



# WOMEN, VIOLENCE and JIRGAS

Consensus and Impunity in Pakistan



NATIONAL COMMISSION ON THE STATUS OF WOMEN (NCSW),  
GOVERNMENT OF PAKISTAN

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# Women, Violence and Jirgas

Consensus and Impunity in Pakistan

Nazish Brohi

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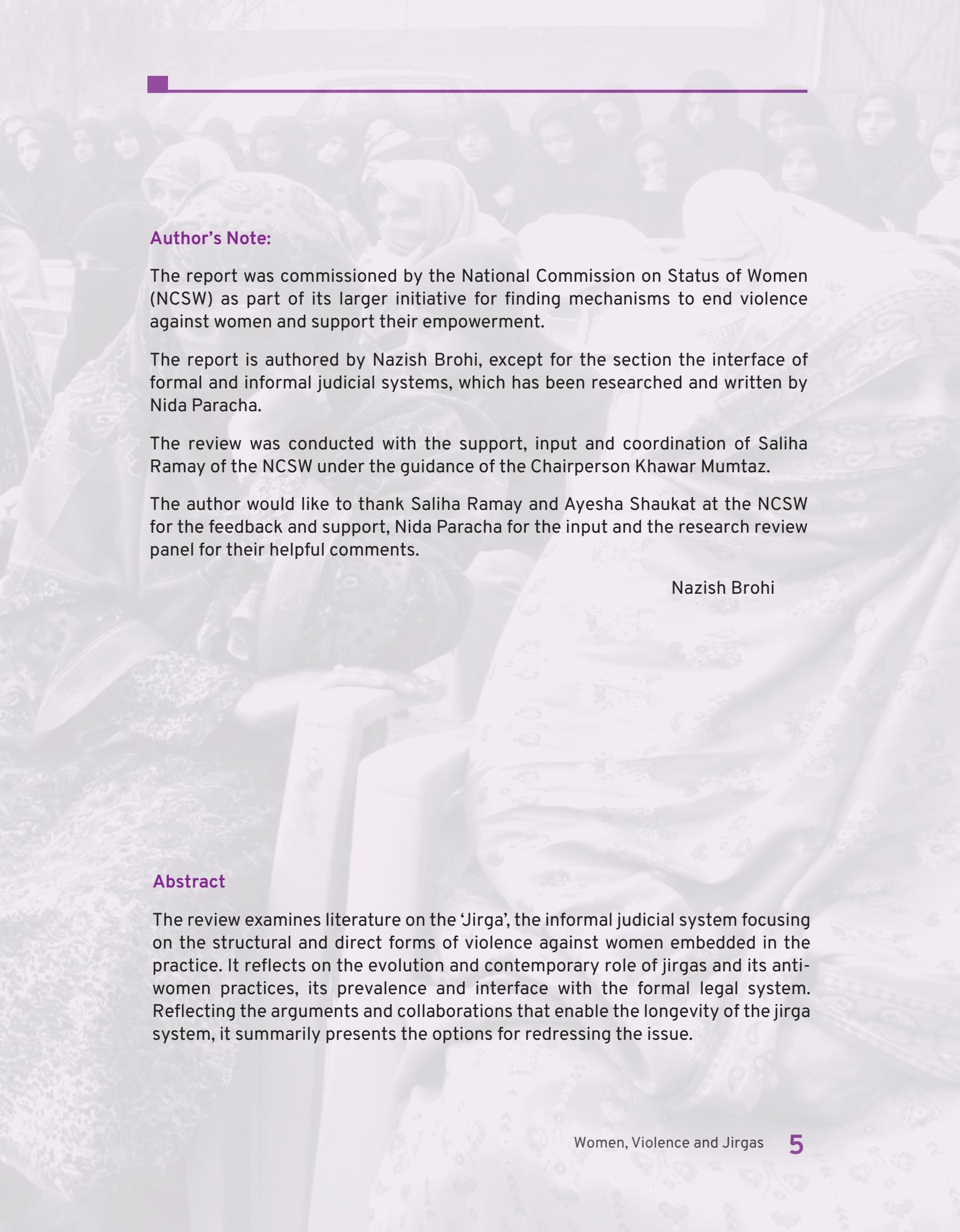
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### Author's Note:

The report was commissioned by the National Commission on Status of Women (NCSW) as part of its larger initiative for finding mechanisms to end violence against women and support their empowerment.

The report is authored by Nazish Brohi, except for the section the interface of formal and informal judicial systems, which has been researched and written by Nida Paracha.

The review was conducted with the support, input and coordination of Saliha Ramay of the NCSW under the guidance of the Chairperson Khawar Mumtaz.

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Nazish Brohi

### Abstract

The review examines literature on the 'Jirga', the informal judicial system focusing on the structural and direct forms of violence against women embedded in the practice. It reflects on the evolution and contemporary role of jirgas and its anti-women practices, its prevalence and interface with the formal legal system. Reflecting the arguments and collaborations that enable the longevity of the jirga system, it summarily presents the options for redressing the issue.



# 1 Introduction

Violence against women is an area of priority for the National Commission on the Status of Women (NCSW). The Commission has worked closely with lawmakers on legislation to address different forms of violence, has examined services available to women and is deeply concerned about the seemingly unabated incidence of violence. NCSW has also filed a petition in the Supreme Court of Pakistan against the jirga system through which women often find themselves victimized. The Commission has stated in its petition that the Jirga system is against the fundamental rights of citizens, and seeks to have the Court declare them as in conflict with the law, hence unlawful.

The NCSW petition cited the Haripur jirga of June 2011, where on jirga orders, a middle-aged woman, Shehnaz Bibi, was dragged out of her home and forced to parade naked on the street as punishment for an alleged crime of her son. Similarly, on an ex-parte jirga decision at Bari Kot village in Swat, Shazia was murdered by her husband Muhammad Saeed and others on the suspicion of his wife's alleged illicit relationship with his brother. The petitioners requested the court to declare the jirga system unconstitutional for being a parallel judicial system having assumed the powers of civil and criminal courts and that appropriate action be taken against those who participated, aided or abetted these illegal activities<sup>1</sup>.

The NCSW in its position against the jirga system is reiterating and endorsing the demand by various women's groups

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1 Barakatullah Advocate & Imran Ahmad Sajid Pk Journal of Criminology (2013?)

across the country for jirgas to be outlawed as it is an institution that strengthens and legitimates anti-women practices. This report is an effort by the NCSW to provide a composite picture of how the institution operates across the country and how it has become one of the loci of misogyny.

This report focuses only on jirgas that impact women and directly arbitrate on cases of women's human rights violations and where the decrees impact women negatively. It aims to present the existing evidence of jirgas promoting anti-women practices that have been outlawed in the country. In that, the report does not reflect in its scope the jirgas conducted on civil disputes and petty crimes.

### Methodology and Limitations

The report is a desk-review aggregating existing published information. It was commissioned under time limitation and financial constraints of the NCSW, to gather existing information on violence against women in the jirga system.

Its methodology is based on secondary information and no primary research was conducted. The author reviewed the existing material through publications including newspaper reports. It also draws from the NCSW's compilation of jirga cases over a two year period, collected by its own staff, which was shared with the author.

The collected findings were then presented before the NCSW's research review board consisting of researchers, journalists, analysts and senior women's rights defenders, in addition to the experts on the NCSW staff. Most of their recommendations have been incorporated in the final draft. The one omission that could not be addressed was of detailed case studies that explain the impact of jirga decisions on the survivors and their families. This is because the methodology relies on existing material, and no such detailed reports were found. It was not possible to conduct fieldwork for this report.

As such, the report does not capture the regional variations of jirga processes and remains skewed in terms of representation. For instance, there is a dearth of material available from Balochistan, whether news reports or academic papers, so the low numbers of references do not reflect low incidence, but low levels of information.

The report should then be read as a probe and not as a representational study nor as an investigative research. It recommends that detailed provincial studies be carried out with primary investigations. The report also does not reflect in detail about the successes, best practices and failures of human rights advocates and rights based organizations to challenge or mediate the jirga as an institution. The Women's Action Forum (WAF) Hyderabad chapter ran a campaign to outlaw jirgas in Sindh. In KP, one organization has experimented with women-centric jirgas to be run by women. In other places, people have tried to limit the remit of jirgas.

Exploring the efficacy of these efforts requires field research, as there is little qualitative work available barring simplistic news reports. Hence, the exclusion does not indicate lack of resistance to jirgas.

This report starts with attempting to establish the problem of violence against women as intrinsic to the current functioning of jirgas. It explains the evolution of jirgas in Pakistan and maps how they currently operate with some regional and provincial variation in processes. In the section on violence against women, it looks at both, direct violence as well as indirect or structural discriminations embedded in the jirga system. In assessing prevalence and impact, case compilations are used to establish veracity of the claim of anti-women practices and not present its incidence rates or a database since the information was culled from newspaper reports. It looks at only the immediate effect and not short term or long term impact of cases. The next section looks into the interface between the formal and informal judicial system and the collusions and tensions between elites of both, using a case study as an illustration. The report summarizes the arguments used in support of jirgas and considers their validity with reference to women's rights, and ends by looking at options for addressing the violence and inequalities perpetuated by the jirga system.

### Jirgas and anti-women practices

The Jirga refers to tribal councils, local institutions of conflict settlement that incorporate prevalent local customary law and rituals. The jirga is an all-male institution where designated 'honorable men' – mostly family headmen, village elders, tribal chieftains and landholders arbitrate conflicts and give solutions that focus on restoring societal equilibrium rather than justice and human rights of individuals. The collective decision is socially binding on the parties involved.

While also settling some civil disputes such as petty theft, the institution of jirga has increasingly become the locus of misogynist practices such as child marriages and the barter of women for conflict resolution. Since jirgas have the veneer of consensus because they are collective albeit all male elite decisions, they construct a social legitimacy around anti-women practices.

- In 2015, a jirga in Darel Valley of Diamir district decreed that women would not be allowed to vote in elections, disenfranchising over twelve thousand women voters in the constituency. The jirga included religious leaders and candidates of political parties from the area.
- In 2014, eleven-year-old Amna was married to a man three times her age as compensation for her uncle having raped a girl in Grilagan in northwest Pakistan. Amna was married off to the brother of the girl who had been raped. She was one of the two girls from the rapist's family given to the aggrieved family through a jirga decision. The other girl, Zulhaj, spoke to the media saying she had accepted her fate .

In 2013, Rubina, a 12-year-old girl appealed to the chief justice of Pakistan's Supreme Court to provide her safety since she was being forced by a jirga to marry an older man in Doong Darra in Upper Dir district .

