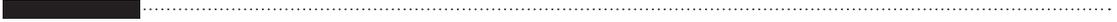


CAMP (Community Appraisal and Motivation Programme)
and **Saferworld**

The Jirga: justice and conflict transformation



March 2012



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COMMUNITY APPRAISAL AND MOTIVATION PROGRAMME and SAFERWORLD

MARCH 2012

Acknowledgements

This report represents an analysis of primary research commissioned by Community Appraisal and Motivation Programme (CAMP) and Saferworld in Pakistan during 2011. This report was co-authored by Christian Dennys and Marjana. This publication was designed by Jane Stevenson, and prepared under the People's Peacemaking Perspectives Project. Particular thanks for their inputs into the research process go to Aezaz Ur Rehman, Neha Gauhar, Riaz-ul-Haq, Habibullah Baig, Naveed Shinwari and Fareeha Sultan from CAMP and Rosy Cave, Chamila Hemmathagama, Paul Murphy and Evelyn Vancollie from Saferworld.

CAMP and Saferworld would like to thank officials from Government of Pakistan, members of civil society and all those people living in Lower Dir and Swat who shared their views and opinions despite the sensitive nature of the topic.

We are grateful to the European Union (EU) for its financial support for this project.

The People's Peacemaking Perspectives project

The People's Peacemaking Perspectives project is a joint initiative implemented by Conciliation Resources and Saferworld and financed under the European Commission's Instrument for Stability. The project provides European Union institutions with analysis and recommendations based on the opinions and experiences of local people in a range of countries and regions affected by fragility and violent conflict.

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Pakistan



This map is intended for illustrative purposes only. Saferworld takes no position on whether this representation is legally or politically valid.

Acronyms

ADB	Asian Development Bank
ANP	Awami National Party
CBO	Community-based organisation
EU	European Union
FATA	Federally Administered Tribal Areas
FGD	Focus group discussion
IDP	Internally displaced person
KP	Khyber Pakhtunkhwa
NGO	Non-governmental organisation
PATA	Provincially Administered Tribal Areas
TNSM	Tehrik-i-Nifaz-i Shariat-i-Muhammadi
TTP	Tehrik-i Taliban Pakistan
UNHCR	United Nations High Commission for Refugees
WB	World Bank

Glossary

Amir-i Shariat Prince of Sharia

Awami Literally peoples, as used in the name of the Awami League political party

Dasturul Amal Codes of conduct in *Pakhtunwali*

De facto In reality

De jure By right

De Paiso Jirga The Money *Jirga*

District (Zila) Administrative unit consisting of *tehsils* and union councils. There are a total of 115 districts in Pakistan, and within the 7 divisions of Khyber Pakhtunkhwa there are 24 districts.

Falah-i Tanzeem Social organisation

Hanifi Islamic School is one of the schools of Islamic law in jurisprudence within Sunni Islam. It is named after the Persian scholar Abu Hanifa an-Nu'man ibn Thabit.

Hujra A place for guests and gatherings for the male population in the community. *Hujra* is usually attached to the house of a local leader.

Jihad A personal struggle in devotion to Islam especially involving spiritual discipline or a holy war waged on behalf of Islam as a religious duty.

Jihadi or **Mujahideen** Literally refers to a person who struggles, which can be interpreted as to fight in the name of Allah.

Jirga Refers to the practice and to the institution. A *Jirga* is a gathering of elders, convened by an intermediary (*Jirgamaar*, see below) between contesting parties, to hear the arguments of the parties.

Jirgamaar The leader of a *Jirga* who hears the arguments of the plaintiffs.

Nang or **Namus** Synonymous with honour and chastity, particularly of women.

Nazim Mayor.

Nizam-i Adl Used in the report to refer only to the *Nizam-i Adl* regulation; in some interpretations it can also refer to the generic use of Sharia law.

Pakhtun (also **Pushtun**, **Pashtun** or **Pukhtun**) Ethnic group

Pakhtunwali (also known **Pashtunwali**) The inherited moral and social code of Pakhtun society

Provincially Administered Tribal Areas (PATA) Pakistani administrative subdivisions designated in the Article 246(b) of the Constitution of Pakistan and include Malakand division, where the districts of Swat and Dir are located.

Qazi Judge

Qazi courts an Islamic court headed by a *Qazi* (Judge)

Riwaj Literally tradition

Sharia law Islamic law, there are several schools present in PATA including *Hanifi* and *Wahhabi*.

Swara The giving of young women and girls in marriage as a method of resolving conflict, this is also known to as *Badal-i Sulh* and *Vani*.

Tehsil Administrative units in cities and towns (a district subdivision)

Tehsildar Administrative head of a *tehsil*

Union council Elected group of people for administration in cities and towns. The territory of a union council is usually part of a *tehsil*.

Wali The term is used to refer to the rulers of Swat. Since 1969, after acceding to Pakistan, the former princely state has been under a civil administration as part of Khyber Pakhtunkhwa province.

1

Introduction

“We have a rich history and culture, and yet, some of us are looking to others to bring peace in our area. So, we have to find a middle ground, somewhere where the older generation and the youth can find a comfortable zone. We might also have to look at other models of conflict resolution and critically assess whether those would work for our community.”

