Primarily in Sections 3 and 5, this paper described how the processes and mechanisms used for resolving disputes have changed over time and also vary from place to place and from one *qawm* group to another. The adaptations in these processes made according to changing social, political and economic circumstances demonstrate their ability to change in response to changing social relationships, structures, and attitudes. Consequently, there is potential for the positive aspects of community-based dispute resolution, such as their ability to create and maintain peace and enhance social cohesion. At the same time, particular aspects of these processes which may no longer fit with Afghan norms and attitudes toward them can change. For example, a decline in the use of *baad* was reported in both communities, which corresponds to respondents' perceptions that this practice is neither Islamic nor right.

The case stories presented in Annex 1 along with the discussion in Section 5 illustrate how community-based dispute resolution processes are also flexible to the demands of particular cases. How a dispute is resolved changes depending on the nature of the case, with a variety of different decision-makers being called on, the spaces used for resolution changing, the principles used varying, and varying amounts of collaboration between state actors and village-level actors. Pragmatism features strongly in guiding choices about which practices to employ to resolve a particular dispute. For example, which type of *waak* (authority) the *jirgamaran* will accept to use in resolving a particular dispute is driven by which will be the most practical for bringing a resolution which pleases both sides in the dispute and will minimise the possibility of any future hostility.

While not wishing to overly romanticise the role that the *jirgamaran* and the *jirga* system play in these communities, this paper has demonstrated that community-based dispute resolution processes do play an important role in maintaining peace and social cohesion in their communities. The importance of this role was highlighted in Section 5 in particular, and evidenced not only through the decision-making rationale for particular cases but also in the discussion of particular practices, namely *nanawati* (giving apology) and *teega* (putting a hold on a dispute).

It was noted in Section 4 that the principles underlying state justice and those underlying community-based dispute resolution are fundamentally different. This is due to different emphasis being placed on individual and community rights, and restoring peace and punishing a guilty party. A further key difference between community and state-based dispute resolution is the differing values placed on subjectivity and objectivity. Subjectivity is a highly prized attribute among decision-makers in community-based dispute resolution and community members, whereas state justice, at least in theory, places a greater emphasis on objectivity, particularly from those passing judgement.

The links and relationships between state actors and community-based dispute resolution processes figured as a major part of the research, primarily because they showed themselves to be so prominent. As discussed in Section 4, rather than existing in

opposition to the state, community-based dispute resolution processes frequently work in cooperation with state actors at district level. Community-based dispute resolution processes, in many examples, are indeed enacted between the district and the village with representatives of the state. Indeed many disputes were referred back and forth between state actors and the *jirgamaran*, and in many examples, both the *jirgamaran* and state actors documented the process and the decisions made within the *jirgee*. The *woliswal* was found to be the key actor at the district level in orchestrating this process.

Section 4 also discussed what informs the choices people make as to how and where to resolve their disputes, and whether they take their dispute for resolution to state institutions or village-based institutions. It also highlighted how these choices are restricted and particularly so for women. Even in situations where disputants may choose and be able to take a dispute to the *woliswali*, their options as to how or where it is resolved at district level may be further restricted due to the gatekeeping role played by the *woliswal*.

As with many aspects of community-based dispute resolution, pragmatism featured heavily in choices of where to resolve a dispute. Two of the most important factors influencing location choices were resolving a dispute in the shortest time possible and with the least expense.

Throughout this paper, attention was paid to the differing roles that men and women play in these processes. Section 3 discussed men's and women's comparative roles as decision-makers in dispute resolution and where their authority to be decision-makers comes from. While women's roles as decision-makers are extremely rare, few examples of older women playing this role were found or reported. Furthermore, it was evident that the communities overall are not entirely opposed to the idea of women playing a greater role in making decisions on how to resolve disputes in their communities. Section 4 discussed women's access to and participation in the *jirga* system. The evidence provided in that section, along with the cases described in the Annex, illustrate that certain women under certain circumstances do access, participate in and influence outcomes in the *jirga* system. Section 5 looked more specifically at the outcomes of decisions made in dispute resolution processes, drawing specifically on the evidence provided in the case stories in the Annex. It is clear from this evidence that, at times, the outcomes of dispute resolution processes uphold women's rights, and notably may protect them from violence within the context of the family.

This paper has been keen to illustrate where there are spaces for women's participation and influence over community-based dispute resolution processes. Furthermore, the discussions of gender dynamics in these processes make the case that while women's access to and participation in *jirgee* is severely constrained, this is not an outcome of community-based dispute resolution itself, but rather a consequence of prevailing gender roles and relations in Afghan communities more widely.

Overall, this paper has presented the case that community-based dispute resolution processes offer a viable alternative in light of the weak reach of the state and a state justice sector with severe limitations. However, it also makes the case that community-based dispute resolution has particular advantages, with its emphasis on keeping and restoring peace and ensuring that different parties to disputes and their families are able to maintain relationships with one another and the wider community.

## Annex 1: Disputes Cases<sup>37</sup>

### Case 1: Land Dispute between Kuchi and Other Muhmand *Qawm* (Muhmand village)

This dispute was between two Muhmand *qawmmuna* living in the one village: the Kuchi Muhmand and the majority Muhmand group. Both claimed rights to an area of unirrigated land. The dispute had been ongoing since at least the end of the Soviet-Mujahiddin War. At times, the dispute erupted into violence.

The story of this dispute illustrates:

- How disputes of a civil nature can become criminal
- How migration and return have caused disputes
- How representatives of the state, throughout different regimes, have participated in community-based dispute resolution processes
- How the process of holding *jirgee* may not always resolve a dispute, but instead may serve to regulate a dispute and stop violence or further violence from erupting
- How the principles used for resolving a dispute are adaptable to the practical demands of the community and the particular context of the dispute
- How keeping the peace may take precedence over conforming to the compensatory demands of *Pashtunwali* or finding out who is the legal owner of land or property
- How *jirgee* may, at times, have more implementing power than the state
- That documents are drawn up to record the outcome of *jirgee* and often held by both the disputants and representatives of the state

#### Background to the dispute

The non-Kuchi village residents claimed that the Kuchi residents never had permanent rights to the disputed land because they used to only come to the village during the winters and depart the following spring. They reported that the roots of this dispute date back to the time of the Soviet-Mujahiddin War, when most of the non-Kuchi villagers migrated to Pakistan.

The Kuchi villagers, on the other hand, reported that their *qawm*, the Otmanzes, had been living in the area for the past 300-400 years. In fact, they claimed to be a sub-*qawm* of the Muhmand, who are the real residents of the area. The Kuchi leaders argued that the non-Kuchi villagers were not, in fact, “real” Muhmand (the non-Kuchi claim otherwise), but part of the Sarghani *qawm*. A senior Kuchi malik stated that the Sarghani *qawm* had been granted land in the area in the past, but eventually came to see themselves as permanent residents who owned all of the land in the village.

The *woliswal* described the non-Kuchi villagers as “Sarghani Muhmand” and the Kuchis as “Otamanzie Kuchi.” He also reported that the Kuchi argue that they were given the land by the Daoud government (1973-1978).

<sup>37</sup> It should be noted that not all the details of all of these cases are described here as many of them are extremely complicated disputes which have lasted over a number of years. Instead, the “bare bones” of the disputes are laid out in support of the arguments in the report.

The area of land where the Kuchi built permanent homes—while the rest of the village residents were in Pakistan—is rainfed land and has never been cultivated. It is between 30-50 *jeribs*. But despite it being rainfed and never-cultivated, when the non-Kuchi villagers returned from Pakistan during the Najibullah government, they were not happy about the Kuchi having settled permanently on this land. Consequently, they asked the Kuchi to destroy their homes and leave. The Kuchi, who believed they have a right to the land, refused.