These cases have occurred after the Prevention of Anti-Women Practices (Criminal Law Amendment 2011) law against anti-women practices, under which the police are empowered to arrest guilty persons without warrants. The law itself was a result of sustained demands of women's rights activists and civil society networks and efforts of women parliamentarians. It was driven by the need to outlaw the growing number of practices that victimized women under the guise of culture and tradition.

While these cases have been occurring with increasing frequency, they are not 'new' trends either. Here is a brief snapshot of some jirga decisions over the past decade across different parts of the country.

In 2005, a jirga ruled that an eleven year old girl from Mardan, KP, was to be given as Swara in compensation for her father having murdered a person. She was sent to the victim's family.

In 2001 a jirga in Thatta district in Sindh ruled that two young girls from the murderer's family were to be given to the victim's family as compensation. An eleven year old daughter of one accused was accordingly married to the forty six year old father of the murdered man, while the six year old daughter of the other accused was married to the murdered victim's eight year old brother.

In 2000, a jirga decision led to a six-year-old girl from Sukkur in Sindh being married to a sixty year old man based on an unpaid debt by her family.

In 1996 a man in Lodhran district, Punjab, attempted to rape an 8 year old girl, but let her go when she screamed. A local jirga on taking up the issue decided that balance would be restored if the young girl's father raped the perpetrator's mother.

Jirgas are not the only non-state actor to give fillip to violence against women. The misogyny of religious militants such as the Taliban is well documented, from prohibiting women's work and mobility, killing of women doctors and nurses, ban on schooling for girls and murder of women asserting themselves. The attacks on women in roles as diverse as teachers, local councilors and art performers, their brutality needs no reiteration. Then there are decisions taken directly by individuals representing the state that inflict violence against women: In 2002, in

Mianwali, Punjab, Nawab of Kalabagh played a vital role in the decision of handing over eight girls as compensation to resolve an age old dispute. In 2006, five minor girls were to be handed as compensation to the rival party in Kashmore, Sindh. The decision was made with the connivance of a parliamentarian and the District Nazim. Both victims were rescued by the *suo-motu* action of the Supreme Court of Pakistan.<sup>2</sup>

But jirgas carry a particular local resonance because unlike the Taliban, they are an indigenous process evolved over generations, and unlike the unilateral decisions of powerful individuals, can claim local consent and participation, and can and do resort to culture and tradition as a legitimizing framework. Attributing precedents to culture is misleading because what is identified as culture is selective and internally contested; the argument sets up culture as an intractable, static, fixed and homogenizing entity whereas it is an evolving, fluid structure that adapts to people's lived realities.

The 2011 law has created some space for respite, as there are many cases where the police has acted against jirga members and arrested those involved in misogynist decrees. But these are reactive measures because while some jirga verdicts may or may not be problematized as anti-women practices, the jirga assembly and arbitration on women's rights cases per se remains legal. The law is a positive development but needs to be supplemented with another law that prevents jirgas from arbitrating on criminal cases and on cases that deal with women's rights. To illustrate, in 2011, the year the law was passed, a jirga agreement between political parties prevented 18000 registered women voters from voting in by-elections in Kohistan<sup>3</sup>. In the same district, women were barred from voting through a jirga in the general election of 2008. The practice has been recurring for several years and continues to date.

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2 *Ibid.*

3 <http://jang.com.pk/thenews/dec2011-weekly/nos-04-12-2011/dia.htm#2>



## 2 The Jirga in Pakistan

Jirga essentially refers to a gathering of men meeting to deliberate and adjudicate over an issue. It is called a jirga in Pushto, ‘majlis’ in Persian, a ‘panchayat’ in Punjabi and Hindi and ‘faislo’ in Sindhi. The word ‘jirga’ itself is traced to ‘jirg’, which means a circle or a wrestling ring<sup>4</sup>.

In its contemporary occurrence in Pakistan, a jirga connotes collective resolution of a dispute through mediation, arbitration, reconciliation, settlement and compensation or punitive measures ranging from fine payment to banishment and death. Jirgas are used to resolve conflicts relating to land, money and women; specifically land conflicts between two warring factions, water disputes, inheritance disputes, honor breaches, and internal and external tribal killings. The span of disputes brought before jirgas extends from feuds over land to marriage, from breach of agreements to cattle theft.

Jirgas are instituted and led by men who are the dominant local elite and who participate as either a hereditary privilege or are nominated because of their social or economic status. As the apex body on conflict mediation at the community level, the jirga is composed of tribal or clan chiefs as well as elite men of the community who are deputed as judges; the elders are not elected, nor do they have any legal or adjudicatory training, but consist of landholding members of the tribe who exercise considerable political

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4 Justice Saleem Akhter, Justice Mushir Alam, Muhammad Shahid Shafid & Iqbal Detho. Study of Informal Justice System in Pakistan, Sindh Judicial Academy & UNICEF.

and economic control.<sup>5</sup>

These councils have no place in the formal legal system and are to that extent unconstitutional. They are mandated only in the Federally Administered Tribal Areas (FATA) and the Provincially Administered Tribal Areas (PATA) where the law explicitly gives allowance to establish their own form of adjudication.<sup>6</sup> For the rest of Pakistan, as defined by Chapter VII of the Constitution, jirgas are not part of the formal structure of the justice system, which creates the formal judicial bodies and lists their functions and jurisdiction.<sup>7</sup> Jirgas in effect are supra-legal: not only do they decree punishments that are counter to national laws; they challenge the national laws directly. For example where women are legally married to a man of their choice, jirgas have announced that both partners be killed because their marriage violates social regulatory codes.

Across Pakistan, though there are provincial variations of the functioning of jirgas, the common denominator is the upholding of anti-women practices in the name of culture. Traditionally jirgas favor conciliation and compensation (in the form of money or women), while the death penalty is rarely awarded except for in cases of breaches of honor. There is no substantive or procedural law followed, except that of arbitrarily selected culture, tradition, religion and precedent. All of these factors may be followed or subverted, depending on the collective opinion at the particular moment in time.

While jirgas are often criticized in the mainstream media and by human rights activists for their anti-women orientation, for many others, locally constituted jirgas are perceived as more 'just' than the national justice system, more so outside urban provincial capital cities. Pakistan has failed to extend state presence in remote villages, leaving jirgas as the only means of justice and reconciliation in these areas.<sup>8</sup> The formal justice system is perceived to be inefficient, slow, and expensive, since courts have backlog running into hundreds of thousands of cases and lawyer fees run into the course of the dispute and are exorbitant. The courts do not always deliver justice because of high degree of corruption at all stages, including police investigation and court hearings.<sup>9</sup>

Even though jirgas are not legal and their decisions often violate human rights

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5 Hooma Shah, *Brutality By Acid: Utilizing Bangladesh as a Model to Fight Acid Violence in Pakistan*, 26 *Wis. Int'l L.J.* 1172 2008-2009: 1180

6 Article 247(7): Neither the Supreme Court nor a High Court shall exercise any jurisdiction under the Constitution in relation to a Tribal Area, unless [Majlis-e-Shoora (Parliament)] by law otherwise provides: Provided that nothing in this clause shall affect the jurisdiction which the Supreme Court or a High Court exercised in relation to a Tribal Area immediately before the commencing day.

7 *Chapter VII, Constitution of the Islamic Republic of Pakistan 1973*, at [http://www.na.gov.pk/uploads/documents/1333523681\\_951.pdf](http://www.na.gov.pk/uploads/documents/1333523681_951.pdf)

8 *Ibid.* 1179

9 *Pakistan: The Tribal Justice System*, Amnesty International, AI Index: ASA 33/024/2002: 31, 2002

norms that the Pakistani state is internationally and constitutionally obligated to uphold, jirgas thrive in connivance with the state.<sup>10</sup> The jirga simultaneously has judicial and executive roles in what Naveed Shinwari describes as community-based traditional victim-offender mediation.

The jirga violations of human rights are not confined to any geographic region and are prevalent across the country. Testimonies from Sindh show that for tribal jirgas, killing women in cases of perceived violations of honor is not considered a murder or a crime but a restitution of honor. In 2007, a serving and prominent Member of Parliament from Sindh, participated in a jirga that decreed marriage of underage girls. A study in jirga justice in KP points out, “The Jirga is the main social system which regulates all facets of Pakhtun life, those who control the *Jirga* control society.”<sup>11</sup> In Balochistan, a serving Senator defended the murder of five girls who were shot and buried before being certified dead for being consistent with historic tribal culture and traditions.

While community leaders uphold the jirga system as its direct stakeholders, this social legitimizing creates varied reactions. In one study on jirgas by CAMP, findings show that men in Swat wanted the custom of using women as conflict mediation tools discontinued as it made women’s lives miserable whereas men in Dir said it is the community’s version of bringing peace and women should not be given the right to oppose it. The women’s rights platform, Women’s Action Forum (WAF) Hyderabad’s petition for outlawing jirgas managed to collect ten thousand signatures across rural Sindh. This shows that jirgas are a contested institution and nowhere close to the unanimous consensus that its defenders claim in its support.

### Evolution of Jirgas

The history of jirgas as presiding council of elders pre-dates British colonization. There are regional variations to this pre-history. Uniformity and institutionalization of jirgas was introduced under the British Raj. The chosen method of colonization was indirect rule, under which such councils were embedded as part of official processes to win loyalties of tribal chiefs by handing over justice related issues and social governance to them. At that point, swathes of what is now Pakistan were part of tribal belts, including regions in all four provinces of Pakistan. These regions were governed by the Sindh Frontier Regulations, Balochistan Frontier Regulations and the Punjab Frontier Crimes Regulations (the latter extended to what is now Khyber Pukhtunkhwa and FATA). The chief administrator of the region was either the Political Agent or the Deputy Commissioner who coordinated and participated in the jirgas.

10 Justice Retd. Nasira Iqbal, *Gender Bias and the Judiciary*, <http://www.supremecourt.gov.pk/ijc/articles/11/1.pdf>

11 Jirga Justice & Conflict Transformation, CAMP 2013 report

Whether the colonization experience was a point of departure from what preceded or whether it represented institutionalization and continuity of the past traditions is a contested notion in Indian historiography, and there is substantive evidence to support both sides. One can prevaricate whether jirgas would have adapted with the course of time, been in stasis or finished off as a practice, but in this particular case, a local practice that thrived on folk notions of justice was interwoven with official processes and institutionalization made the practice resistant to whatever its natural adaptive evolutionary process may have been.