Group discussions, Lower Dir

The conflict that erupted in the Provincially Administered Tribal Areas (PATA) in 2007 with the takeover of Swat and other areas by militants loyal to the Tehrik-i Taliban Pakistan (TTP) led to the displacement of 3.2 million people, the interruption of education and health provision and destruction of vital infrastructure as the Pakistan Army fought a violent counter-insurgency. The impact of the conflict was heightened by the floods in 2010 and 2011 which devastated large parts of the region.

There are a number of complex causes of the conflict including poor governance, low levels of state legitimacy and poverty. In the case of PATA, one of the key drivers of the conflict was the inability of the local population to gain access to equitable and responsive justice systems. The lack of provision for justice, in either the formal or informal spheres, led many to turn to extreme forms of Islamic jurisprudence in search of justice. This is in part because of the reforms of the Musharraf government, but also because of long-standing policies with regard to the status of PATA which not only reduced the capability and reach of the formal justice system, but also undermined the informal justice system, the *Jirga* (a gathering of elders convened by an intermediary to hear grievances between contesting parties and reach decisions by consensus), by de-recognising it. This is despite the fact that the *Jirga* in PATA has been central to governance and justice provision for several hundred years.

Even though the *Jirga* has been restricted in recent years it has remained essential to informal justice provision, and was a central institution that challenged the militants. This places the *Jirga* in a critical position where it still retains social legitimacy in the eyes of the population. However, it is unable to support and foster conflict transformation and justice provisions as it has historically done because of incoherent policies by the state.

As this report explores even local respondents who use the institution recognise that there are limitations with the *Jirga*. In some instances its weaknesses, including a lack of representation of women and minorities, poor implementation of human rights and a lack of clarity on its status in the wider judicial system, have allowed militant groups to espouse and find support for alternatives, as illustrated by the Taliban’s imposition of their version of Sharia (Islamic) courts. These flaws need to be addressed as part of efforts to improve the entire judicial system – a system that provides poor and

inconsistent access to justice through formal and informal mechanisms. Potentially beneficial linkages between formal and informal justice mechanisms need to be better understood and, where appropriate, strengthened so that one of the key drivers of conflict in the region – the lack of access to timely and impartial justice to address social and political grievances – is dealt with holistically and without delay, leading to greater justice for all in Pakistan.

“Jirga also needs to be brought in conformity with the modern world dynamics such as issues pertaining to peace and stability, human rights and violence against women.”

Interview, Swat

The concerns raised above have also been identified by key international partners such as the United Nations (UN), Asian Development Bank (ADB), World Bank (WB) and European Union (EU) which, along with the Pakistan government, conducted in 2010 the Post Crisis Needs Assessment of Khyber Pakhtunkhwa (KP) and the Federally Administered Tribal Areas (FATA). This report identified four key strategic areas which need to be addressed, including the need to “Build [the] responsiveness and effectiveness of the State to restore citizen trust” and to “Counter radicalisation and foster reconciliation.”¹ The *Jirga* is a critical, but underrepresented, component of achieving those objectives.

This report highlights areas of concern with regard to the *Jirga* and justice provision in PATA and identifies three main outcomes based on the research:

- 1 Reform of the wider judicial system is crucial for preventing future conflict:** strengthen the functional linkages between formal and informal mechanisms and clarify the status and potential of *Jirga* to complement the judicial system.
- 2 A more representative and inclusive *Jirga* system will improve access to justice for all members of society and reduce local tensions and conflicts in PATA:** adapt the customary system to include marginalised and vulnerable groups.
- 3 Time-honoured *Jirga* plays a constructive and effective role in conflict transformation and resolution:** enhance the understanding and use of *Jirga* in contributing to reduced levels of militancy in PATA.

This report will examine the *Jirga* in the context of militancy in PATA, particularly in Swat and Lower Dir, and its potential role in a reformed judicial system. The report will then discuss the limitations of the *Jirga* and concerns highlighted by local respondents with regard to human rights, women’s rights and inclusivity before turning its focus to why attention is required on the *Jirga* and its status as a conflict transformation body. Finally the report will make recommendations regarding potential ways in which the *Jirga* could be supported, which are also explored in a policy paper *People’s Peacemaking Perspectives: Pakistan*.²

Methodology

This report is based upon individual interviews and focus group discussions (FGDs) carried out in Swat, Lower Dir, Peshawar and Islamabad. In total 140 people participated in the research between May and November 2011. This included 14 FGDs which were carried out in Swat and Lower Dir districts: 7 in each site (4 FGDS with men only and 3 FGDs with women only), totalling 113 respondents (61 male, 52 female). Twenty-seven individual interviews were carried out. Partly because of the nature of Pakhtun society and the focus of the research on the *Jirga*, which is an institution dominated by men and community leaders, the representation of disadvantaged groups was a challenge throughout the project. Despite this, and the limited geographical scope, the research design has attempted to balance the data from the male local leaders with input from young people and women.