### Resolution process

During the Mujahiddin government, the non-Kuchi village residents took the dispute to the *woliswali* and then to Jalalabad, the capital of Nangarhar Province. The governor, along with a senior Mujahiddin commander (who was very influential in the province), visited the village to investigate the case. They made no decision. The non-Kuchi village residents then took the case to the district court and reported that they had won the case. In response, the Kuchi residents filed an appeal. Again, the non-Kuchi village residents reported that the court had decided in their favour, stating that the Kuchi must pay a large sum for each *jerib* of land in order to stay on it. Some respondents reported that the case also reached the Supreme Court. Kuchi leaders contradicted the non-Kuchi claims and argued that they, in fact, had won the case.

When the Taliban came to power, the non-Kuchi village residents reported that the Taliban did not implement the courts' decisions. This led the villagers to organise a demonstration, which was reported to be the first held under Taliban rule in the province. The leaders of the demonstration instructed the followers to remain peaceful and refrain from shouting slogans against the Taliban leadership. The demonstrators marched from the village toward Jalalabad, but were stopped at the *woliswali*, where they were asked to wait for the Taliban governor of Nangarhar to come to meet with them, which he did. Shortly afterwards, however, the Taliban government collapsed and there were no further developments.

A senior *malik* of the Kuchi residents claimed that the escalation of the dispute was the responsibility of the then-Taliban governor of Nangarhar. He described the governor as a man who had the "English idea" to divide and rule.

By Karzai's presidency, the non-Kuchi village residents had taken matters into their own hands by setting fire to the Kuchis' houses. The Kuchi reported that they all ran and hid in the mountains and watched their homes being burnt from there. The elders forbade the younger Kuchi villagers from fighting because they did not want any bloodshed. The burning of the Kuchi houses turned a verbal dispute into one of violence, escalating a civil matter into a criminal case.

The police arrived on the scene, arrested the non-Kuchi elders, and confiscated their weapons. Two days following this the police returned and arrested more people, including the younger men. When the non-Kuchi elders protested against this, the police claimed that they were trying to prevent these men from attacking the Kuchi again.

When the then-governor of the province found out about the dispute, he, along with other government officials from the *huquq* office and the police, visited the village. He released the prisoners, and suggested that the matter be resolved through a *jirga*. Both sides accepted.

The non-Kuchi village elders gave authority to resolve the dispute to the governor; the

Kuchis, to a wealthy Kuchi trader who was then living in Pakistan. Both parties agreed to give *aam taam waak* (full authority) to their representatives. Both parties also had to give a *machalga* (deposit) of Rp ten million to their representatives. The *machalga* was collected from the households of their respective communities. More than a 1,000 people from different areas of Nangarhar and some from Pakistan attended the *jirga*.

### Outcome and its rationale

During the *jirga*, it was discussed that according to *pashtuwali*, for each house burnt a girl should be given in *baad*. This would have meant that the non-Kuchi villagers would have had to be given 500-600 girls, an unrealistic demand. Consequently, an alternative decision was made in which all whose houses had been burned could keep the land on which their houses had been, and the non-Kuchi villagers would give *nanawati* (apology) to the Kuchis.

The non-Kuchi villagers slaughtered ten Peshawari bulls to feed all the members of the *jirga*. They then, along with all members of the *jirga*, walked to the Kuchi side of the village, "without pride," to give *nanawati*.

The non-Kuchi villagers requested one addition to the decision: if the Kuchi were to be permanently settled residents of the village, they must share in both the loss and the benefit of the village, and as such should be obliged to protect the village from strangers. This was accepted by the *jirga*.

Decision letters were given to both *qawmmuna* as well as to the *wolayat* (Jalalabad provincial government offices). The *machalga* money was returned. A stone was placed to demarcate Kuchi and non-Kuchi land.

One of the senior members of the non-Kuchi *qawm*, however, reported that the Kuchi had not stuck to their side of the agreement. He gave an example of an incident in 2005 when the Muhmand village had a dispute with the Shinwaar people. The non-Kuchi villagers had placed armed checkpoints on the border between the Muhmand and the Shinwaar areas. The Shinwaar attacked these checkpoints and took several men hostage, but the Kuchi reportedly did not come to their aid, despite their close proximity to the site.

The Kuchis' failure to defend the village was reported to the then-governor of Nangarhar. However, he was transferred shortly afterwards and did not investigate if there was a breach of the *jirga*.

Nevertheless, the non-Kuchi residents felt that the decisions of the *jirga* were now broken. The Kuchi elders disagreed with the non-Kuchi version of events, and insisted that the dispute with the Shinwaar was as much theirs as it was the non-Kuchis'.

Both the *qawmmuna* in this dispute reported that although the relationship is currently peaceful, they cannot guarantee how much longer it can last. It should be noted here that both sides were happy to have the research team work with the other *qawm*. Indeed, the non-Kuchi *malikan* introduced the team to the Kuchi community. (This is in contrast to Case 3 in Shinwaar village, where the team was advised against working with the other party in the dispute). It was also evident that the non-Kuchi and Kuchi residents of the village have social relations with each other.

## Case 2: Inherited Land Dispute (Muhmand village)

This dispute is between two paternal cousins over land inherited from their fathers. This story illustrates:

- The power of the *woliswal* and the gatekeeping role that he plays in deciding how disputes will be resolved
- That migration and return can be a cause of disputes, particularly in regards to land
- The close links between the *woliswal* and community-based dispute resolution processes at village level
- The legitimacy that the *woliswal*'s involvement can add to *jirga* decisions
- Two written documents go back and forth between the *woliswal* and the village *jirgamaran*
- How disputes can go back and forth between the *woliswali* and the village

### Background to the dispute

This dispute between two cousins, Rashid and Riaz, began at the beginning of the Mujahiddin government (circa 1992). Riaz was living in Peshawar, Pakistan; Rashid, in the Muhmand village. Rashid invited Riaz back to Nangarhar Province to claim his share of inherited land. A *jirga* was held to divide the land, and Rashid was told to give one-third of the land to Riaz, which amounted to three *jerib*, measured by the *jirgamaran* at the time.

Although the data is inconsistent on this point, it seems that Riaz returned to Peshawar while Rashid continued to cultivate all of the land, including planting 30 mulberry trees. Roughly 18 months before the research commenced, Riaz returned to the village, argued that the former *jirgamaran* had measured the land incorrectly, and requested it be divided again. Rashid was not keen on letting Riaz have any more of the land. He argued that he had been cultivating the land all along and had tax documents to prove it.

### Dispute resolution process

Although the village *jirgamaran* tried to persuade him to resolve the dispute within the village, Riaz went to the *woliswal* to make his claim. He believed the dispute was too large to be resolved in the village, and that only government involvement would make Rashid revisit the original decision. However, the *woliswal* did not refer the dispute on to the *modir-i-huquq* and instead he sent it back to the village—as one woman discussant put it, “they went to the *woliswali* but their dispute was solved by the *jirga*.”

The *woliswal* wrote a letter referring the dispute back to the *jirgamaran* and authorising particular *jirgamaran* to take the lead in resolving it. Each disputant chose two *jirgamaran* and the *woliswal* chose two. One selected *jirgamaran* reported that the reason the *woliswal* referred the case back to the village was because it was a family dispute. He also said the *woliswal* claimed he would force the disputants to accept whatever the *jirga* decided. A *machlaga* was set of between 140,000 and 180,000 Afs. from each disputant. Rashid put up his car as *machalga*.

The case took a long time to resolve. At times the *woliswal* was invited to attend the multiple *jirgee* because the *jirgamaran* could not find a solution that satisfied both

sides. Rashid reported that this was because the *jirgamaran* were corrupt and did not want the disputants to accept their decision so that they could keep the *machalga*. How much truth there is in this accusation is impossible to establish; it is also possible that Rashid was frustrated and disappointed with the progress of the dispute.

Part of the decision-making process was that the *jirgamaran* went to look at the land to see how it could be redivided. In this case the disputants did not sit in the *jirgee*. Instead, their *wakils* (representatives) presented their cases on their behalf, reported back to the disputants every day, and carried out their advice and instructions. (This is similar to the way in which women will have a *wakil* who represents them in a *jirga*.)

