

# A Study of Formal & Parallel Legal Systems Prevalent in Pakistan

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National Commission on the Status of Women (NCSW)

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## EXECUTIVE SUMMARY

### The Study

Access to justice has been one of the most critical issues facing the citizens of Pakistan in particular women. Due to the various issues facing the judicial system which has resulted in its inefficiency, there has been an increase in a variety of different measures to support the judicial system in the form of additional courts, tribunals etc, and the people seeking recourse to illegal informal structures such as tribal elders, jirgas and panchayats etc.

As a result, there now exist simultaneously several forums of justice. It has become difficult for the common man to understand where to go for seeking justice, which is the correct forum, how to get there etc. There is also a continuous over-lapping of the system, which makes it even more confusing. Further, the community has also taken over their own justice by setting up their own tribal traditional systems, which are highly illegal and which mete out wrong, inhumane and illegal sentences without legal backing.

It is in consequence to this that the NCSW commissioned a nation-wide study in 2010 to examine these systems with a gender perspective in order to analyse whether these systems were cohesive, what problems plagued all of them and what advantages existed in them. In essence, the study was intended to provide an overall analysis on how well these systems operate and whether there is a need for all of them to exist, and if not, what measures could be taken to make the system cohesive, supportive and sustainable, while providing quality access to justice and redress for all the citizens of the State.

### **1. Introduction**

Parallel legal systems are not just the traditional social set ups presuming to provide 'justice' to the community. In fact, this term goes beyond just these informal structures and includes any structure or institution in existence that performs judicial and legal functions in a State in any manner and is parallel to the formal legal system, including parallel courts such as the anti-terrorist court, bodies sanctioned by the government of legislation and quasi government bodies. This results in three categories of systems, all of which exist in Pakistan with varying issues and with varying consequences:

- (i) The formal legal system;
- (ii) The parallel legal system; and
- (iii) The parallel informal and illegal system.

The study elaborates on the existence of these parallel legal forums as a cause and a threat to the weakening of the formal judicial system or as possible support structures that can be tapped to improve the system.

This study is a nationwide study and includes Federally Administered Tribal Areas (FATA) and Gilgit-Baltistan. The discussion is based on what effect these systems have had, whether positive and negative and examines whether they should continue to exist or be removed. It also examines the entire system from a gender perspective.

## **2. Forums for the dispensation of Justice**

The different categories of both legal and illegal systems operating within the country have been identified:

### **2.1 The Legal System of Pakistan:**

- The Supreme Court;
- High Court (The Highest Court of Province)
- Court of District & Session Judge
- Court of Additional District Judge
- Court of the Civil Judge / Judicial Magistrate
- Small Causes Court.
- Sessions Court
- Courts of Judicial Magistrates

#### **In FATA only:**

In FATA, the justice sector follows what is laid out in the Nizam-e-Adl Regulation 2009

- Jirgas
- District & Sessions Judge as Zilla Qazi
- Additional District & Sessions Judge as Izafi Zilla Qazi
- Senior Civil Judge/Judicial Magistrate u/s 30 of Criminal Procedure code, 1898, as Aa'la Illaqa Qazi
- Civil Judge/Judicial Magistrate as Illaqa Qazi
- Court of Executive Magistrate

#### **In Gilgit Baltistan:**

The system in Gilgit Baltistan is completely different. The region was granted political autonomy under Gilgit-Baltistan (Empowerment and Self-Governance) Order 2009. This sets up an independent

Legislative Assembly and Council. The Gilgit Baltistan Council has the freedom to form any number of administrative courts or tribunals as is necessary. 2 courts are formed under the law.

- Gilgit Baltistan Chief Court
- Supreme Apellate Court

## **2.2. Parallel Legal Forums established under codified laws**

Special courts have been set up by the State, usually relating to specific issues/topics. Listed below are important federal and provincial special courts.

### **Federal Special Courts**

Some of the special courts/tribunals set up by federal enactment are:

- Federal Shariat Court;
- Accountability courts;
- Banking Courts;
- Anti-terrorism Courts;
- Drug Courts;
- Special Courts for emigration offences;
- Labour Courts (currently suspended);
- Court of Special Judge (Customs);
- Income Tax Appellate Tribunal;
- Services Tribunal;
- Insurance Tribunal;
- Environmental Tribunal;
- Customs Tribunal;
- Revenue Courts;
- Family courts;
- Provincial Special Consumer Courts;
- Rent courts.

### **Quasi Legal Forums having the cover of Law**

| These quasi judicial forums are accessed by the people as they have the cover of law- but these are not formal parallel judicial forums. These forums include

- Muslahat e. Anjuman constituted under the Local Government system 2001
- The Arbitration council constituted under the Muslim Family Laws Ordinance 1961
- Appointment of Arbitrators under Arbitration Act 1940
- The Office of Wafaqi Mohtasib created under Presidential Order 1984.

### **2.3 Parallel Informal and Illegal Forums not having the cover of codified laws**

A variety of informal systems exist in Pakistani society. These include methods of asking a 'naik mard' (honest/pious man), the local 'maulvi' (religious leader/scholar), the vadaira (feudal lord) to act as an arbitrator in a dispute and resolve the conflict.

Some of the most common forms of informal systems existing across the country are listed below.

- Jirgas/Panchayats/Maraka;
- Sarkari Jirga;
- Qaumi or Ulusi Jirga;
- Shakhsi Jirga;
- Loya Jirga;
- Panchayat;
- Faislo.

#### **Gilgit Baltistan**

Different areas in Gilgit Baltistan follow different systems

- Mir System;
- Aga Khan Arbitration & Reconciliation system;
- Shari System and also Shia Scholars.

### **3. Advantages and Disadvantages of these Systems**

For the purposes of this study, four focus group discussions were held in all five provinces with the intention of getting feedback from the community their views on the advantages and disadvantages of the formal legal system, legal parallel systems and the illegal parallel systems. Questions regarding the nature of these systems, their effectiveness, quality of judgments, gaps, lacunas were discussed, while also identifying positive features that could be replicated in other systems in order to make them effective. This section is composed of the community's perspectives.

### **3.1. Formal legal system**

#### **Advantages of the formal legal system**

- It is an authentic system with the requisite backing from the existing Constitution of Pakistan and the laws of Pakistan.
- It is the State mechanism.
- It is a set principles of laws and precedents that must be followed exactly and equally across the country.
- Its verdicts are executed or meant to be executed by the State rather than left in different hands etc.
- Support structures to process, deal with and implement the cases and verdicts, including police, prisons, shelters etc.
- The court structure itself is an advantage – a network of courts following set procedures which have different levels, allowing for appeal and review of cases and verdicts.
- Intentioned impartial judges. They do not necessarily belong to the community where they are performing their duty as judges, thereby they do not have any personal interest or bias in the matter.
- Trained judges with legal experience.
- Judges sole job is their work as a judge with no other obligations upon them.
- They are also permanent employees with financial and other support of the Government, therefore they are not dependent on other employment for payment.

#### **Disadvantages of the formal legal system**

- Lengthy procedures resulting in indefinite delays;
- Lack of efficiency and running also;
- Corruption throughout the justice sector include police officers, court clerks etc;
- Lack of appointment of requisite number of judges;
- Huge workload of judges resulting in delay and lack of quality of judgment.
- Lack of awareness raising with community;
- High lawyer fees;
- Poor quality of legal education and therefore lawyers;
- None or poor system of monitoring and transparency.
- Lack of resources;
- Inherent gender bias
- Lack of extension of laws to Gilgit Baltistan and FATA.

### **3.2 Parallel Informal and Illegal Systems**

### **Advantages of Parallel Informal and Illegal System:**

- On the spot decisions
- Easily approachable with low or no costs;
- Awareness amongst people of these systems;
- Faith and trust because they know the adjudicators.

### **Disadvantages of Informal Judicial Forums**

- The systems are illegal;
- Lack of support structures;
- Lack of resources to conduct even the most minor of investigations etc;
- No reliability of authenticity;
- The set-up of these systems is suspected;
- Out-dated forms of justice which are discriminatory, unequal, perverted, conservative and culturally interpreted – or rather mis-interpreted versions of Islam;
- The ‘judges’ in jirgas, panchayats, and other mediators etc are members of the community, thereby have community biases;
- Due to prominent positions, the men can force their views on the weak and powerless.
- Often inhumane, out-dated and superstitious methods of investigation are sometimes used e.g. walking on hot coal to decide on guilt or innocence.
- These ‘judges’, judge on the basis of traditions and customs as opposed to the law of the land and as opposed to the rule of law, human rights, fundamental principles.
- The evidence, procedures and decisions are not based on law and often contradict the law to provide punishments which are illegal and often horrific e.g. rape, death as karo kari, exchange of girls as compensation<sup>1</sup>.
- Decisions are also made on the basis of age old principles e.g. ‘To pay in the same coin’.
- No appeal allowed – it there is an exception, appeal is allowed it is to another jirga constituted of some different members;
- Erratic systems i.e. there is no codified consensual form of justice being meted out around the country;
- There are no concepts of documentation, appeal etc;

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<sup>1</sup> ‘Rethinking jirgas’, Huma Yusuf, Dawn Newspaper, Sunday, 11 April, 2010; ‘Marriages of minor girls in compensation for murder: SC orders arrest of MNA, 11 others’, Mohammad Kamran, Daily Times, 19 August 2007

- Exclusive systems and exclude women except as recipients or to punish.