¹ The two other objectives are “Stimulate employment and livelihood opportunities” and “Ensure the delivery of basic services.” *Post Crisis Needs Assessment Khyber Pakhtunkhwa and Federal Administered Tribal Areas*, September 2010, Pakistan, p 6, available at www.khyberpakhtunkhwa.gov.pk/Departments/PnD/mne/MnE/Download/7.%20PCNA%20Report.pdf accessed 1 February 2012.

The data collected has not allowed for the disaggregation of respondents by income levels or livelihood types. As a result the sample is likely to be weighted towards more affluent groups (i.e. local leaders) who may agree more readily with the *Jirga* system because they operate the system. The sample is also likely to be better educated than the overall population because of the inclusion of both local leaders as well as civil society leaders. Due to these limitations, involved with any research methodology, the report represents only a snapshot of people's perceptions.

Swat has a population of 1,257,600 people³ and is split in to two *tehsils*; Swat and Matta. Swat *tehsil* is further subdivided into 41 union councils with Matta *tehsil* containing 24 union councils. The valley is predominantly Pakhtun with minority groups also present. The literacy rates of the region have been poor, with official figures at 13.45 percent among women and 43.16 percent among men.⁴

Lower Dir has a population of 717,649 people and is 1,583 square kilometres in area.⁵ It is split into 2 *tehsils* (Timergara and Samar Bagh), which include 37 union councils. The area is dominated by Pakhtuns though there are minority groups.

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² Conciliation Resources and Saferworld, People's Peacemaking Perspectives: Pakistan (Conciliation Resources and Saferworld, February 2012). Available at: www.saferworld.org.uk/smartweb/where/people-s-peacemaking-perspectives

³ Government of Pakistan 1998, District Census Report 1998, Swat District at a Glance, available at www.census.gov.pk/NWFP/SWAT.htm, accessed 12 December 2011.

⁴ *Ibid.*

⁵ Khyber Pukhtoonkhwa, Official gateway to government, available at www.khyberpakhtunkhwa.gov.pk/aboutus/Area-Population.php, accessed 1 February 2012.

2

The impact of militancy in Swat and Lower Dir

MILITANCY HAS BEEN PRESENT IN THE WIDER REGION FOR SEVERAL DECADES

and has expanded rapidly since the 1980s, both in terms of the number of individuals involved and the number of groups. As a result there are now multiple conflicts in the region including home grown militancy under the banner of the Tehrik-i Taliban Pakistan (TTP), also known as the 'Pakistani Taliban,' which targets the Pakistani state and security forces. Afghan militants are also present with multiple Afghan insurgent groups using the region as a sanctuary in their conflict in Afghanistan against the state and/or international military forces. Finally, militant groups that are promoting a global *Jihad*, including al-Qaeda but also the Islamic Movement of Uzbekistan and others, are located in the region.

While beyond the scope of this report which focuses on PATA and the impact of Pakistan militancy, all three actors in those conflicts have long-standing and at times overlapping aims which both encourage them to work together, but also at times to violently attack one another. This is partly because each of the three groups, Pakistani Taliban, Afghan Taliban and other militant groups, including a number of autonomous groups, vie for resources and power in the region.⁶ The fragmented nature of these groups partially explains why containing the insurgency in Pakistan has been a substantial challenge for the state. The fragmentation was, however, created by the Pakistani state which directed support given by the United States and Saudi Arabia to the Mujahideen in the 1980s, as they were fighting Soviet forces and the communist Afghan government.

Out of this milieu, militancy focused against the Pakistani state emerged in the 1990s with prominent *Jihadi* leaders coming from across both the federally and the provincially administered tribal areas, FATA and PATA respectfully. Significantly for this report, Maulana Sufi Mohammad, leader of Tehrik-i-Nifaz-i-Shariat-i-Muhammadi (TNSM), who originally comes from Dir, first publicly called for Sharia (Islamic) law in 1994.⁷ The calls for Sharia law are important because PATA suffers from a particular form of fragility with regard to justice. There is a substantial lack of clarity regarding justice provision in PATA (see section 3), which forms one of the key grievances that drives militancy. The inability of the state to bring clarity allows the various militant

⁶ There are several sources which describe the relationships between these groups including; Rashid Ahmad, 2009, *Descent into Chaos: The world's most unstable region and the threat to global security*, Penguin; and Nawaz, Shuja, 2009, *FATA – A Most Dangerous Place; Meeting the Challenge of Militancy and Terror in the Federally Administered Tribal Areas of Pakistan*, Center for Strategic and International Studies, Washington, DC.