The first *jirga* decision was for Rashid to hand over an additional three *jerib* of land to Riaz. The *woliswal* was present for this decision, but Rashid did not accept it. The *woliswal* therefore told the disputants to come to the *woliswali* so that he could refer the dispute to the *modir-i-huquq*. Riaz, as previously noted, had originally wanted to resolve the case through the courts. However, when he went to the *woliswal*, the *woliswal* once again referred the case back to the village *jirga*.

At least four additional *jirgee* were held to resolve the dispute. The expenses for the *jirgee* totalled 50,000 Afs. (this included the cost of the meal when the final decision was accepted). Riaz and Rashid paid for the expenses between them.

### Outcome and rationale

The final decision was made when the amount of land to be given was reduced to one *jerib* from the three *jerib*. A *jirgamar*, trusted by both sides, persuaded Riaz and Rashid to accept the decision. This *jirgamar* explained that the other villagers were deliberately trying to turn the cousins against each other, and as family, they should make peace or face regret in the future. Both cousins agreed. The cousins also divided the mulberry trees between them. The *jirgamaran* went out to the land to measure it and place stones along the new boundary. A document recording the decision was drawn up by the *jirgamaran*, signed by the *jirgamaran*, the disputants and the *woliswal*, who all kept copies. The rationale for the *woliswal* signing the document and keeping copies was so that he can enforce the decision if the dispute should arise in the future.

Once the decision was finalised, a sheep was slaughtered and the meal shared to mark the end to the dispute. The *woliswal* was also present for the final decision and meal. Riaz then returned to Peshawar and let out his land to other farmers.

Unfortunately, toward the end of the research team's time in the village, there appeared to be a new dispute emerging between the cousins. Rashid reported that Riaz wanted to sell his share of the land. As the person owning the land bordering Riaz's, Rashid had the first right to buy the land, which he could not afford. Rashid was concerned that, if the land were to be sold to strangers, the women in his family would not be able to freely walk around the property, restricting their mobility significantly.

### Case 3: Land Dispute between Two Shinwaar *Qawmmuna* Living in one Village (Shinwaar village)

This story describes a dispute over 300-400 *jeribs* of land, dating back to Soviet occupation. Two groups from different Shinwaar *qawm* were in conflict over land ownership. The dispute was resolved toward the end of the research team's time in this district. It

should be noted that it was only possible for the research team to speak to one side in this dispute, the village Shinwaar *qawm*. This dispute illustrates:

- How commanders use coercive power to prevent disputes from being resolved
- How state representatives and community actors can work together to resolve a dispute
- The extent to which an individual *woliswal* can determine whether and how a dispute is resolved
- That *jirgee* can be held at the *woliswal's* office
- How disputes can manifest into different forms through many years and different regimes, and how constant change in regimes can be the cause of ongoing disputes
- How a change in government officials can lead to the end of a dispute depending on their own allegiances to commanders in the area and their own level of integrity
- How court orders can be useless unless there is the power and will of local authorities to enforce them

### Background to the dispute

This was probably one of the most commonly talked about disputes in this village because it affected so many of the respondents and their livelihoods, and because of the length of the dispute. The research team first heard of the dispute at an introductory meeting with some of the village women. Different respondents, including men and women, also discussed this dispute in individual interviews and in focus groups. Although they focused on different aspects of the dispute and how it affected them individually, there was a consistent overarching story.

What is particularly striking about this case is the different versions that the men and women told. The men described the dispute as being between the village Shinwaar *qawm* (themselves) and a commander named Sarajudeen and his family, partners, and cronies. The women, on the other hand, described the dispute as between themselves, the village Shinwaar (*da kuz*) *qawm*, and the mountain (*da bar*) Shinwaar *qawm*. Both versions are considered to be truthful, since Sarajudeen is a mountain Shinwaar.

The disputed land was owned by multiple village Shinwaar, each with different amounts of property. There were also at least three flour mills on the land in question.

The origins of the dispute date to the time of the Taraki government (in the late 1970s) when the communists instituted a land redistribution programme. Some respondents claimed that, at this time, the government redistributed their lands to the mountain Shinwaar, who were landless and living in the mountains. Some villagers claimed that the mountain Shinwaar were powerful despite their lack of land. Others claimed that Sarajudeen and his supporter's land deeds were forged after the fall of the communist regime by a *modir-i-amlak* (officer of the land department) who had kept official stamps. Respondents stated that when the land was being redistributed, all the villagers were migrating away, and thus, nothing was done about the issue.

A *malik*, Hameedjan, gave the most details about the dispute and whose land was in question. He reported that while the village Shinwaar had no deeds for the land, since it was inherited land, they did have tax documents from the governments of Daoud, Rabbani, and the Taliban. He also reported that the villagers won a court case in Kabul

which stated that the land belonged to the village Shinwaar. It is unclear if he received this court order during the Rabbani or Taliban regime. Hameedjan also claimed that there was a Supreme Court order during the Rabani government which stated that all the lands redistributed during the Communist regime were to be returned to their original owners.

It appears that the village Shinwaar had ownership of their land until 2002, when Commander Sarajudeen, who was then based in a neighbouring district, occupied this land by force and stationed checkpoints in various locations. It was reported that he had assistance from the police to accomplish this. It was also reported that he threatened the village elders and kidnapped and held a group of men, including Hameedjan's cousin. Sarajudeen also tried to force Hameedjan to sign a waiver releasing all official ownership of the land, which Hameedjan refused to do. The men held hostage were badly beaten by Sarajudeen's men.

Another village *malik*, according to his now-widowed wife, was taken to Sarajudeen's prison and beaten mercilessly to sign the waiver. Sarajudeen was reported to have his own private prison in a neighbouring district and to be heavily involved in opium and heroin smuggling. The *malik* died shortly after being released.

Sarajudeen reportedly had very close ties to the then-governor of Nangarhar Province, and the then-*woliswal* of the district appears to have been under the commander's control in some way. When the Shinwaar villagers took the dispute to the *woliswal*, they were told that he was powerless to do anything about it. Some respondents accused the *woliswal* of taking bribes from Sarajudeen. It was also reported that Sarajudeen paid off the most senior elders of the Shinwaar *qawm*.

Despite Sarajudeen's close ties to state actors, Hameedjan did go for help to the district police commander. The police commander agreed to help but since he did not have many men, requested that the village raise a force. Approximately 40 to 45 villagers armed with Kalashnikovs and rocket-propelled grenades (the village was still heavily armed at this time) freed the hostage men and arrested eight of Sarajudeen's men (who were released shortly afterwards after paying a fine).

When the men who were held hostage returned to the village, they again went to the *woliswal*; one of the men had been so badly beaten that he could not walk. The *woliswal* said he could not do anything to help but offered to pay for the man's medical expenses out of his own pocket. At some point, the Afghan Independent Human Rights Commission (AIHRC) became involved and took photocopies of all the relevant documents, but nothing occurred beyond this.

## Resolution process

Hameedjan reported that no *jirgee* were held in regard to this dispute. He claimed that the purpose of a *jirga* is to create peace and resolve disagreements, and this particular case did not apply. Since the village Shinwaar had documents to prove full ownership of all the land, he believed that there was no point in holding a *jirga* to discuss the issue. However, many other respondents contradicted Hameedjan's statement. Even his own wife reported that he attended many *jirgee* in regard to this matter, and the research team also witnessed *jirgee* being held at the *woliswal's* office. The team suspects that Hameedjan reported that no *jirga* had taken place to make his point.

Another villager reported going to the Provincial Reconstruction Team (PRT) in regard to

his own land. He said they were helpful, being the only ones with the force to stand up to Sarajudeen. The outcome of the PRT intervention, however, was that all cultivation on his land was stopped until a clear decision had been reached.