#### **4. Gender Dimensions in the Formal and Parallel Legal and Illegal Systems**

Due to social constraints and traditions, women are placed in a subordinate role in society. They face discrimination on the basis of being female and subject to patriarchal biases; they are considered to be the 'property' of men, who need to be guided, supported, have decisions made for them etc. As a result, women are not allowed freedom of any kind nor allowed recognition as a full person deserving of rights and freedoms. Any woman trying to break away from these bindings is branded to be dishonourable, shameful and shunned from society.

This bias is carried into the legal system and specifically with regards to women's access to justice through the legal system. Within formal legal systems and legal and illegal parallel systems, women remain at a disadvantage.

However, it is important to note that the situation has improved a little with the increasing activism around women's rights. A large number of non-governmental organizations have strived for decades to improve women's position in society and for women's empowerment. While there remains a huge amount of work to be done and countless issues still existing, it is important to note that women's issues are no longer invisible. This in itself is a victory. Nevertheless, dedicated and committed focus needs to be given to women's issues in order to give them actual and real equality.

The gender dimension with regard to the different systems is discussed in this section.

##### **4.1. Formal Legal System**

There are a number of contributory factors relating to women's difficult in accessing the courts.

It is hard for anyone to access courts due to high costs of litigation; lack of court environment e.g. lack of basic facilities, biased attitude of court personnel; huge delays.

Women's access to the legal system is extremely difficult for a number of reasons. It is physically difficult for women to reach the court room; typical role of woman as child-bearer and caretaker; those who oppose these views and try to break free are branded as disobedient women etc; biased treatment of women in court, treating them as culprits as opposed to victims or petitioners; women are usually financially dependent on men; women are considered to be men's property; poverty; lack of access to basic facilities e.g. food, water, education.

#### **4.2 Parallel Informal and Illegal Forums**

- Women remain even more marginalized as they do not receive even the formal equality given to them by the State under the Constitution and under its laws;
- The formality of 'equality' need not be fulfilled;
- Concepts of customs, traditions and mutilated versions of religion rule the decision making, subjecting women to the most inhumane, insane and unfair decisions, treating them as chattels, as property and as commodities;
- Women are not included in any part of the decision-making;
- Women are also not included in the process. If they are the accused, they are not allowed to be heard themselves but may have agent;
- Women are very much present in the decisions themselves. Women are exchanged in cases of resolution of disputes; given as collateral in cases of murder and tribal warfare; as collateral in cases of honour and dishonor; raped and harassed as punishment to men in their family i.e. dishonouring the family etc.
- System is biased and discriminatory against women.
- Harsh and imhumane punishments.

#### **5. Recommendations**

- Increasing the number of judges. Number of judges should be increased in the formal court system to allow better dispensation of justice;
- Women should be part of decision making in all forums at all levels therefore women judges should be appointed in all High Courts as well as Supreme Court.
- Retired judges and retired senior lawyers should be appointed to assist sitting judges in judgment writing.
- More funds need to be allocated for judicial sector, the working conditions of the courts should be improved. There should be judicial complexes and all the courts must be situated in one premises
- The pay scale of judges and the court staff should also be increased.
- All the special courts, Tribunals and quasi judicial forums should be abolished (this is against Article 175 (3) of the Constitution, 1973 Article 25 thereof) and the cases should be entrusted only to the regular courts with full time judges at the district level at first stage. The parallel judicial forums lead to prolonged litigation as sooner or later the disputes are taken up at judicial forums. This leads to prolonged litigation and puts the litigants in a more adverse situation. Therefore there should be no parallel judicial system and unification of judicial system is necessary in the long term judicial reforms;

- Special courts in the shape of parallel judicial system have proved to serve the interests of the groups for whom they are created instead special benches need to be established under the High courts.
- As a short term measure the quajai judicial forums needs to be strengthened in terms of enhancing their capacity such as the
  - (1) Muslahat e. Anjuman constituted under the Local Government system 2001
  - (2) The Arbitration council constituted under the Muslim Family Laws Ordinance 1961
  - (3) Appointment of Arbitrators under Arbitration Act 1940

And increasing the scope and powers of Wafaqi Mohtasib created under Presidential Order 1984 by including the provincial departments as well and by providing an appeal to to the High court instead of President by the aggrieved party from the order of the Wafaqi Mohtasib.

- An awareness campaign on laws and procedures through popular media may be launched to aware people to avoid jirga exploitation;
- Laws, rules and regulations affecting the status and rights of women should be reviewed and suggestion for repeal, amendment or new legislation essential to eliminate discrimination may be brought forward;
- To redress of violation of women's rights, individual grievances, and facilities for social care, the government should take appropriate actions for better management and efficient provision of justice and social services through concerned forums and authorities.
- Extend laws, especially family laws and other pro-women legislation to Gilgit-Baltistan and FATA and any other territories in Pakistan not under the cover of the Constitution and the law of Pakistan;
- Women Ministries and other relevant bodies should be set in Gilgit Baltistan and FATA and any other territories in Pakistan not under the cover of the Constitution and the law of Pakistan.
- Effective Implementation of laws needs to be done.

## ACRONYMS

ARB	Arbitration & Reconciliation Board
FATA	Federally Administered Tribal Area
FIR	First Information Report
H.H.Aga Khan	His Highness the Aga Khan
NWFP	North West Frontier Province
PCrLJ	Pakistan Criminal Law Journal

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## Review of The Parallel Legal Forums In Pakistan

### Background

#### The National Commission on the Status of Women (NCSW)

The NCSW is a statutory body established by the Government of Pakistan by an Ordinance in 2000. The functions of the NCSW are to:

- a. examine the policy, programmes and other measures taken by the Government for women development and gender equality to assess implementation and make suitable recommendations to the concerned authorities where considered necessary for effective impact;
- b. review all laws, rules and regulations affecting the status and rights of women and suggest repeal, amendment or new legislation essential to eliminate discrimination, safeguard and promote the interests of women and achieve gender equality in accordance with the Constitution and obligations under international covenants and commitments;
- c. monitor the mechanism and institutional procedures for redress of violation of women's rights, individual grievances, and facilities for social care, and undertake initiatives for better management and efficient provision of justice and social services through the concerned forums and authorities;
- d. encourage and sponsor research to generate information, analysis and studies relating to women and gender issues to provide knowledge and awareness for rational policy and strategic action;
- e. develop and maintain interaction and dialogue with non-governmental organization, experts and individuals in society and an active association with similar commissions and institutions in other countries for collaboration and action to achieve gender equality and development at the national, regional and international level; and
- f. any other function which may be assigned to it by the Federal Government.

The NCSW has functioned extremely well as a review body, examining existing laws and policies and making recommendations to the Government and working with the Government to realize a women's perspective within the current scheme of laws and policies. This is evidenced by two of its important reports i.e. Reports on 'Hudood Ordinances 1979' which was the basis for the promulgation of Women Protection Act 2006 and Concept of Justice in Islam: Qisas and Diyat to deal with the 'honor crimes. Criminal Law (Amendment) Act 2004 was based on the major recommendations given in the

former report though some major recommendations were not incorporated and still lobbied for by the Commission.

### **The Study**

Access to justice has been and remains one of the critical issues facing the citizens of Pakistan, with women suffering even more. The judicial system had been plagued with a number of issues, which are discussed later in the study, resulting in a lack of provision of effective, timely and quality justice to the citizens of Pakistan. This has had two results: firstly, the Government has tried to support the formal legal system through a variety of different methods e.g. additional special courts, committees, tribunals or other legal forums etc; Secondly, the people have taken to seeking recourse in other methods of resolving their disputes i.e. through social/community based methods, which have had the effect of illegal 'justice' based on culture, traditional and biased interpretation of religion, being meted out by the community, sometimes with some horrific results.

This has resulted in a number of problems. Within the State, there now exists a number of different forums of justice. The cohesiveness of the system is difficult to ascertain and especially for the people, who are either confused as to which body to approach or ignorant as to different options available to them. There is overlapping of systems resulting in confusion and thereby not working or effectively providing the required quality of accessibility or justice that is the fundamental right of all citizens of the State. To add further to the confusion, the existence of informal, illegal systems, the communities are implementing justice on their own without legal sanction, resulting in illegal 'punishments' and 'penalties' being meted out which are not only unlawful in themselves but the 'sentences' passed are very often contradictory of the law of the State. However, these go without adequate checking by the State and remain largely ignored and therefore continue to flourish.

With this in mind, the NCSW, under its mandate, commissioned a nation-wide study in 2010 to examine these systems with a gender perspective in order to analyse whether these systems were cohesive, what problems plagued all of them and what advantages existed in them. In essence, the study was intended to provide an overall analysis on how well these systems operate and whether there is a need for all of them to exist, and if not, what measures could be taken to make the system cohesive, supportive and sustainable, while providing quality access to justice and redress for all the citizens of the State.

## **Methodology**

A team was appointed with five Field Researchers in each of the four Provinces and in Gilgit-Baltistan under the guidance of a Lead Researcher. The Field Researchers initially conducted a desk review of formal and parallel systems in their vicinity. Armed with this information, the Researchers then conducted focus group discussions on the issue in their regions with a focus on the problems and gaps felt within the legal system and whether parallel systems were providing a remedy or adding to the problems; and collecting recommendations from the field and from different people in different provinces and regions.