There are provincial variations to their evolution. In Balochistan for instance, jirgas have been traced back to the time of Naseer Khan<sup>12</sup>, who was deputed the Khan of Kalat after aiding Ahmed Shah Abdali, the conqueror from Afghanistan in the mid-eighteenth century. He subdued tribesmen by establishing a confederacy where each tribal chief was responsible for his tribesmen and failure to discharge duties led to confiscation of property and title. The jirga was the ‘Conciliatory Commission’. When this system started to decay in face of internecine warfare, the first agent to the Governor General in Balochistan, Robert Sandeman revived it by revitalizing village jirgas including instituting supra-jirgas held bi-annually which he personally presided over, called ‘Shahi Darbar’. He introduced incentives of cash and property to tribal chiefs and feudal lords who maintained order in their regions as well as extra amounts to catch culprits and conduct Jirga trials<sup>13</sup>. The jirgas functioned on the Baloch tribal code of honor, which as documented in the Balochistan Gazetteer (1809) included: retribution for murder; protection of those given refuge, except adulterers; honor and protection of guests; death for adulterers; give pardon if women of offender’s family intercede; cease fighting if religious figures (*mullah*), Sayyids or women intervene holding the Quran; not kill offender while he is taking refuge at a sacred shrine<sup>14</sup>.

Yet where the British colonial administration did try to push through change in notions of justice mediated by jirgas, in the case of “honor killings” for instance, they were unsuccessful. For instance, after the conquest of Sindh, Charles Napier attempted to clamp down on honor killings, and issued a proclamation prohibiting it, introducing punishments including hanging and banishment. It resulted in the spiking of cases of apparent ‘suicides’ by women, which were in fact murders. Captain Kieth Young, as quoted by Nabi and Baloch, noted that suicides were almost unknown in Sindh at the time of the British conquest<sup>15</sup>. Further penalties were then introduced including fines to be levied on the entire village where women

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12 PDI

13 (On colonial strategies in Balochistan, see: <https://balochlinguist.wordpress.com/2014/06/23/producing-tribal-balochistan-sovereignty-and-rule-in-a-colonial-frontier-state/> )

14 As quoted in research on Jirgas by Participatory Development Initiatives

15 Aftab Nabi and Dost Ali Baloch, Early British efforts to curb Karo Kari in Colonial Sindh, in Pakistan Journal of Criminology, Special Issue: Women’s Rights and Violence against Women, Vol 2, No 2, 2010, Pakistan Society for Criminology

were killed and revenue officials in charge of the area were to be dismissed<sup>16</sup>. British writers chronicled that killing in the name of honor was seen as a ‘Divine Right’ and no clampdowns were effective. This realization led to modifying criminal law in 1892 to provide special legislation under Sind Frontier Regulation for trial for offence of adultery by a jirga of *sardars*. Before the jirga, the husbands would invariably confess to the crime and punishments included women given in exchange in marriage (*swara, vanni, sung chatthi*)<sup>17</sup>. The effect this had is clear from Nabi and Baloch’s documentation showing that the Baloch who resided in areas where Frontier Regulations were not applicable would bring women to areas that were under the law and killed them there for the benefit of trial by Jirga. It is generally believed that Karo Kari custom was introduced in areas of Sindh with the migration and settlement of Baloch tribes in the province.

But historic entrenched rituals do not explain the continuity of either “honour” killings today, or for the social patronage for such acts extended by jirgas (See section on Collusion with formal system). Rabia Ali<sup>18</sup> notes the departure from original customs, pointing out that unlike in the past when the burden of proof in the Baloch tribal code required witnesses, currently rumor, hearsay and allegations suffice. The killing is no longer reserved for married women, nor is it the prerogative of only the husband or father. According to Shirkat Gah’s case studies, while half the honor related killings were committed by husbands, the other half was carried out by other male relatives. Increasingly, researchers have pointed out the functionality of “honor” killings. Shirkat Gah’s findings show that villagers believed allegations of adultery were false in half the cases and said the murders were actually about land, enmities or other existing disputes.

### How Jirgas Work

Jirgas are known by different names in different provinces, with some variations in their processes. In Sindh for instance, it is known as the *faislo*, or at times as *sulah* (settlement). The venue is the *autaq* (all male space, a reception room) of the consensually decided head of the group, sometimes called the *sarpanch*. The *sarpanch* is usually, though not always, the head of the tribe or community. The two parties in dispute explain their version of events and their claims to the appointed group of men. Each party has advisors, *musheers* who then discuss the case and try to build support with the other members of the jirga, acting like mediators. According to a study by the Sindh Judicial Academy, “Unlike the professional lawyers of criminal justice system, Musheers are volunteers who represent their sides as a part of the overall political or social responsibility. Unlike the state system of justice there is no appellate authority and the *faislo* is neither reviewed

16 Hamida Khuhro

17 Aftab Nabi and Dost Ali Baloch, Early British efforts to curb Karo Kari in Colonial Sindh, in Pakistan Journal of Criminology, Special Issue: Women’s Rights and Violence against Women, Vol 2, No 2, 2010, Pakistan Society for Criminology

18 Rabia Ali, The Dark Side of ‘Honour’: Women Victims in Pakistan, Women Living Under Muslim Laws Special Bulletin 2001

nor held again and there is no mechanism for appeal.”<sup>19</sup> In cases where women are involved, the study finds that though women may not be present at the Jirga, her advisors or family members can plead on her behalf. If she is the victim, she is paid more compensation than a man would. Earlier, she would also be given protection by the head of the community, the *Wadero* or the *Sardar* in his house, but now this is rarely so, owing to the negative media coverage of such cases<sup>20</sup>.

With Pushtuns, including those based in Khyber Pukhtunkhwa, Balochistan and FATA, the jirga is usually held in a community leader’s *hujra* (all male space/reception area similar to the *autaq* in Sindh). It may also be held in the local mosque or in open fields. All tribal elders (*Speen geeri* – white beards) are eligible for jirga membership, according to Barakatullah & Sajid’s research into jirgas in Pashtun culture<sup>21</sup>. But preference is given to those with a high social and financial status as they can enforce implementation of decision. Within the jirga members, everyone’s opinion is given equal weight. An arbitrator mutually agreed on by both parties to the conflict mediates the jirga and offers a solution that is acceptable to both parties. If the decision is agreed upon, it becomes binding and non-compliance results in loss of face and ostracism. If consensus of outcome is not possible, the search for alternatives continues. Decisions of the jirga keep at the fore the Pukhtunwali (tribal code / way of life) which is based on the foundations of courage, honor and pride (*nang; ghairat*), hospitality and protection of guests (*melmestia*); asylum for fugitives and safe passage (*nanawati*) and *badal*, that simultaneously signals revenge and justice and revenge as justice.

There are additional contextual considerations in FATA. Primarily, it is the only means of conflict resolution as there are no formal institutions such as lower courts and high courts. Jirga is also the mechanism for official dispute settlement and justice. In FATA therefore, there are varying types of Jirga in addition to the local tribal jirgas (*Shakhsi* Jirga). There is the *Sarkari* Jirga, established under the FCR 1901 where an official of the political administration exercised powers of a magistrate and the *Qaumi* Jirga for discussing matters of collective property and public issues such as distribution of water and site selection for schools. Francois Tanguay-Renaud points out, “It is in the FATA that parallel normative accretion has reached a unique pinnacle. Here, customary, colonial, and Islamic regimes continue to interact both at the informal and formal levels. Jirgas enforce both customary and Shariat, state representatives administer the FCR, and the Federal Shariat Court oversees the implementation of the Hudood laws.”<sup>22</sup>

Jirgas remain in the news almost exclusively because of decrees resulting in

19 Justice Saleem Akhter, Justice Mushir Alam, Muhummad Shahid Shafid & Iqbal Detho. STUDY ON INFORMAL JUSTICE SYSTEM IN PAKISTAN, Sindh Judicial Academy & UNICEF.

20 Ibid.

21 Barakatullah Advocate & Imran Ahmad Sajid, Pakistan Journal of Criminology, Vol 5 No 2, July – Dec 2013, Pakistan Society for Criminology

22 François Tanguay-Renaud, Post-Colonial Pluralism, Human Rights & the Administration of Criminal Justice in the Federally Administered Tribal Areas of Pakistan, Singapore Journal of International and Comparative Law 6 pp 541 – 596, 2002

# 3 Jirga and Violence Against Women

women's human rights violations. While the arguments in support of jirgas center on dispute resolution of petty matters, examining the gendered dynamics of jirgas offers a stark contrast to all arguments for achieving order based on notions of justice. A gender lens illustrates the systemic bias, showing how asymmetric the notions of accessibility and affordability are, and shreds the claim of jirgas being participatory, equitable and focused on reintegration of community members. This section focuses on how jirgas are embedded in both, the direct as well as structural violence that confronts women.

The primary objective in cases brought before jirga is not to determine guilt, innocence or culpability or to find justice for the aggrieved individual, but to restore balance in society and maintain equilibrium. It is therefore a mechanism for maintaining status quo. The jirga uses the scaffolding of restorative justice that considers social cohesion and harmony rather than the individual, which is the start and end point for human rights. Where women's actions are seen to have shaken societal equilibrium, the immediate task is to restore status quo, and the killer along with the entire male society, is seen as the victim and aggrieved party.

### Direct and Structural Violence against Women

While formations of jirgas vary by province, women are consistently excluded in all of them. Women cannot be members of a Jirga; they cannot be present even when they are the main accused or victim in the case in question. If she is accused of a crime, her advisors may present her point of view. It is a purely male institution

which neither sanctions women as members nor as witnesses or as complainants. Women may access a jirga only through a male relative. In case of grievances against her male relatives, there is no recourse whatsoever.

Jirgas function on local traditions and belief systems of men, of which honor is a critical component (see section on honor). In cases of adultery, where a man's honor is violated, the single testimony of a husband, brother or father is enough to condemn a woman. A woman marrying of her free will (against family's wishes) is also considered same as an adulteress because male honor is similarly besmirched. Even if the marriage has been legally solemnized, it remains a violation of the honor code and hence punishable by death. Pakistani courts on the other hand have ruled that a woman does not need the consent of either her parents or guardian to marry.

A research conducted in Balochistan by Shah, Ali & Mahmood<sup>23</sup> finds that, "Even if in rare cases, it is proved that the woman killed by declaring her kari was in fact innocent, there are no convictions, and most of the accused literally get away with murder on the basis of *razinamas* ('reconciliation' agreements) presented to and accepted by the police. Any person who has committed such heinous crime is also set free in the case of *razinama*, which happens to be in the form of payment of cash or girls in marriage to the aggrieved party."