⁷ Globalsecurity, undated, *Tehreek Nifaz-e-Shariat-e-Muhammadi (TNSM) Movement for the Enforcement of Islamic Sharia*, available at www.globalsecurity.org/military/world/para/tnsm.htm, accessed 30 January 2012.

groups space not only to challenge the state with regard to justice, but also to establish their own forms of justice provision very easily.⁸

TNSM has gained notoriety for its violent campaign to introduce Sharia law in the Malakand division of KP and was one of the founding groups of TTP. TTP, which formed in December 2007 by bringing together 13 militant groups, has established local groups across much of KP, wresting large parts of the region out of state control.⁹ Prior to the insurgency in Pakistan, Sufi Muhammad led thousands of *Jihadi* (volunteer) fighters across the Afghan border to support the Afghan Taliban against the US in the winter of 2001. Sufi Muhammad was arrested upon his return to Pakistan after losing almost all his *Jihadis*. Sufi Muhammad remained in jail until he was released by the new Awami National Party (ANP) government in KP, following the February 2008 elections.¹⁰

In the absence of Sufi Muhammad, his son-in-law, Maulana Fazlullah reorganised the TNSM and transformed it into an armed militant organisation. Through his FM radio station Fazlullah attracted and motivated new recruits and public support for his campaign demanding Sharia law – particularly the form of Sharia law which the Afghan Taliban promulgated in Afghanistan.¹¹ In July 2007, Fazlullah declared *Jihad* against the Pakistan Army in retaliation for its siege of the Red Mosque (*Lal Masjid*) in Islamabad. This declaration brought about the second military operation against Sufi Muhammad and Fazlullah's group.¹² Despite this, by autumn of 2007, Fazlullah had gained administrative control of Swat, setting up Islamic courts and attacking girls' schools.¹³

In retaliation, the Federal Government of Pakistan deployed the Pakistan Army in late 2007 in order to curb TNSM's activities in the settled areas of Swat. The mission continued for almost six months and led to the Pakistan Army regaining control of the Swat Valley. Hundreds of militants were killed, caught or jailed. While the problem of militancy itself did not go away, it was significantly contained and people who formed the core of TNSM took refuge in the remote Peochar Mountains. Despite this progress, the elected provincial government (as opposed to the federal government in Islamabad), led by the ANP in KP, sought a negotiated settlement because of their fears that the military control of Swat was fragile. The negotiations led to the release of Maulana Sufi Muhammad, who it was hoped would be able to bring TNSM into a settlement with the government. However his time in prison had weakened his position within TNSM, which instead went on the offensive, re-entering the Swat Valley in 2008. The militants eventually gained control of most of the region and an estimated 80,000 girls were forced out of schools.¹⁴ In April 2009, the government passed the *Nizam-i Adl* regulation and agreed to impose Sharia law and suspend military operations in the Swat Valley.¹⁵

In spite of the supposed political settlement the Pakistan Army started Operation Black Thunderstorm on 26 April 2009 with the aim of retaking Buner, Lower Dir, Swat and Shangla districts from the Pakistani Taliban. The operation largely cleared

⁸ Zafar R, 2011, *Development and the Battle for Swat*, al-Nakhlah, The Fletcher School Online Journal for issues related to Southwest Asia and Islamic Civilization, Tufts University, Vol Spring 2011, pp 2–3, available at <http://fletcher.tufts.edu/Al-Nakhlah/~media/1C405F8026A64D748902426CB599F21F.pdf>, accessed 9 December 2011.

⁹ While this study focuses on the *Jirga* in the context of militancy in Swat and Lower Dir, the militants are and were also present in the following districts: Bannu, Buner, Chitral, Dera Ismail Khan, Hangu, Kohat, Kohistan, Malakand, Mardan, Nowshera and Tank, as well as the suburbs of Peshawar.

¹⁰ Khattak, Iqbal, 22 April 2008, *TNSM chief Sufi Muhammad freed*, available at www.dailytimes.com.pk/default.asp?page=20080422%22story_22-4-2008_pg1_9, accessed 30 January 2012.

¹¹ The authors note that these interpretations often differ substantially from mainstream Islamic practice and culture mores in these regions.

¹² Khattak Daud Khan, April 2010, *The Battle for Pakistan: Militancy and Conflict in the Swat Valley*, New America Foundation, Counterterrorism Strategy Initiative Policy Paper, available at <http://counterterrorism.newamerica.net/sites/newamerica.net/files/policydocs/dir.pdf>, accessed 30 January 2012.

¹³ Zafar R, 2011, *Development and the Battle for Swat*, al-Nakhlah, The Fletcher School Online Journal for issues related to Southwest Asia and Islamic Civilization, Tufts University, Vol. Spring 2011, p 3 available at <http://fletcher.tufts.edu/Al-Nakhlah/~media/1C405F8026A64D748902426CB599F21F.pdf>, accessed 9 December 2011.

¹⁴ CNN, 2008, *Militants grab U.S. military Humvees in ambush*, CNN, 11 November 2008, available at www.cnn.com/2008/WORLD/asiapcf/11/11/pakistan.convoy.attack/index.html, accessed on 26 March 2011.

¹⁵ Khaliq, Fazal, 19 January 2011, *Nizam-i Adl regulation top sharia court set up in swat*, available at <http://tribune.com.pk/story/105998/nizam-e-adl-regulation-top-sharia-court-set-up-in-swat/>, accessed 30 January 2012.

the Lower Dir, Swat and Shangla districts. Fighting in Swat was particularly fierce as the Taliban felt strong enough to engage in open warfare rather than using insurgent tactics. The operation to clear Mingora, the district capital, in May 2009 resulted in the escape of Fazlullah and the arrest of Sufi Muhammad, leaving administrative control of Swat to the army and federal government. Sporadic fighting continued on the city's outskirts for another month.¹⁶ On 14 June 2009, the operation was declared over and the military had regained control of the region. Only small pockets of Taliban resistance remained and the military started mopping up operations.