### **1. Introduction**

The term ‘parallel legal forums’ immediately brings to mind traditional, social set-ups acting in a judicial manner and implementing justice in the community. ‘Panchayats, Jirgas are examples of such traditional set-ups, which are run by the elders in a community who come together to solve the problems plaguing the community or individuals within the community.

However, this term goes beyond just these informal structures and includes any structure or institution in existence that performs judicial and legal functions in a State in any manner and is parallel to the formal legal system. This therefore includes government sanctioned bodies, legally sanctioned bodies, parallel courts, quasi government bodies i.e. ‘any body’ operating outside the remit of formal legal structures, given the function of dispute resolution through any manner whatsoever, or performing this functions. This results in three categories of systems, all of which exist in Pakistan with varying issues and with varying consequences:

- (iv) The formal legal system;
- (v) The parallel legal system; and
- (vi) The parallel informal and illegal system.

The study elaborates on the existence of these parallel legal forums as a cause and a threat to the weakening of the formal judicial system or as possible support structures that can be tapped to improve the system.

The study has gathered data and opinions from the grassroots from across the nation – in all four provinces and in Federally Administered Tribal Areas (FATA) and Gilgit-Baltistan. Questions raised during focus group discussions and in meetings have included those related to why these systems have come up in the first place and what implications does the current system have on the future? Are these systems effective? What parts of them are effective and how can they be replicated? What are

the disadvantages and how can they be eliminated? The results from these discussions have been analysed and placed before the reader in this study.

The study examines the entire system from a gender perspective. The role of women within Pakistani society has always been an inferior role with little recognition and participation.

All three categories of systems have been examined in order to identify the role women play in these, if any at all and how women have been affected.

Finally, the study culminates in a series of recommendations given by the different participants from across the nation and the final recommendation given by this study in conclusion.

## **2. Forums for the dispensation of Justice**

This section defines the different categories of both legal and illegal systems in order to be able to understand how all the systems function within the judicial and social set up. It will provide an overview of the formal legal system, which is essential to understand whilst embarking on this discussion. It will go on to identify what is specifically meant by parallel legal systems and finally identify different types of parallel illegal systems operating within the country.

### **2.1 The Legal System of Pakistan**

The 1973 Constitution establishes the superior courts – the Supreme Court and the four provincial High Courts. Below the High Court in each province lie two levels of courts, Civil and Magistrate courts, the courts of first instance for civil and criminal matters respectively, followed by the District and Sessions courts, which serve as the appellate courts for each.

The **Supreme Court**<sup>2</sup> is the apex court of Pakistan and consists of a Chief Justice, known as the Chief Justice of Pakistan, and such other judges as may be determined by Act of the Parliament. The court has limited original and extensive appellate jurisdiction. A special bench of the Supreme Court known as the Shariat Appellate Bench hears appeals from the orders/judgments of the Federal Shariat Court. The Supreme Court has important powers with regard to the enforcement of fundamental rights. Judges of the Supreme Court hold office till the age of 65 and are appointed by the President in consultation with the Chief Justice of Pakistan.

There is one **High Court**<sup>3</sup> for each of the four provinces in the country. The High Courts have a principal seat and one or more benches: Expansions have been made in Punjab with benches in Rawalpindi, Multan and Bahawalpur; in Sindh in Hyderabad, Larkana and Sukkar etc. Recently a fifth High Court was established for Islamabad. High Courts have extensive appellate and substantial

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<sup>2</sup> Constitution of the Islamic Republic of Pakistan

<sup>3</sup> Ibid

original jurisdiction. They have powers to issue orders in the nature of writs. High Courts are also entrusted with powers of superintendence and control over most courts.

The **Federal Shariat Court**, a parallel judicial forum, comprises of not more than eight judges including its Chief Justice. The Court has appellate and revisionary jurisdiction in Hudood cases, family laws and jurisdiction to review laws to find out their compatibility with injunctions of Islam.

### **District Judiciary**

Courts of general jurisdiction are courts which deal with the main body of civil and criminal law in Pakistan. These courts have jurisdiction over all civil and criminal matters unless provided otherwise by legislative enactment. Courts of general jurisdiction are provincial in character.

Civil courts have general civil jurisdiction and try all suits pertaining to torts, lands and declaration of rights. Procedure in these courts is regulated by the Code of Civil Procedure 1908 provides for the following classes of courts:

- **High Court (The Highest Court of Province)**
- **Court of District & Session Judge**
- **Court of Additional District Judge**
- **Court of the Civil Judge / Judicial Magistrate**
- **Small Causes Court.**

In each district there is one district judge and varying number of additional district judges and civil judges. Based on pecuniary jurisdiction on the original side, courts of civil judges are divided into three types- courts of civil judge class I, courts of civil judge class II, courts of civil judge class III. In every district one of the civil judges is known as the senior civil judge. The Senior Civil Judge assigns cases among his colleagues.

Criminal courts of general jurisdiction are set up under the Code of Criminal Procedure, 1898. These courts can try all cases arising out of the Pakistan Penal Code. Criminal courts are of two types:

- **Sessions Court**
- **Courts of Judicial Magistrates**

The Sessions Court comprises one Sessions Judge who is in charge of the administration of the court and varying number of Additional and Assistant Sessions Judges. Additional Sessions Judges have same judicial powers as the Sessions Judge. Sessions judges are invariably District Judges and are known as District and Sessions Judges. There are three types of courts of magistrates: Magistrate of the First class, Magistrate of the second class, and Magistrate of the third class. Magistrates do not always act as courts. In addition to the above noted types of magistrates there are special judicial magistrates and section 30 magistrates. These magistrates belong to one of the three classes mentioned above but because of special powers are known as Special Judicial Magistrates or section 30 magistrates.

### **Nizam E Adl**

Federally Administered Tribal Area (FATA) is a region in which the law of Pakistan does not apply unconditionally. Here, jirgas have been given some form of a legal status under the FCR and the NWFP Local Government Ordinance, 2001. In 2009, in the Malakand Division of Khyber-Pakhtoonkhwa, the Governor of Khyber-PakhtunKhwa (NWFP) with the approval of President of Pakistan notified the Shariah Nizam-e-Adl Regulation 2009. By virtue of this regulation, now a completely different legal system exists in this region, which by virtue of Article 247 of the Constitution of Pakistan 1973, allows them the freedom of interpretation of Shariah which may be drastically different from the scheme of law prevailing in the rest of the country.

Under this regulation, provisions are given for reconciliation through 'musliheen' (mediators). Here, law cases for reconciliation have to be referred by the concerned Qazi Court in both civil and criminal cases. The Shariah Nizam-e-Adl Regulation 2009 states clearly in Section 4 that any law, instrument, custom or usage having the force of law not corresponding to the Quran and Sunnah will cease to exist.

According to Shariah Nizam-e-Adl Regulation 2009 the Qazis would be judicial officers who would be under the administrative control of the Peshawar High Court. However, the Regulation through its Paragraph 7(4) has empowered the executive magistrates to perform judicial functions putting them under the administrative control of District Magistrate, which is against the judgments of the Supreme Court and the Constitution.

Similarly the Qazi is authorized to interpret the law according to Quran and Sunnah including Family Laws. The judicial officer is appointed by High Court and preference shall be given to those judicial officers who have completed Shariah course from a recognized institution. There are no women judicial officers. The new courts are;

1. District & Sessions Judge as Zilla Qazi
2. Additional District & Sessions Judge as Izafi Zilla Qazi
3. Senior Civil Judge/Judicial Magistrate u/s 30 of Criminal Procedure code, 1898, as Aa'la Illaqa Qazi
4. Civil Judge/Judicial Magistrate as Illaqa Qazi
5. Court of Executive Magistrate

### **Gilgit Baltistan**

As with FATA, the situation differs in Gilgit Baltistan which follows a different pattern of formal and informal legal systems. A brief history of Gilgit Baltistan's formal judicial system is given below:

### **A brief introduction of Gilgit-Baltistan**

The Federal Cabinet has approved an Order in August 2009 that assigns political autonomy to Pakistan's Northern Areas and a new identity, i.e. Gilgit-Baltistan.

Under this Order, the Gilgit-Baltistan (Empowerment and Self-Governance) Order 2009, the Northern Areas have been assigned a new name i.e. Gilgit-Baltistan, and under this new system the area will have its own legislative assembly. The President of Pakistan has appointed a Governor for Gilgit-Baltistan from the same area.

The Order grants the Legislative Assembly of Gilgit-Baltistan autonomy in making laws on 61 subjects, while the Gilgit-Baltistan Council will be autonomous in deciding about 55 subjects. A consolidated fund will empower the Assembly and the Council on financial matters. The area will get a separate election commissioner and an auditor general as well. However, Gilgit-Baltistan will not get any representation in the National Assembly.

#### **The Legislative system:**

The cabinet decision empowers the Gilgit-Baltistan council and assembly to make laws. The subjects about which the Assembly shall now have power to make law have been increased from 49 to 61 while the Council shall have 55 subjects.

Under Section 60 of the 2009 Order, a Gilgit Baltistan Supreme Appellate Court is formed. The Court will be presided over by a Chief Judge assisted by two other judges. These judges will be appointed for terms of three years each.