The mechanism, called *swara*, *vanni* and *sung chatti*, is the barter of women for marriage as a form of settlement. This is detailed in Naveed Shinwari's report on jirgas in FATA. Compromise between two hostile persons or groups is sought in a way that avoids bloodshed, by giving away women as that ensures both antagonists become related by marriage and hence part of the same family. *Vanni* applies in cases of murder, kidnapping or attack on other women. "The nearest virgin daughter, sister, etc. of the offender is given over to the aggrieved family," Shinwari documents. "Since it is a forced marriage between the enemies, there is no wedding ceremony. The girl is made to ride a donkey or horse and a third party leads that animal to the other side. The receiving family takes over the girl as a punishment to the enemy." In FATA, bride price called *walwar* is the norm, so in such cases, the family loses the bride price, which compounds the punishment. Not having a ceremony designed to announce marriage and sending bride off on a donkey are ways of public shaming in traditional culture. The act of *swara* is now meant to denigrate the family, without consideration for the will and emotions of the woman in question.

Samar Minallah points out that the practice of *swara* has evolved and can no longer be seen as a continuation of old practices as it has been redefined by economic

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23 Shah, Ali, Mahmood, Sardari, Jirga & Local Government System in Balochistan, Edar-e-Tadrees, Lahore, 1994

and social forces<sup>24</sup>, and that power disparities have led to it deteriorating as a form of revenge and humiliation rather than a peace keeping measure as originally devised. “One does not hear of an influential person giving daughter as compensation for the crime committed by his son. However, on the receiving end one mostly finds people with sound social and economic standing for whom accepting a girl as compensation is more like a status symbol,” explains Minallah<sup>25</sup>.

Once a jirga has passed a verdict for *swara*, *vanni*, *sung chatti* or other issues, no appeal is possible against the decision. The implementation mechanisms are built into society, so refusal to accept is not a possibility.

In a household survey of five thousand women, the Rutgers World Population Foundation found that more than 77% of marriages were settled under customary practices such as *swara*, *vanni* and *sung chatti*. The survey was conducted in areas within Pakistan known for the high prevalence of such harmful cultural practices, namely Dera Ghazi Khan, Muzaffargarh, Jacobabad, Kashmore, Jaffarabad and Naseerabad. Three fourths of the women interviewed said they were victims of physical violence<sup>26</sup>.

Brohi and Zia<sup>27</sup> highlight the economic base for needing community consensus such as modes of collective economic labor and division of work that makes social opprobrium unaffordable. They make the point that women’s bodies are a governance tool, and marriages are used for localized governance decisions such as which tribes or groups ally; which ones feud; who gets irrigation water from whom; who joins who for electoral reasons and such. Women’s bodily autonomy threatens this system; hence jirgas are vested in preserving it.

### Assessing Prevalence and Impact

There are no official statistics on the occurrence of jirgas, and no government line ministry or official agency records jirga verdicts or incidence of. The NCSW collected information for the year 2014 to provide a snapshot that establishes their frequency and to substantiate the claim that jirgas promote and strengthen anti-women practices. The following table is meant to establish veracity of jirga occurrence and not an exhaustive compilation of cases. The data for 2014 also shows that the police have started to move forward in making arrests in cases that violate the law, especially in KP and to some extent in Punjab. These cases where

24 Nafisa Shah makes the same point in greater detail and complexity with regard to honor killing.

25 Samar Minallah, Judiciary as a Catalyst for Social Change, <http://www.supremecourt.gov.pk/ijc/Articles/9/2.pdf>, accessed 12<sup>th</sup> July 2015

26 Sehrish Wasif citing Rutgers World Population Foundation reporting in Express Tribune, <http://tribune.com.pk/story/506066/survey-finds-77-of-marriages-made-in-traditional-exchanges/>, accessed 12<sup>th</sup> July 2015

27 Nazish Brohi and Afiya S. Zia, With the Will to Die: Agentive Defiance to Honour Codes in Pakistan, in ‘Honour’ and Women’s Rights: South Asian Perspectives, (eds.) Manisha Gupte, Ramesh Awasthi and Shradha Chickerur, MASUM, India, 2012

official machinery shows responsiveness are sporadic and many others still follow the custom of the state distancing itself from jirga decisions, but it is important to show that a break from past traditions is not only possible, but underway.

**Table of Jirga cases in Punjab -2014**

Source	Place	Cause of Jirga	Decision taken by Jirga	Action taken by authorities
Jang newspaper, 13-02-2014	Darya khan	Kidnapping of a married woman	7 year old sister of the perpetrator was declared <i>vanni</i> .	FIR registered but not arrested
Khabrain newspaper, 15-02-2014	Rajanpur	Love marriage of father (second marriage)	5 year old girl was given in <i>vanni</i> to 40 year old man	Police arrested accused and recovered the girl
Khabrain newspaper, 19-02-2014	Muzaffargarh	Rival party alleged illicit relation on brother due to property dispute	11Y old sister was declared <i>vanni</i> with man having 8 children.	Police supported the <i>panchayat</i> and filed a false case against the family
Khabrain newspaper, 1-03-2014	Basti mandos (Multan)	Accusation of theft on brother	14 Y sister of accused forcibly married to 11 year old boy.  Father assaulted by landowner for refusing to give girl as <i>vanni</i> . Girl was assaulted and abused.	Not mentioned

Source	Place	Cause of Jirga	Decision taken by Jirga	Action taken by authorities
Khabrain newspapers, 2-03-2014	Gabra Arain	Uncle admitted to illicit relations with a girl. Jirga gave 2 options: i) he will be killed, ii) he gives 15 acre land and a girl in <i>vanni</i> .	12Y old girl was given in <i>vanni</i> to a 10 Y old boy. It was decided that the marriage will be solemnized in another area	Police supported <i>panchayat</i> and took bribery of one lakh from rival party.
Khabrain newspaper, 8-03- 2014	Lodhran	Love marriage of brother	13 years old sister of the boy was forcefully abducted and taken to the <i>Panchayat</i> where girl was declared <i>vanni</i> .	Not mentioned
Express newspaper, 9-03-2014	Tandaliyan wala (Lahore)	Love marriage of brother	12 years old girl of the brother was forcefully married to a 30 year old man by the <i>panchayat</i> and the girl was shifted to a undisclosed location.	The family complained that the police have struck a deal with the <i>panchayat</i> and is not supporting their complaint.
Express newspaper, 17-03-2014	Nankana sahib	Love marriage	Two sisters of the boy were given in <i>nikah</i> to the brothers of the girl as compensation for eloping with their daughter for love marriage.	Not known to police

Source	Place	Cause of Jirga	Decision taken by Jirga	Action taken by authorities
Khabrein newspaper, 25-03-2014	Lodhran	Love marriage of uncle	Demand to <i>vanni</i> 5 girls. The girls' mother was abused physically on refusing to give girls as <i>vanni</i>	Action not taken
Khabrein newspaper 27-03-2014	Taunsa sharif	Father took 500000 for giving girl for marriage. Husband later called Jirga to announce her adultery with 12 year old boy.	12 years old declared adulteress and banished from the area	Action not taken
Nawai Waqt newspaper, 30-03-2014	Jaran wala	Love marriage of brother	8 years old girl declared <i>vanni</i> with 13 year old boy and they were solemnize in marriage.	Police arrest the Jirga members and the 13 year old boy as groom
Jang newspaper, 11-05-2014	Faisalabad	14-year-old girl kidnapped by a class fellow's father and later married her.	The minor daughter of the kidnapper was declared <i>vanni</i> and was ordered to be married to the girl's brother	The mother of the <i>vanni</i> girl and the girl herself were arrested and the members of the <i>panchayat</i> were also being searched for arrest.
Khabrein newspaper 26-05-2014	Kot chatta	Honor crime, couple branded as adulterers	"kali" adulteress sold for 600,000 Murder attempt on adulterer	Not mentioned

Source	Place	Cause of Jirga	Decision taken by Jirga	Action taken by authorities
Khabrein newspaper 4-06-2014	Gabber Araein	Kidnapping and Rape	5 years old girl ordered to be given in <i>vanni</i> from the rapist family as compensation, married to a 7 year old boy. Payment 200,000 to be paid by the boy's family to the girls family.	Police supported Jirga  Political influential figure and police were harassing the girls family to sign a blank stamp paper to formalize decision
Khabrein newspaper 4-06-2014	Darya khan	Illicit relation of brothers	2 sisters: 8y and 14 years old <i>vanni</i>  14-year-old girl married to 25-year-old brother of <i>kali</i> .  8-year-old girl married to a 9 year old boy from the <i>kali's</i> family.	Arrested <i>nikahkawan</i> and 3 members of <i>panchayat</i>  Recovered both girls
Khabrein newspaper 27-06-2014	DG khan	Kala kali	60 years old woman declared <i>kali</i> with a 45 year old man. The <i>kala</i> ordered to be <i>ilaka badar</i> and the woman was to be sold.	Action not taken

Source	Place	Cause of Jirga	Decision taken by Jirga	Action taken by authorities
Jang newspaper, 30-06-2014	Sargodha	Love affair of the brother with a girl who committed suicide on parents' refusal to permit marriage.	Boy held responsible for suicide. 12 years old sister of boy forcibly married into girls' family.  Parents and brothers were booked under a false case and were sent to jail.	Action not taken
Roznama newspaper, 26-08-2014	Fort Munru	Suspect wife of illicit relationship	<i>Kali</i> sold in 500000,  <i>kala</i> fined 700000 with threat of banishment	Action not taken
Roznama newspaper, 7-09-2014	Mian Chanu	Brother eloped with girl and they married.	14 years girls given in <i>vanni</i> to 28Y old man	Police arrested Jirga members
Express newspaper, 30-09-2014	Rahim Yar Khan	In return of sister- in-law	2 sisters: 9 year and 7 year old given in <i>vanni</i> with two brothers: 11 year old and 9 year old.	Police arrested jirga members and recovered the girls
Roznama newspaper 25-10-2014	Rohilla wali	In compensation of cousin's love marriage	3 years old cousin given in marriage under the custom of <i>vanni</i> to a 15 y old brother of accused girl.	Police arrested jirga members

The same trend is consistent with the findings from Khyber Pukhtunkhwa province. The 2011 law has prompted the police to act on some cases that get reported in the media, but because jirgas are not in violation of the law per se, the police can intervene only after such jirgas have been conducted and anti-women decisions announced. In some cases, the police continue to endorse and / or ignore the verdicts.

