

Amu Darja

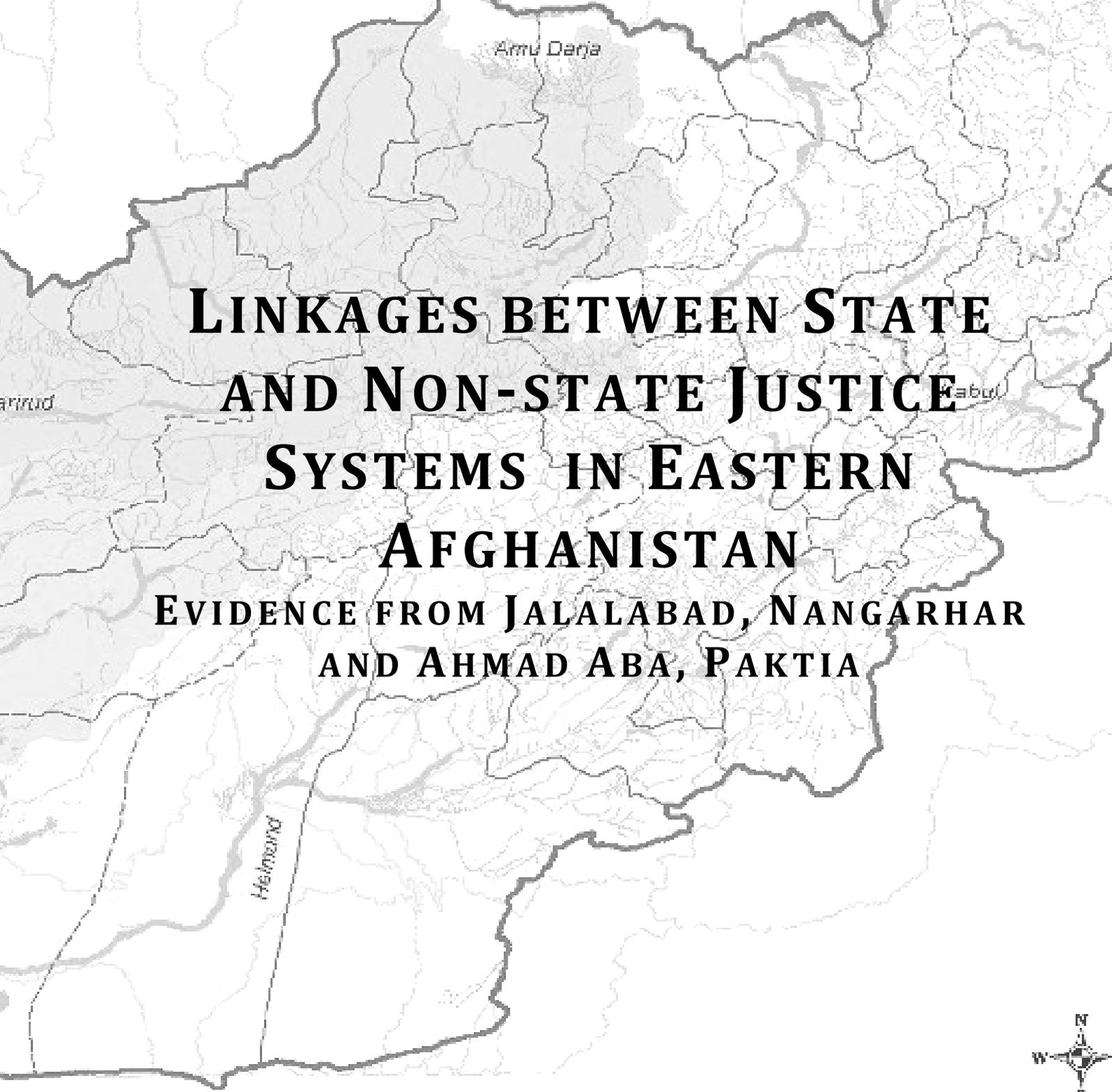
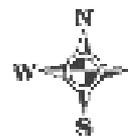
Herat

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**LINKAGES BETWEEN STATE  
AND NON-STATE JUSTICE  
SYSTEMS IN EASTERN  
AFGHANISTAN**

**EVIDENCE FROM JALALABAD, NANGARHAR  
AND AHMAD ABA, PAKTIA**

A map of Eastern Afghanistan showing provincial boundaries and major rivers. The Amu Darja river is labeled at the top, and the Herat river is labeled in the lower-left quadrant. The city of Kabul is marked on the right side. The map is rendered in shades of gray.

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THE LIAISON OFFICE



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## List of Abbreviations

AGO	Attorney General's Office
DAI	Development Alternatives, Incorporated
FGD	Focus Group Discussion
Mol	Ministry of Interior
MoJ	Ministry of Justice
PRT	Provincial Reconstruction Team
TLO	The Liaison Office
USIP	United States Institute for Peace
WFP	World Food Program

## Glossary of Pashtu and Dari Terms

<i>arbakai</i>	A tribal community-based police raised and controlled by a <i>jirga</i> for enforcing the <i>jirga's</i> decision.
<i>bad</i>	The giving of girls in marriage by the family of the perpetrator to the family of the victim in compensation of a murder.
<i>baramta</i>	A guarantee (usually money or other valuables) from both conflict parties prior to entering a <i>jirga</i> (→ <i>machalga</i> ).
<i>eslah khat</i>	A formal document specifying a mediation result, which is registered with a court.
<i>farman/ firman</i>	Decrees, edicts or legal letters etc. issued by the King or President used as ownership documents
<i>hanafi</i>	One of the four established schools of legal thought in Sunni Islam. It is the predominant school of Islamic jurisprudence in Afghanistan.
<i>haq-ullah</i>	A concept of <i>sharia</i> , which refers to the 'rights of society', i.e. issues which have the potential to disrupt the peace within the community and for which it is the duty of the state to issue and implement legislation.
<i>haq-ul abd</i>	A concept of <i>sharia</i> similar to the notion of 'civil law', which refers to the 'rights of person', i.e. those rights that private individuals hold vis-à-vis each other and that can be forfeited by the individual.
<i>huqoq</i>	A person's rights under the government
<i>ibtidaya mukhama</i>	Primary Courts operating at the district level
<i>jihad</i>	Here the 'holy war' against the Russian invasion from 1978 to 1989 in defence of one's faith ( <i>al jihad</i> means struggle).
<i>jirga</i>	Traditional temporary/ad hoc decision-making body created usually for solving disputes among tribes, sub tribes, clans, families or individuals, but also between the government and the tribes. Also called <i>marakha</i> in the South.

<i>kabargen</i>	An agreement by all surrounding tribes to socially isolate those who did not accept the <i>jirga</i> decision as they promised.
<i>khalat</i>	Fee demanded by <i>jirga</i> mediators, usually to be paid before the decision is announced.
<i>khan</i>	Traditional landed elite in Afghanistan
<i>machalga</i>	A guarantee (usually money or other valuables) from both conflict parties prior to entering a <i>jirga</i> .
<i>manteqa</i>	Geographic unit of a community sharing a common identity, in most cases a cluster of villages.
<i>marakchian</i>	Mediators
<i>morafiya muhkama</i>	Secondary Courts operating at the provincial level.
<i>mujahideen</i>	Fighters involved in a holy war ( <i>jihad</i> ). Afghan resistance fighters who fought against the Communist government adopted this title.
<i>nahia</i>	Administrative sub-unit of a municipality or urban district.
<i>namus</i>	refers to what needs to be protected in order to be honourable (→ <i>nang</i> ), basically the women and the land of a family.
<i>nang</i>	Concept of honour according to the <i>pashtunwali</i> .
<i>narkh</i>	Refers to the community specific interpretation of various elements of the customary law ( <i>Pashtunwali</i> ) that are used in a <i>jirga</i> . The mediators are bound to follow specific rules for different crimes, <i>the narkh</i> .
<i>narkh waak</i>	Establishes limited authority for the mediators in a <i>jirga</i> .
<i>pashtunwali</i>	The Pashtun customary law and traditional code of conduct structuring social behaviour in Pashtun dominated areas.
<i>qabala shariat</i>	Statutory land documents.
<i>qanoon madani</i>	Civil Code
<i>qawmi shura</i>	Here a tribal council at the district level. <i>Qawm</i> in general refers to a unit for collective action, which may be based on tribe, clan, family, geographic location or profession.
<i>rish safidia</i>	Dari for 'white beard', meaning a tribal elder.
<i>stara muhkama</i>	Supreme Court operating at the highest and most central level
<i>sharia</i>	Islamic law composed of the Koran and the Hadith (sayings of the prophet).
<i>shura</i>	Originally the term <i>shura</i> was used for gathering of Islamic dignitaries ranging from mullahs to <i>ulema</i> . However, during the Afghan War and the emergence of the mujahideen the term <i>shura</i> was introduced for all kinds of gatherings with official character. The shura and also its members are of more long-term character. Shuras are sometimes also established for development projects.
<i>soorati hal</i>	Process for registering a civil case in court.
<i>spin giri</i>	Pashtu for 'white beard', meaning a tribal elder.
<i>sulh</i>	Concept from <i>sharia</i> , which refers to the mediation of disputes.
<i>toya warai waak</i>	Establishes absolute authority to the <i>jirga</i> mediators, without a need to look for more specific <i>narkh waak</i> .

<i>tukhum jirga</i>	'Seed', or 'root' <i>jirga</i> . <i>Jirga</i> comprised of elders from different tribes. A <i>tukhum jirga</i> holds final authority and its decisions are considered binding.
<i>ulema</i>	Plural of scholars, here for religious scholars.
<i>waak</i>	To give authority to <i>jirga</i> mediators to deal with a dispute and agree to accept the decision made.
<i>wakeel-e guzar</i>	A special form of <i>malik</i> , who is responsible for a specific area such as a street or a neighbourhood.
<i>walwar</i>	Bride price
<i>wolayati shura</i>	Provincial Council
<i>woluswal</i>	District Governor

## Executive Summary

Historically the Afghan state administration, including the court system, has never had full control over the entire country. For the vast majority of rural Afghans, local governance, security and justice administration was and is provided through non-state, religious and informal community bodies. The relationship between state and non-state institutions has often been conflictual, and attempts at effectively expanding the jurisdiction of the state have frequently sparked rebellion. At the same time, the relationship between the two systems is often characterised by degrees of recognition, coordination and cooperation.

Today as throughout the last century, the state justice sector suffers from a severe lack of capacity and is mistrusted as corrupt and ineffective by the majority of the population. As a result between 80-90 percent of all civil disputes and criminal offenses in the country are dealt with through informal institutions. This report maps the formal and informal justice institutions as well as the interactions and linkages between them in two districts in the majority Pashtun East and Southeast of Afghanistan, one urban (a *nahia* of Jalalabad) and one rural (Ahmad Aba in Paktia).