Section 68 introduces the Gilgit Baltistan Chief Court which consists of one Chief Judge and four other judges of whom 60% will be appointed from the lawyers community and 40% from the subordinate judiciary. The Chief Court is subordinate to the Supreme Appellate Court.

The Gilgit Baltistan Council has the freedom to form any number of administrative courts or tribunals as is necessary.

With regard to the new system in Gilgit-Baltistan the Chief Judge of the Appellate Court will be appointed by the chairman of the council on the advice of the governor, and other judges will be appointed by the chairman on the advice of the governor after seeking views from the chief judge.

### **2.2. Parallel Legal Forums established under codified laws**

The parallel judicial courts established under codified laws deal with offenses relating to a particular subject and most but not all have both civil and criminal jurisdiction. Special courts are set up both by

the federation and the provinces and in certain cases specialist courts are constituted by federal legislation but their finances are provided by the provincial government. Listed below are important federal and provincial special courts.

### **Federal Special Courts**

Some of the special courts/tribunals set up by federal enactment are:

- **Federal Shariat Court:** Established by the Constitution of the Islamic Republic of Pakistan 1973
- **Accountability courts:** Established under the National Accountability Bureau Ordinance, 1999
- **Banking Courts:** Established under the Financial Institutions (Recovery of Finances) Ordinance, 2001
- **Anti-terrorism Courts:** Established under the Anti-terrorism Act 1997. Anti-terrorism court can be established by both the federal and provincial governments (§13)
- **Drug Courts:** Established under the Drugs Act, 1976. In addition to establishing Drug Courts itself the federal government is authorized under this Act to direct a provincial Government to establish Drug Courts (s 31)
- **Special Courts for emigration offences:** Established under the Emigration Ordinance, 1979 (s 24)
- **Labour Courts:** Established under the Industrial Relations Ordinance, 2002(s 33). The Act however empowers the provincial government to establish Labour Courts. These are currently suspended due to the lapse of the Industrial Relations Act 2008.
- **Court of Special Judge (Customs):** These Special Judges are established under section 185 of the Customs Act, 1969.
- **Income Tax Appellate Tribunal:** This tribunal is established under the Income Tax Ordinance, 2001 (s 130)
- **Services Tribunal**
- **Insurance Tribunal**
- **Environmental Tribunal**
- **Customs Tribunal**
- **Revenue Courts**
- **Family courts:** Established under the Family Courts Act, 1964(s 3)
- **Provincial Special Consumer Courts:** Established under the Punjab Consumer Protection Act, 2005
- **Rent courts:** Established under the Punjab Rented premises Act, 2007

### **Quasi Legal Forums having the cover of Law**

| These quasi judicial forums are accessed by the people as they have the cover of law- but these are not formal parallel judicial forums. These forums include

- (1) Muslahat e. Anjuman constituted under the Local Government system 2001
- (2) The Arbitration council constituted under the Muslim Family Laws Ordinance 1961
- (3) Appointment of Arbitrators under Arbitration Act 1940
- (4) The Office of Wafaqi Mohtasib created under Presidential Order 1984.

The *Musalihat Anjumans* are meant to deal with a wide range of disputes, both civil and criminal. They are required to “conclude [their] proceedings within seven days in criminal matters (where no FIR has been lodged) and within three weeks in civil matters, from the date of commencement of proceedings”.<sup>4</sup>

- (5) The Local Government Ordinance (2001, Sections 102-106) requires that each union council to constitute a *Musalihat Anjuman*<sup>5</sup> - a 3-person ‘panel of impartial persons’ whose task is to ‘dispense justice to victims of gender violence.’
- (6) Out of three Musaleheen (Conciliators), one shall be the Convener, who shall be selected by the Insaf Committee of the union council. The Convener shall be selected, within thirty days after the election of union council, from amongst the residents of the union council who are publicly known to be persons of integrity, good judgment and command respect. The union Nazim, Naib Union Nazim or the members of the Union Council cannot become members of the Musalihat Anjuman.
- (7) According to section 104 any court of competent jurisdiction may, in a case where it deems appropriate, refer a matter to the Musalihat Anjuman through the Union Nazim for settlement. The Musalihat Anjuman shall inform the court if the dispute is not settled within the time fixed by the court or, may ask for extension in time for settlement of the dispute
- (8) Many of the cases brought to the Musalihat Anjumans involve violence against women, a variety of issues relating to marriage (including several kinds of forced marriage) and divorce and inheritance.
- (9) The cases that cannot be resolved by the Musalihat Anjuman (*i.e.* no agreement can be reached or it is felt that it would not be in the interest of justice to proceed) the Musalihat Anjuman is required to report this fact to the Court in writing, and to inform the contending parties of this decision.

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<sup>4</sup> Sindh Musalihat Anjuman (Constitution and Function) Rules 2000, p.4.

<sup>5</sup> These are known as *Musalihat Jirgas* in NWFP.

(10) The Musalihat Anjumans are supported by two bodies: Musalihat Anjuman Support Services (a consortium of NGOs) and a Musalihat Anjuman Justice Advocate (MAJA), a support mechanism that provides technical backstopping.

(11) **Arbitration Council**

Under the Muslim Family Laws 1961 an arbitration council, constituted by the chairman of the union council, is provided by the law. The Chairman heads the council with other two members: one on behalf of each spouse as members. The chairman of the union council is a person with political affiliations and his decisions do not always advance the interest of justice. The concept of the creation of such a council is giving local responsibility and adjudication of disputes through arbitration. The chairman of the commission is more likely to be influenced with public opinion as he has political affiliations. Moreover most of the times he is a person with little general education and has no legal education and is therefore unable to guide the parties to a legally valid settlement. More over his decisions have no legal sanction. The parties can always resort to the courts.

(12) **Ombudsman**

The institution of the Ombudsman was established by a presidential order called the Establishment of the Wafaqi Mohatasib (Ombudsman) Order, 1983.

The objective of the establishment of the office of Ombudsman is “to provide for the appointment of a Wafaqi Mohtasib (Ombudsman) to diagnose, investigate, redress and rectify any injustice done to a person through maladministration.”

Maladministration has been defined in the Order<sup>6</sup> as

- (I) a decision, process, recommendation, act or omission or commission which is contrary to the law, rule or regulations or is a departure from established practice or procedure unless it is bonafide and for valid reasons or
  - (a) Is perverse arbitrary or unreasonable, unjust , biased, oppressive or discriminatory or
  - (b) Is based on irrelevant grounds or
  - (c) Involves the exercise of power or the failure or refusal to do so, for corrupt or improper motive such as bribery, jobbery, favoritism, nepotism and administrative excess and
- (II) neglect, inattention, delay, incompetence, inefficiency and inaptitude, in the administration or discharge of duties and responsibilities .

The Office of Ombudsman cannot take up complaints

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<sup>6</sup> Establishment of the Wafaqi Mohatasib (Ombudsman) Order, 1983

- against the provincial departments such as police, health education revenue which are a concern of a common person
- as well as Ministry of Defense and Foreign affairs
- and against autonomous bodies

Under this law the Mohtasib has the power only to make recommendations. He can investigate a case and give his recommendations but does not have the statutory powers to enforce those recommendations. The President has the ultimate discretion to accept or reject the Mohtasib's recommendations against the orders of the executive. This has resulted in the government agencies appealing against the decisions favorable to aggrieved citizens and overturning numerous major recommendations of the Ombudsman.

**(13) Arbitration Act 1940**

The Arbitration Act 1940 provides for settlement of disputes with or without the intervention of the courts. For arbitration it is necessary that the parties to the dispute agree to take the dispute or difference to arbitration. This agreement can take many forms and the parties:

- May have an arbitration clause in the contract before a dispute has arisen
- May refer to arbitration after the emergence of dispute
- May file a joint application to a pending suit in a court to refer to arbitration

When a difference arises, reference to arbitration is possible with or without the intervention of the court. Reference to arbitration without the intervention of the court requires the assent of both the parties. Any party may move the application for reference to arbitration with the intervention of the court. Anyone can be appointed as an arbitrator or arbitrators to whom the parties to the dispute agree

Arbitration proceedings are quasi judicial in nature. The arbitrators may issue notices and processes for appearance and lead evidence before them. The arbitrators may solicit the opinion of the court on any point of law but the opinion of the court is not binding.

The arbitrators on reaching an award have to file the award with all evidence if any to the court. The court can then on the application of a party modify, correct, or even remit to the arbitrators for reconsideration. The Court after it is satisfied as to the correctness of the award filed pronounces judgment and decree according to the award. No appeal lies from such decree and judgment.

All civil cases may be referred to arbitration but matters that are purely criminal in nature and do not give rise to civil remedies cannot be referred to arbitration.

### **2.3 Parallel Informal and Illegal Forums not having the cover of codified laws**

Parallel informal legal systems have been in existence in this region for years, since before the existence of Pakistan, and have continued functioning within its borders since Pakistan's independence. Informal systems, consisting of 'elders' who are 'presumed to speak for 'the community' were not de-legitimized by the colonial powers, rather used to their advantage so they continued to speak for the community as the 'authentic' voice of the culture and community. These structures also failed to be fully dismantled at independence and thereby continue to be in existence<sup>7</sup>.