**Table of Jirga Cases in KP 2013-2014**

Source	Place	Cause of Jirga	Decision taken by jirga	Action taken by police
23-10-2013 Express	Mingora	To resolve a man's illicit relation with married woman. The accused woman was murdered by her in-laws.	His sisters were given in <i>swara</i> . 3y old girl was solemnized with 4 years old boy, and 13Y old were solemnized with husband of accused wife.	Police arrested the members and recovered the girls
23-10-2013, The News	Kalam	To resolve honor related dispute	10Years old girl given in <i>swara</i> and imposed a fine of 200,000 rupees on accused girl's father	Police ordered to arrest all members who were involved in Jirga
23-10-2013, The News	Kalam	Love marriage of couple	The sister of accused boy given in <i>swara</i> to accused girl's family.  Jirga imposed a fine of 350,000 on accused boy's father	Police ordered to arrest all members who were involved in jirga.
30-10-2013, Express	Mingora	In return of father's extra marital affairs	Two girls, one 3 years and another 13 year old girl given in <i>swara</i>	Arrested
3-03-2014, Express	Dir Upper	Not mentioned	4 years old girl given in marriage under the custom of <i>swara</i>	Police arrested 5 members.

Source	Place	Cause of Jirga	Decision taken by jirga	Action taken by police
28-04-2014, Dawn newspaper	Mansehra	Father of the minor girl eloped with a married woman.	Jirga decided to marry off an 8 years old daughter of the accused to a 26Y old man (which was former husband of his father's second wife with which he was eloped)	Police registered FIR against cleric and 12 others jirga members.
13-05-2014, Dawn	Charsaddah	Girl taken to Afghanistan to settle old dispute of her brother who had killed a woman 16 years ago and fled	Accused party will give 3 girls in <i>swara</i> to the aggrieved party.  They had already given 2 girls in <i>swara</i> and the victim girl is the last one.	Police arrested mother, 3 step brothers and jirga members and the girl was sent to Dar-ul-Aman (shelter).
4-06-2014, Express	Shangala	Aunt eloped with someone	Jirga decided to <i>swara</i> 2 nieces of accused man. 5Y old girl was married with 9Y old boy, and 6y old girl was married to 11Y old boy.	Police registered FIR and arrested 19 jirga members including 2 religious leaders.
4-06-2014, Mashriq	Shangala	In exchange of girl's elopement	2 girls in <i>swara</i>	Arrested
11 October, 2014, Aaj	<a href="#">Lakki Marwat</a>	To resolve dispute of brother's illicit relation	9 years old girl given in <i>swara</i> because of her brother was caught in inappropriate condition.	Police arrested the members and recovered the girl

The parliament passed a milestone law, and that, coupled with High Court judgments declared such practices prohibited. This slow change seems to be bearing in on implementation in some areas. According to NCSW collected data, all cases of *swara* reported in the media in 2014 in Khyber Pukhtunkhwa led to police arresting Jirga members, and in some cases, arrests of family members consenting to *swara* as well as arrests of the *nikahkhwans* who solemnized the marriage. These cases occurred across the province, from Upper Dir and Mansehra to Charsadda and Lakki Marwat, with the police being proactive in each. This could signal a change in the police's policies after the introduction of the law, or indicate effectiveness of media in drawing public attention and building pressure on the police.

The evidence from Punjab is more mixed. In just the year 2014, the police actively colluded in *swara/vanni* cases by protecting *panchayats* (in Gabber Arain, Tandaliyanwali and Muzaffargarh), to not taking any action against such *panchayats* (in Sargodha, Dera Ghazi Khan and Taunsa Sharif) to arresting *panchayat* members involved in such verdicts (in Jaranwala, Darya Khan, Mian Chanu, Rahim Yar Khan and Rohiwala).

The data compiled from Sindh has some format inconsistencies with the others. The newspaper source has not been cited and case details are not present. It included the names of prominent personalities including political and community leaders who participated in the jirgas, but are withheld here as they have not been indicted by any court of law.

**Table of Jirga cases in SINDH -2014**

Date	Place held	Cause of Jirga	Decision taken by Jirga	Action taken by authorities
29-09-2014	Qamber	Rape of 8year old girl By religious leader	800000 fine	FIR registered and arrest made
7-07-2014	Lukhy Ghulam Shah	<i>karo- kari</i>	900000 fine	Not mentioned
4-07-2014		<i>karo kari</i>	3 girls were given in <i>sang chatti</i> exchange	Not mentioned
01-07-2014	Sagan Waah , Tholh	<i>karo kari</i>	300000 fine	Not Mentioned

Date	Place held	Cause of Jirga	Decision taken by Jirga	Action taken by authorities
14-07-2014	Ghari Hussan Surki, Tholh	<i>karo kari</i>	500000 fine	Not Mentioned
30-06-2104	Gazi sahyarni, Kandhkot	<i>karo kari</i>	500000 fine	Not Mentioned
30-06-2104	Kajloee Jatooe, Lukhy	<i>karo kari</i>	500000 fine	FIR registered
25-06-2014	Saleem Khan Khosu, Tangwani	<i>karo kari</i>	400000 fine	FIR registered
27-07-2014	Garhi Khairo	Consensual love marriage, couple accused of <i>karo-kari</i>	1400000 fine on man, made to pay 300000 for wife	Police not notified
28-07-2014	Ghumbat	Woman murdered	1400000 fine	Not mentioned
6-08-2014	Tando Adam	2 women kidnapped	1000000 fine	Not mentioned
7-08-2014	Tholh	<i>karo kari</i>	600000 fine	Not mentioned
9-08-2014	Tholh	<i>karo kari</i>	850000 fine	Not mentioned
9-08-2014	Tholh	<i>karo kari</i>	600000 fine	Not mentioned

Date	Place held	Cause of Jirga	Decision taken by Jirga	Action taken by authorities
11-08-2014	Tangwani	Murder and <i>karo kari</i>	1500000 fine. 850000 was for the murder, rest for adultery.  50000 given to father of the girl	FIR registered
12-08-2014	Sukkar	Love marriage / <i>karo kari</i>	530000 fine for man, woman sold for 210000	Not mentioned
18-07-2014	Tangwani	<i>karo kari</i>	475000 to be paid in installments	Not mentioned
15-06-2014	Lukhy Ghulam Shah	Murder of Wife	800000 fine to be paid in installments	Not mentioned
26-07-2014	Matiari	Murder of Woman	1200000 fine	Not mentioned
27-07-2014	Village Mohd Ameen Banglani	<i>karo kari</i>	450000 fine paid in installments	Not mentioned
27-07-2014	Tholh	<i>karo kari</i>	400000 fine	FIR registered
27-7-2014	Shahpur Chaker	Kidnapping, murder of Women	1400000 fine for murder  500000 for kidnapping	
31-08-2014	Mitho Lukhan, Dherki	<i>karo kari</i>	Declared <i>karo kari</i> 2 years after  love marriage, 2 girls given in  <i>sangh chatti</i> , a 5yr old and a 11yr old	Sindh High Court ordered police to give security to petitioner.  police did not respond.

Date	Place held	Cause of Jirga	Decision taken by Jirga	Action taken by authorities
2-09-2014	Tholh	<i>karo kari</i>	300000 fine	Not Mentioned
5-09-2014	Kareem Dad Bajkani	<i>karo kari</i>	650000 fine	Not mentioned
7-09-2014	Ahsan Bajrani near Kurmpur	<i>karo kari</i>	1100000 fine with 200000 to be paid immediately	Not mentioned
8-09-2014	Ghari Hussain Saherki near Tholh	Murder of Woman	1100000 fine to be paid in installments	Not mentioned
9-09-2014	Dadan kaha, Mirpur Mathailo	Karo Kari	200000 to be paid in installments	Not mentioned
15-09-2014	Thari Meerwah	Seven murders	1100000 fine per murder, including for the 1 woman victim	Not mentioned
16-09-2014	Tangwani	<i>karo kari</i>	275000 fine to be paid in installments	Not mentioned
20-09-2014	Abdul Razq Esasni	Rape of a woman	825000 fine to be paid in installments	Not mentioned
22-09-2014	Tholh	<i>karo kari</i>	600000 fine	Not mentioned

Date	Place held	Cause of Jirga	Decision taken by Jirga	Action taken by authorities
23-09-2014	Ghauspur, Rohri	<i>karo kari</i>	Jirga announced the woman <i>kari</i> to be killed, additionally, 2 girls given to 'aggrieved' family and 200000 fine be paid	FIR Registered against 6 people, 1 person arrested released after payment
23-09-2014	Bhitai Colony, Tangwani	<i>karo kari</i>	350000 fine to be paid in installments	Not mentioned
25-09-2014	Tholh	<i>karo kari</i>	1000000 fine in installments	Not mentioned
9-10-2014	Huzor Nondwani Tangwani	<i>karo kari</i>	350000 fine in installments	Not mentioned
11-10-2014	Daira Saherki Tholh	<i>karo kari</i>	410000 fine to be paid in installments	FIR was registered in
15-10-2014	Tholh	<i>karo kari</i>	400000 fine in installments	Not mentioned
13-10-2014	Tangwani	<i>karo kari</i>	700000 fine in installments	FIR was registered

The case tables from Sindh are sketchy in terms of case context, but illustrate a stark, glaring reality: the commercialization of jirgas. Increasingly, jirgas are moving away from even the veneer of justice or even restoring equilibrium, and are money making enterprises. All jirga members get shares from the fines imposed, with large portions for the *ameens* (guarantors) and judges. If the conflict occurs between tribes, it is the head of the tribe, the *sardar* who pays the amount, for

other intra-community conflicts, it is the parties involved. In a study on jirgas<sup>28</sup>, Shah et al. point out that tribal chiefs/*sardars* usually receive a share from the compensation amount paid in cases of honor killing, usually one fourth of the total settlement. Some charge the amount as *autaq kharch* (costs associated with hosting the assembly) or saying the money had to be paid to the police. According to Massoud Ansari, “Many of the *sardars* today depend largely for their survival on the income they generate from heading jirgas”.

Nafisa Shah points out that the police end up functioning as agents not of the State that employs them but of the elite who exercise real political and economic clout. “If a *sardar* presides over a *faislo* and sends the police a *razinama* resulting from the settlement – and there is also money in it for everyone, including the police – who is the SHO to insist that he will register a case of murder according to the book?” she asks.

### Interface with Formal Legal System

The Constitution of Pakistan through Article 8 explicitly states that any custom or usage that has the force of law, to the extent that it is inconsistent with the (fundamental) rights listed in that chapter, is void to the extent of such inconsistency – these include due process, fair trial, and a number of other rights that are not, and cannot be observed by the local jirgas.

There are many conflicts between the formal and informal judicial system. Writing about Balochistan, Shah, Ali and Mahmood point out that in contrast to the formal justice system where the aggrieved files a report with the police against the accused, in the jirga system the alleged accused or the guilty individual, family or tribe has to ask for the tribal jirga. This reversal is in keeping with what is being sought in each system. In the formal court system, the aggrieved is asking either for compensation for damages inflicted and / or punishment of the party proven guilty. In the settlement system of tribal Jirga, the guilty party is trying to counter the aggrieved party’s wish to either take revenge in which case the latter can either agree to the tribal jirga request or refuse such a request<sup>29</sup>.