Non-state justice systems play a significant role in both areas, but there are substantial differences as well. The state system is much stronger in Jalalabad. The vast majority of serious criminal cases there is dealt with by state courts. In rural Ahmad Aba, in contrast, the majority of criminal cases is resolved through *jirgas*, often with the tacit knowledge of local government officials. The differences are less extreme for civil disputes. In Jalalabad, the majority of civil cases is solved through non-state mechanisms, but a significant number of cases goes to the courts. This is different in Ahmad Aba, where almost all civil disputes are resolved by *jirgas* at the village level.

In practice, key actors from the formal and the informal justice systems cooperate closely in both research sites. The institutions central to the informal justice system, i.e. local *shuras* as well as district/ *nahia shuras* have become increasingly formalised over the last years, in the sense that they and their members are registered with the district government and in the case of the district shura with the provincial government as well. Particularly civil cases are frequently referred to *jirgas* by justice departments and courts, and the arbitration results formally registered. This both reduces the burden on an overstretched state justice system and strengthens the implementing power of *jirga*-decisions.

Some linkages, less between the two justice systems as such but between informal justice actors and state agencies in general, have the effect of reducing the accountability of informal justice mechanisms. This is particularly the case when *shuras* from which mediators for *jirgas* are frequently drawn also serve to distribute government and aid resources. This configuration enables elders to disadvantage individuals who opt out of the informal system.

The cooperation between formal and informal justice institutions is already extensive and highly formalised in the case of civil disputes. As in addition some of those linkages serve to reduce accountability in urban areas, this report recommends to focus efforts at strengthening linkages on the cooperation between prosecutors, courts and *jirgas* in Jalalabad. The same recommendation is also given for rural Ahmad Aba. An additional recommendation for Ahmad Aba is to strengthen and formalise the cooperation between tribal *shura* and district governor on inter-tribal land conflicts.

# 1 Introduction

The Afghan state has historically never held full administrative control over the entire country, and the formal court system is no exemption from this general rule. For the vast majority of rural Afghans, local governance, security and justice administration were and are provided predominantly through non-state, religious and tribal institutions. Attempts to extend the reach of the formal justice administration have historically been central to state-building processes in Afghanistan. As they have often come at the expense of customary justice system, these attempts have also often sparked considerable resistance. At the same time, the relationship between the systems has at most times been characterised by degrees of recognition, coordination and cooperation<sup>1</sup>.

There is a serious lack of baseline data on how state and informal justice system function and how they interact with each other on the ground. For the purpose of this United States Institute for Peace (USIP)-financed study, information on existing justice institutions, processes of dispute resolution, linkages between formal and informal justice system and general perceptions on both of them was gathered through qualitative field-research between 15 February 2009 and 14 May 2009. The two research-sites were urban Jalalabad and rural Ahmad Aba district of Paktia province, both majority Pashtun areas. Based on this data, it maps the state and non-state justice systems as well as interactions and linkages between them.

The central finding of this study is that substantial linkages already exist between state and informal justice mechanisms. Many of these are formalised and pertain to the referral of disputes as well as to the formal registration of the decisions of customary dispute resolution mechanisms. The linkages must not necessarily be positive. Particularly in urban areas, the extent to which informal justice actors are connected informally to state actors has the potential to cripple the built-in accountability mechanisms of customary justice mechanisms.

Research on customary law and justice mechanisms poses special methodological difficulties mainly due to the inherently political and highly contested nature of this subject. Representations of customary law as homogenous body of rules considered equally binding for all members of a particular community and unchanging over time thus have to be treated with extreme caution. Thomas Barfield puts forward the following definition: “[c]ustomary law is the means by which local communities resolve disputes in the absence of (or in opposition to) state or religious authority. It is based on a common cultural and ethical code that generates binding rules on its members.” (Barfield *et al.* 2006, 6). However, Barfield *et al.* themselves point out on the same page that customary norms are subject to considerable manipulation and contestation, which implies that they may be commonly known, but are open to interpretation and that the extent to which they are binding, may vary considerably.

The representation of customary law as generating binding norms and guiding behaviour is part of the way in which it is legitimised. The same holds true for the assertion that ‘traditional’ justice systems have a long history and a high degree of continuity. The *pashtunwali*<sup>2</sup>, on which the customary law examined for this report is based, is often said to have existed for centuries. Academic research, however, has clearly demonstrated that Pashtun tribal institutions are changing considerably over time (Barfield *et al.* 2006; Wardak 2004). When speaking of ‘traditional’ institutions, this report therefore uses the Weberian concept of ‘traditional authority’. This means that it treats tradition as a construct of the present which legitimises present institutions by reference to the past (Hatt 1996).

As a long tradition of research on legal pluralism demonstrates, representations of customary law and non-state dispute resolution are often used as strategic resources for the post-facto

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<sup>1</sup> On the historical development of the relationship between state justice system and customary law see among others Ghani (1978; 1983), Gregorian (1969), Jones-Pauly & Nojumi (2004) and Tarzi (2006). On the current relationship between formal and customary justice cf. Barfield *et al.* (2006), CPHD (2007), ICG (2003), Nojumi *et al.* (2004) and Wardak (2004).

<sup>2</sup> On the *pashtunwali* cf. e.g. Glatzer (1998).

legitimation of actions rather than as a-priori guide for behaviour. The focus of research therefore has to be on the context of representations and on the question why customary law is represented as set of binding rules for conduct in certain situations (Benda-Beckmann 1989).

In light of the analysis presented here, the research team has therefore tried to consider the social context in which the justice institutions and processes examined are embedded. While the degree to which this is possible in a field-research period of two months is limited, contextual information was gathered and included in the analysis as far as possible.

## 2 Methodology and Research

In order to discover the different ways in which formal and informal justice system are linked, two case studies were examined in each of the two research locations. The rationale behind using key informant interviews as well as case studies was that the latter would rather reveal linkages that people are not aware of as such and that the research team was not familiar with. The cases examined in Jalalabad include a conflict over an inherited house and a dispute between cousins over outstanding debt which had resulted in fighting. The cases in Ahmad Aba include a conflict between two Ahmadzai subtribes (Salam Khel and Khalikhel) over a large piece of land and a conflict between two individuals from Ahmad Aba over a house in Gardez. The disputes were selected with regards to the issues at stake, but also the institutions involved, successfully or not, in their resolution.

- Jalalabad case 1: first went to the primary court in Jalalabad and via two appeals processes up to the Supreme Court. A *jirga* was called to help implement the verdict of the Supreme Court.
- Jalalabad case 2: was referred to local elders by the *nahia* Chief of Police despite having a criminal dimension and subsequently resolved by a *jirga*.
- Ahmad Aba case 1: a *jirga* was called by the district governor but failed to resolve the dispute, as one of the tribes did not accept the outcome and approached the provincial governor. The provincial governor selected *jirga*-mediators from the provincial shura. The decision of this *jirga* was not accepted either. One of the parties went accused the *jirga*-members of overstepping their mandate as members of a legislative body and they are now under investigation from the Attorney General's Office. The provincial governor then selected a new *jirga* from the provincial level tribal council which is still working on the dispute.
- Ahmad Aba case 2: was referred to the courts system under the Taliban after the implementation of a *jirga* decision failed. Over a period of 9 years, the case went through several appeals processes between appeals court and Supreme Court, until an appeals court judge selected elders for a *jirga* which was able to arrive at a compromise that both sides accepted.

The data gathered for this study is predominantly qualitative and was collected through semi-structured interviews and Focus Group Discussions (FGDs) between the 15 February and 13 April 2009 (Jalalabad) and 1 March and 14 May 2009 (Ahmad Aba). The primary field research was conducted by a team of two TLO research officers, one research assistant and a liaison officer in Jalalabad and by one research officer and one research assistant in Paktia. The latter received extensive assistance from other staff members of the TLO Gardez office. An international research officer in the TLO Kabul office coordinated the research processes in the two regions and conducted follow-up interviews at later stages of the research process for the purpose of triangulation.

The following is an overview of the individuals interviewed for this study. A total of 51 individuals were interviewed (27 in Jalalabad and 24 in Paktia) in 36 semi-structured

interviews and 4 FGDs. Sixteen of these interviews and 2 of the FGDs were conducted by the international research officer in the follow-up phase. Interviews were held with the following individuals:

Jalalabad:

- Government (9): wakeel-e guzar, prosecutors (3), primary court judges (2), appeals court judge, state cases department, hoquq department, member of the Upper House;
- General public (13): university professor, representative business union, representative of Sikh community, *nahia* elders (6); *nahia* residents (3), ulema-member;
- Case studies (7): conflict parties (4), mediators (3),

Paktia/ Ahmad Aba:

- Government (9): appeals court judge, district governor, city court judge (2), hoquq department, prosecutors (2), provincial shura member, district chief of police;
- General public (10): elders/ members of tribal shuras (6), *ulema*-member (2), Ahmad Aba residents (2),
- Case studies (6): conflict parties (3), mediators (3);

### 3 Formal Justice in Jalalabad and Ahmad Aba

#### 3.1 Formal Justice in Jalalabad

Jalalabad is one of Afghanistan's biggest city and the provincial capital of Nangarhar. Its location near Torkham, one of the most important border crossings with Pakistan in terms of both formal trade and smuggling, renders it an important economic hub. The thriving economy, the high level of education and a distinctly pro-Kabul stance of the main local power-holders have kept the insurgency consistently weak in most of Nangarhar province. Particularly in the city, the Afghan state has a strong and uncontested presence.

The formal justice set-up in Jalalabad City comprises the provincial level appeals court, one city primary court for the 6 *nahias* (urban districts, see glossary) of Jalalabad, the *hoquq* department and the prosecutor's office. According to court officials, the case-records reach back to the time of Zahir Shah. Considering that Jalalabad was held by the communist government until the last stages of the civil war, this claim is not altogether unlikely, but could not be verified.

Compared to estimates for the rest of the country and reflecting the strength of the state in the city, a high proportion of civil and criminal cases are dealt with by state courts<sup>3</sup>. In 2007/2008<sup>4</sup>, 377 cases were registered with the primary court from all six *nahias*. The fact that 153 of them were criminal cases, 129 traffic-related and only 93 civil suggests that criminal cases are more likely to be registered with the state courts in Jalalabad than civil disputes. The picture for 2007/2008 as well as 2008/2009 looks similar in the appeals court. In 2008/2009, 183 criminal cases were registered so far, of which 53 have been closed. In contrast, only 16 civil cases were registered of which 10 have been resolved either through the court or *jirgas*<sup>5</sup>.