Apart from jirgas and panchayats, a variety of informal systems exist in Pakistani society. These include methods of asking a 'naik mard' (honest/pious man), the local 'maulvi' (religious leader/scholar), the vadaira (feudal lord) to act as an arbitrator in a dispute and resolve the conflict.

This section identifies some of the most common forms of informal systems existing across the country.

**Jirgas/Panchayats/Maraka** It is impossible to identify exactly how many people take recourse to illegal parallel systems. However, it is evident that a large number of people do rely on it a great deal, either because it suits them or the formal system is not within their reach. This section will highlight some of the most common illegal systems that are prevalent in the country.

Jirgas and panchayats are informal dispute resolution mechanisms that have existed in Pakistan for centuries. In April 2004 the Sindh High Court declared that "decision of a jirga declaring a valid piece of law as unlawful usurps the powers of the Courts and the Parliament<sup>8</sup>.

Matters referred to a jirga or panchayat to settle disputes are not protected by the law. Nor can jirgas and panchayats legally make decisions which are against the law: if they do, the offenders are dealt with according to the law and can be tried for offences which they have committed. This judgment clearly sets the parameters of such informal forums and provides guidelines as to the legal status of their decisions.

The history of Jirga seems to be as old as the local history itself<sup>9</sup>. It is widely practiced in the Pukhtoon areas of Afganistan, the provinces of Balochistan and Khyber Pakhtoonkhwa in Pakistan and the Federally Administered Tribal Areas of Pakistan. Comparatively, in FATA, the Jirga offers the only platform for dispute resolution as the formal legal system of the country is not enacted made

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<sup>7</sup> 'Negotiating Culture: Intersections of Culture and Violence Against Women in Asia Pacific', Report of the Asia Pacific NGO Consultation with the UN Special Rapporteur on Violence Against Women, Dr Yakin Erturk, 11-12 September 2006, Ulaanbaatar, Mongolia

<sup>8</sup> 2004 PCrLJ 1523

applicable in these areas. Hence in its purest forms, practices of Jirga in FATA can be called as the most indigenous form of Jirga. Originally jirga consisted of volunteers but now in most of areas jirga member charge money or any assets given by disputed parties.

Besides its 'role' as a dispute resolution body, Jirga also performs a number of social, 'judicial' and executive functions. Originally Jirga is an independent social institution, which was responsible besides other things, to ensure security and social justice.

It is a council of elders which may be led by "Khans" (in settled Khyber Pakhtoonkhwa), "Malaks" in (Khyber Pakhtoonkhwa -Tribal Belt), Chaudrys (in Punjab) and "Sardar" (in Balochistan) who work not only for the trials of major or minor crimes and civil disputes but they also assist in resolving conflicts and disputes between individuals, groups and tribes. The council is not fixed or perpetual but its members change partly in line with the wishes of the disputing parties.

Notably, in contrast to above, all Pukhtoon Jirga do not need to be led by local feudal in all cases. In areas where land holdings are small and feudal systems are not so dominant, Pukhtoon society exhibits much more equity among its population than other areas. For example, a Jirga of FATA will more often than not, comprise mainly of elderly representatives who would practice and participate in Jirga as a profession rather than only a title. These tribesmen are neutral and wise, and enjoy support of the masses. Hence an issue once decided by them, will gain legitimacy within that particular community or group.

In case of Haq (Right), each party has the right to challenge the decision of the Jirga on its merit. If one of the parties is not satisfied with the verdict and feels that the Jirga has not done justice, they can quote precedents and rules (Narkh) to plead their point and reject the decision. It is interesting that different tribes may have different Narkh in similar cases. In case there is a reservation of one of the parties regarding the verdict so announced, the aggrieved party has the right to bring another Maraka to re-examine the issue. In doing so, usually the decision given on the third occasion is considered to be final.

In the case of Waak (A right given by parties in a dispute to arbitrators for arbitration), the two parties repose their full confidence in the Jirga and authorize it to decide the case according to its best judgment. The parties have to abide by the decision and cannot challenge it. However, the decision has to be unanimous. This is more like the process of arbitration where the parties to a dispute surrender their rights to a third party for taking a decision.

The Jirga determines the punishment to be inflicted on the basis of Narkh (tribal rule, or precedent). Anyone who then does not abide by the decision of the Jirga is subjected to punitive measures. This practice varies from one part of the tribal areas to another. Usually, anyone who rejects collective

wisdom takes a grave risk; for a Jirga can impose powerful sanctions to enforce its judgment. The sanctions can include forced exile of the non-complying person or a group. The Jirga can confiscate rifles belonging to the non-compliant party and place them with the Jirga as 'Gravey' (mortgage), or impose heavy fines to be paid to the complying party in the dispute. If non-compliance persists, the Jirga can use force by sending men to burn down the party's house(s). If someone still remains defiant and does not comply with the Jirga orders, he is considered to be 'Kabarjan', the arrogant one. By doing so, he loses the security promised by the Jirga, and thus may be killed without any consequence by his opponents<sup>10</sup>. This includes in the Jirga rules that is not documented but still practiced in Pukhtoon belt of Pakistan and Afghanistan.

Outside the cultural context of tribal areas and still within the Pukhtoon belt, where primarily the adjudication of justice is available through the formal courts, the term "Jirga" is used for raising the issue with the disputing party through local elders. This is also done to deal with common social issues like match-making or addressing petty issues of rent or loans etc.

Further away from the Pukhtoon areas, and particularly in Sindh, the use of the term "Jirga" is mostly a misnomer. In April 2004 Sindh High Court had declared *Jirga (Faisloon)* as un constitutional and illegal where Faisloon was convent in case of kidnapping of former Naib Nazim as against two accused an FIR was lodged already. Our law does not allow a compromise in case of kidnapping (non-compoundable).

**Process and Procedure of Jirga:** Traditionally a jirga functions in a straightforward and simple manner. The jirga is mostly comprised of elders and other male members. The elders act as judges whereas other participants are like jurists. During the proceedings all the parties address the members and not the rival party. Following thorough discussion with the parties, jirga members analyze the dispute, keeping in view the traditional, religious, cultural and socio-economic circumstances. The jirga decision is usually based on local traditions or Shariat (the Islamic Code).

Implementation of a jirga decision is crucial to its credibility. If one of the parties has serious objections to the outcome of the jirga, the implementation process becomes difficult, if not impossible. Anybody who does not abide by the decision of the jirga is subject to punitive measures. The jirga determines the type of punishment based on tribal rules and precedents. It could impose powerful sanctions for implementing its decision. Such sanctions could include social boycott or ex-communication of the non-compliant person or party.

The jirga mostly functions in context of Pakhtunwali (the way of the Pakhtun), the unwritten code which governs the social fabric of the Pakhtun society. Distinctive tribal customs and traditions are an integral part of the Pakhtun society.

Presently, the jirga system is a parallel judicial system, by virtue of courts, the officials and the State turning a blind eye to their existence and functioning. While in certain cases, usually as a result of public outrage and large amounts of media coverage, when the jirga had committed illegality while deciding certain disputes, the courts had intervened. There are various instances when jirga members were arrested when they had decided giving females including minor girls in swara to rival group for settling a dispute. However, despite its illegality, the State has continued to allow the system to exist by its implicit acceptance by its lack of action. This is evidenced not just by its lack of actions but also by the Government's tacit acceptance, members of Parliament and other State officials participating in these set-ups<sup>11</sup>, and in fact includes members of the Cabinet<sup>12</sup>.

## **TYPES OF JIRGA**

A jirga is held at all levels of the society for achieving different objectives and purposes. The nature of a specific jirga may vary and there is generally no clear distinction between types of jirga. A jirga may be divided into four general types: Government or *sarkari* jirga; *Qaumi* (community) or *ulusi* (peoples) jirga; *shakhsi* (individual); and loya jirga.

**Sarkari Jirga:** The sarkari or government jirga is normally the one sponsored by the government. From time to time the government has pressed into action jirgas for resolving serious disputes between tribes or communities or in any specific area mostly in the Federally Administered tribal Areas (FATA). The best example of such like jirga could be the one which on several occasions tried to resolve issues between the Shia and Sunni sects in Kurrum Agency and southern Hangu district of the NWFP.

The jirga system had also been legalized during the British rule through the Frontier Crimes Regulation of 1901. The said regulation provides for a council of elders to be set up by the tribal administration for dealing with both civil and criminal cases. However, the final authority rests with the administration whether to accept the findings of the said council or to refer the issue to another council for fresh findings in the same case.

Furthermore, under the NWFP Local Government Ordinance, 2001, musalihati (reconciliatory) jirga could be set up on union council level. The said musalihati jirga has been empowered to achieve the amicable settlement of disputes amongst the people in the respective union council through mediation, conciliation and arbitration.

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<sup>11</sup> 'Rethinking jirgas', Huma Yusuf, Dawn Newspaper, Sunday, 11 April, 2010

<sup>12</sup> 'Anti-women' cabinet riles Pakistan activists', Saeed Shah, The Guardian, Wednesday, 12 November 2008

**Qaumi or Ulusi Jirga:** This kind of jirga comprise of mostly members from each of the household of a certain community or area. Such like jirga is held to decide an issue related collectively to the community or people. Such like jirga is convened after consultation between few elders or leaders of a community. In recent past scores of such like jirga were held in the conflict-hit areas, both in FATA and NWFP, for deciding a joint course of action against militancy.