Similarly, Zubairjan, the hostage who had been so badly beaten that he could not walk, reported being forced to attend a *jirga* in the Khyber agency in Pakistan to decide who owned his 13 *jeribs* of land. He said that all members of this *jirga* were on Sarajudeen's side, and described them as Al Qaida and as terrorists. He was forced at this *jirga* to sign over 10.5 *jerib* of his land to Sarajudeen.

There were more than 20 *jirgee* held at the *woliswali* with representatives of both sides. But the village Shinwaar would not accept the decisions made because the then-*woliswal* was supporting Sarajudeen and the mountain Shinwaar.

## Outcome

During the end of the research team's second round of research, it was reported that dispute had finally been resolved with the support of the new *woliswal*, who was held in high regard by most of the villagers spoken with. The elders from the two different *qawmmuna* went to both Jalalabad and Kabul to try to resolve the dispute, and in the end a large *jirga* was held at the *woliswal*'s office, where it was agreed that most of the land would be returned to the village Shinwaar. Sarajudeen and the mountain Shinwaar would keep a smaller portion. One woman also reported that the government claimed some of the land themselves. It should be noted that, by this point, the governor of Nangarhar had changed, and so it is likely that Sarajudeen no longer had the support from the state which had enabled him to forcibly take land without repercussions.

## Case 4: Exchange Marriage Dispute (Shinwaar village)

This dispute about exchange marriage began during the time of the Taliban. Two of Parwana's daughters were married to her first cousin's sons, and one of her cousin's daughters, Hanifa, was married to her son, Nabi. The marriages between these couples were problematic to the extent that the three girls all returned to their natal families. A *jirga* was convened to discuss the problems and persuade the girls to return to their husbands' homes. This case illustrates:

- Women who are disputants participate in *jirgee*
- White-hair women in the village will be called on to be part of the *jirga* when the disputants are women
- How family disputes are resolved within *jirgee*
- How *jirgee* can be used to resolve issues of domestic violence

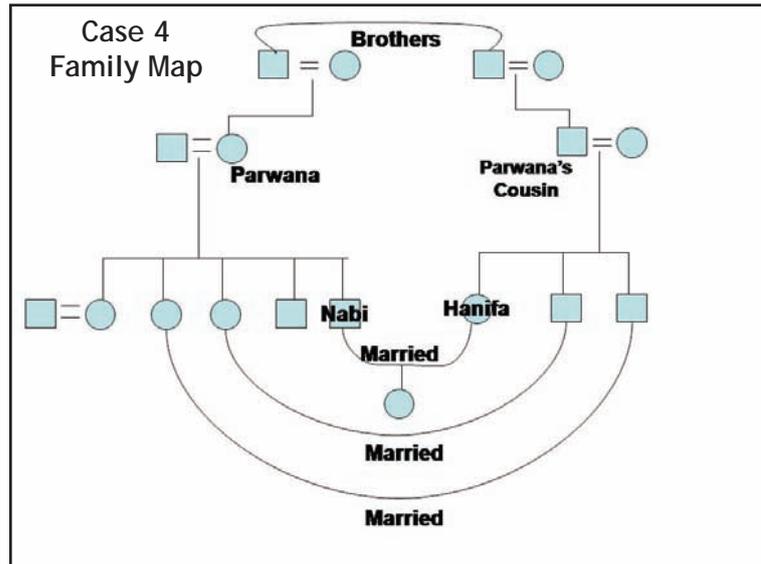
## Background to the Dispute

Parwana is a widow who works in other people's houses as a cleaner. She is in her fifties and is recognised as a white-hair in the village. Parwana's husband was killed during the Soviet-Mujahiddin War.

She has three daughters and two sons. All of her daughters and one of her sons are married. One of her daughters was exchanged with her cousin's daughter, Hanifa, for her son, Nabi. Parwana's other daughter was also married to the same family but exchanged for money. Her daughters were only 11 and 12 years old when the marriages took place. Her

daughter-in-law, Hanifa, was in her mid-to late teens. The marriages took place in the late 1990s.

During the Taliban regime, Parwana's other son was killed during a rocket attack. After the explosion Parwana went to the site and collected pieces of her son's body and has since suffered emotional problems. She claimed that she often argued with her daughter-in-law, Hanifa, and was once kicked out of her own house, forcing her to go and live with her brother. Parwana also reported that Hanifa told her own mother to beat Parwana's daughters.



Hanifa, however, reported that her husband, Nabi, used to beat her when they were first married, and her sister-in-law would cause trouble for her. Indeed, one of the white-hair women involved in the dispute, who sympathised with Parwana, reported that both Parwana and her daughter were cruel to Hanifa when she was first married. She did also report that Hanifa's brothers and mother, in retaliation, started to beat Parwana's daughters.<sup>38</sup>

Eventually Hanifa was taken back to her parents' house by her brothers. Parwana also took her daughters away from their in-laws to stay with relatives in Peshawar, Pakistan. The daughters were in Peshawar for seven to eight months. Parwana reported that Nabi did not want his wife back and that he was angry with her. During this time, Hanifa had a baby girl, but refused to feed her, saying she did need her husband or his daughter. Parwana therefore took her granddaughter to live with her and had other women in the village who had recently had babies feed her. Parwana, however, decided that it was best for Hanifa to return to live with her family and the baby, and she and Nabi went to take Hanifa back. Hanifa refused to return, despite her natal family's attempts to persuade her to do so. At this point, Parwana's daughters were still living in Peshawar because Parwana wanted to make sure that her daughter-in-law would return before she would send her daughters back to their husbands. However, according to Hanifa, Parwana just wanted all three of the girls to get a divorce.

### Resolution process

To resolve this ongoing stalemate, Hanifa's uncles decided to hold a *jirga*. One of Hanifa's uncles, along with a senior *jirgamar* from the village (who is also a relative), decided that the women should also attend the *jirga*. Two recognised white-hairs, Parwana, and Hanifa's mother attended. The *jirgamaran* explained that they wanted the women present at the *jirga* because the dispute involved women and therefore they would understand the issue better. One of the white-hairs explained that she was able to figure out at the *jirga* who was in the right and who was in the wrong since she knew what

<sup>38</sup> It is common in cases of exchange marriage that a self-perpetuating cycle of violence toward married women occurs. For further details, see Deborah J. Smith, *Decisions, Desires and Diversity: Marriage Practices in Afghanistan* (Kabul: Afghanistan Research and Evaluation Unit, 2009).

had occurred. She believed that Parwana had been cruel to her daughter-in-law and that she was too old to try to destroy her daughters' lives by getting them divorced. Hanifa herself did not attend the *jirga*; it was explained that this was because in Pashtun culture, young women do not attend *jirgee*. However, the white-hairs did talk to her separately and reported back what she had said to the *jirga*. It was also reported that they tried to persuade her to go back to her husband's house as this would be best for her life in the long run.

Parwana explained that after a few *jirgee*, both she and Hanifa accepted the decision that all the girls should return to their husbands' houses. Hanifa returned to Parwana's house and Parwana's daughters returned from Peshawar to their husbands' houses. A document was drawn up in which Nabi, Parwana's son, agreed that he would not beat his wife again. At the end of the *jirga*, Parwana invited all the participants to her house and slaughtered two chickens for them to eat.

For a month or two they were all happy, until Hanifa began fighting with her sister-in-law, who wanted her to leave the house. Hanifa, once again, left and returned to her father's house, leaving her baby girl with Parwana. Parwana's brother tried to persuade Hanifa to return to her husband's house but she refused unless her sister-in-law, Parwana's daughter, left the house.

Parwana reported going to the Taliban *woliswal* twice to file a claim against Hanifa for leaving her husband's house and leaving her baby with her. The *woliswal* asked Hanifa's brothers to go to the *woliswali*. The brothers explained that the reason that Hanifa would not return home was because Nabi treated her poorly and beat her. The *woliswal* then called Nabi to the *woliswali* and imprisoned him and one of Hanifa's brothers for some days. The Taliban also beat Nabi, but it was reported that Hanifa's brother was not because his family had some connection to the Taliban.