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<sup>3</sup> As national average, the proportion of disputes resolved through the state justice system is estimated at between 10-20 % (e.g. Barfield et al. 2006; CPHD 2007; Wardak 2004).

<sup>4</sup> 1387 according to the Islamic calendar

<sup>5</sup> Interviews, justice officials, 23 May 2009, Jalalabad.

A significant proportion of civil disputes registered by the courts, however, is ultimately resolved through *jirgas*. Of the 377 cases registered in 2007/ 2008, 150 were resolved informally<sup>6</sup>. The contrast of 12 cases in the same period solved directly in *nahia* 5 indicates that around half of the disputes arising in the *nahia* may enter the court system before being solved informally.

In *nahia* 5, the presence of formal state institutions restricts itself to the *nahia* office, coming under the Jalalabad municipality, a small police station and the eight *wakeel-e guzars*<sup>7</sup>. Only the first two have formal links into the justice system. They may be approached by residents to register criminal and civil cases. The former are supposed to undergo an initial investigation of no longer than 24 hours by the *nahia* police and then be registered with the Prosecutor's Office. The next time the *nahia*-level then becomes formally involved, both for civil and criminal cases, is after the court implements the court-verdicts.

### **3.2 Formal Justice in Ahmad Aba**

Ahmad Aba district in Paktia province is home to about 80.000 residents according to the estimates of the district administration. Until 2003, the district was part of Said Karam. The split occurred along tribal lines and the residents of Ahmad Aba are almost exclusively Ahmadzai Pashtuns. Ahmad Aba belongs to the wealthier districts in Paktia. The economy is mainly based on agriculture, but the soil is fertile and there is sufficient water for irrigation. The district also has a good dirt road connection to the province's main bazaar in Gardez. Similar to most areas of Paktia except Zurmat district, there is no notable insurgent activity.

The two only justice departments in Ahmad Aba district are the *hoquq* department and the prosecutor's office, both set up in 2005. The relationship between the justice departments in Ahmad Aba appears to be unproblematic. For instance, *hoquq* department and prosecutor's office routinely cooperate in cases comprising both civil and criminal aspects, e.g. land-conflicts involving suspected fraud<sup>8</sup>. Together with the district governor's office and the police station, they are the only government offices in the district. A district primary court has not yet been established, and the court cases from Ahmad Aba are registered with the city court in Gardez.

The first point of contact for Ahmad Aba residents willing to register a dispute with the government and deal with it through the formal system is the district governor. According to the law, the *hoquq* department and prosecutors office can be approached directly and no role for the district governor is foreseen. Both representatives of the prosecutor's office and the *hoquq* department, however, asserted that cases have to reach them through the district governor<sup>9</sup>.

In Paktia, very few disputes seem to reach the formal justice system in the first instance and even less are resolved through formal court procedures. For example, a provincial level prosecutor asserts that of the 110 cases recorded last year, 15% were settled through the formal system and 85% through the informal system<sup>10</sup>. The picture in Ahmad Aba district is similar, with an estimated 95% of cases resolved through *jirgas* and only 5% making their way to the courts<sup>11</sup>. According to a justice official from Ahmad Aba, particularly civil cases are increasingly settled through the informal system<sup>12</sup>.

The *hoquq* department in Ahmad Aba has registered only 36 cases since its establishment in 2005. Of the 14 disputes registered this year, 10 were referred to the city court, of which 5

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<sup>6</sup> *ibid.*

<sup>7</sup> A special form of *malik*, who is responsible for a specific area such as a street or a neighbourhood.

<sup>8</sup> Interview, head of Ahmad Aba *hoquq* department, 28 March 2009, Ahmad Aba.

<sup>9</sup> Interview, head of Ahmad Aba *hoquq* department, 28 March 2009, Ahmad Aba.

<sup>10</sup> Interview, Provincial level prosecutor, 19 April 2009, Gardez.

<sup>11</sup> Interview, tribal elder and member of Ahmad Aba district shura as well as jihadi-shura, 13 May 2009, Gardez.

<sup>12</sup> Interview, head of Ahmad Aba *hoquq* department, 28 March 2009, Ahmad Aba.

were resolved and 5 referred back to the district for mediation. Most of the cases reaching the *hoquq* department in the first instance are conflicts over land or the repayment of debt<sup>13</sup>. In the prosecutor's office in Gardez, only two or three criminal cases from Ahmad Aba district are registered in most years<sup>14</sup>.

### **3.3 Perceptions of the Formal System**

The opinions of elders and other residents of Jalalabad and Ahmad Aba of government courts and the police match those widely reported in the literature on the formal justice system<sup>15</sup>. A common point of criticism pertaining to the formal system are the expenses associated with it, mostly through bribes and particularly if a case runs through several levels of appeal. Judges, prosecutors, *hoquq*-staff and police are widely claimed to be corrupt and formal court procedures to be expensive and lengthy. First-hand experiences recounted by conflict parties in the case studies as well as by key informants corroborate these claims. They also indicate that the amounts that regularly have to be paid in court procedures are substantial<sup>16</sup>.

These expenses do not only weaken the rule of law by influencing court-decisions, they also severely limit the access to formal justice institutions for those who are less well-off<sup>17</sup>. Tracing the causes of corruption in formal justice institutions, the head of a provincial justice department in Paktia cited the low wages as most important factor. A salary of between \$ 60-80 per month for most of his staff and about \$ 150 for himself, he argued, leaves little choice but to look for additional sources of income<sup>18</sup>.

Allegations of corruption pertain to virtually all levels and institutions of the formal justice system. The police is said to be easily bribed into overlooking criminal activities and enforcing administrative measures patchily or not at all. Accordingly, the implementing power of court decisions is often assessed as rather low<sup>19</sup>.

In Ahmad Aba district, a perceived distinction between different forms of corruption becomes apparent, depending on whether they support policies of the tribal institutions or not. While the governor is said to be taking bribes for not registering criminal cases from time to time, this is not regarded as particularly grave offence. The criminal offenses in question appear to have been transferred to the informal justice system with the consent of important elders of the district. The last district chief of police, in contrast, was widely accused of protecting armed robbers in the area. This crime had caused considerable problems in the district and tribal elders had agreed on steps to tackle it (for details see section 5.2). In this case, district elders raised the issue with the provincial administration and the chief of police was removed from his position.

Allegedly as important as corruption through bribes is influence through connections, whether based on family or other networks. As in other parts of the country, the decades of war have given rise to networks of strongmen, often militia commanders. Even in cases in which they are not a direct conflict party, non-state as well as government power-holders are said to frequently become involved on behalf of one of the conflict parties<sup>20</sup>.

Representatives of the formal system in Paktia also allege the frequent interference of government officials on behalf of suspects in criminal cases<sup>21</sup>. This pertains particularly to investigations of corruption-allegations. A provincial level prosecutor for example alleged that

<sup>13</sup> Interview, head of Ahmad Aba *hoquq* department, 28 March 2009, Ahmad Aba.

<sup>14</sup> Interview, Prosecutor, 12 May 2009, Gardez.

<sup>15</sup> E.g. Barfield et al. (2006), ICG (2003), TLO (2008, 2009).

<sup>16</sup> Interview, nahia 5 residents, 27 March 2009, Jalalabad.

<sup>17</sup> Interview, Provincial level prosecutor, 19 April 2009, Gardez.

<sup>18</sup> Interview, Prosecutor, 12 May 2009, Gardez.

<sup>19</sup> Interview, prosecutor, 12 February 2009, Jalalabad.

<sup>20</sup> Interviews, Professor at Nangarhar University, 18 February 2009, Jalalabad.

<sup>21</sup> Interview, Provincial level prosecutor, 19 April 2009, Gardez.

his investigation in the municipality provoked the provincial governor to ask him not to forward his files to the court. When he refused, he claims, the provincial governor and chief of police requested his removal in a petition to the attorney general in Kabul, charging him with blackmailing innocent civil servant with allegations of corruption. For lack of any evidence, however, the attorney general did not cede to the request<sup>22</sup>.

The first case examined in *nahia* 5 also illustrates the length of court processes, as the process in the primary court took about two years instead of the maximum ten months prescribed by law<sup>23</sup>. While the fact that courts, *hoquq* department and Prosecutor's Office are overburdened certainly plays an important role, it is also frequently alleged that civil servants artificially delay processes in order to press claimants for bribes.

The lengthy and costly nature of court cases are widely held responsible for the fact that many people prefer to resolve their disputes informally. As the section on linkages will demonstrate, however, the reasons for this fact are also to be found in the informal system, from where there is pressure not to approach government courts.

## 4 Informal Justice in Jalalabad and Ahmad Aba

### 4.1 Informal Justice in Jalalabad

Although the state justice system is relatively strong in Jalalabad, informal justice institutions still resolve the majority of civil disputes and a significant proportion of minor and less minor criminal cases.

The informal justice set-up in *nahia* 5 revolves closely around its mosques and a *shura* at the *nahia*-level. Each of the 16 mosques is catering to several hundred families and forms a ten-member *shura*, headed both by the Imam and one elder. These *shuras* were set up during the time of the *mujahideen* government in the beginning of the 1990s when many of the refugees from Jalalabad returned. When parties to a dispute in *nahia* 5 decide to resolve it through the informal system, the mosque *shuras* are usually approached first and most cases are settled by *jirgas* composed of members of these *shuras*<sup>24</sup>. Beyond the resolution of conflicts, the responsibility of the mosque *shura* also comprises distributing food aid by INGOs and UN agencies to the ultimate recipients.

For both purposes, the mosque *shuras* work closely with the *nahia shura*. This 32 person strong body is comprised of two members of each mosque *shura*, one of them usually its head. The main responsibility of the *nahia shura* is to be the contact point with the municipality and the canal department, coordinate infrastructure construction as well as maintenance and coordinate aid distribution<sup>25</sup>. It had served this purpose informally since 2002 and was formally registered with the municipality and the *wolayati shura* (provincial council) in 2005<sup>26</sup>. Although the resolution of conflicts is not part of its formal mandate, the *nahia shura* is heavily involved in it. If one of the mosque *shuras* fails to resolve a dispute, a new *jirga* consisting of members of the *nahia shura* is usually called. Equally, disputants may approach the *shura* directly, in which case the *jirga* would also consist of some of its members.

A third set of institutions, which seems, however, less central to informal conflict resolution in *nahia* 5, are the business unions in Jalalabad. Originally founded under the short-lived Taraki government (1978-1979) as proper labour unions for all major business sectors, these organisations turned into informal business associations during the decades of *jihad*,

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<sup>22</sup> Interview, prosecutor in Paktia prosecutor's office, 13 May 2009, Gardez.

<sup>23</sup> Ibid.

<sup>24</sup> Interview, 5 members of a mosque *shura* in *nahia* 5, 13 April 2009, Jalalabad.