Pakistan’s formal judicial system is clear on cases of *swara/vanni/sung chhatti* that it is a violation of the constitutionally provided fundamental rights<sup>30</sup> as well as of the Pakistan Penal Code through an amendment in 2004. The efforts of elected governments to abolish such practices can be gauged by a relatively recent law, the Prevention of Anti-Women Practices (Criminal Law Amendment

28 Shah, Ali, Mahmood, (1994) Sardari, Jirga & Local Government System in Balochistan, Edar-e-Tadrees, Lahore

29 Shah, Ali, Mahmood, (1994) Sardari, Jirga & Local Government System in Balochistan, Edar-e-Tadrees, Lahore

30 It violates Article 9 of the Constitution 1973 that guarantees the freedom of liberty. It also offends Article 4 that guarantees every citizen the inalienable right to enjoy the protection of the law and to be treated in accordance with law.

2011), added Section 310 A. This section specifically states that while a *wali* (heir) of the murdered person can compound the right of Qisas (an eye for an eye) in *Qatle amd* (Intentional murder) in accordance with Islamic Shariah Law, girls and women cannot be given as *Badle Sulh* for marriage (in compensation for restoring peace and settling the dispute).<sup>31</sup> The punishment for the commission of this crime is imprisonment for at least three years and up-to seven years, yet police or legal action against jirgas, who still regularly indulge in this practice, has rarely been taken. The offence has been made non-cognizable, requiring the police to get a warrant from a magistrate before making an arrest.

The Sindh High Court (SHC), Sukkur bench on April 24 2004, explicitly banned the holding of jirgas in the province and declared them illegal and unconstitutional.<sup>32</sup> However, this ban has never been imposed and there is no implementation of it anywhere in the province. Yet there have been instances of the higher judiciary taking action to ban jirgas and overturn jirga decisions especially in cases involving violence against women. In a 2004 case where a petition came before the Karachi High Court under Article 199 of the Constitution, to save the petitioner and her husband from being subjected to the jirga system, the court found that “the Jirga system was not a creation of Constitution or law, nor was it a Parliament and they could not declare a valid marriage contracted under the provisions of the relevant law as invalid or unlawful”<sup>33</sup>. Another case had previously also averred that the decision of the jirga did not qualify to be an award within meaning of S. 2 (b), Arbitration Act, 1940.<sup>34</sup> Both these decisions show the higher judiciary of the country has declared jirgas unconstitutional and their decisions without force of law.

The Supreme Court under its original jurisdiction under article 184(3) in 2005, in order to protect women and girls from these misogynistic customs, challenged the unconstitutional, unlawful and un-Islamic custom of giving girls as compensation to end primarily male disputes. Accordingly the Court instructed the inspector generals of the police in all four provinces, and in the Northern Areas, to take action against these settlements. At another hearing in the Supreme Court, directions were given by the court to form special committees throughout Pakistan to give legal assistance to the victims of *swara* and *vanni*. These committees have been formed and have already started assisting those who are referred to it.<sup>35</sup>

31 Section 31 O-A contains the punishment for the giving of a female in Badl: “Whoever gives a female in marriage or otherwise in badal-i-sulh shall be punished with rigorous imprisonment which may extend to ten years but shall not be less than three years”.

32 Samar Minallah, *Judiciary as a Catalyst for Social Change*, Supreme Court 2006 at <http://www.supremecourt.gov.pk/ijc/Articles/9/2.pdf>

33 *Mst. Shazia versus Station House Officer*, Sindh High Court, Pakistan Criminal Law Journal 2004: 1523

34 *Badshah versus Bahadur Shah*, Supreme Court, Supreme Court Monthly Review 1994: 384

35 *Ibid.*

The Supreme Court opened the gates: During the months between December, 2005 and June, 2006, up-to sixty cases of *swara* were recorded in the two districts of the KP. While more than twelve cases emerged only from District Bhakkar within two weeks.<sup>36</sup> Awareness of these cases resulted in seven of them being intervened with, by local media and police. In Mianwali, five sisters who were given as *vanni*, reached out for judicial intervention.<sup>37</sup>

In May 2006 on the demand of jirga members in Shikarpur, Sindh, a man avowed to hand over his two daughters, ages nine and one, as compensation for eleven buffaloes. The handing over of the girls was immediately halted as the case was brought to the attention of the Supreme Court. Since the Supreme Court has taken up the issue, the police have also been forced to become more proactive and have stopped treating these as a private matter. For example, in June 2006, in Buner, KP, a two month old girl was given in marriage to a one year old boy but the Buner police arrested the jirga members and the imam who had aided the verbal solemnization of this pact based on the illegality of such action.<sup>38</sup>

In another case that came before the Peshawar High Court where the complainant was suspected of having illicit relations with a woman and so a jirga was convened and the elders of the locality decided to give the hand of the complainant's sister to a person as *swara*. The court found that there was a prima facie case to be made against the accused and co-accused, father and brother of the victim, who had participated in the jirga and had been an active part of the process of sacrificing the victim, under S.310-A, P.P.C. The court therefore refused bail of accused and co-accused and ruled that handing over of a female, without her consent, was unlawful.<sup>39</sup> The Peshawar High Court also refused bail in another case, where a Jirga was convened, wherein the elders of the locality gave the hand of complainant as *swara*. The High Court ruled that the practice of such tradition was derogatory and disobedient of the law, indicating the importance and value of human beings.<sup>40</sup>

In 1992 a jirga denied franchise to female voters, and the court ruled the decision of the jirga to be void and could not be enforced for jirgas have no right to disenfranchise females from their right of franchise.<sup>41</sup> In the 2013 elections, leaflets were circulated across the province of KP, stating that it was un-Islamic for women to vote and hence creating security problems for women going out to polling stations.<sup>42</sup> In this case women's rights groups took direct action and set up security at polling stations to ensure women could exercise their rights in safety. Yet again, in the by-election of 2015, in a number of polling stations including Upper and

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36 *Ibid.*

37 *Ibid.*

38 *Ibid.*

39 *Muhammad Sultan versus State*, Peshawar High Court, Pakistan Criminal Law Journal 2013: 950

40 *Sargand versus the State through Additional Advocate General*, Peshawar High Court, Monthly Law Digest 2014: 1464

41 *Inayatullah Khan versus Ghafoor Jadoon*, Peshawar High Court, Monthly Law Digest 1992: 2540

42 *Pakistan's Women Face Battle for the Right to Vote*, The Guardian, May 2013 at <http://www.theguardian.com/world/2013/may/04/pakistan-women-right-to-vote>

Lower Dir, Buner, Mardan, Dera Ismail Khan, Noshera, Batagram and Malakand Districts, men from all parties agreed to ban women from voting.<sup>43</sup> A petition was filed by twelve female voters of the constituency, that pursuant to a consultation between political leaders and their parties, women were not allowed to vote in said by-elections. The Election Commission of Pakistan ruled that the by-election of constituency No. PK-95 Lower Dir-II is void for the reasons of disenfranchisement of female voters.<sup>44</sup> The Peshawar High Court however held that the petition was non-maintainable as no proof of prevention from voting was presented.<sup>45</sup> Women's rights activists have gone to the Supreme Court against the PHC judgment. The Supreme Court judgment is pending.

However, while jirgas have time and again been declared unconstitutional, there is no court judgment in which members forming the council of elders have been brought to justice. In a case in 2014 for example 6 persons who carried out an inhumane order by a jirga to kill three brothers of the two young boys featured in the famous Kohistan dancing video, were convicted, the jirga members themselves were acquitted.<sup>46</sup> However, as of 2014, there is a shift in the trend in Khyber Pukhtunkhwa after passing of the law against anti-women practices, and jirga members have been arrested in some cases<sup>47</sup>, but none have been sentenced yet, as the cases are under trial.

The National Judicial Policy Making Committee held a meeting in which they announced that 'bargain over women in the case of compromises under *vanni* is against Islamic values'. The then Hon'ble Chief Justice of Pakistan Mr. Justice Sh. Riaz Ahmed presided over the meeting while other participants included Mr. Justice Fazal Elahi Khan, Chief Justice Federal Sharait Court, Mr. Justice Raja Fiaz Ahmed, Chief Justice Baluchistan High Court Mr. Justice Iftikhar Hussain Chudhri, Chief Justice Lahore High Court Justice Shakir ullah Jan Chief Justice Peshawar High Court, Justice Sabih ud din senior judge Sindh High Court and committee secretary Dr. Faqir Hussain participated in the Meeting. They noticed the *vanni* and resolved it against Islamic Laws because a marriage demands the will of both sides. Committee resolved that it is prohibited under sections 310 and 338 (E) of Pakistan Panel Code to give a woman in marriage or otherwise in *badal-i-sulh*. It was resolved in the meeting that all the Chief Justices are bound to issue notice to all 'Trial courts' and 'Appellate Courts' to strictly notice *vanni* cases. The High Courts in Pakistan have declared Jirga unlawful and observed that most of the time the *Jirga* or *Punchayet* or *Faislo* system or as envisaged in legislation like

43 <http://www.dawn.com/news/1184647> and page 15 Women, Violence and Conflict in Pakistan

44 Shah Marai, By Poll Result Cancelled After Women Barred From Voting, News Week Pakistan, June 4, 2015 <http://newsweekpakistan.com/by-poll-result-cancelled-after-women-barred-from-voting/>

45 Sirajuddin, PHC Dismisses, Women Voters' Petition Challenging PK-95 By-Election Results, Dawn, May 27, 2015 at <http://www.dawn.com/news/1184542>

46 Mohammad Sadaqat, 6 Convicted for Carrying Out Jirga Orders, The Express Tribune, January 31, 2014 at <http://tribune.com.pk/story/665707/6-convicted-for-carrying-out-jirga-orders/>

47 NCSW data

Frontier Crimes Regulation violate fundamental rights of a person and do not give opportunity of being heard to all the parties to the dispute and, in particular, women and children. (A judgment of Sindh High Court reported in 2004 PCr.LJ 1523).

Scholars have shown that the formal and informal justice system are not binaries and are connected by their collective reinforcement of power hierarchies. Activists, journalists and social analysts have pointed to instances where politicians, ministers and bureaucrats have participated in and led jirgas, held in official venues such as government Circuit Houses. Several parliamentarians themselves being tribal leaders conduct Jirga hearings. An example of this is the presence of many parliamentarians and state officials, a Jirga held in December 1998 involving Bhayo, Marfani and Brohi tribes and 46 murders spanned over 30 years. The Jirga was held in the district council hall of Shikarpur and included Members of National Assembly from the Pakistan People's Party, Members of the Provincial Assembly, as well as the District Magistrate and the Senior Superintendent of Police of Shikarpur. Paramilitary rangers and police were also deployed for the protection of the jirga.<sup>48</sup>

In one particular example of active collusion, when the Sindh High Court declared jirgas in Sindh illegal and unconstitutional in 1994, the same year the Sindh government gave the directive for drafting the Sindh Amicable Settlement of Disputes Ordinance (SASDO) 2004, to give jirgas legal cover.