Parwana and her relatives' went to the *woliswal* to persuade him to release Nabi on the understanding that they would resolve the dispute among themselves. Nabi tried to convene another *jirga*, but the white-beards refused, saying they had resolved the dispute once and would not revisit it. He then collected a group of his friends and went to Hanifa's family's house to offer a *nanawati* (apology). After a small *jirga* with family members, Hanifa agreed to go back to her husband. The *jirgamaran* also drew up a document in which Hanifa agreed not to fight with her sister-in-law, and her husband agreed not to fight with her again. The sister-in-law also had to leave Parwana's house as part of the agreement. The friends of Hanifa's husband, Nabi, who are also friends of Hanifa's brothers, agreed that they would be responsible for keeping all to the agreement.

### Outcome and its rationale

Parwana reported that she is still unhappy living with her daughter-in-law and often stays with her brother and others in the village. She also reported that her son now sides with his wife. Hanifa reported that she now has a happy life with her husband, that her sister-in-law has left the house, and that she just lives with her husband, mother-in-law, and children. One of the white-hairs, who is friends with Parwana, reported that Parwana has had mental problems since the death of her son, and so creates arguments over small things but that Nabi just tells her to eat, rest and pray.

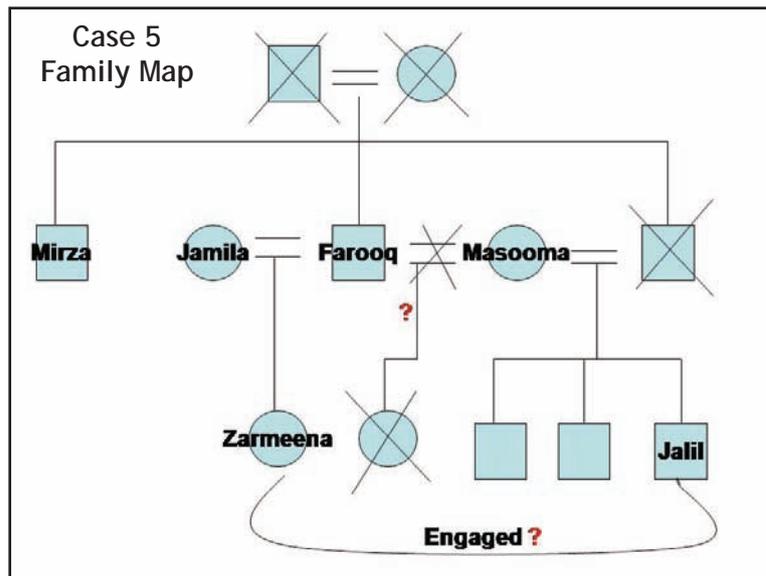
## Case 5: Dispute Over an Engagement (Shinwaar village)

This is a dispute between members of an extended family in regard to first cousins being promised to each other in marriage when they were still children. When the children grew up, the mother of the girl said that such an arrangement had never been made, while the boy claimed that it had and said he still wanted to marry the girl. This case illustrates:

- How women are able to access both the *jirgamaran* and the *woliswali* with their disputes
- How older women are able to participate as disputants in *jirgee*
- How *jirgee* do at times uphold women's/girls' rights
- How *jirgee* will become involved in resolving disputes of a domestic nature and between members of extended families
- How cases can move between the *woliswal* and the community for resolution
- How processes and outcomes of disputes are documented

### Background to the dispute

Roughly 18 years prior to the research being conducted, when Masooma was pregnant with Jalil, her husband died, leaving her with unborn Jalil and his two older brothers. Masooma and her sons, after their father's death, initially lived with Jalil's older uncle, Mirza. However, after some time, Masooma married the younger brother-in-law, Farooq, and she and her sons went to live with him. Farooq was then already married to his first wife, Jamila. Seven months after



Farooq and Masooma's marriage, Masooma gave birth to a baby girl. Farooq, not believing the child to be his, sold<sup>39</sup> Masooma back to her father for Rp 150,000. Her father then sold her to a Shinwaar man from another area for Rp 180,000. Masooma's sons stayed with Farooq and Jamila. Everyone in the village knew about the scandal. The baby girl eventually died, and one non-family respondent reported that some people suspected Masooma killed her. Jalil told a different version of events and argued that his uncle's wife, Jamila, forced Farooq to sell his birth mother. Jalil believed that when Farooq sold Masooma, Farooq promised his daughter, Zarmeena, in marriage to Jalil, as a form of compensation. Jalil also reported that Farooq promised to pay for the wedding.

Jamila denied any promise of marriage made to Jalil, and her daughter, Zarmeena, said that she did not want to marry the *yateem* (orphan) boy. Jamila argued that she was

<sup>39</sup> Among certain Pashtun *qawm* it is a practice to sell women if they are proven to have been sexual deviant.

unable to get Zarmeena married to anyone else because Jalil was telling everyone that Zarmeena was engaged to him.

### Resolution process

Jamila and her Zarmeena went to the *woliswal* initially to make a claim against Jalil, saying that he was lying about the engagement and that he had been “teasing” her daughter. Jalil and his two brothers fled to Pakistan, frightened of the consequences. Jalil’s brothers left their wives and children with Mirza, their older uncle.

The *woliswal* referred the case back to the *jirgamaran*, arguing that a family dispute between cousins would be best resolved in the village. He wrote a letter giving his permission for the *jirgamaran* to resolve the dispute.

A *jirgamar* from the village went to visit Jalil and his brothers in Peshawar to seek their permission to resolve the dispute. Jalil agreed to give *waak*<sup>40</sup> to the *jirgamaran* but only under the condition that they agree to resolve the dispute in his favour. When he offered *laar waak* and the *jirgamaran* did not accept, Jalil finally relented.

The *jirgamaran* felt that because this was a dispute in which it was one parties word against another, having *laar waak* would mean that at least one party would have to swear to tell the truth and that this would cause animosity in the future. Eventually Jalil and his brothers agreed to give *aam taam waak*, as did Jamila. An authority letter was prepared on which Jalil and his brothers had to put their thumb prints. A *machalga* of Rp 50,000 was set. Since the brothers could not afford the *machalga* in cash, they gave three *seers* of opium which they had stored in their village. The brothers were reluctant to return to the village for fear that the *woliswal* would arrest them, but after one of the *jirgamaran* guaranteed this would not happen, they returned.

Along with a selection of white-beards, Jamila was also present at the *jirga*, arguing that Jalil would have to prove that he was engaged to her daughter. (It should be noted that there were *jirgamaran* present at the *jirga* who were *not* members of Jamila’s family.) Jalil was present and argued that when Farooq sold his mother he agreed to give his daughter in marriage as a form of compensation.

### Outcome of the dispute

In the first *jirga*, it was decided that Jamila stick to the original agreement and give her daughter in marriage. However, Jamila and her daughter did not accept this. The *jirgamaran* investigated further and held another *jirga*. This time it was decided that Zarmeena would not have to marry Jalil, but Jamila would have to pay Rp 140,000. as both compensation for selling Jalil’s mother and as bride-price so Jalil could marry someone else. Jamila had to pay the expenses of the *jirga*, which primarily meant paying for a sheep to be slaughtered and making food as a way of cementing the end of the dispute. Jamila also asked the white-beards to prepare a letter for Jalil to sign which indicated that in the future he will not claim that he is engaged to her daughter.

One week after the *jirga*, Jalil was engaged to a *malik*’s daughter. Zarmeena had to be married out of the village as the *jirgamaran* feared that if she stayed in the village, the dispute could arise again or that there might be trouble between her husband and Jalil. Jamila has since left the village and moved to a neighbouring

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40 Detailed descriptions of these different types of *waak* (authority) are provided in Section 5.

district to avoid any further trouble between her sons and their cousins, Jalil and his brothers.