The conflict led to significant social and economic damage. In 2009 it was estimated that the overall costs for recovery in KP and FATA would be over US\$1bn, 79 percent of which was believed to be in the five conflict affected districts in KP, including Swat and Lower Dir.¹⁷ In Swat alone six health facilities were completely destroyed and a further twelve partially destroyed, and in Dir nine were destroyed and seven partially damaged.¹⁸ The conflict also led to one of the largest population movements in Pakistan's history with some 3.2 million people displaced. These millions of internally displaced persons (IDPs) had to be re-housed and returned to their home locations as part of the recovery.¹⁹ It was estimated that 28,000 families were displaced from Dir (both Upper and Lower) and a staggering 141,000 families from Swat and the Malakand area (i.e. Mingora).²⁰ Across the region 7.6 percent of schools were completely destroyed or partially damaged. In Swat alone 276 schools were either fully or partially damaged and a further 57 in Lower Dir were also affected.²¹ By August 2009, 1.6 million people displaced across the region had managed to return home according to UN estimates.²²

The state is now responsible for most governance and administrative functions, under the authority of the army. However the pace of reconstruction has been slow, prolonging the risk for the region to fall back into conflict and, in order to maintain peace in the region and keep it safe from the Taliban, the government needs to take significant steps for the reconstruction, progress and development of the region. Reconstruction was further set back by the devastating floods in 2010 and 2011, which affected the lives of millions of Pakistanis living in the region.

The combined crises of militancy and floods present a daunting challenge to the Government of Pakistan as it struggles to restore basic services in health and education and jump start economic activity. Within the approach laid out by the Government of Pakistan in the recovery plans, support was included for the *Jirga* as an informal justice system which revived after the imposition of the Taliban Sharia court system.²³ This recognises that the lack of access to justice was a key driver and grievance supporting the insurgency and the reality that in the absence of responsive governance, the *Jirga* provides the critical system of local governance and justice provision.

¹⁶ Sayah, Reza, 2009, *Pakistan secures key Swat Valley city* – CNN.com, published 30 May 2009, available at <http://edition.cnn.com/2009/WORLD/asiapcf/05/30/pakistan.mingora/index.html>, accessed on 12 December 2011.

¹⁷ ADB and WB, 2009, *Pakistan North West Frontier Province and Federally Administered Tribal Areas Preliminary Damage and Needs Assessment, Immediate Restoration and Medium Term Reconstruction in Crisis Affected Areas*, Asian Development Bank, and World Bank for Government of Pakistan Islamabad, Pakistan, p ix.

¹⁸ *Ibid* p 26.

¹⁹ UN High Commission for Refugees (UNHCR), 2009, *UNHCR IDP Operation in Pakistan*, Reporting Period 1 Jan 2009 – 31 Jan 2010, UNHCR Pakistan, p 2, available at www.unhcr.org.pk/IDP%20Documents/IDP%20Report%202009.pdf, accessed 12 December 2011.

²⁰ ADB and WB, 2009, *Pakistan North West Frontier Province and Federally Administered Tribal Areas Preliminary Damage and Needs Assessment, Immediate Restoration and Medium Term Reconstruction in Crisis Affected Areas*, Asian Development Bank and World Bank for Government of Pakistan Islamabad, Pakistan, p 43.

²¹ *Ibid* pp 21–22.

²² UNHCR, 2009, *UNHCR IDP Operation in Pakistan*, Reporting Period 1 Jan 2009–31 Jan 2010, UNHCR Pakistan, p 2, available at www.unhcr.org.pk/IDP%20Documents/IDP%20Report%202009.pdf, accessed 12 December 2011.

²³ *Op cit* ADB and WB, 2009, p 104.

3

Jirga and justice provision in Swat and Lower Dir

THIS SECTION EXPLAINS THE JIRGA AND JUSTICE PROVISION in the context of the primary research locations, Swat and Lower Dir districts in Malakand division.

Background

In terms of justice provision, the central role of the *Jirga* in local governance was secured by the decision of the *Wali* of Swat, Miangul Abdul Wadood Khan, to allow local *Jirgas* within Swat to formulate their own laws, or Codes of Conduct. The lack of consistency in justice provision across Swat stems from this decision whereby *Jirgas* have been allowed to formulate different local justice codes.²⁴ The varying Codes of Conduct in *Pakhtunwali* (the inherited moral and social code of Pakhtun society) were called *Dasturul Amal* and existed alongside *Qazi* courts (Islamic courts headed by a *Qazi* or judge), which applied Sharia legal interpretations. In cases requiring the judgement of the *Wali*, who held both ultimate executive and judicial power, the rulers of Swat would use the *Pakhtunwali* inspired *Dasturul Amal* to resolve disputes.²⁵ In practice this meant that Sharia law was subservient to *Pakhtunwali*, which was subservient to the political requirements of the *Wali*.²⁶ The *Qazi* courts were replaced by a four-man *Jirga* system at the *tehsil* level by the 1975 PATA Regulation, but these met infrequently.²⁷

Pakhtunwali "It is law inasmuch as it is enforced by *maliks* and *jirgas* (officials and representatives) and was accepted as such by the British Frontier Crime Regulations. It is custom insofar as every Pathan knows what to do or not to do under it in the circumstances of daily life. It is manners because a 'true *khan*-like' Pathan never departs from it. It is mind-set because all Pathans accept it." ²⁸

²⁴ Dr Sultan-i Rome, 2006, *Administrative System of the Princely State of Swat*, JRSP Vol XXXXIII. No. 2, 2006, p 9, available at www.valleyswat.net/literature/papers/Administrative_System_of_Swat.pdf, accessed 1 February 2012.