**Shakhsi Jirga:** This kind of jirga is formulated in the case of a dispute that arises between two individuals or families. The jirga members are chosen from both of the parties or both parties agree to the nomination of neutral members. Such like jirga are normally held in offences related to individuals. The focus of such jirga is to resolve the dispute so as to avoid long enmities between individuals or groups. In Pakhtun society jirga is often press into action by an offender so as to mend relations with the aggrieved party.

**Loya Jirga:** Loya Jirga commonly known as “Grand Assembly” is a process through which representatives of various areas organize to discuss and vote on issues at national level. These exist only in FATA

**Panchayat :** The other substantial system is popularly known as Panchayat. The history of Panchayat dates back to British era where a local system of governance through devolved bodies was established.

In the present context of Pakistan, Panchayat System refers to the legacies of Panchayats which were attempted to be established in 1950 in Punjab. However, after the introduction of the Basic Democracy System in 1961, the idea of establishing Panchayats was given up. The system of Panchayat, literally means assembly (yat) of five, a council of elders representing a village or caste.

In the present context in southern Punjab, where traditional law is more in practice and formal legal institutions have not been able to make much mark, communities undertake adjudication of criminal offences and dispute resolution through the informal means of Panchayat, where the Sarpanch or the leader of the group of five has a final word.

Drawing from the traditions of pre partition times, Hindus and Christians in Pakistan also practice dispute resolution through Panchayats but these Panchayats are less dictatorial in nature as compared to the Panchayats under practice in Muslim areas of Southern Punjab. In Punjab Panchayat is carried out by the chowdry or feudal of the area, thereby allowing lots of dictatorial discretion to setup the system in autocratic ways.

**Faislo:** Used in Sindhi for the resolution of a dispute, “Faislo” literally means a decision and a judgment; which is used to describe the traditional system of adjudication/settlement of disputes in a cultural context. It is just like the present day Panchayat of Southern Punjab, led by the Waderas and

Pirs and the system prevails in Sindh. There are hardly any rules set for the proceedings and much is left to the whims of the influential in the proceedings.

In Sindh, practice of informal legal systems prevails in a much derogatory manner as compared to Pukhtoon areas. This is because the Jirga has more defined roles and practices while the practices in Sindh are not strictly documented or uniformly understood. Punishments are also not uniformly practiced. For example, the practices of Informal legal Ssystems in the jurisdiction of Pir Pagara are widely practiced and respected within Hurr community but these are not uniformly applicable to other areas in Sindh. This pushes the poor and weak at the mercy of the local feudal whose orders would be totally unpredictable and may be harsh or inhuman.

Punishments are usually imposition of fine or forced exile in serious cases. In case where sufficient evidence is not available, and the accused asserts its innocence, the Sardaar may announce Aag Paani (a term used for accused to walk barefoot over a bed of fire. If the accused comes out un-burnt, its innocence is established otherwise guilt is presumed).

### **Gilgit Baltistan**

As discussed above, Gilgit Baltistan follows a different scheme of both informal and formal systems. Different areas within the region follow different systems. For e.g. a number of people follow the jirga system, following the format much like the jirgas and panchayats in the other provinces. However, here a large part of the systems are more religion based, whether they follow the Aga Khan or religious scholars or scholars who have been trained and educated in Iran. Some of the more prominent systems are discussed below:

**Mir System:** Selected courtiers from each village who were well versed with the customs and traditions of Hunza would attend Mir's court for at least two hours on daily basis. The unwritten customary laws were implemented and exercised by the local Numberdars, recognized by the Mir himself, at the village level. According to the participants there were various decision making levels ranging from a village to the Mir's court.

A model of a parallel system at a village level during Mir's time:

No of tribes:	04
No of Numberdars	04 (one numberdar from each tribe)
Chief Numberdar	01 (who was the chief of all 4 numberdars selected from the same village by the Mir of Hunza on the basis of his traditional wisdom and skillful in settleing issues locally).

Conflicts emerged at a village level, in accordance with the local customs, were being settled by village “numberdars” at the village (grassroots) level. The parties had the liberty to appeal against the decisions made by the numberdars at a village level to the upper system, Wazir, (special advisor to Mir).

“Wazir” would constitute a group of numberdars not necessarily from the same village but also from the other villages would assign the responsibility to settle the issues across Hunza in absence of Mir. Wazir was allowed to continue the court system in absence of Mir and the courtiers would attend court likewise. However, the Wazir was not allowed to sit on the “Throne” of course, he would sit in his own seat which was placed next to Mir near his (Mir’s) Throne. Some times Mir himself would pass on instructions to the Wazir to settle the issues even during Mir’s presence. If the parties/opponents were not satisfied of the decision made by Wazir, the parties were allowed to appeal in Mir’s court against the decision made Wazir and his team.

Mir would listen to the discussions, arguments and debates made by the courtiers, finally he would give his decision and it was considered to be the final decision.

**Aga Khan Arbitration & Reconciliation system:** Establishment of an Arbitration & Reconciliation Board (ARB), an independent parallel system, by H.H.Aga Khan in Hunza in 1987. The mandate of ARB has been to settle the cases of all natured existed in Hunza exclusively. The performance of this type of parallel system has been up to the mark and people have been receiving justice at their door steps without spending a penny. People have the right to approach court the legal system in the area and they have the liberty to reject the decision made by ARB. According to the consultative team the cases sent to court, after thorough investigation carried out by the Honorable Judge, were send back to the ARB for a decision.

**Shari System and also Shia Scholars:** Certain regions in Gilgit Baltistan look to religious scholars for settlement of disputes. These scholars have obtained relevant degrees in Fiqah and are thereby ‘authorized’ to settle issues. There are boards existing in certain regions such as the Imamia Sharyee Board in Gilgit headed by Agha Rahat ul Hussini and the Mohkama e Sharia headed by Shekh Hassan Jaffery in Baltistan. A number of these scholars, specifically the former have been nominated by “Alam Mushtahid” from Iran who hold the authority to nominate scholars of caliber to decide issues within their community. They settle cases according to the Shariah.

The procedure followed under these requires the applicant to submit his/her application. In the light of the complexity of the case, two or three scholars shall be called and the case will be handed over to them. The Ulema scholars study the case and argue with each other and in the light of Fiqah Jafferia they resolve the case without wasting time and the applicants receive justice on their door steps soon after.

## **ADVANTAGES AND DISADVANTAGES OF THESE SYSTEMS**

For the purposes of this study, four focus group discussions were held in all five provinces with the intention of getting feedback from the community their views on the advantages and disadvantages of the formal legal system, legal parallel systems and the illegal parallel systems. Questions regarding the nature of these systems, their effectiveness, quality of judgments, gaps, lacunas were discussed, while also identifying positive features that could be replicated in other systems in order to make them effective. This section is composed of the community's perspectives.

### **3.1. Formal legal system**

#### **Advantages of the formal legal system**

The biggest advantage of the formal legal system is its formality itself i.e. it is an authentic system with the requisite backing from the existing Constitution of Pakistan and the laws of Pakistan. It is the State mechanism. Further it is a set principles of laws and precedents that must be followed by all wherever they are in the country, therefore there is little worry of completely different procedures, punishments, standards of evidence being followed in different parts of the country.

Further, due to the formality of the system, its verdicts are executed or meant to be executed by the State rather than left in different hands etc. It also then has the support structures to process, deal with and implement the cases and verdicts. Relevant support structures include institutions such as the police, prisons, dar ul amans etc. These structures assist in upholding the rule of law, as has been authenticated and decided by the State. For example, in any case, a proper investigation is done on the basis of a set of rules and procedures that have been approved by an elected Parliament. Further if a verdict is given, there are options for appeal to the appellate courts.

On a whole the court structure itself is an advantage – a network of courts following set procedures which have different levels, allowing for appeal and review of cases and verdicts. The courts are also meant to be impartial. Appointed judges do not necessarily belong to the community where they are performing their duty as judges, thereby they do not have any personal interest or bias in the matter. The judges appointed are also judges who are trained to be judges or have practiced as advocates for a minimum period of ten years with a proper understanding of the law, Constitution and procedures. Further, their sole job is work as a judge with no other obligations on them. They are also permanent employees with financial and other support of the Government, therefore they are not dependent on other employment for payment. As such their entire focus is on the dispensation of justice, rather than it being a side occupation or a part time position.

#### **Disadvantages of the formal legal system**

The advantages of the formal system are many. But the biggest problem with it however, is its lengthy procedures resulting in indefinite delays. There is a general feeling of lack of efficiency and running also. The problems with the system are not necessarily with its set-up and the manner with which it should be running, but the ground reality of how it actually does run at the moment. The consensus at the meetings was that if the formal legal system was working as it is meant to be working, there would be little or no need for parallel systems and reliance on parallel informal and illegal systems would also diminish as the people, having faith in the legal system, would prefer that than decisions made by the community. The problems of the formal system have been touched upon earlier and will be briefly identified here.

The disadvantages of the current system are manifold and are overlapping. There is a huge problem of corruption throughout the judicial system. This does not necessarily mean the judges, but includes police officers to register cases, clerks, secretaries etc. Also the requisite number of judges at High Court and District Court are not appointed thereby placing a huge burden on sitting judges. This means sitting judges, specifically in the lower courts, have double the workload with over a hundred cases to be heard a day. This results in delay in hearing of cases, delay in judgments, delay in disposal of cases and a serious lack of quality of judgments. The piling of work puts lot of pressures on the judges. It has been argued that the procedure at different levels must be simplified to avoid delays.