<sup>25</sup> Interview, *wakeel-e guzar* of *nahia* 5, 7 April 2009, Jalalabad.

<sup>26</sup> Interview, head of the *nahia shura*, 4 March 2009, Jalalabad.

*mujahideen* governments and Taliban-regime. Still organised around business sectors, e.g. shopkeepers, goldsmiths, money exchangers, etc., the main activity of the unions shifted towards the resolution of business-related disputes among their members as well as between the members of different unions as the regulatory capacity of the government weakened. In 2005, members of the business community in Jalalabad connected the different unions, which were in various stages of activity, into a federation which serves as a collective platform for negotiations of regulatory issues with the municipality, hence strengthening the bargaining position of individual business sectors. The federation also serves as basis for the mediation of more serious disputes, e.g. between larger groups of businessmen. According to the estimates of the provincial head of the federation, between 65-70 percent of business-related cases in Jalalabad City are now resolved by the unions or the federation and only 35-30 percent by government courts<sup>27</sup>.

A usually important question in the multi-ethnic cities of Afghanistan is the coexistence of different forms of customary law and how customary law deals with disputes between members of different communities. In *nahia* 5 of Jalalabad, the question of applying the *pashtunwali* for the settlement of disputes involving members of non-Pashtun communities does not arise, as its residents are almost exclusively Pashtun. Key informants assert, however, that in Jalalabad in general, *jirgas* held according to the *pashtunwali* constitute the norm, regardless of whether all disputants are Pashtun or not. An interview with a representative of Jalalabad's Sikh-community confirms this claim. Living in a predominantly Pashtun environment, he said, most conflicts with people outside the Sikh-community are resolved through mediation in the *jirga*-mechanism<sup>28</sup>.

The actual processes in all of the institutions involved in the informal justice system broadly follow the principles of the *jirga*-mechanism. As elders in *nahia* 5 explained the informal regulations governing the mediation process, disputants first both have to agree to have their case dealt with by a *jirga*. After granting *waak* (authority) to the mediators, the disputants provide *machalgha* as guarantee, which is to be returned once they accept the *jirga*'s decision. After the mediators have come to a conclusion, they write and sign a decision document which usually also specifies a fine that the disputants will have to pay if they do not adhere to the agreement in the future. There are usually at least three copies stored. One remains with the mediators and one with each of the conflict parties. Often, one copy is also forwarded to the local government (see section 5 on linkages).

The primary basis for decision-making is the *pashtunwali*. More specific *narkh*<sup>29</sup>, however, does not play any role. This is due to the type of conflicts that are dealt with by the informal system in *nahia* 5. *Jirgas* are mainly held on civil cases over property or debts and over minor criminal offences like petty theft or scuffles, which are not serious enough to require the adherence to *narkh*. Serious criminal cases and cases involving women are either registered in a government court, or, frequently, taken to rural areas, where the reach of the state is more limited than in Jalalabad<sup>30</sup>.

## 4.2 Informal Justice in Ahmad Aba

At the centre of the informal justice system in Ahmad Aba are *jirgas*, which are predominantly drawn from tribal *shuras* at the village, district and provincial level. The existing *shura* structures in Ahmad Aba date back to the *jihad* against the Russians, when the *mujahideen* set up local, district and provincial level *shuras*. Even though Ahmad Aba was then still a part

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<sup>27</sup> Interview, provincial director of the Federation of Afghan Craftsmen and Traders, 14 March 2009, Jalalabad.

<sup>28</sup> Interview, Sikh-representative, 9 April 2009, Jalalabad.

<sup>29</sup> Refers to the community specific interpretation of various elements of the customary law (*Pashtunwali*) that are used in a *jirga*. The mediators are bound to follow specific rules for different crimes, the *narkh*.

<sup>30</sup> Interview, Deputy Head of the Provincial Council, 17 March 2009, Jalalabad.

of Said Karam district, the Ahmad Aba *shura* was already established as Ahmadzai tribal *shura*<sup>31</sup>. As a general rule, resolution attempts start within the village-community through local *shuras* and only move 'upwards' to involve outsiders if these attempts fail.

In Ahmad Aba 65 of those *shuras* exist, one for each village. According to the internal agreements many tribes have (see below), it is in fact compulsory to first approach the local *shura* in case any dispute arises<sup>32</sup>. A *jirga* consisting of all or some the *shura* members is formed. If this *jirga* fails to reach a decision, or if its decision is rejected by one of the disputants, the conflict moves either directly to the district *shura*, or to the district governor's office (see section 5 on linkages). However, estimates by mediators involved in *jirgas* in villages as well as at the district level suggest that more than 90% of conflicts are solved at the local level<sup>33</sup>.

Founded in 2003, the Ahmad Aba district *shura* consists of 19 members of whom 17 have been selected by their respective tribes and two by the district governor. The basic mandate of the *shura* is to liaise between the residents of Ahmad Aba and the government, particularly the provincial governor. In addition, the *shura* represents an important body for the informal resolution of disputes<sup>34</sup>. A member estimates that the *shura* has solved between 300 and 400 cases since it was set up in 2003. Most of the civil cases dealt with are land conflicts, most of the criminal cases murders. According to a member, in its initial years the *shura* dealt predominantly with land conflicts involving refugees returning from Pakistan. Since then, the case-load of the *shura* has declined significantly and it has presently only ten disputes pending resolution<sup>35</sup>.

Reflecting the broader role of the district *shura* as a liaison point to the government, the district governor is rather prominent in the resolution of conflicts through this body. Disputes are either brought to the *shura* directly by elders, by local *shuras* if their attempt at resolving an issue has failed, or the district governor refers cases to it. It is also the district governor who usually chooses the members for the *jirga*. Once the *jirga* has been granted *waak* by the disputants (usually *toy warai waak* in civil and *narkh waak* in criminal cases), the mediators collect *baramta* (guarantee money) from them and have them sign a document confirming the *waak* given. The *jirga*-decision is then again set out in a written document which is signed by the disputants and mediators and confirmed by the governor<sup>36</sup>.

The role of the *ulema* in the resolution of conflicts is very limited in Ahmad Aba. While the *ulema* seems to play no role at all at the village-level, conflict-mediation at the district level may at times see the involvement of the eight member *ulema-shura* of Ahmad Aba. This *shura* was formed only recently. Before 2005, only a provincial level *ulema-shura* had existed. According to a member of the *shura*, its formation three years ago was the result of a government-request and its primary purpose to counter any possible advances of insurgents in the area. As the *ulema* are supposed to have easier access to the Taliban, the same *shura* member argues, the *shura* is meant to assist the government in talks with them. For Ahmad Aba, however, where there is no active insurgency, no such contacts have taken place as of yet. The *ulema-shura* gets involved in the resolution of conflicts only in very particular cases. Conflict parties as well as the governor do usually not approach them. Instead, the district *shura* may call on them in disputes its members are unable to resolve. These are particularly inter-tribal conflict over land. The involvement of the *ulema* seems to take place in order to seek a broader consensus in conflicts which pit large parts of the community against each other.

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<sup>31</sup> Interview, Salam Khel elder, 9 May 2009, Gardez.

<sup>32</sup> Interview, Salam Khel elders, 9 April 20, Gardez.

<sup>33</sup> Interview, tribal elder and member of Ahmad Aba district *shura* as well as jihadi-*shura*, 13 May 2009, Gardez.

<sup>34</sup> Interview, member of the Ahmad Aba *shura*, 18 March 2009, Ahmad Aba.

<sup>35</sup> Interview, member of the Ahmad Aba *shura*, 18 March 2009, Ahmad Aba.

<sup>36</sup> Interview, member of the Ahmad Aba *shura*, 18 March 2009, Ahmad Aba.

On the provincial level, five *shuras* exist, but membership, competences and operational practice overlap to a degree which render the distinction between most of them irrelevant for most situations. In terms of significance for conflict resolution, the *shuras* can roughly be grouped into *jihadi-shura*, *qawmi-shuras* and *ulema-shura* on the one and provincial *shura* (or Provincial Council – PC) on the other hand. Two *qawmi shuras* exist, one for Pashtun tribes and one for Dari-speakers. They are comprised of representatives of all tribes of Paktia. A smaller number of the most influential elders of the province form the *jihadi-shura*. This council was set up by the *mujahideen* during the war against the Russians, and a confederation of provincial level *jihadi shuras* is now registered with the Ministry of Justice as formal organisation. The head and deputy head of the *jihadi-shura*, are also the head and deputy head of the *ulema shura*, which comprises around 100 religious scholars. The four *shuras* hold joint meetings, and are usually approached as one for the resolution of conflicts. The lines of distinction between them are therefore blurred to the extent that even the senior leadership is not quite aware about which particular member belongs to which *shura*<sup>37</sup>.

Most conflicts dealt with at the provincial level are referred to the *jihadi/ ulema* council from district *shuras* or by the provincial governor. With the majority of disputes solved in the districts, these are only very problematic conflicts, in particular inter-tribal conflicts over larger pieces of land as well as murder-cases and conflicts over women between different tribes.

The Provincial Council appears to play a less important role in the informal resolution of conflicts, although this is disputed. A former head of the Council asserted that it usually deals with big inter-tribal conflicts, which are referred either by the provincial governor or a *jirga* for which the case proved to be complicated<sup>38</sup>. The disputes are then dealt with purely according to customary law. In contrast to other bodies involved in the informal resolution of conflicts, however, the Provincial Council does not raise *baramta* and the acceptance of its decisions is claimed to be voluntary<sup>39</sup>. Members of the *jihadi-* and *ulema-shura*, however, hold this representation of the Provincial Council's role in resolving inter-tribal disputes to be grossly overstated. In the first case from Ahmad Aba examined for this study, the dispute between Salam Khel and Khalikhel, members of the Provincial Council did try to mediate on request of the provincial governor. As a result, however, these councillors are now formally charged with misuse of authority as the mandate of the Provincial Council is formally purely legislative<sup>40</sup>.

Overall, the absolute majority of all non-state dispute resolution mechanisms in Ahmad Aba decide according to the *pashtunwali*, and the process by and large follows the general template for *jirgas* outlined in the previous section. This includes the submission of *baramta* as guarantee money, which equips the *jirga*-mechanism with considerable implementing power<sup>41</sup>. A notable exception, similar to Jalalabad, is that mediators are usually not selected by the disputants themselves, at least at the district level. Although it is often stressed that disputants may refuse the suggestions made for example by the district governor, this practice may hint at genuine limits to the voluntary nature of the *jirga*-mechanism.