²⁵ Fleischner J, 2011, *Governance and Militancy in Pakistan's Swat Valley*, Center for Strategic International Studies, Washington DC, p 3, available at http://csis.org/files/publication/111014_Fleischner_SwatValley_0.pdf, accessed 12 December 2011.

²⁶ This in part helps explain the Pakhtun response to the imposition of Sharia law; it has always been part of the justice system it has however not normally been the dominant element.

²⁷ Fleischner J, 2011, *Governance and Militancy in Pakistan's Swat Valley*, Center for Strategic International Studies, Washington DC, p 6, available at http://csis.org/files/publication/111014_Fleischner_SwatValley_0.pdf, accessed 12 December 2011.

²⁸ Spain W James, 1995, *Pathans of the Latter Day*, Oxford University Press, Oxford, p 39.

Jirga In the context of Swat and Lower Dir, the *Jirga* system does not rely on a single judicial code, instead it draws on three: *Pakhtunwali*, Sharia law and Pakistani state law (enacted in KP through the Frontier Crimes Regulation 1901).

Over several decades, the people of PATA slowly lost their access to justice. The end of the reign of the *Wali* in 1969 ended the primary appeals court (as the *Wali* had been the final court of appeal), the removal of *Qazi* courts in 1975 removed Sharia law, the de-recognition of the *Jirga* in resolving disputes in 1992 delegitimised *Pakhtunwali*²⁹ and the elimination of the administrators' judicial functions in 2002 stopped the formal administration of justice. This meant that by the time the Local Governance Ordinance was enacted in 2002, the state had effectively stripped PATA of most forms of justice provision. Only the formal courts remained, but the population did not trust those. At the same time the informal *Jirga* system was coming under increased social and economic pressures, which degraded its own capabilities to provide justice.

The application of Sharia law, the first time in 150 years that it has been used as the primary source of jurisprudence, has been highly problematic. While the *Nizam-i Adl* Regulation of 2009 has reinstated the *Qazi* courts, there are no systematic interpretations of Islamic jurisprudence in the region, mirroring the heterogeneity of interpretations of *Pakhtunwali* prevalent in the area.³⁰

Despite occasional historical differences in the governance structures at the top, Swat and Dir both continued to use the *Jirga* as a principal structure for managing state-society relations as well as conflict resolution. It is a legitimate justice mechanism in the sense that it is an acceptable form of justice to the people it governs and a respected part of Pakhtun life.

The use of *Jirga* substantially pre-dates the British and later British and Pakistani legal codes, but has been bolstered by the use of Sharia in some areas. As one respondent succinctly explained,

*"Jirga is the historical and traditional institution and gathering of the tribal elders that in every era has served to resolve our tribal nation's political, social, economic, cultural and even religious conflicts by making decisions based on mutuality, consensus and respect."*³¹

In 1848 a *Jirga* with representatives from Swat, Dir, Bajaur and Buner decided to establish a state on the principles of Sharia law but used the primary Pakhtun governance system, the *Jirga*, as a vehicle for incorporating new legal elements. The strength of tribal resistance in this part of the sub-continent led the British to acknowledge Swat and Dir as tribal areas in 1863, allowing them a substantial degree of legal autonomy.

3.1 Judicial reform and the legal status of the *Jirga*

At present there is very limited and inconsistent access to justice in PATA through a mix of formal and informal justice mechanisms that include formal courts, Sharia courts and the informal *Jirga* system, and the boundaries between them are not always clear. Cases can also move between these systems. The formal justice system is often disregarded because it is lengthy, costly and at times corrupt and has been unable to gain credibility among the local population during the past 150 years. In its present state, it was not perceived by research participants to be able to enforce its own decisions without the consent of the tribes, or their elders (see case study below).

²⁹ ALT (Fleischner) *Ibid* p 9.

³⁰ ALT (Fleischner) *Ibid* p 7.

³¹ Interview, Lower Dir, May 2011.

Case study

Jirga is a central feature of Pakhtun culture – a tool to resolve domestic, local and even regional conflicts. It provides access to justice for people in PATA, particularly as the formal system is perceived to be costly, corrupt and time-consuming. One respondent in Lower Dir noted its conflict prevention role, “In our area two tribes had a dispute over land and litigation, which started in the lower courts, had reached the Supreme Court. The court decided in favour of the Essa Kheil tribe but there was no way to implement the court’s decision, which resulted in constant tension between the two tribes and [it became] a security threat for the whole area ... *Jirga* members tried to settle the dispute between them. These people solved this dispute among the tribes and prevented a large scale conflict.”