Jirgas have also taken place in the premises of the official criminal justice system, for example in 1998 the Sindh Home Department invited a tribal leader to conduct a jirga inside Sukkur Central Jail so as to resolve an eight year dispute between warring factions of the Dhareja tribe which had cost six lives. As such state officials are also known to have been successfully tried by jirgas and have submitted to their 'jurisdiction'.<sup>49</sup>

These tribal courts are also supported by the local police and civil administration as they prefer that crimes are not recorded. Moreover, given the largely ethnic and political party loyalties, the police are likely to ignore legal violations in order to keep gaining compensation from the tribal leaders. This patronage is justified through resorting to culture, without problematizing who defines what culture is, whose practices are upheld in it, who it protects and who is cast 'outside' it, who participates and who withdraws to the margins.

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48 *Ibid.* 24

49 *Ibid.* 24-25

## Case Study

The following case study is excerpted from an interview conducted by the author for a book on sexual violence and impunity, submitted to Zubaan Press for publication.

### Consensus as Impunity – An interview with Arfana Mallah

This is an interview of a known feminist and public intellectual. Dr. Arfana Mallah is a leading woman's rights activist with the Women's Action Forum (WAF) in Hyderabad. She is a Professor of Chemistry at University of Sindh at Jamshoro. This interview was conducted to follow up on a discussion on the case summarized below.

A journalist's son and a girl fell in love and got married without consent of their families. A few months later, the girl's family tracked them down and killed both of them. The boy's father was distraught and tried to get them punished for the murders, but the girl's family was related to a judge in the session court so neither the judiciary nor the police would take up the case. The journalist then turned to others in his professional community to draw media attention to the injustice.

Around then, there was a SAFMA Conference (South Asian Free Media Association) in Islamabad, where Arfana was in attendance along with a contingent of journalists from Sindh. The conference delegates were invited for dinner by the then President of the country, Asif Zardari. The journalists from Sindh decided to apprise him of the case to draw attention towards how a fellow journalist was suffering because the authorities were indifferent and unwilling to do their job.

The President immediately called the police chief from that dinner and issued strict instructions to follow up the case, give him a briefing and keep him informed of any progress on it. The President's involvement galvanized the police and they exhumed the couple's bodies for postmortem. The autopsy report showed that the girl had been more than five months pregnant. From here, the case took a strange turn, and it was this point onwards that Arfana Mallah became involved.

When the news of her pregnancy became known, the boy's father called a Jirga, which is an informal judicial system where men from the village/ caste/ tribe elite assemble, judge cases and announce verdicts that may or may not be in conformity of the law, but conform to social or community notions of justice. His plea for summoning a Jirga was that this was no longer an 'ordinary' murder case because his lineage had been terminated.

According to the jirga's verdict, the girl that the family had killed was their property, so there was no hisaab/ kitaab, no accountability or penalty for that; it was their

discretion and their right to do so. The jirga also decided that the girl's family must pay compensation to the boy's father because they killed his son.

Then the matter came to the journalist's lineage, the pregnancy and the girl's uterus. The jirga decreed that the uterus was the girl's so her family could do what they want to it, but the child in the uterus belonged to the boys' family. The Jirga deliberated the rightful owner of the 'beej' or the 'tukham' (seed), and said it belonged to the paternal grandfather as his lineage. His seed was destroyed by the girl's family so they must pay compensation for the seed.

Interview:

**Q. You have taken up countless cases of violence against women, of sexual violence, of survivors whom you now have a personal connection with and have seen change over the years. Why was this case so pivotal and traumatic for you, more than the others even though you never met the girl in question?**

**A.M.** It illustrates the limitations, the solid rock walls we women face. The belief that we can do something that matters, the transformative potential, that agency is what keeps the activist alive. Except it's like a ghost limb; it hurts even after it's severed.

It should have been a success story. The case was brought into media spotlight. It featured in the corridors of power. It reached the Presidency; the police kicked into gear, investigations were conducted; autopsy done; culprits arrested and sent to jail. Getting it this far should have been the end of the road. But then look what happened. There was an out of court settlement, a jirga.

The jirga unanimously decreed that she was not entitled to sexual autonomy and bodily rights; that the consent over her body was not hers to give, hence her murder was not the problem. But the seed that was incubated in her uterus as a result of her consent was not only acceptable, but the family had rights over it, hence the compensation paid.

The case was withdrawn and everyone freed. The law allowed it. Where do we go from here?

**Q. The Jirga ruling – was it unprecedented?**

**A.M.** Jirgas don't follow precedents. It's based on whatever makes sense in the moral universe of the men who are part of it at that moment in time. But they are allowed to get away with this. Jirga rulings are not just verbal. The whole process is documented, an agreement – the Razinama is signed.

The Jirga was called at the Circuit House, official premises. The Commissioner Hyderabad was part of the jirga, a ruling party's senator was also a member. The

girl's uncle was there, who is a judge himself. Renowned journalists also consented to being part of this Jirga – keep in mind that as per a Sindh High Court ruling, jirgas are illegal in Sindh.

Q. But the Sindh High Court ban has not been put into effect – there was no consequent legislation on it. The Court itself never pursued it either.

A.M. Who would legislate for it – the politicians who facilitate it? And how can senior journalists openly be party to something that's in contravention of court decrees? As an explanation, they said it's a case affecting their community – so as easily as that, they slid into the same tribal, caste-driven, misogynist mindset they condemn others for, because this time it was about them.

Q. But it wasn't a tribal context, was it?

A.M. The context was not, the mindset was. The people involved were definitely not tribal, they just resort to the tribal code whenever it suits them. Look at the profile of people involved. Ali Hassan, the district correspondent for BBC was part of it – forget tribal, he is neither Baloch nor Sindhi. He is from the Urdu speaking community, which doesn't have the Jirga system. There was also Jan Khashkheli of The NEWS, Ishaq Mangrio of Sindh Express – they were official Jirga members, these educated, professional, middleclass, influential men. No Sardar (tribal chief) was part of the Jirga, nor did this happen in the remote rural areas away from the glare of the media. It was Hyderabad, the second biggest city in Sindh.

Q. The girl's paternal uncle was a judge. How big a role did that fact play? We usually refer to jirgas as the informal parallel judicial system. Yet in this case, a member of the formal judicial system was part of it.

M.A. It's a misnomer. There is nothing parallel about it. The informal and formal judicial systems converge, both ideologically and in practice when it comes to strengthening patriarchy. Look at this case: member of the judiciary, media, administration, senators, political parties, aggrieved party, offending party, all colluded in protecting each other's masculine patriarchal interests.

Across Sindh policemen, elected political representatives and bureaucrats are part of jirgas or facilitate them. You see them urging people to resort to jirgas instead of the formal judicial system; their verdicts are not challenged even though they are invariably anti-women. The Jirga as an institution is anti-women; no women are allowed to be its member; witness or even complainant; only in the latter can she be represented by a male relative.

Q. The Jirga process was followed in its entirety?

A.M. Yes. It started with a recitation from the Quran, followed by an oath taking by the ameen [guarantors] that they will accept the outcomes on behalf of the parties

involved. Then the Jirga verdict was announced, and a Razinama was signed. All the ameen were journalists. I have photographs of it.

**Q. Would it be different if the families had come to this very agreement between themselves without a Jirga being held? Does the Jirga unanimity makes it worse?**

A.M. Absolutely, because it gives decisions a veneer of consensus, that it is somehow democratic and grounded in social norms. How can a process that excludes women by definition be democratic? Some of these old leftist type men still have some romance with the Jirga system, they say it is our tradition and culture; others say it is a potent rejection of the state and its institutions, like any of it is a good thing. Misogyny has such a resonance with the Sindhi middleclass men.

**Q. Jirgas are often defended as lessening caseload of the judiciary – that otherwise judges would be dealing with petty problems like cow theft, whereas the system is overburdened already.**

A.M. Rubbish. Jirgas are now fixated on women, irrespective of what it historically was as an institution. People go to police and courts with their daily issues, but when it comes to women they appeal for jirgas. Almost every case of violence that Women’s Action Forum Hyderabad has fought has ended in a Jirga. We can battle courts and police and state structures, we cannot battle this on its intrinsic terms, and that is precisely why these men prefer them. Jirgas are ‘uncontaminated’ by ideas of equality, of women having rights and entitlement to protection.

See, the Jirga or the faislo, it is the foundational building-block of impunity, in itself a license. Once your actions have been endorsed or absolved by a jirga, you receive social acceptance. It also works as an official pardon because of the laws of Pakistan – the Qisas and Diyat Islamic laws that allow such deals to be struck because the laws declare murder a crime against a person and not against the state. So even if state officials and government employees are not part of the Jirga, they have no problems in accepting jirga ruling because if nothing else, it gets a crime amicably resolved and off their hands. Even if it means that in the majority of the cases, a woman is dead because of it. The jirga is the bedrock of impunity for sexual violence here in Sindh.

**Q. But society is porous. Do you see things changing? For instance honor killings are now condemned unlike in the past.**

A.M. Even these people who are ostensibly sympathetic to women in honor killing cases end up validating the oppressive honor regime. The police officers who pursue cases and want to protect women, and yes, there are many of those, they go around saying women have been wrongly accused of adultery so it is wrong to kill them. Even Oxfam’s ‘We Can’ campaign for ending honor killing showcased all the fake allegations against them. By focusing on women being framed falsely of

sexual transgression, they skirt around the issue of consent. They don't defend women's right to make choices and give sexual consent. If it is wrong to kill her on fake charges, is it right to kill her on real, true charges? Her consent is permissible only when it coincides with society's consent.



# 4 Reassessing support for Jirgas

There is considerable support for jirgas in local rural communities as well as in official structures and both are embedded in the jirga system.