### Case 6: A Case of Child Abuse (Muhmand village)

This case happened about three to four years prior to the research period. It is the story of Janwara, who as a child was taken against her family's wishes to Pakistan by her in-laws, where she suffered terrible abuse. She eventually returned to her own village, and both the *woliswal* and the *jirga* decided she was innocent, that she should be freed from her in-laws and her marriage, and that she should receive compensation. It should be noted that only women in the village were spoken to about this case as it never came up in conversations with men in the village, most likely due to its sensitive nature. The story of this dispute illustrates:

- How community-based dispute resolution processes do, at times, protect women's and children's rights
- How while normative answers indicate that women do not and should not have any role in the *jirga* process, women do participate and there exists an awareness that their presence and testimony is needed at times
- That women have access to the community-based dispute resolution mechanisms in the village
- That a *jirga's* implementation powers can be limited once disputants leave the village
- That the state and the *jirgamaran* work together to resolve disputes

### Background to the dispute

Janwara was promised in an exchange-marriage at the age of eight. (Her older brother was married to her future husband's sister.) Her family felt that Janwara was still too young to get married, and as a result, her future in-laws demanded compensation for losing a daughter but not gaining a daughter-in-law. Janwara's parents were not in a position to pay this money. Despite Janwara's mother's protests, her future mother-in-law took Janwara to Pakistan, where the family lived, without the marriage taking place. While in Pakistan, Janwara was severely abused and beaten by her in-laws, including being burnt to the extent that she had visible scarring. Her husband also raped her.

After some time, Janwara's in-laws decided that they wanted to remarry their son and sell Janwara.<sup>41</sup> In order for this to be socially acceptable, they needed to demonstrate that Janwara had been sexually deviant. To do so, Janwara's mother-in-law made up a story that Janwara had had an affair with a Kuchi boy (whose mother is a widow) in Janwara's village before they took her to Pakistan. Janwara's mother-in-law tortured Janwara until she admitted having sexual relations with the boy. The mother-in-law recorded the confession on a tape recorder. The in-laws then returned to the village with Janwara and asked for a *jirga* to accuse Janwara of her deviance. Janwara's mother reported that she herself went to one of the *jirgamaran* to ask for their help in releasing her daughter from the marriage.<sup>42</sup> The *jirgamaran* felt the case was too big for them and

41 Among certain Pashtun *qawm*, it is a practice to sell women if they are viewed as having been sexually deviant. Through this research, this was reported by Shinwaar respondents as one of their practices. However, this was the only time it was mentioned in the Muhmand village.

42 While Janwara's mother reported that a proper *nekha* (marriage) had not been conducted, as far as everyone was concerned Janwara being engaged and then being taken to live with her husband counted as a *nekha*.

referred her to the *woliswal*. (Janwara's father was sick and her elder brothers would either not support their mother or were away from the village at this time.)

### Dispute Resolution Process

Janwara's mother said that she went to the *woliswali* to report what was happening, and afterwards the *woliswal* sent a letter to the *jirgamaran* of the village asking them to attend the *woliswali*. However, others also reported that Janwara's mother- and father-in-law also went to the *woliswali* to report that Janwara had had an affair with a Kuchi boy. The Kuchi boy's mother reported that the *woliswal* sent police to the village to bring her to the *woliswali*. Janwara, her mother, her mother-in-law, and some of the *jirgamaran* all eventually went to the *woliswal's* office for a meeting. The prosecutor and head of police were also present. When the *woliswal* asked Janwara about her confession on the tape recorder, Janwara was able to tell her version of what had happened to her and to show the scars on her face and arms. The *woliswal* believed Janwara and referred the case back to the village for resolution.

### Outcome and rationale

At the *jirga*, which was attended by Janwara, her father, and her mother-in-law (although it seems that for some of the proceedings the mother-in-law was told to sit in another room), it was decided that Janwara should return to live with her parents and her husband should "divorce" her and pay her *deya* (compensation) for her injuries. However, the mother-in-law returned to Pakistan straight after the *jirga*, and Janwara was neither divorced nor given *deya*. Janwara continues to live with her parents.

The women to whom the research team spoke used this case as an example of why women should participate in *jirgee* as disputants and witnesses; if Janwara had not been there to show her scars, no one would have believed her side of the story.

## Case 7: Interlinked Land and Water Disputes (Shinwaar village)

This story is about two interlinked disputes. The first is between Muhammad Amini and Waseem in regard to irrigation water. Waseem was unhappy because Muhammad Amini was allowing irrigation water from his poppy fields to drain into Waseem's poppy fields and damage his crop. The second is between Muhammad Amini and his paternal cousin Zubair in relation to ownership of inherited land. This story illustrates:

- How processes for recording divisions of land, inheritance, etc., are in place in the villages, including with written documents that are witnessed
- How disputes and particularly those between family members can be very complex
- How there are perceptions that *jirgamaran* can be bribed
- That there are set ways of doing things in *jirgee* when resolving disputes
- That the type of *waak* (authority) given at the beginning of a dispute has a substantial influence on the way the dispute is resolved
- That there is potential for *jirgamaran* from other villages to be consulted as to whether a decision has been made according to *laar*

### Background to the dispute

The land dispute between Muhammad Amini and his paternal cousin Zubair began two to

three years prior to research beginning in the village. The dispute stems from the division of the family land by Zubair's father, Mir Alam, when Muhammad Amini's father died. Muhammad Amini believed that the land had been divided unfairly, with Mir Alma keeping a larger allocation and better quality land for himself and his sons. Muhammad Amini accused Zubair of showing the *jirgamaran* papers about a separate dispute the cousins had had over a path through their land, which was resolved in the court. Muhammad Amini accused Zubair of lying by saying that this decision related to the inheritance as well, whereas Muhammad Amini sees them as two separate issues. Muhammad Amini also made the argument that he was not able to make a claim for his rightful share of the land when it was initially divided by Mir Alam because at this time Mir Alam was working at the *woliswali*. He also added that he did not make the claim then because he did not have adult males in his immediate family who would support him. His sons, having now grown up, were an impetus for him to raise the issue recently.

Zubair, however, showed the team a decision letter that he said was from the court outlining who owns which part of the land. He said that while it is not in the decision document, Muhammad Amini received compensation from his uncle Mir Alam as he did lose some land when the path was built. Zubair said it is not documented because Mir Alam didn't believe it was necessary, as they are uncle and nephew (this does, however, seem a little strange since they had just been through a court case). Zubair also argued that it was agreed that he would get a larger share of the land so there was some to give to his sons from his first marriage as well. He argued that when this was agreed to a document was drawn up, which Muhammad Amini agreed to and the white-beards in the village signed. *Laar waak* was given to the *jirgamaran* to resolve this dispute.

Muhammad Amini sees what he views as an unfair decision in his dispute over irrigation with Waseem to be a consequence of this earlier, ongoing dispute with Zubair. It is particularly bad for poppy crop to stand in water, so after irrigation the excess water is drained off and typically goes to lower fields. For the past few years, Muhammad Amini had been draining his water into Waseem's fields and it had not been a problem. In fact, it is standard procedure in the village to drain water into the lower fields to irrigate other crops. It is, however, also standard that if the runoff water is harmful to other's crops, then it will not be allowed or it will only be allowed at specific times. Muhammad Amini and Waseem had an argument and Waseem said he would not let Muhammad Amini drain his fields into his anymore. This created a dispute between them and they decided to resolve it through a *jirga*.

They gave *waak* to Zubair (and three other *jirgamar*. These two representatives asked for *aam taam waak*. Muhammad Amini himself reported that he secretly told Zubair that he would only give him *aam taam waak* on the condition that he make a decision in his favour, and if he was not prepared to make a such a decision, he should withdraw from the *jirga*. Muhammad Amini believes that this is an acceptable according to Shinwaar *laar* when giving *aam taam waak*. According to Muhammad Amini, Zubair agreed to make a decision in his favour. Zubair denies this.