Usually no or little change in process takes place when *ulema* become involved. Basis for decision making remains the *pashtunwali*. Only on the explicit request of the conflict parties do the mediators decide according to *sharia*. These request are rare and allegedly mostly opportunistic, i.e. the application of *sharia* would lead to a more suitable result<sup>42</sup>. Probably reflecting the less influential standing of *mullahs* in Paktia, the *ulema* usually stresses the commonalities between *pashtunwali* and *sharia* over their differences. In comparison to Jalalabad, conflicts between customary provisions and *sharia* are played down and only reluctantly discussed<sup>43</sup>. While *sharia* had become temporarily more influential as basis for

<sup>37</sup> Interview, deputy head ulema shura, 11 May 2009, Gardez.

<sup>38</sup> Interview, member of the Provincial Council, 26 April 2009, Gardez.

<sup>39</sup> Interview, member of the Provincial Council, 26 April 2009, Gardez.

<sup>40</sup> Interview, Prosecutor, 12 May 2009, Gardez.

<sup>41</sup> Interview, head of Ahmad Aba hoquq department, 28 March 2009, Ahmad Aba.

<sup>42</sup> Interview, member Ahmad Aba ulema shura, 11 May 2009, Gardez.

<sup>43</sup> Interviews, member Ahmad Aba ulema shura, 11 May 2009;

the resolution of conflicts during the Taliban era, members of the *ulema* admit that it has since had to cede ground to Pashtun tribal customs again<sup>44</sup>.

The issue of *waak* also merits special attention in Ahmad Aba. No matter through which *shura* a dispute is resolved, the question of *toya warai waak* or *narkh waak*<sup>45</sup> arises. As a common *narkh* for all Ahmadzai exists, conflicts between different *narkhs* do not occur at the district level. However, mediators expressed a strong preference for *toya warai waak* over *narkh waak*. As a general reason, they were of the opinion that *narkh* with its specific provisions for fact-finding and compensations is closer to a court decision, while *toya warai waak* offers the scope to negotiate the compromise necessary for a genuine reconciliation. More specifically, uneasiness with the fact-finding rules under *narkh waak* was expressed. While witnesses may be questioned under *toya warai waak* as well as Ahmadzai *narkh*, the latter also allows the conflict parties to swear on the *q'uran* instead. This was not considered an absolutely reliable way of establishing the facts of a dispute<sup>46</sup>.

Another reason for the preference of *toya warai waak* specifically in murder-cases is that if they are resolved informally at the district level, payments of money or the transfer of agricultural land is usually accepted as an alternative to *bad*<sup>47</sup>. However, while this practice points to the flexibility of Pashtun customary law with regards to rules incompatible with Afghan statutory law and international human rights obligations, its applicability is limited. As the compensation-payments are substantial, only richer families will be able to avoid *bad*, while those from a less wealthy background will not be able to afford to do so.

### **Tribal agreements:**

In addition to the general principles of the *pashtunwali* and specific *narkh*, additional or more specific rules of conduct, the rules for dealing with disputes and the relationship with government institutions are regulated in tribal agreements for most tribes in Paktia. Except for Zurmat district, these agreements exist all over Paktia. Differences exist in terms of the areas covered and the degree of institutionalisation, with some of the agreements existing only in oral form and others as written contracts, signed by all the tribe's elders. In order to support their implementation, many of the agreements also establish an *arbakai* with the mandate of enforcing their provisions. Others call *arbakai* more ad-hoc when the need arises, in order to prevent abuse of authority<sup>48</sup>.

The most recent tribal contract of the Salam Khel in Ahmad Aba district, for example, was agreed on in early 2009 at a meeting of elders called by one of the most influential Salam Khel elders. It follows past agreements with similar provisions, but introduces several new points which reflect more recent concerns. Of the 24 provisions, the 14 in the first two parts pertain to social occasions and ceremonies like marriages and funerals. Most of them cap the expenses that are allowed to be made and ban certain practices considered dangerous like firing shots into the air. The third part deals with criminal offences and sets out rules for dealing with disputes. Reacting to recent events causing tensions with neighbouring tribes, heavy fines of between 50,000 and 100,000 Afs. are put on growing, smuggling and consuming narcotics, robbery and abduction. For disputes between tribesmen, fighting is prohibited and it is further specified that they need to be dealt with through a tribal council

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<sup>44</sup> Interview, deputy head *ulema shura*, 11 May 2009, Gardez.

<sup>45</sup> Establishes absolute authority to the *jirga* mediators, without a need to look for more specific *narkh waak*, which establishes limited authority for the mediators as they have to follow specific *narkh*.

<sup>46</sup> Interview, tribal elder and member of Ahmad Aba district *shura* as well as *jihadi-shura*, 13 May 2009, Gardez.

<sup>47</sup> Interview, Ahmad Aba elders, 14 April 2009, Gardez. In *bad*, girls from the family of the perpetrator are given in marriage to the family of the victim in compensation of a murder or serious injury leading to mutilation.

<sup>48</sup> Interview, members of Machalgho local *shura*, 10 May 2009, Gardez. On *arbakai* see also Schmeidl & Karokhail (forthcoming).

first and may only be referred to a government court if this mediation attempt fails<sup>49</sup>. An 18-member *arbakai* is established for implementing the agreement.

These kinds of agreements are widespread in Paktia. They are not only set up by tribes, but also by residents of villages or clusters of villages. As a result, individuals often have to follow several sets of rules. Salam Khel residents of Machalgho village in northern Ahmad Aba, for example, have to adhere both to the Salam Khel agreement and an agreement at the village-level, which prohibits banditry as well as hosting insurgents or smugglers, punishable by burning down the house of the offender. In addition, robberies and insurgent activities are banned by a recently renewed contract between the residents of Machalgho village and a cluster of villages in a neighbouring area<sup>50</sup>.

### 4.3 Perceptions of the Informal Justice System

Overall, the positive sides of *jirgas* were mainly described in contrast to the formal justice system. Residents of *nahia* 5 stressed that *jirgas* solve disputes as a matter of hours or days, as compared to months or years in the formal system. Moreover the pervasive corruption in courts was contrasted with the opinion that in a *jirga* 'nobody can eat the right of someone else'. Another factor for the overall positive judgement of the *jirga*-mechanism in Jalalabad is the perceived transparency of the process which is described as easy to understand as compared to the opaque workings of the court system<sup>51</sup>. These perceptions largely matched those of Ahmad Aba residents, who equally held overall very positive views of *jirgas* as compared to government courts<sup>52</sup>.

The *jirga*-system, however, was claimed to also not be free of corruption. This holds true especially for the case of *nahia* 5 of Jalalabad. The most influential mediators here were termed "*tijaraati* elders" (literally: commercial elders), who would enrich themselves as much as possible through *jirga* processes.

An important dimension of the principles governing *jirgas* is that they stress the independence of the disputants. The authority of the *jirga* is to be accepted voluntarily and on a case-by-case basis. This legitimises the process from the perspective of the *pashtunwali*, which has individual autonomy as one of its basic tenets. It is also used as a main argument against the existence of

abuse of authority by elders and notables. If elders are biased or corrupt, the line of argument goes, they will lose the respect of the community and not be chosen as mediators in the future. In *nahia* 5 of Jalalabad,

**Box:** "No, it was not like that disputant parties appointed their representatives. Both the parties agreed with me and my decision was acceptable for them." (Mediator, Jalalabad)

however, both the choice between formal and informal system and of the specific mediators used is severely restricted. A group of influential elders and notables is able to pressure disputants both to use the informal system and choose the mediators used for the *jirgas*. Their power to do so is based on their position as brokers and gatekeepers between the state as well as aid agencies and the residents of *nahia* 5, who depend on them for access to state- and aid-resources (see section 5.2 for details). The control-mechanism that the 'voluntary' nature of the *jirga* mechanism represents is thus effectively disabled.

The ineffective control mechanism renders corruption a regular occurrence in the *jirga*-system of *nahia* 5. The disputants usually have to pay money to the mediators. As demanding payment is widely viewed as immoral, it is normally concealed as reimbursement

<sup>49</sup> Interview, Salam Khel elder, 9 May 2009, Gardez.

<sup>50</sup> Interview, members of Machalgho local shura, 10 May 2009, Gardez.

<sup>51</sup> FGD, residents of *nahia* 5, 27 February 2009, Jalalabad.

<sup>52</sup> Interview, Ahmad Aba residents, 12 April 2009, Gardez.

of expenses for fuel, meals or mobile phone credit. Similarly, elders often do not return a part of the *machalgha*. In some cases, this may even constitute a 'perverse incentive' inducing elders to artificially prolong the mediation process, as is illustrated in the quote from

**Box:** "The elders often take *machalgha* in the form of money and the *jirgamaran* divide the *machalgha* among themselves. Sometimes they intentionally delay the decision of a dispute in order to avoid returning the money to the disputants. At last when they give a decision, all or most of the money has been eaten by them by the name of meals or fuel for their cars." (Ulema, Jalalabad)

the Box. This, however, was not frequently claimed for *nahia* 5 and both conflicts studied for the case studies were resolved as a matter of days or even hours. In comparison to the formal system, mediation through elders is still seen as the 'lesser evil', or, as one of the less influential elders from a mosque shura expressed it; people would still rather pay 2000 Afs. to the elders than 10,000 Afs. to the government<sup>53</sup>.

The dependency-relationship between the *tijaraati* elders and residents of *nahia* 5 also contributes to the fact that their *jirga* decisions are more consistently implemented than those of other mediators. This is otherwise a general concern about the decisions of *jirgas* in *nahia* 5, which are regarded as informal and therefore lacking in 'strength' compared to court decisions<sup>54</sup>. The relative strength of the decisions of the most influential elder is further bolstered by implicit threats of violence. The use of violence to enforce decisions appears to occur rarely if ever, but residents named it as probable result if the *jirga* decisions of influential elders would be violated<sup>55</sup>. This, in turn, was frequently named as the main reason why a determinant for the authority necessary for becoming an elder is 'social influence', defined as controlling a clientele (mostly based on tribal affiliation), which could force disputants to respect agreements<sup>56</sup>.

Most of these problems do not seem to exist to the same extent in Ahmad Aba. There appears to be no direct evidence that overall dependency of the population on elders limits the effectiveness of the built-in accountability mechanisms of *jirgas*. The district's elders fare much more favourably in the opinions of the district's residents. *Tijaraati* elders were said not to exist in the district, but only at the provincial level, where they would charge fees for using the connections in the government<sup>57</sup>.

Nevertheless, a concern related to failures of *jirgas* in Ahmad Aba is that *jirga* mediators are perceived to often be partial in favour of one of the contending sides. Partiality is considered the most important reason for *jirgas* to fail. This may occur either because partial mediators have been selected by either side and the *jirga* itself fails to come to a conclusion. It may also happen when one of the disputants is of the opinion that the entire *jirga* is biased, e.g. because the mediators have been bribed<sup>58</sup>. The usual course of action in both cases would be to call another *jirga* comprising elders from third parties.