Corruption

Respondents frequently said, for example, “*Jirga* is the backbone of Pakhtun society”;³² however there was a tacit acceptance that what is experienced as *Jirga* today is not the same as what was experienced previously and those involved in the *Jirga* were no longer as respected as before and may have been corrupted.

While there were concerns about general bias in the group discussions, respondents in the individual interviews, who were perhaps more willing to discuss sensitive issues, identified corruption as the main issue that has weakened the *Jirga* system. There are clearly concerns with some *Jirgas* as one respondent from Lower Dir noted that “...in our area when a dispute is solved between two people and the influential person does not listen or follow the decision there is nothing that we can do about it.”³³

In early practice *Jirga* members would be chosen in line with their age and place in the community (i.e. tribal lineage). However several respondents described how money is now one of the key determinants about what role a *Jirga* member can play in resolving disputes. The emergence of new power centres based on wealth, social status and political influence has also diluted the authority of *Jirga* which have found that they cannot always enforce decisions that the *Jirga* members have taken. The consensual nature of the *Jirga* decisions means that they rely on the powerful members of the community to back those decisions (implicitly or explicitly). There have even been cases (see case study above) where the Supreme Court of Pakistan has lacked the necessary influence to enforce decisions, as a powerful group of elders in the tribal regions has more influence in that area than the courts. However, this then begs the question: who would be able to enforce a decision on the leaders who are already powerful if they themselves have engaged in an event that could or should be sanctioned by a *Jirga*?

The extent of the monetisation of justice has led some local people to refer to the system as *da Paiso Jirga*, or literally ‘the Money *Jirga*,’ meaning that *Jirgas* have become a commodity that can be purchased for the right price. The concerns about corruption are the same as those leveled by many local people about the formal system, which may indicate that it is the broader system of justice that is being corrupted rather than simply the formal or informal system. Thus reform of the broader judicial system is required.

These respondents also reject the notion that *Jirga* has been delivering quick and cost effective justice, undermining romantic and historical notions of the *Jirga* being open to all. For example, the *Jirga* decisions are often made after several meetings and both parties have to arrange grand feasts, and at times gifts are offered to the *Jirga* members, which can be costly for the plaintiffs. The more recent concerns about corruption and *da Paiso Jirga* mean that it can fail to deliver justice because, like the formal system, it can be manipulated easily using power and money. This would suggest that one of the reasons that the extreme forms of Sharia law may have been appealing to some segments of society was due to the fact that it was faster and more efficient than both the *Jirga*

³² Group discussions, Lower Dir, May 2011.

³³ Group discussions, Lower Dir, May 2011.

and court systems, and more generally the gap between the formal (court) and informal (*Jirga*) systems allows space for militant groups to provide justice.³⁴

Reform

The enduring nature of the *Jirga* and the fact that the state relied on the *Jirga* system to address the militant threat, means that the *Jirga* still remains a central part of the governance system. That said, due to the pressures it faces, and as this generation of leaders gives way to a new generation, the threatening situation is likely to worsen. Therefore there was support from the younger generation to promote the institutionalisation of the *Jirga*, which would include promoting broader selection of *Jirga* leaders, initiating a formal office by moving the meetings of the *Jirga* from a *hujra*, which would traditionally be maintained by the *Jirgamaar* (leader of a *Jirga*), to a community hall. These are all steps which would institutionalise the *Jirga* in some form (i.e. new selection criteria, new offices and physical structures) which would necessarily involve the evolution of the *Jirga*.

“Jirga need to be formalised, but no role should be given to government in the constitution and proceedings of Jirga. The state administration should be made subordinate to Jirga and the only role for administration should be in the implementation of Jirga’s decision.”

Participant, group discussions, Lower Dir

However those ideas are not without controversy. There are tensions about whether *Jirga* should or should not be part of the formal judicial system, how they might be linked, and whether the state has a role. Views also differ at the local and central levels about its mandate. In addition, there are huge inconsistencies within and between *Jirga* practices which stymies external understanding of the region. Thus, despite its successes, the lack of clarity in its functions and huge variability across the tribal areas – in the context of an already discredited and deficient formal and informal system – contribute to a vacuum, which has been exploited by militants in recent years, enabling them to enforce different forms of ‘justice’ and weaken the state.

“The Jirga is the best alternative. Jirga is comparatively successful because of the people’s traditional attachment with it and love for it. The court system is very costly for them financially and in terms of time.”

Male community leader, Swat

It should also be noted that, despite being a popular and cherished social institution, the practice of *Jirga* has never remained static. To stay relevant to people in Swat and Lower Dir, it now needs to respond to the demands of young people, women, ethnic minorities and a number of elders to ensure it becomes an even better mechanism for managing conflicts and accessing justice for all.

Representation in and inclusivity of *Jirga*

Despite the centrality of *Jirga* in Pakhtun society, it would be inappropriate to romanticise the *Jirga* and Pakhtun society in general. The recent past, with experiences of militancy and natural disasters, have presented the *Jirga* with an unprecedented challenge: to provide local leadership but at the same time to respond to the changing demands of the population, the state and the international community. This has been further complicated by modernisation and globalisation which have brought new found wealth and power to particular groups and, in the eyes of some communities, has contributed to the degradation and corruption of the *Jirga*.