### Dispute resolution process

A *machalga* of Rp 20,000 was set for both disputants. This was not handed over in cash but someone stood guarantor for each of them. Three to four *jirgee* were held and it was decided that if Waseem did not want the water to drain into his fields then it should not. Zubair reported to the research team that even though he and Mhd. Amini are cousins, he did not want to favour Muhammad Amini, and that his decision was be made for the sake of Allah. He reported that he and Muhammad Amini disagreed, with Muhammad

Amini saying he only agreed to *aam taam waak* because Zubair had promised to resolve the dispute in his favour. Zubair showed the research team the authority letter and said that no such agreement was made.

Muhammad Amini believed that Zubair did not ensure that the decision went in his favour as a means of taking revenge because of their families' ongoing dispute over the inherited land. As such, Muhammad Amini contested the decision, but Zubair told him that if he did not agree to the decision and did not sign the decision document, he would forfeit his *machalga*. Muhammad Amini then refused to agree to the decision and also refused to pay his *machalga*.

Consequently, a new dispute was created between Zubair and Muhammad Amini. They gave *waak* to a further four *jirgamaran* to resolve this dispute. Zubair said he never made any promise to Muhammad Amini, and the *jirgamaran* asked him to swear by those words. The *jirgamaran* claimed that if Zubair swore he made no promises, then the outcome of the previous *jirga* would have to stand, but if he does not swear then the decision made in the *jirga* can be looked at again. However, the *jirgamaran* representing Zubair claimed that the decision has been made according *aam taam waak* and that it should therefore stand. Zubair is refusing to swear that he did not make any promises to Muhammad Amini, probably out of a sense of pride that his decision should not be challenged in this way. Zubair also accuses Muhammad Amini of having bribed the *jirgamaran*, stating that he cannot afford to do the same because he does not smuggle opium like his cousin does.

Muhammad Amini said that he wants a new decision and that the authority given for the new decision should be *laar waak*, so that if he feels the decision is not correct he can call another group of *jirgamaran* to adjudicate on the decision. He also stated that when the *jirgamaran* have *laar waak* they do not make mistakes because they are worried about their reputations if another group of *jirgamaran* have to be called in to adjudicate on the first decision.

## Outcome and rationale

Both of the disputes between the cousins are ongoing. The research team did ask Zubair why he did not go to the court in regard to the land dispute since he does have an original court decision. He said that this is because it is custom to go to the *jirgamaran* first, but if it isn't resolved soon he will go to the *woliswali*.

## Case 8: Dispute Resolved Using *Baad* (Muhmand Village)

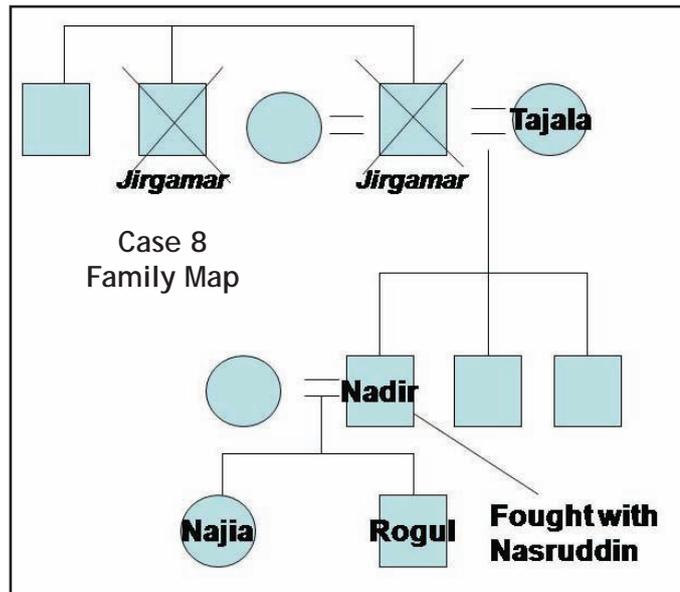
This dispute is between two unrelated families. It began with a fight in which both parties were injured, but when one of them died eight months later, his family blamed his death on the injuries he received in the fight. A *jirga*, which was held 4-5 years prior to the research being conducted, decided that the practice of *baad* would be used to resolve the dispute between the two families. A seven-year-old girl was promised in marriage to one of the brothers of the man who died. This dispute illustrates:

- How the practice of *baad* (while reported to be on the decline) is still used to resolve disputes
- That people are aware of the potential risks to a girl who is married in *baad*
- That the risks to a girl who is married in *baad* are recognised by *jirgamaran* and efforts are made to protect her

- That actors from outside the village can have considerable influence over the outcome of a dispute
- That women participate in *jirgee* as disputants

### Background to the dispute

Tajala's grandsons had a fight with Nasruddin outside one of the grandsons, Rogol's, shop. The fight was over children of the two families fighting. Nasruddin injured Rogol's head by hitting him with stones. When Rogol went home, his father, Nadir, was angry and went and fought with Nasruddin.



Villagers came and stopped the fighting. For a while, nothing more happened as all sides had been injured. Eight months later, Nasruddin became sick and died. Tajala's sons, including Nadir, and all the other villagers went to the funeral. At this point, Nasruddin's brothers and cousins started claiming that Nasruddin had died because of the injuries caused by Nadir in the fight. Nasruddin's brother said they would take revenge.

Nadir and his brothers did not go outside for three days and their shop remained closed. Then their uncle (their father's brother), Hamdat, went to two *jirgamaran* and *malikan* and requested that they form a *jirga* to resolve this problem.

### Resolution process

Initially one of the *jirgamaran* went to the house of Nasruddin's family to ask if they would sit in a *jirga* to resolve the problem. At first they did not accept, but eventually did and said that the *jirga* could be held at their house. Ten *jirgamaran* participated in the *jirga*. They held four *jirgee* in total; one was held at Nasruddin's brother's house and the others were held at one of the *jirgamaran*'s house. Tajala described Nasruddin's family as being powerful as they are related to Haji Ziai, a very senior and wealthy *jirgamar* of the Muhmand *qawm*.

Both sides gave *waak* to the *jirgamaran*. One *jirgamar* argued that they could not blame Nasruddin's death on a fight that occurred eight months before. If they did, they would set the wrong precedent for future fights. People would point to the *jirgamaran*'s decision as a basis for demanding *baad* or revenge if anyone died even months after a fight.

But Nasruddin's cousins would not accept this argument. So they and Hajji Ziai decided to bring a *nirkhi* (senior *jirgamar*) from the border areas of Pakistan and Afghanistan to resolve the dispute. The *nirkhi* arrived and Hajji Ziai told him the story.

Tajala reported that she believed Hajji Ziai and Nasruddin's family met with the *nirkhi* in advance and devised a plan with him. Hajji Ziai gave authority to the *nirkhi* to make the decision. The *nirkhi* decided that Nadir should give a daughter in *baad* to Nasruddin's family. Nadir complained that all of his daughters were too young, to which Hajji Ziai and the *nirkhi* said that they would wait until the daughters grew up; after five to six years, there would be a wedding. The other *jirga* members accepted this decision, believing it would end the hostility.

Nadir was extremely upset that he would have to give his daughter, Najia, in *baad*. His mother, Tajala, tried to reassure him by saying:

*It doesn't matter. Don't feel upset. This is your daughter's fate. May Allah bring peace between our families and if we don't give baad we will be at risk from them [Nasruddin's family].*

Tajala also explained how the *jirgamaran* would try to ensure that the girl is not harmed in her in-laws' household:

*Sometimes her life is good and sometimes it is bad. Because the girl is in a hostile house she cannot relax. But one thing is good about the jirga decision. When they make a decision to give a girl in baad, before giving the girl the jirgamaran will take a letter from her husband and his family which says that in the future they will not fight with the girl and there will be no violence against her. And they also tell the husband's family, "don't think that you are taking this girl as baad but that you have taken her instead of bride-price." The jirga members make three copies of this letter. One is given to the boy's family and the original is kept with the jirgamaran and malikan.*

## Outcome

The *jirgee* held to resolve the case happened four to five years before the research team spoke to the families. At that time, Najia was seven years old. She is now 11 or 12 and living with her natal family, but is engaged to Nasruddin's brother. Her grandmother, Tajala, is concerned and upset for her, despite the reassurance she gives to her own son. Tajala nevertheless reports that the dispute is solved and that there has been no hostility between the families. She also reports that Nasruddin's family want the marriage to happen this year. She says that she believes *jirgee* are good but that outsiders should not attend them, and that the decision that the *nirkhi* made was wrong.