The access of individuals from Ahmad Aba to the formal justice sector is limited through intra-tribal agreements, pressure from the district governor, and potentially from the side of influential elders as well (see section 5.2). Within this limit, the factors wealth and manpower are decisive for the choice between the two options. As we have seen, wealth raises an individual's chances to win a case in court (see section on formal system). In the case of conflicts in villages, there is in principle always the possibility to resort to violence. This grants a specific advantage to those who can draw on a large family, subtribe or other sort of following, which can be mobilised for violent confrontations. As mediation efforts in principle always take place on a voluntary basis, this advantage is not cancelled out in the *jirga*-

<sup>53</sup> Interview, 5 members of a mosque shura, 13 April 2009, Jalalabad.

<sup>54</sup> Interview, Ahmad Aba residents, 12 April 2009, Gardez.

<sup>55</sup> Interview, conflict party in case 2, 9 April 2009, Jalalabad

<sup>56</sup> Interview, conflict party in case 2, 10 April 2009, Jalalabad

<sup>57</sup> Interview, Ahmad Aba resident, 13 May 2009, Gardez.

<sup>58</sup> Interview, Ahmad Aba resident and elder, 13 May 2009, Gardez.

mechanism, but translates into a better bargaining position when the mediators deliberate what would constitute an acceptable decision for the disputants. As a result, local elders from Ahmad Aba assess 'weaker' disputants, i.e. those with a small family or subtribe, to be more likely to try and register a case with the government court<sup>59</sup>.

For parties financially stronger than their opponents, *khalat*<sup>60</sup> offers an opportunity to gain an advantage in *jirga* processes. In what effectively amounts to a bidding process, two financially strong parties may attempt to raise the costs of *khalat* to a prohibitive level for each other and sway the elders in their favour. Although considered very shameful, this practice also occurs if there are considerable wealth differences between the disputants. The less affluent party finds itself in the difficult position of either not agreeing to hold a *jirga* and therefore being accused of avoiding the inquiry into the rightfulness of their claim, or agreeing to a *jirga* and losing the case<sup>61</sup>.

## 5 Structural Linkages

In practice, key actors from the formal and the informal justice systems cooperate closely in both research sites. The institutions central to the informal justice system in Ahmad Aba and Jalalabad, i.e. local/ mosque *shuras* and district/ *nahia shuras*, have become increasingly formalised over the last years, in the sense that they and their members are registered with the district government and in the case of the district shura with the provincial government as well.

When talking about the distinction between formal and informal justice system, it is easily forgotten that the same individual may frequently hold important positions in both structures. Most judges and prosecutors in Nangarhar hail from influential families. Accordingly, many of them, including provincial level justice officials, are also influential tribal elders and are frequently called to mediate in *jirgas* in their districts of origin<sup>62</sup>. The same holds true for Paktia. This fact indicates that existing divides

**Box:** "In my personal point of view jirga is a good thing and I am totally in favor of jirgas. Along my official work I am also a well-known elder and jirgamar of my area. If you ask in Khoghani, there will be no jirga in which I haven't taken part. [...] I am also an elder of my tribe and responsible for dealing with all those problems which happen in my village. I haven't brought those cases outside from my village and resolved all those problems by talks."  
– Primary Court Judge, Jalalabad

between the formal and informal justice system do not rest on lack of knowledge and mutual misunderstanding but rather on the formal incompatibility of professional roles.

### 5.1 Institutional Linkages

Cases in Jalalabad and Ahmad Aba are frequently referred from the formal to the informal system, or with the help of government officials kept in the informal system in the first place. The first contact point for registering civil cases as specified in the law is the *hoquq* department. In Jalalabad, claimants are here usually strongly encouraged to solve their dispute through the informal justice system. *Hoquq* staff justifies this policy with reference to

<sup>59</sup> Interview, members Machalgho local shura, 10 May 2009, Gardez.

<sup>60</sup> A fee demanded by jirga mediators for their services.

<sup>61</sup> Interview, prosecutor Paktia prosecutor's office, 12 May 2009, Gardez.

<sup>62</sup> Interview, provincial level prosecutor, 8 April 2009, Jalalabad.

the *sharia* principle of *sulh*<sup>63</sup> and relevant legal provisions. Although encouragement for the referral to the informal system seem to be not as institutionalised, the primary court judges interviewed also asserted that they strongly support the informal resolution of civil disputes and often advise disputants to seek the arbitration of elders before registering a case<sup>64</sup>.

After a civil case is registered in Ahmad Aba, the *hoquq* department generally first encourages the disputants to resolve their conflict through a *jirga*. If they agree, the district governor selects the mediators for the *jirga*<sup>65</sup>. Most conflicts in which disputants approach the government, however, go directly to the district governor, who likewise mostly tries to convince the parties to use the informal system.

A significant formalisation of conflict resolution through *jirgas* at the district/ *nahia* level can also be observed in the registration of mediation results. Usually the decisions for all cases referred by the formal system and successfully resolved by *jirgas* are formally registered. However, there is no standardised way of doing this and the precise form of registration varies according to which government body initiated the referral in the first instance. In Jalalabad, if the dispute is referred by *hoquq* department or *nahia* office and no case has yet been registered, the general practice is to obtain a stamp for the *jirga* decision from the respective office and have one copy stored there. In minor criminal cases, a copy is also sent to the *nahia* police station. If a case has already been registered and is referred to a *jirga* by a court, the respective judge usually simply passes a verdict following the decision of the *jirga*<sup>66</sup>.

In Ahmad Aba as well, a substantial proportion of *jirga* processes is now formally registered in the district government. If a dispute is resolved informally at the district level without a formal case having been registered in a court, then a copy of the *jirga* decision is usually stored in the district governor's office. According to the district governor, reliable files on *jirga* decisions in Ahmad Aba exist since about 2005, when the *hoquq* department and prosecutor's office were established in the district<sup>67</sup>.

Arguably because of the role of customary law in Paktia is even stronger, formal justice institutions are forced to take it even more into account. As a result, linkages between the formal and informal justice system in Paktia witness an even higher level of formalisation at the provincial level. Paktia courts frequently refer civil cases to *jirgas*, and formally register the results. As a city court judge asserted, the cases referred by him to *jirgas* are often important ones and their number is significant<sup>68</sup>. When disputants in a civil case attempt to register their case in the primary court in Gardez, the judges usually attempt to convince them to resolve their conflict informally with the help of mediators. If the disputants follow the advice at this stage, i.e. before any formal registration in court (*sooraty hal*) has occurred, they have the choice between registering the mediation result with the *hoquq* department, or as *eslah khat* with the court. In the latter case, 3% of the dispute value has to be paid as tax, but the *jirga* decision acquires formal status equivalent to a primary court verdict. If the disputants only opt for informal resolution after the case has been registered, the mediation result has to be registered with the court as *eslah khat*<sup>69</sup>. In the appeals court, judges equally often advise disputants to resolve their conflicts informally and, if successful, formally register the result<sup>70</sup>.

The relationship between courts and *shuras* is not a one-way-road. As many *jirgas* leave disputes unresolved, a significant number of cases enter the court system after unsuccessful mediation attempts. According to the head of the Gardez City Court, significantly more

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<sup>63</sup> Concept from *sharia*, which refers to the mediation of disputes.

<sup>64</sup> Interview, Head of the Jalalabad City Court, 19 February 2009, Jalalabad.

<sup>65</sup> Interview, head of Ahmad Aba *hoquq* department, 28 March 2009, Ahmad Aba.

<sup>66</sup> Interview, Head of the Jalalabad City Court, 19 February 2009, Jalalabad.

<sup>67</sup> Interview, Ahmad Aba district governor, 11 May 2009, Ahmad Aba.

<sup>68</sup> Interview, Head of Paktia City Court, 19 April 2009, Gardez.

<sup>69</sup> Interview, Paktia City Court judge, 12 May 2009, Gardez.

<sup>70</sup> Interview, Paktia Appeals Court judge, 26 March 2009, Gardez.

criminal than civil cases enter the court system in this manner, a fact which he attributes to an overall rising number of criminal offences<sup>71</sup>.

Very frequently, disputes never leave the district or *nahia* or are formally registered in the first instance. In Jalalabad, the *nahia* office or police station is informed of a dispute, the case referred to a *jirga* and a copy of the decision stored with the *nahia* government bodies. This is also the level where, contrary to the professed policy of all representatives of the formal justice system, more serious criminal cases are often not registered and referred to the local elders for resolution instead. While it appears that very serious cases like murders would still either be dealt with through the formal system or otherwise be resolved by a *jirga* outside of the city, this is often the case for criminal offences like e.g. fights resulting in serious injuries or traffic accidents resulting in deaths<sup>72</sup>.

This non-registration of criminal cases is also where the importance of the government-connections of the elders of the *nahia* comes into play. When a resident of *nahia* 5 is arrested on criminal charges, they would usually petition the *nahia* chief of police not only to temporarily release the suspect but also to not register a case and let the elders deal with the issue. This usually involves the payment of bribes to the police. In an interesting variation, a case may be registered as a less serious offence, officially referred to a *jirga* and the 'toned down' decision document be deposited at the police station. This was for example the case in the second conflict examined as case study, in which a rather serious fight between cousins over outstanding debts, involving mutual threats with guns and resulting in injuries was portrayed as harmless fistfight in the *jirga's* decision document.

In Ahmad Aba as well, the perpetrators of criminal offences and district level government officials have a common interest to prevent criminal cases from entering the formal system and resolve them informally for different reasons. When criminal cases are brought to the

**Box:** "This was help of the wuluswal for you. Now what can be done for the wuluswal?" (Prosecutor, Paktia)

attention of the governor, he and the district Chief of Police (CoP) can also usually be bribed into not registering the case officially<sup>73</sup>. Particularly a former CoP was associated with maintaining good ties with local criminals, and was seen sitting with well-known robbers in the bazaar of Ahmad Aba<sup>74</sup>. His case also demonstrates the limits of official-criminal cooperation. A recent spate of robberies victimising residents of neighbouring districts as they were travelling through Ahmad Aba severely strained relations with neighbouring tribes, and thus affected the district population as a whole. As a result, Ahmad Aba elders registered a complaint with the provincial head of security. Provincial police forces arrested several robbers pointed out by the elders, and the CoP was replaced in early May 2009<sup>75</sup>.

Reports for Paktia in general suggest that the process in the district governor's office may frequently run along a similar line for civil cases. Approached by the disputants, the governor would warn them about possible criminal charges against them, e.g. for fraud if ownership documents are found invalid. In an institutional environment as little accountable as that of Afghanistan, this claim may often appear quite credible. The governor would then offer not to report the 'case', demanding a bribe in return. This practice was also claimed to constitute a point of cooperation between the governor and some elders, who are suggested by the governor to mediate in the case and demand their share through *khalat*<sup>76</sup>.