There is also a lack of awareness amongst the people about the law and its systems. This lack of information, and its easy availability also makes people suspicious of the 'unknown'.

The legal education is severely lacking resulting in inadequately qualified lawyers being churned out. This of course also has an effect on the judiciary with a number of poor quality judges sitting on the benches as well. The lawyers have also taken to charging large professional fees for taking a case to court. With poor quality of lawyers and no system or transparent governance, poor and election based system of monitoring and no check on the quality and ethical performance of a lawyer's has weakened the formal system.

Further, judges are also part of the society which is gender biased and corruption has gone to the roots. They are usually men who are strongly influenced by the cultural, traditional and patriarchal trends and thoughts present in Pakistani society. There are very few women in the superior judiciary, and almost none in any other position in the court system, apart from lawyers and the police. Further, rather than remaining impartial, and especially without any sort of check on their impartiality, they infuse their bias into the judgments especially on women in Pakistan. There is also a lack of infrastructure and specifically technical staff in the judicial system though Access to Justice Programme has helped in solving some of the problems.

The problem with the judicial system is not merely restricted to the courts itself. Problems start with the police, who are also corrupt and inefficient. Without proper investigation, a case cannot be said to be decided. In fact, often cases have been lost due to defective FIRs poor investigation, and lack of process serving the part of the police – whether deliberately or not. The weak prison systems and old Jail Manuals are also a problem. Rather than becoming rehabilitation centers, they become breeding grounds for more criminals. Lack of space, procedures and an out-dated jail manual results in prisoners being in jail often long after their sentences are completed; under trial prisoners not being brought forward for a trial; prisoners convicted for petty crimes being housed with hard core criminals etc. Once again, without proper procedures of monitoring and evaluation, this system also goes unchecked.

Many of the laws do not extend to Gilgit Baltistan and Fata. In both areas, completely different systems have been set up which are not a part of the larger court structure and legal scheme of the country. This not only excludes them from the principle that all citizens must be treated alike, it allows parallel systems to exist within the country to its detriment. Laws such as the Muslim Family Ordinance and any other pro-women laws are not extended to these regions, thereby depriving citizens of Pakistan in general and women in particular of their basic and fundamental rights.

### **3.2 Parallel Informal and Illegal Systems**

#### **Advantages of Parallel Informal and Illegal System:**

The biggest advantage of this system is that in certain ways, it is a direct affront to some of the biggest issues people have with the formal legal system. There are on the spot decisions, eliminating issues of delay, lengthy procedures and late dispensation of cases. It is easily approachable with low or no costs. These systems are voluntary, with quick decisions about people's issues without the hassle of the long procedures and delays in getting justice etc. Further, with these systems, the people know what they are getting i.e. they know who is making the decision, they are aware most likely of the procedures they will follow and what principles they will follow. There is no lack of awareness here.

#### **Disadvantages of Informal Judicial Forums**

Nevertheless, the problems infused in this system are huge. The biggest issue is the fact that in most of the cases, these systems are illegal. Without the sanction of the law and the State these lack the support structures and State mechanisms that allow proper investigation, set procedures, implementation and even sustainability of penalties. There is no reliability or authenticity.

Further the set-up of these systems is suspected. The jurisdiction of these systems lies only within their territory – they do not hold any sort of obligation or relevance outside these territorial borders. Further, the entire systems are based on age old tradition, customs, culture which is out-dated; and perverted, conservative and culturally interpreted – or rather mis-interpreted versions of Islam. Despite the Islamic nature of all laws in Pakistan<sup>13</sup>, these systems use their own interpretations to be ‘true’ and ‘valid’ and use these mis-interpretations as the standard of judgment. Most often, even this is overtaken by customs and traditions that are clearly un-Islamic, some of which not only pre-date Islam but are also invalidated by Islam!!

The ‘judges’ in jirgas, panchayats, and other mediators etc are members of the community, thereby holding all the biases and therefore are not impartial. These men are often from the most prominent families in the community and in often include the local feudal or other powerful figure. This in essence results in the powerful forcing their views on the weak and powerless. In fact, often the only reason, punishments are carried out is due to fear and lack of power to stand against the powerful. Further the evidence shows that their investigations are not based on truth. Often inhumane, out-dated and superstitious methods are used e.g. walking on hot coal to decide on guilt or innocence. These ‘judges’, as mentioned above, judge on the basis of traditions and customs as opposed to the law of the land and as opposed to the rule of law, human rights, fundamental principles. The evidence, procedures and decisions are not based on law and often contradict the law to provide punishments which are illegal and often horrific e.g. rape, death as karo kari, exchange of girls as compensation<sup>14</sup>. Decisions are also made on the basis of age old principles e.g. ‘To pay in the same coin’. These decisions are also mostly not allowed to be appealed against. If appeal is allowed it is to another jirga constituted of some different members.

The systems are also erratic i.e. there is no codified consensual form of justice being meted out around the country. Each system in its own area dispenses its own form of justice as it likes. Therefore what is acceptable in one region is not in the other. Methods also differ from system to system. Further, there are no concepts of documentation, appeal etc.

These systems are also exclusive. Their lack of inclusion of women is discussed in the next chapter, but it is sufficient to note here that women are not involved in these systems except as recipients of

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<sup>13</sup> All law in Pakistan has to be according to the provisions of Islam as is stated in the Constitution of the Islamic Republic of Pakistan.

<sup>14</sup> ‘Rethinking jirgas’, Huma Yusuf, Dawn Newspaper, Sunday, 11 April, 2010; ‘Marriages of minor girls in compensation for murder: SC orders arrest of MNA, 11 others’, Mohammad Kamran, Daily Times, 19 August 2007

judgments. There are also clearly very anti-women sentiments and punishments. Women are also included as part of punishments of other men. There is also a lack of involvement of non-Muslims and other sects of Islam.

## **GENDER DIMENSIONS IN THE FORMAL AND PARALLEL LEGAL AND ILLEGAL SYSTEMS**

Due to social constraints and traditions, women are placed in a subordinate role in society. They face discrimination on the basis of being female and subject to patriarchal biases; they are considered to be the 'property' of men, who need to be guided, supported, have decisions made for them etc. As a result, women are not allowed freedom of any kind nor allowed recognition as a full person deserving of rights and freedoms. Any woman trying to break away from these bindings is branded to be dishonourable, shameful and shunned from society.

This bias is carried into the legal system and specifically with regards to women's access to justice through the legal system. Within formal legal systems and legal and illegal parallel systems, women remain at a disadvantage.

However, it is important to note that the situation has improved a little with the increasing activism around women's rights. A large number of non-governmental organizations have strived for decades to improve women's position in society and for women's empowerment. While there remains a huge amount of work to be done and countless issues still existing, it is important to note that women's issues are no longer invisible. This in itself is a victory. Nevertheless, dedicated and committed focus needs to be given to women's issues in order to give them actual and real equality.

The gender dimension with regard to the different systems is discussed in this section.

### **4.1. Formal Legal System**

Despite the existence of a legal system; a constitution that guarantees the existence and protection of fundamental rights; and vast amount of laws dealing with the rights of citizens, the actual access and securing of these rights within Pakistan is extremely difficult and exceedingly frustrating.

The formal court system in Pakistan has not proven itself to be an effective institution for imparting justice. With problems of delay, corruption, excessive workload, lack of qualified judges at the district level and lack of appointments on grounds other than merely merit and lack of clerical, administrative and technical staff, the judicial system has been unable to uphold its necessary role.

For women, this situation is even worse. Access to justice for women refers not just to the physical proximity of reaching the court room, but also the environment with which women live and the

appreciation of these women as individuals with inherent rights which include freedom of movement, speech, choice etc.

Women are regarded as subordinates and as property of men. They are only given the role of child bearers and caretakers of their families. Those who try to break these bonds are violently opposed and are branded as violating culture and tradition and considered as 'dishonouring' their families, tribes and communities and as 'disobedient women' who are not worthy of any dignity or honour and are considered outcasts. This bias is present in the treatment they receive in court rather than being treated objectively. Law officers, lawyers, judges, police officials and other officials retain this bias and treat them as 'culprits' and not victims for challenging the status quo. As a result, the women is not just fighting her case, but also society on a whole.

Women are also dependent on men financially as well as emotionally. Due to the concept of women as men's property, women are brought up to believe they are unable to stand and survive without a male in their life. Other disadvantages include their poverty, lack of finances to take a case to court, lack of access to the most basic facilities including education, awareness of their fundamental and legal rights, lack of information about laws etc. Further, due to the existing patriarchy and cultural bias against women, even the law is often over-turned and manipulated to be anti-women. As a result, there is a general fear of the law for women who are forever taunted with consequences which will go against them.

Accessing the judicial systems is hard for anyone who wishes to do so. In reality, mostly those who are extremely desperate voluntarily take a case to court. The cost of litigation, including the costs of court fees, stamp papers etc, is extremely high; the delays in court cases, due to the large caseload on each judge, is extremely frustrating for the litigant morally, as well as financially; the court environment, specifically the lower courts i.e. without basic facilities, lack of information, attitudes of the court personnel and judges and incompetent legal assistance, is intimidating and overwhelming. For women without the financial and familial support, this becomes even more difficult.