## Case 9: Multiple Murders in One Family: Dispute Resolved Using *Baad* (Muhmand village)

This dispute is the story of the tragic life of Sohila, whose three sons have been murdered (two by her own brother) and whose brother was murdered by her son as an act of revenge. The dispute between Sohila's natal and marital families was eventually resolved through an exchange of girls in marriage as compensation for each of the murders. The dispute began ten years prior to the research being conducted. This case illustrates:

- That while *baad* is reported to be being used less and less, it is still a practice for restoring peace and cooperation between families who are disputing, as well as a mechanism for ending the cycle of revenge taking
- That women do participate as disputants in *jirgee*
- That the risks to a girl who is married in *baad* are recognised by *jirgamaran* and efforts are made to protect her

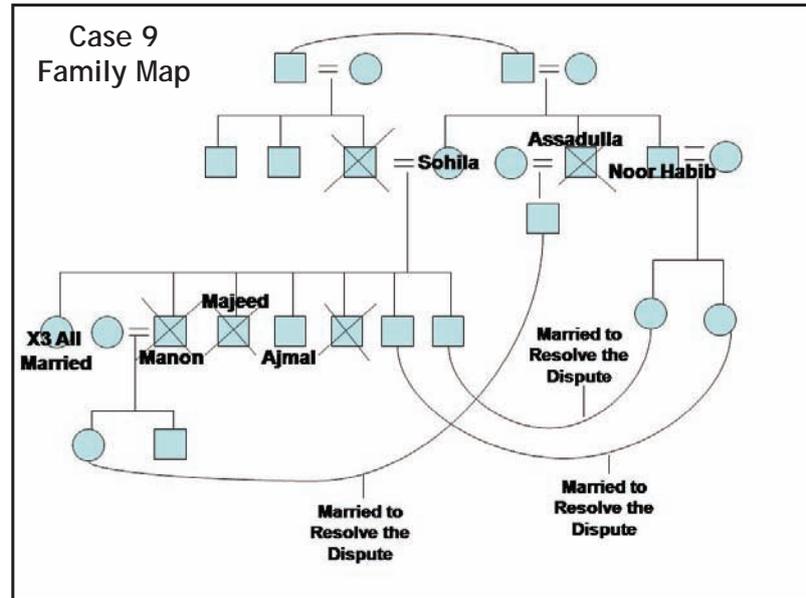
Sohila's family is relatively wealthy, with one son working as a pharmacist and another as a businessman who trades across the Pakistan border.

## Background to the Dispute

This dispute began when Sohila's sons and Sohila's brothers were arguing about inheritance issues. In the heat of the argument, Sohila's eldest son, Manon, attacked his grandfather

(Sohila's father), who was trying to resolve the dispute. In response, one of Sohila's brothers, Noor Habib, took a machine gun and killed Manon and his younger brother Majeed. Following the shooting, Noor Habib ran away.

Against his mother's wishes, Ajmal, Manon's younger brother, was determined to take revenge for his brothers' deaths. With a group of friends he tricked one of



his other maternal uncles, Assadullah, into going to the mountains with them. Ajmal and his friends killed Assadullah and took the body to Sohila and her father. Ajmal said to them, "This is revenge for one of my brothers, now I will find the killer and kill him to revenge my other brother."

After this incident, the village elders, *jirgamaran*, white-beards and *malikan* gathered in a *jirga* to make peace between the families. They held the *jirga* in the mosque after Friday prayers. Sohila's father said, "My children are fighting with each other. My sons and my daughter's sons, they are killing each other." The *jirgamaran*, at the suggestion of Sohila's father and her elder brother, decided that both families would have to give girls in *baad* to make peace. From Sohila's brothers, two girls should be given to Sohila's sons, and from her eldest murdered son, one girl. But Manon's widow would not agree to this. The widow said, "Blood should be exchange with blood. We are not equal. They killed my husband and brother-in-law, but my brother-in-law only killed one person." However, the *jirgamaran* were eventually able to make her accept the decision.

Both Sohila and her widowed daughter-in-law participated in the *jirgee*, and Sohila described it as a family *jirga* with no strangers. Although many *jirgamaran* were present, they must have all been distantly related and from the same *qawm* group. Sohila reported that her daughter-in-law talked a lot in the *jirga*, as did her father and one of the *malikan*.

Four *jirgee* were held in one month to resolve the dispute; it had to happen quickly as Sohila's son, Ajmal, was still bloodthirsty for someone from her brother's family. The girls were all married and exchanged almost immediately. Sohila speaks positively about *baad*, believing it to be the best way to resolve a dispute.

## Outcome

After the exchange marriage, relations improved between all these different family members. The mother of one of the *jirgamaran* reported that the girls are also happy in their families, and that letters were drawn up in which both families agreed not to harm the girls. Sohila's father died and both families participated in the funeral. The uncle who killed his nephews is reported to be very repentant and still lives in the village, although often goes to Kabul.

However, more sadness was to come to Sohila. One of her younger sons and his friend had a fight, and her son shot and killed his friend. Her son stayed inside for a while, but then one day went to their fields, when the family of his friend shot him. Sohila said she would not let any of her sons go out and told them, "We are equal and I don't want any more blood spilt." There have since been no further murders and no *jirga* was held.

## Case 10: An Accidental Killing (Shinwaar village)

This dispute is a tragedy which began about eight years prior to the research being conducted in the village. It began when one boy shot and killed his friend by accident. While the elders were initially able to prevent any revenge murders from taking place, the brother of the murdered boy was, after some time, cajoled into taking revenge. This story illustrates:

- How certain community-based dispute resolution practices are able to maintain peace and prevent further bloodshed
- How accidental killings are treated very differently to murder within the *jirga* system
- How *jirgamaran* and elders from different villages and *qawms* are able to come together to regulate a dispute

### Background to the dispute

Abdul was sitting in his room preparing to clean his Kalashnikov, when the gun went off by accident and killed his friend, Habeeb, who was sitting with him. Abdul sat and hugged Habeeb's dying body and cried. Abdul is not from the Shinwaar village but from a nearby village and he is Muhmand. At the funeral, Habeeb's cousin became angry with Abdul's friends.

Everyone knew that the two boys were friends and the elders from Abdul's village and *qawm* came to the village to offer *nanawati* (an apology). Habeeb's family accepted and four sheep were slaughtered. Habeeb's family promised that they would forgive his blood. There was no hostility for three years. Then one of Habeeb's brothers got into a fight with someone from Abdul's village. The man from Abdul's village started taunting Habeeb's brother saying, "You sold your brother for four sheep. You are a coward and now you want to fight with me. You should wear a *chodar* like women and sit in the house." Habeeb's brother decided he must take revenge for his brother's killing. He took his Kalashnikov and went to Abdul's village, where he saw Abdul's brother cleaning his car, and shot and killed him. He then ran back to the Shinwaar village.

### Resolution process and outcome

The elders of the Muhmand *qawm*, who had solved the case three years ago, came to speak to the elders of the Shinwaar village, stating that an agreement had been made that Habeeb's family would not take revenge and that they had broken the agreement. The elders of the Shinwaar village held a *jirga* and Habeeb's brother recognised he was at fault and that he had lost control when he was taunted by the man from the Muhmand *qawm*. He asked some of the elders to go to Abdul's village, give *nanawati* and ask for forgiveness. The elders of Abdul's village would not accept the apology and said they would wait and take revenge.

Habeeb's brother then left the village for a long time but has now returned. It has now been over six years since he killed Abdul's brother, but he is still afraid and cannot walk around freely.

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