<sup>71</sup> Interview, Head of Paktia City Court, 19 April 2009, Gardez.

<sup>72</sup> Interview, 5 members of a mosque shura, 13 April 2009, Jalalabad.

<sup>73</sup> Interview, Ahmad Aba resident, 13 May 2009, Gardez.

<sup>74</sup> Personal observation, TLO research team, April 2009, Ahmad Aba.

<sup>75</sup> Interview, Ahmad Aba resident, 13 May 2009, Gardez.

<sup>76</sup> Interview, Prosecutor, 12 May 2009, Gardez.

Linkages between the informal justice system and government institutions also back the implementation of *jirga* decisions, and in *nahia* 5 of Jalalabad the implementation of court decisions as well. *Jirga* decisions are often easily implemented, for the reasons laid out above (section 4.2). A further encouragement for the conflict parties to come to an agreement especially in criminal cases, however, is to keep the state out and not have the case registered with a government court if the mediation through *jirgas* fails. In the case that *jirga*-decisions have been formalised as court-judgements, or court decisions been confirmed by *jirgas*, implementation seems to be particularly unproblematic. This was observed, for example, in the first of the two case studies examined in Jalalabad. Although one of the two parties had at first defied a court order to clear a part of a house contested, he gave in once the court verdict was confirmed by a *jirga* comprising among others also members of the two most influential families of the *nahia*. While the mediators claimed respect of the elders to be the reason for this change of mind, both conflict parties identified fear of police involvement as primary factor<sup>77</sup>. The latter version seems credible if we take into account that after having the court decision confirmed by the elders, the defiant conflict party would not be able to count on their protection in case of a confrontation with the police.

In Ahmad Aba, if the decision of a local *shura* is not accepted by one of the conflict parties, one of the options for the other party is to approach the district *shura*. The other option is to inform the district governor, who then tries to convince the defecting party to accept the verdict. It is not entirely clear how much pressure the governor brings to bear. While some claim that he only tries to convince the defector verbally that a court procedure would be lengthy, costly and therefore ill-advised<sup>78</sup>, others mention the involvement of the police for forcing the defector to appear in front of the governor, which hints at more robust arguments<sup>79</sup>. In any case, members of local *shuras* claim that the assistance of the governor in most cases helps to have the *jirga*-decision accepted and implemented<sup>80</sup>.

An area more peculiar to rural Ahmad Aba and without importance in Jalalabad City are highly politicised conflicts between tribes, which easily escalate into violent clashes. These conflicts are predominantly over larger pieces of agricultural or building land and often have a criminal dimension, e.g. when clashes have resulted in deaths and injuries. Resolution of these conflicts frequently fails at the district level, and they come to the attention of the provincial governor who then usually turns to informal justice institutions, predominantly the *jihadi*- and *ulema-shuras*. The accounts of members of the provincial level *shuras* indicate, that they rarely become involved without the mandate of the provincial governor<sup>81</sup>.

The most fundamental linkage in rural areas, however, is probably the agreements between tribes and government, mostly the district governors (see section 5.2). This is the case in the general sense that these contracts regulate the competences and responsibilities of state and tribal institutions. There are also very specific interactions. The initiation, renewal and amendment of the contracts take place not with the involvement, but sometimes on the initiative and often with the input of the district governor. The Salam Khel agreement, for instance, was requested by the district governor and signed by him as well.

The agreements partly reflect local and inter-tribal dynamics, but they also very directly answer to the demands of the government and, less directly, to those of the US military forces in Paktia. Salam Khel representatives are adamant about the fact that they are doing a favour to a government unable to control the area by itself. Their own interests, in turn, does not only lie in keeping the government out for sheer autonomy's sake. The interference of the government and even more of foreign military forces is seen as risk to stability, as conflict parties may use their links to the external actors to pass on wrong information about

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<sup>77</sup> Interviews, conflict part A, case 1, 27 March 2009, conflict party B, case 1, 31 March 2009, mediator case 1, 7 April 2009, Jalalabad.

<sup>78</sup> Interview, members of the Machalgho local shura, 10 May 2009, Gardez.

<sup>79</sup> Interview, Khalikhel elder Case 1, 12 April 2009, Gardez.

<sup>80</sup> Interview, members of the Machalgho local shura, 10 May 2009, Gardez.

<sup>81</sup> Interviews, deputy head of jihadi-shura, 11 May 2009; Ahmad Aba member of jihadi-shura, 13 May 2009, Gardez.

their opponents and thereby cause violent escalation. Example given referred to Pacha Khan Zadran and his links to the American forces in the 2002 standoff at the provincial level, but also to the local police who for example mistakenly arrested one party to a civil conflict after the other party represented the person as drug smuggler<sup>82</sup>.

## **5.2 Informal Linkages and Dependency on Elders**

The main responsibility of the elders in the *nahia shura* is to liaise with the local government, particularly with the municipality and the canal department. Formally, these interactions are predominantly about communicating needs and priorities for infrastructure-development and –maintenance; informally, they go far beyond. Residents and elders of *nahia* 5 assert that the extent to which the area benefits from state and development resources depends crucially on how well connected its elders are with municipality and provincial level government officials<sup>83</sup>. On an individual level, well-connected elders help with ‘work’ in the administration against a fee. This comprises using their connections to cut through red tape, e.g. for helping people to obtain the identity cards they are actually entitled to, as well as actually circumventing government regulation, as for example by helping people who have been arrested to get out of prison and preventing cases against them to be formally registered by the police<sup>84</sup>. This particular instance is also of importance for the relationship between formal and informal justice systems in the *nahia*, as has been demonstrated in the considered in the previous sub-section.

The importance of government contacts is reflected in the leadership structure of the *nahia shura*. The most influential members, who also selected its head, are the eight *wakeel-e guzars*. The head of the *shura* himself is said to command by far the best connections to important government officials in the municipality and at the provincial level. These ties date back to his position in the provincial government before the 1979 revolution and to his close ties with Haji Qadir, when he was provincial governor in the early 1990s<sup>85</sup>. Haji Qadir was an important strongman in Nangarhar. Qadir himself was killed in 2002 in an attack by gunmen in Kabul, but his family remains influential and his former network strongly represented in the administration. The head of the *shura* in particular is thus called on whenever any obstacles are to be overcome in the administration.

The other major factor rendering the population dependent on the head of the *nahia shura* and the *wakeel-e guzars* of the *nahia* is the control they have over the distribution of international aid. A main source of aid in the *nahia* is UN Habitat, which formed ‘cluster *shuras*’, whose membership partly overlaps with that of the mosque *shuras* and which operate under the supervision of the *nahia shura*. The UN Habitat aid is channelled and partly directed through this structure, which effectively grants its leadership influence about its distribution. WFP aid in the form of wheat, flour or cooking oil is distributed according to lists of ‘deserving beneficiaries’, which are compiled by the *nahia shura*. According to residents and elders, a part of the food aid is retained by the members of the *nahia shura*, and the bulk of it distributed to their relatives and supporters.

As result of the dependency of the local residents on the head of the *shura* and a handful of other elders and notables, the usual control-mechanisms against abuse of power of elders are rendered ineffective in *nahia* 5. Disputants in the conflicts we examined in the case-studies as well as key informants expressed the opinion that there was little choice to reject mediation-offers by elders or not to accept their decisions. In case someone would, it was expected that the relationship would be disrupted with lasting effect, and no assistance provided in the future. This expectation was based on examples in which precisely this happened, for example to the extent that the elders of the *nahia* did not even attend the

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<sup>82</sup> Interview, Salam Khel elder, 9 May 2009, Gardez.

<sup>83</sup> Interview, 5 members of a mosque shura, 13 April 2009, Jalalabad.

<sup>84</sup> Interview, resident of nahia 5, 13 April 2009, Jalalabad.

<sup>85</sup> Interview, 5 members of a mosque shura, 13 April 2009, Jalalabad.

funeral of a person who had declined their offer to mediate a dispute he was involved in<sup>86</sup>. In the light of the comprehensive dependency on the elders, breaking the relationship with them might be out of the question for anybody without own good connections to the administration and therefore most of the *nahia*'s population.

**Box:** “the people also think about their future. If they don't accept the decisions of the elders, tomorrow these elders will not listen to them and never help them.” (Professor at Nangarhar University and Advisor to the Governor)

However, some of the factors that are responsible for the dependency-structures in Jalalabad can also be found in Ahmad Aba. Here, however, there is no explicit evidence that they lead to corruption in the informal system (see section 4.3). Similar to Jalalabad, the main purpose of the district *shura* as an institution is to liaise with the district governor and other outside actors, i.e. predominantly provincial government and international development agencies. In this capacity, the district *shura* plays an important role in the distribution of aid and development resources in Ahmad Aba. The most important development actors in the district are the Afghan government, with road-building projects and the construction of the Machalgho dam, the American-led Provincial Reconstruction Team with a water-project, Care International with a solar power project as well as UN-Habitat and DAI with various trainings. In cooperation with the *ulema shura* and the local *shuras* affected, the district *shura* has a significant voice in where and how the projects are implemented. Important parts of this are staffing decisions, which provide an opportunity to dispense patronage but also for profiting personally. An important Salam Khel elder, for example, is the head of Care International's solar power project<sup>87</sup>. Most Ahmad Aba villagers as well as most members of the local *shuras* also depend on a limited group of elders for their connections with the government. As in Jalalabad, these are necessary, for instance, in order to free people who have been imprisoned by the police<sup>88</sup>.

## 6 Mutual Perceptions of Formal and Informal Justice Actors

There is a profound mismatch between the stated perceptions of elders on the one and those of judges, prosecutors and *hoquq* staff on the other hand, which reveal deep divisions, and the extensive cooperation taking place in practice. As pointed out under section 5, these representations may well rather be a tribute to professional roles when speaking to (foreign) researchers than reflecting perceptions guiding practice.

The question of punitive vs. reconciliatory justice in the case of criminal offences represents the main faultline between formal and informal justice system in both research locations. Here, perceptions reveal deep divisions, but also fundamental complementarities which would or already do enable fruitful cooperation. Thus, the distinction between *haq-ullah* and *haq-ul abd*, the law of the state and the reconciliation between perpetrator and victim, could represent a clear point of entry for cooperation in these cases. This view was widely shared among representatives of both systems. In fact, this cooperation already appears to take place in many instances (see above). Compared to other linkages, however, there seems to be virtually no formalisation yet.

<sup>86</sup> Interviews, Professor at Nangarhar University, 18 February 2009, conflict party in case 2, 10 April 2009, Jalalabad

<sup>87</sup> Interview, Salam Khel elder, 9 May 2009, Gardez.