In exploring the underlying logic of the jirga, Tom Ginsburg<sup>50</sup> finds such mechanisms for dispute resolution an organic response to the lack of effective state institutions and government, and an effort to limit the escalation of private violence. Referring specifically to the *Pashtunwali* code and the role of jirga within it, he explains it as “A proto-legal system” that has its own logic of “Adjudicating in anarchy.”<sup>51</sup>

Others have pointed out that arguments over jirgas must be read in the wider

context of the shortcomings of Pakistan’s formal legal system where courts are already staggering under the weight of cases. The National Assembly was informed that by the end of 2013, 1.7 million cases were pending in the Supreme Court and subordinate courts in the country, despite the laws and reforms undertaken for expediting delivery of justice<sup>52</sup>. Stopping jirgas would mean transference of those disputes to the formal courts, which already cannot cope with the current burden. The problems that citizens face with the formal courts are minimized, if not absent in jirgas. In a survey of district courts conducted by

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50 Tom Ginsburg , An Economic Interpretation of the Pashtunwali , University of Chicago, Legal Forum Draft Apr 15, 2011

51 Ibid.

52 <http://nation.com.pk/national/15-Jan-2015/1-7m-cases-pending-with-sc-lower-courts-na-told>

Osama Siddique<sup>53</sup>, respondents cited the problems they faced while fighting their cases in court. In order of frequency, these were a) cost of litigation, b) attitude of lawyers, c) complexity of legal system, d) corruption, e) distance of court from home, f) transfer of judges, and g) language. How prohibitive these barriers are is reflected in 42% of the study's respondents saying that they would not come to court again for any other future disputes or problems and would resolve them elsewhere.

The problems with the mainstream formal judicial system remain equally forbidding for women. As many women's rights activists point out, judicial systems are not necessarily justice systems, formal or informal. There has been no comprehensive comparative gender analysis of both judicial processes and it is an important knowledge gap. While the legal judicial system may fail women on many counts, the jirga system does not as any preferable alternate, in fact, is worse because it does not even formulaically endorse notions of gender justice.

There are no studies focusing specifically on women's experiences of or their opinions about jirgas. The all-male discourse around jirgas follows the androcentric norm that men's perceptions and experience are a valid proxy for that of women. All evidence points to the opposite.

In listing reasons in support of the longevity of jirgas, Naveed Shinwari<sup>54</sup> summarizes that jirgas dispense affordable, accessible, speedy and transparent justice; they are trusted to work in accordance with traditions and cultural values ingrained; they are conducted by community elders known for piety and fairness; and they focus on settling disputes rather than adjudicating and passing sentences, emphasizing compensation for victims and reintegration of offenders back into society. While Shinwari recognizes the violations of women's rights and violence against them perpetuated through jirgas, his pros-and-cons matrix is useful to show that even the pros, the stated advantage of jirgas are hollow claims once referenced with regard to women.

### **Jirgas dispense affordable, accessible, speedy and transparent justice:**

Women cannot access jirgas. They cannot call for them, appeal to them, participate in them, give testimonies in them or witness them. It is neither inclusive or representative nor egalitarian as a system. Amar Sindhu, an intellectual and women's rights activist has been closely following jirgas in Sindh for five years. In an interview, she explained, "It is a myth that jirgas are a cheap form of justice. There is no justice and it is not cheap. Nor are the solutions sustainable. The offender cannot afford to pay the fine in most cases, and after paying a few installments, cannot continue and the conflict flares up again." Additionally, she challenges

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53 Osama Siddiqui, *Pakistan's Experience with Formal Law: An Alien Justice*, Cambridge University Press

54 Naveed Shinwari, *Jirgas* (complete the citation)

the notion of jirgas providing speedy justice. “In tribal cases, the *sardars* wait for the conflict to intensify and for the body count to rise. The more the number of killings, the higher the penalty payments and the larger their share is. It is not in their interest then for the conflict to be immediately mitigated.”

### **Jirgas uphold traditions and cultural values:**

In populist invocations, culture is upheld as static and fixed and consensual practice uniformly shared by all members of the said group. This essentialist notion of culture obfuscates that those who define culture in a particular way are often beneficiaries of that definition. Shaheen Sardar Ali<sup>55</sup> draws attention to the power politics of defining culture. She brings forward how perceptions of culture were frozen in time by British colonizers through preservation in regional Gazetteers, in a context where culture was not previously documented. They attempted to record culture by travelling across the region and documenting what they heard in villages and gatherings. Sardar Ali notes, “The crucial question to pose here is: who were the participants and informants in these culture-gathering meetings? It was no doubt, the male elite, excluding working classes, minority groups and women. Women’s concerns were obviously not taken into account. For months, men would continue to record what they thought constituted culture and it was this particular version of culture that became embedded in structures of the colonial state.” (Also, see section on Defining Culture).

### **Jirgas are conducted by community elders known for piety and fairness;**

Participation criteria in jirgas vary across regions, but invariably span the male elite. It is usually traditional figures of caste or tribal authority, landowners, senior government officials or elder family patriarchs. The logic is to include those with the social resources to get decisions implemented, and not those considered the most impartial or just. Jirga decisions have included ordering women to be killed, children to be sold into marriage, women to marry those who raped them and acts of public humiliations. While Samar Minallah found that almost 90% of jirgas included local religious leaders as participants in some regions, including in decisions of *swara* which is decidedly not a religious practice, there is no such association in Sindh – where landlords and tribal leaders use the Jirga to continually assert their power. Tracing the perpetuation of tribal leadership in Balochistan, Naseer Dashti writes, “The Jirga system was institutionalized by the British to control rebellion and it gave Sardars immeasurable power over the lives and belongings of the Baloch masses.”<sup>56</sup> Many others continue to critique the hereditary power of tribal

55 Shaheen Sardar Ali, *Overlapping Discursive Terrains of Culture, Law and Women’s Rights: An Exploratory Study on Legal Pluralism at Play in Pakistan in Scratching the Surface: Democracy, Traditions and Gender* (ed.) Jennifer Bennett, Hierich Boll Foundation, Pakistan 2007

56 Naseer Dashti, *The Baloch and Balochistan: A historical account from the beginning to the fall of the Baloch state*, Trafford, 2012

headman-ship. The point here is that the piety, fairness and integrity accredited to jirga leaders and members are contested and contingent, and not just by women.

In addition, there is a deliberately cultivated blurring of religion and culture, which buttresses support for jirgas. The common perception is that many of anti-women practices such as forced marriages or forced prevention of marriages that jirgas uphold are consistent with Islamic laws or Shariah, but on the other hand, when it comes to giving women land and property, as requisitioned in Islam, the argument for not doing so is that it is inconsistent with culture<sup>57</sup>. In research findings in Afghanistan that mirror Pakistan, the Max Planck Institute finds that common people have little knowledge of Islamic law and believe customary law complies with it even when it is in contradiction with each other. It found that most people don't see this contradiction because members of the jirga very often include religious figures of the village and their participation in the jirga makes people believe that the decision complies with Islamic law.<sup>58</sup>

There is however evidence that people's perceptions of jirgas may be undergoing a change. The Sindh Judicial Academy<sup>59</sup> found in its study that jirgas are becoming unpopular in South Punjab. It found that as education levels rise and population has higher mobility, their social mores change, and as media highlights the cruelty of the *panchayat* system there, with regard to women specifically, people are becoming more skeptical of it. The findings also show that people are now likely to voice reservations about class distinctions, and that people increasingly believe that jirgas perpetuate class and anti-women discriminations.

This is substantiated by a campaign against jirgas in Sindh organized by WAF-Hyderabad (Women's Action Forum) in 2008. It was a voluntary, non-funded initiative that was conducted by feminist activists with minimal costs and no donor support, who were yet able to travel, stay and lobby in twenty districts in Sindh, holding public seminars, dialogues, TV programs and press conferences in each with enthusiastic public support. They also managed to collect over sixty thousand signatures on a petition demanding the implementation of the Sindh High Court ban on jirgas. In their accounts, they maintain that they found substantive support and little opposition. Increasingly women are defying jirga verdicts by appealing to state authorities to safeguard their rights as citizens and demand protection against fallouts of jirga defiance.

57 Saba Gul Khattak and Nazish Brohi, *Women and Land: Access and Ownership in Pakistan*, SDPI

58 *Afghanistan: Blood feuds, traditional law (Pashtunwali) and Traditional Conflict Resolution*, LandInfo, Norway, 2011, quoting Max Planck Institute, 2005

59 Justice Saleem Akhter, Justice Mushir Alam, Muhammad Shahid Shafid & Iqbal Detho. *Study on Informal Justice System in Pakistan*, Sindh Judicial Academy & UNICEF

# 5 The Way Forward

There are knowledge gaps in the understanding and working of jirga systems. It would be useful to have comprehensive qualitative and quantitative researches on variations within jirgas including their processes and constitution of; the volume and nature of cases that are placed before them; the nature of decisions; the political economy of jirgas (who is paid and how much and how); women's opinions and experiences; impact on families; longevity of the arbitrated peace; impact of social changes on jirgas; relationship with other state institutions and so on.

There are four main approaches regarding addressing of problems intrinsic to the jirga system. These are:

- i. Calling for an outright ban on all jirgas
- ii. Reforming jirgas by measures such as including women at all levels, ensuring representation of marginalized groups and allowing civil society groups to participate
- iii. Regulating jirgas by mechanisms such as instituting an oversight body or limiting the remit to particular kinds of cases such as civil cases and excluding criminal cases
- iv. Gradual redundancy of jirgas by improving substitute systems such as ADR (Alternative Dispute Resolution) and mainstream judicial processes, especially at the level of lower courts and civil courts

While a comparison of the strengths and weaknesses of each option is beyond the scope of this report as it would require public consultation, opinion surveys and feedback of law enforcement personnel, a summary review would suggest that

attempts at regulating and reforming jirgas would encounter systemic constraints. The regulating option would be difficult to implement since regulatory bodies work in limited environs such as x number of companies or y number of thematic or geographic clusters. The same issue would arise in the reformation agenda. By definition jirgas are informal groups of men collecting to resolve local problems, and it is difficult to envision authorities managing such surveillance of 180 million people across an area more than 300,000 miles, more so given the state's capacity gaps.

A ban on jirgas may be most effective approach as by criminalizing jirgas, making it squarely a law and order concern. This would remove the case specific subjectivities of assessing each case to see whether it complies with laws and where it violates human rights. The criminalization itself works as a deterrence and may restrain many people from such participation. By inducing more people to turn to the state for solutions, it would enable people's connection with state institutions such as courts and strengthen state/citizen relations. It would also breach the psychological barrier of women belonging to the private sphere, whether of the home, village or community, and enabling them to the protection and entitlement to rights in the public and private space. For the ban on jirgas to be workable, it would need to be accompanied by a structural overhaul of the efficiency and working of the formal judicial system. The last option is more of a necessity that must be done in either case; however, this is not a far-fetched option. The state of Pakistan has already undertaken to do so; in fact, the reason that military courts were instituted with a two year 'sunset' clause in 2014 was for the judicial system to use that time frame to fix its backlog, anomalies and court processes.

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