There is also a lack of respect for the rule of law within the community. The law is seen more as an instrument of control rather than relief, redress and security due to its misuse by the elite. Also the laws are not seriously or consistently implemented and money can be used to 'buy' a verdict. In women's cases specifically, law is often over-turned and manipulated in favour of discriminatory laws, customary practices and society's unwritten rules for women's behaviour – a practice that is through such behavior by concerned institutions, openly condoning or justifying these acts. This, not only encourages lack of respect, but also the fear of the law. The Parliament and the people in control of the Government violate law to perpetuate violence against women and the poor.

One of major results of all of this has been the loss of faith in the system, which leads to a feeling of insecurity amongst the women, leading them to feel helpless without any support or protection from the State or State institutions. Drastic steps need to be taken to restore women's confidence in the formal legal system. Of course we are not talking of the few suomoto cases taken up by the Superior judiciary.

#### **4.2 Parallel Informal and Illegal Forums**

As with the systems discussed above, women under the informal parallel legal forums also fall victim to the discrimination and persecution of society due to their sex. Within these illegal systems, women remain even more marginalized as they do not receive even the formal equality given to them by the State under the Constitution and under its laws. The formality of 'equality' need not be fulfilled. Concepts of customs, traditions and mutilated versions of religion rule the decision making, subjecting women to the most inhumane, insane and unfair decisions, treating them as chattels, as property and as commodities.

Women are not included in any part of the decision-making. The elders or any person who sits on the decision making side is male. There is no option of the inclusion of women here.

Women are also not included in the process. If they are the accused, they are not allowed to be heard – instead they may appoint someone to represent them, but they themselves may not appear.

In very few cases, women are allowed to be present during the hearings – elderly women are sometimes allowed to participate in family jirgas but not in public jirgas.

Despite their invisibility in the process and decision-making, women are very much present in the decisions themselves. Women are exchanged in cases of resolution of disputes; given as collateral in cases of murder and tribal warfare; as collateral in cases of honour and dishonor; raped and harassed as punishment to men in their family i.e. dishonouring the family etc.

Due to societal norms, these systems are extremely biased and discriminatory towards women. It is in fact some of the harshest and inhumane victimizations of women that initially projected these systems into the spotlight. Without a major overhaul of society and its perspectives, there is little hope of affording equality of women and humane treatment and respect of women in such community and societal systems.

## RECOMMENDATIONS

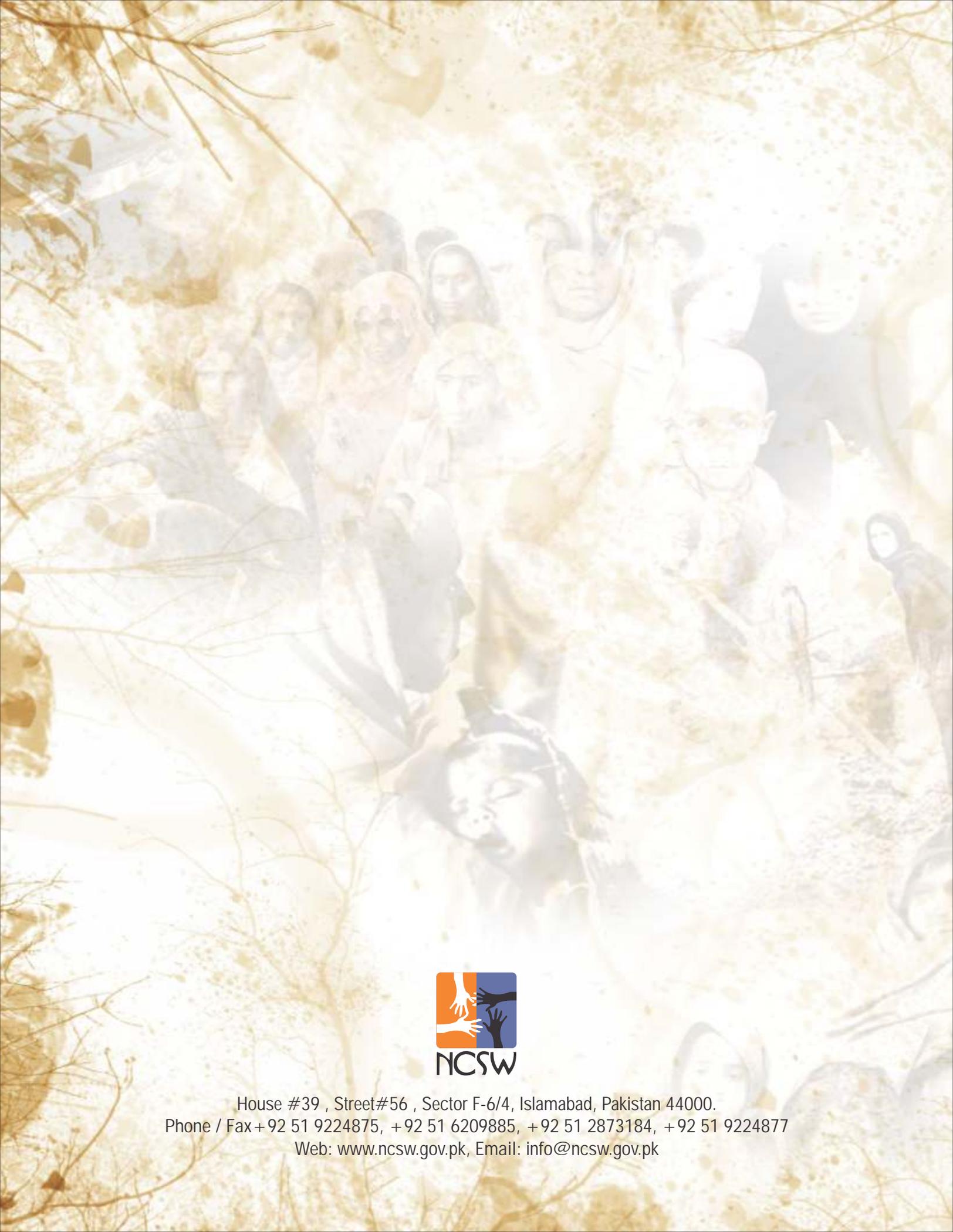
A different number of recommendations were collected across the country. Interestingly, it appears that the prevalence of formal legal system is inversely proportional to the prevalence of informal legal system. This means that more reliable the formal legal system is, the less attractive the informal legal systems will be; and vice versa. A large majority of the participants of the focus group discussions felt that if the formal legal system was strengthened to ensure speedy delivery of verdicts, low costs and easy accessibility across the country, there would be no need for parallel systems. Unfortunately, as this does not seem a possibility, other recommendations were given. These have been collected and are presented below:

- Increasing the number of judges. Number of judges should be increased in the formal court system to allow better dispensation of justice;
- Women should be part of decision making in all forums at all levels therefore women judges should be appointed in all High Courts as well as Supreme Court.
- Retired judges and retired senior lawyers should be appointed to assist sitting judges in judgment writing.
- More funds need to be allocated for judicial sector, the working conditions of the courts should be improved. There should be judicial complexes and all the courts must be situated in one premises
- The pay scale of judges and the court staff should also be increased.
- All the special courts, Tribunals and quasi judicial forums should be abolished (this is against Article 175 (3) of the Constitution, 1973 Article 25 thereof) and the cases should be entrusted only to the regular courts with full time judges at the district level at first stage. The parallel judicial forums lead to prolonged litigation as sooner or later the disputes are taken up at judicial forums. This leads to prolonged litigation and puts the litigants in a more adverse situation. Therefore there should be no parallel judicial system and unification of judicial system is necessary in the long term judicial reforms;
- Special courts in the shape of parallel judicial system have proved to serve the interests of the groups for whom they are created instead special benches need to be established under the High courts.
- As a short term measure the quasai judicial forums needs to be strengthened in terms of enhancing their capacity such as the

- (4) Muslahat e. Anjuman constituted under the Local Government system 2001
- (5) The Arbitration council constituted under the Muslim Family Laws Ordinance 1961
- (6) Appointment of Arbitrators under Arbitration Act 1940

And increasing the scope and powers of Wafaqi Mohtasib created under Presidential Order 1984 by including the provincial departments as well and by providing an appeal to to the High court instead of President by the aggrieved party from the order of the Wafaqi Mohtasib.

- An awareness campaign on laws and procedures through popular media may be launched to aware people to avoid jirga exploitation;
- Laws, rules and regulations affecting the status and rights of women should be reviewed and suggestion for repeal, amendment or new legislation essential to eliminate discrimination may be brought forward;
- To redress of violation of women's rights, individual grievances, and facilities for social care, the government should take appropriate actions for better management and efficient provision of justice and social services through concerned forums and authorities.
- Extend laws, especially family laws and other pro-women legislation to Gilgit-Baltistan and FATA and any other territories in Pakistan not under the cover of the Constitution and the law of Pakistan;
- Women Ministries and other relevant bodies should be set in Gilgit Baltistan and FATA and any other territories in Pakistan not under the cover of the Constitution and the law of Pakistan.
- Effective Implementation of laws needs to be done.



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