<sup>88</sup> Personal observation, 9 May 2009, Gardez.

For civil cases, almost all representatives of the formal justice system in both research locations expressed strong support for restorative justice in general and the mediation between disputants through *jirgas* in particular. In this regard, their as well as religious dignitaries' main argument was frequently the principle of *sulh* (peace), according to which the *q'uran* gives preference to conciliatory justice. They also admit that the informal system resolves civil disputes much quicker and spares disputants considerable expenses<sup>89</sup>. Furthermore, it is widely acknowledged that *jirgas* reduce the formal case-load significantly and that it would not be feasible to abandon them<sup>90</sup>.

**Box:** "The decisions of the courts is like that: if someone gets hurt by a knife, his injury recovers but the scar remains. We accept jirga and sulh. Because Allah says in the Quran that sulh is better. The Quran demands to do Sulh. Whenever a dispute occurs between two muslim brothers, it demands to bring peace between them." – Primary Court Judge, Jalalabad

Representatives of the formal justice system perceive jirga mediators as well equipped to come to equitable and locally acceptable decisions for their often detailed knowledge of the actors involved. In Paktia and Jalalabad, however, they often doubt their willingness to do so, claim them to be little accountable to disputants<sup>91</sup> and often partial<sup>92</sup>.

In Jalalabad, as strongly as the *jirga*-mechanism is supported for civil cases, as staunchly and unanimously it is opposed for the resolution of any but minor criminal cases. The basic argument for this opposition is that *jirga*-

**Box:** "Sorry to say, that jirgas also take money. Usually they buy a sheep and slaughter it in front of the victim's house. The murder is buried under the soil and the jirgamen enjoy eating kebab. In criminal cases, the law should be imposed point by point." (Prosecutor, Jalalabad)

decisions in serious criminal cases favour the individual perpetrator and do not create a disincentive strong enough to deter other potential perpetrators<sup>93</sup>. In the context of criminal cases, the *jirga* mechanism is also argued to favour wealthier people as monetary compensations are less problematic for them. It is also claimed that wealthy individuals may frequently evade giving a woman from their family in *bad* and pay the bride price for another marriage instead. Reconciliatory justice is argued to be ineffective particularly in murder cases. A story frequently told in different versions is of a murder resolved by a *jirga*. Without the satisfaction of seeing the murderer in jail, however, the relatives of the victim soon after break the agreement and shoot the murderer. Criticism of the *jirga*-mechanism in criminal cases was much more carefully expressed in Paktia, reflective of the relative weakness of the state and the much higher proportion of criminal cases actually resolved informally.

The point drawing most criticism from within the formal system both in Jalalabad and Paktia is the practice of *bad*, i.e. marrying women from the perpetrator's family into the victim's family for compensation, as well as exchange marriage. Particularly prosecutors and members of the *ulema* stress these practices to be in violation of state law and *sharia*<sup>94</sup>. A provincial level prosecutor in Paktia therefore advocated to formalise the *jirga* system and ban practices such as *bad* and exchange marriage. For this purpose, he suggested to form a

<sup>89</sup> Interview, Jalalabad City Court Judge, 19 February 2009, Jalalabad. Interviews, Provincial level prosecutor, 19 April 2009; Head of Gardez City Court, 19 April 2009, Gardez.

<sup>90</sup> Interview, Deputy Head of the Provincial Council, 17 March 2009, Jalalabad.

<sup>91</sup> Interview, Provincial level prosecutor, 19 April 2009, Gardez.

<sup>92</sup> Interview, Head of Appeals Court, 26 March 2009, Gardez.

<sup>93</sup> Interview, Prosecutor, 1 March 2009, Jalalabad.

<sup>94</sup> Interview, Deputy Head of the Provincial Council, 17 March 2009, Jalalabad. Interview, Provincial level prosecutor, 19 April 2009, Gardez.

*jirga* comprised of all the tribes of Paktia, in order to agree on a set of common principles. This suggestion, he said was inspired by observations in Pakistan, where tribe-state relations are formalised to a higher degree<sup>95</sup>.

Many judges and prosecutors are open, however, to cooperation with *jirgas* in criminal cases. Precondition for them is still that perpetrators are tried and punished by courts according to state law. *Jirgas* are then awarded a possible role in additionally working on the reconciliation of perpetrator and victim. Judges frequently expressed that a successful reconciliation could result in a lower sentence or fine.

Elders and *jirga*-mediators frequently acknowledge that the state justice system is in principle useful. However, this statement is always qualified by assertions that the court system is slow, most judges corrupt and their decisions influenced by money and relationships<sup>96</sup>. This perception is sometimes contrasted with the court system under the Taliban regime, in which it is said no bribes in the form of either gifts or money were necessary, at least in the initial years of the regime<sup>97</sup>.

The other important point of criticism of the formal system refers to the lack of conciliatory justice in court decisions. *Jirga* mediators argue that court decisions will inevitably favour one side and do not take into account that only a judgement acceptable to all participants can restore peace in the community<sup>98</sup>. In an interesting twist of the story of the murder-case solved by a *jirga* and the murderer killed some time later, their murderer is imprisoned for ten years upon the judgement of a court, then released and shot by the victim's family the minute that he leaves the prison gates. Especially in Paktia, the fundamentally punitive approach of the formal legal system was vocally criticised. This approach is considered of little use in a social environment in which peace can not be enforced by a strong state but has to be achieved through consent to a compromise (even though in the negotiation of this compromise a wide variety of power-relations come to bear).

## 7 Conclusion: Rural and Urban Justice

This study confirmed the assertion of existing literature that informal justice system does not only serve as an important means for the resolution of conflicts, here in Jalalabad and Paktia, but is also well regarded by the local population. This presents an opportunity for developing a more formalised interaction between informal and formal justice providers in order to strengthen the credibility of the formal court system on the one hand, and increase the legitimacy of the customary system within the Afghan justice system on the other.

There are some clear differences between urban Jalalabad and rural Ahmad Aba in Paktia. Due to the relative strength of the state in Jalalabad, most serious criminal cases are dealt with by courts and so is a significant proportion of civil cases. The majority of civil cases (and some criminal ones as well) however are still resolved by *jirgas*, the importance of which can therefore not be discounted even in this major urban centre. In contrast, almost all disputes (criminal and civil) in rural Ahmad Aba are resolved by *jirgas* comprised of tribal elders, and only a tiny minority of cases enters the court system.

A commonality in both areas is the extent to which the non-state resolution of civil disputes is formalised. District administration, courts and *hoquq* departments routinely encourage the resolution of civil disputes through *jirgas* and the results can be formally registered with these institutions. This study therefore sees little need to further strengthen these linkages or even

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<sup>95</sup> Interview, Provincial level prosecutor, 19 April 2009, Gardez.

<sup>96</sup> Interviews, Ahmad Aba elders, 12 April 2009, Gardez; 14 April 2009, Ahmad Aba.

<sup>97</sup> Interview, Salam Khel elder, 9 April 2009, Gardez.

<sup>98</sup> Interview, Ahmad Aba elders, 14 April 2009, Ahmad Aba.

create new ones as the informal mechanisms function successfully as out-of-court arbitration mechanisms.

State and non-state justice providers in both areas, however, tend to regard each other's efforts as insufficient in criminal cases. Representatives of the formal system criticise the lack of punitive justice in *jirgas* and elders object to the absence of reconciliatory justice in court processes. Thus, there is more need to explore how the informal justice sector can cooperate with the court system (and vice versa), in order to address both punitive and reconciliatory aspects. This view is widely shared by both informal and formal justice providers, who perceive the distinction between *haq-ullah* and *haq-ul abd* as a clear entry point for more cooperation between the two systems. Currently, some informal cooperation already exists, such as courts and *jirgas* running parallel deliberations for murders, physical assaults or robberies. In case reconciliation between perpetrator and victim (or their families) is achieved, the sentence for the perpetrator is lowered. One could explore if such cooperation can be formalised and become part of the legal apparatus, or if a different linkage needs to be developed to be more acceptable under the current body of law (e.g., holding reconciliation *jirgas* after a sentence is handed down).

The cooperation of formal and informal justice systems on criminal cases could be envisaged for rural and urban districts. As currently there is little involvement of state courts in the resolution of criminal offences in Ahmad Abad, a formal role for *jirgas* in court procedures might encourage more people to take criminal cases to courts. In Jalalabad's *nahia* 5 this may encourage residents to begin taking even less serious criminal cases to court as well.

While in general, a more formalised cooperation between formal and informal actors facilitates increased public scrutiny of either of them and therefore has the potential to raise their accountability, the Jalalabad case study highlights one possible problem area. Often *shuras* or *shura* elders are in charge of conflict resolution through *jirgas* as well as facilitating the distribution of development resources from state and aid agencies to communities. This creates a dependency of residents on elders for access to resources, which may prevent them from voicing dissent and/or 'exiting' to the formal system even if they would prefer to do so. The built-in accountability mechanisms of *jirgas* become defunct under these circumstances, as elders can use the withholding of resources as pressure mechanism to achieve agreement. In *nahia* 5 of Jalalabad, this configuration has already led to considerable corruption within the non-state justice system. This needs to be taken into account when working on formalising cooperation between the customary and state mechanisms in order to avoid creating a worse product than to begin with, by for example granting elders and local officials more discretionary power without effective oversight.

Ahmad Aba case study demonstrates that inter-tribal land conflicts represent the most problematic category of disputes. They have a high risk of violent escalation and their informal resolution at the district level frequently fails. If they are solved, this mostly happens under pressure from the provincial governor and with the involvement of mediators from third tribes, but only once they have escalated into violence or are on the very brink of doing so. The ensuing arbitration process then takes the form of a political negotiation rather than a strictly legal process. For Ahmad Aba, and possibly a rural district of Nangarhar<sup>99</sup>, this report therefore suggests to explore the feasibility of an inter-tribal forum for the mediation of such conflicts at the district level, similar to the Commission on Conflict Mediation which exists in Khost and Paktia at the provincial level. A comparable body at the district level could help initiate arbitration processes at an earlier stage of conflicts and thereby reduce the risk of violent escalation. Cooperation between such district-level bodies and the provincial

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<sup>99</sup>Senior justice officials in Jalalabad strongly recommended working on the linkages between formal and informal justice actors in rural districts of Nangarhar, as this already functions well in the city. Thus, overall there seems a bigger need for developing informal-formal justice cooperation in rural Afghanistan, while in urban areas it is more a matter of how such a linkage is channelled.

mechanisms needs to be carefully considered in order to avoid competition or duplicate efforts.

All these ideas, however, need to be discussed with relevant stakeholders in order to ensure that a mechanism is tailored to the local context and has local ownership. Only this will ensure sustainability of any given mechanism.

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