³⁴ Zafar R, 2011, Development and the Battle for Swat, al-Nakhlah, The Fletcher School Online Journal for issues related to Southwest Asia and Islamic Civilization, Tufts University, Vol. Spring 2011, pp 2–3, available at <http://fletcher.tufts.edu/Al-Nakhlah/~media/1C405F8026A64D748902426CB599F21F.pdf>, accessed 9 December 2011.

Several respondents noted that there has been a diminishing strength of *Jirga* in the region as a result of the socio-economic and political processes in the last generation. As one respondent explained "...the Swat dynastic system was based upon the *Riwaj* (tradition) in which *Jirga* played a very important role, but merging with Pakistan in 1969 disturbed that fabric. The government tried to introduce an alternative to the *Jirga* system; it was a legal system from 1975 under FATA Regulation Act. The system worked up until 1993, after which that system also diminished the new type of *Jirga* system and thus *Jirga* faced its decay."³⁵

The long term decay of the *Jirga* as a viable system of governance was reiterated by a respondent who said, "...after the establishment of government system, the role of the *Jirga* was passed on to the government institution, which led to the decay of *Jirga*. After the disappearance of Swat dominion [in 1969] the Government of Pakistan failed to maintain the previous political system. Thus the locals lost their political system as well as *Jirga* system."³⁶

Thus, while recognising the importance of *Jirga* to Pakhtun society, it is not appropriate to assume that it holds all the answers. Social and political changes in Pakistan and the influence of conflict in neighbouring Afghanistan have affected the evolution of the *Jirga*. Despite enjoying a renaissance in the recent past, research participants believed that as a viable system of governance the *Jirga* has been in long-term decay. While defending its continued importance to Pakhtun society, stressing its value and relevance, there was tacit acceptance that the experience of *Jirga* now is different to that in the past and those involved in the *Jirga* no longer command the same respect, not least due to perceived corruption in the system.

"Jirga is a very effective tool for settling disputes, but that doesn't mean that Jirga does not have room for improvement."

Female civil society member, Swat

There was frustration that *Jirga* has not kept pace with modernisation in the region. This is seen as a result of past government attempts to side-line it.

Human rights

Concerns were raised by some participants about the weak implementation of human rights principles, which is hampered by low levels of awareness of international human rights standards and those enshrined in the Constitution of Pakistan and the Quran. A few female and several male interviewees also outlined substantive concerns about women's rights in *Jirga*, particularly the use of *Swara* (the giving of young women and girls in marriage as a method of resolving conflict).

"Jirga ... needs to be brought into conformity with the modern world dynamics such as issues pertaining to peace and stability, human rights and violence against women."

Interview, Swat

Some respondents noted that local people in general often have a strong concept of rights, though these may not be articulated in the same way as international human rights standards. This is significant because in the context of Swat and Lower Dir, the *Jirga* system does not rely on a single judicial code, instead it draws on three: *Pakhtunwali*, Sharia law and Pakistani state law (enacted in KP through the Frontier Crimes Regulation 1901), all of which have varying issues from the perspective of human rights.

These three codes to some degree have overlapping jurisdictions and are not consistent with each other. For example, *Pakhtunwali* supports the use of *Swara* as a conflict resolution mechanism (see box on *Swara*) while both Sharia law and Pakistani state

³⁵ Group discussions, Swat, May 2011. The respondent is referring to the period from 1993 where militants began to encroach in the justice systems.

³⁶ Group discussions, Swat, May 2011.

law³⁷ forbid the practice. In another example, in some interpretations Sharia law and *Pakhtunwali* practice, less weight is given to a woman's testimony compared to a man's, discriminating against women in a way which is forbidden by Pakistani law. The situation is further complicated by the fact that the Frontier Crimes Regulations confirm the use of collective punishment, contrary to the Pakistani Constitution (making the Pakistani legal code internally inconsistent) and human rights standards which focus on the rights of the individual.

The conflict between these codes and human rights is not simply one of the potential punishments that can be handed down, but the fact that in some areas these codes have different orientations towards more fundamental questions such as 'What is justice?' Both Sharia and *Pakhtunwali* are able to use restorative justice which considers societal wellbeing, social cohesion and harmony rather than the individual, which is the start and end point for human rights. Unsurprisingly given this confusion, there were clear tensions between the respondents' views about the application of human rights in the *Jirga*. While there are some specific concerns regarding certain judgements (see box on *Swara*), there was a more general concern about the way in which human rights could, in the eyes of some community members, be applied to the *Jirga* without diminishing it in some way.³⁸

As a result there were both male and female respondents who argued that because of the centrality of the *Jirga* system to Pakhtun life, applying human rights standards to such a system would be inappropriate. However there were also views that indicated that human rights were integral to the *Jirga* because "...the *Jirga* does not violate human rights, it is based on volunteerism and therefore equality is found in it as philosophy. The *Jirga* decisions are in line with human rights".³⁹ It should be stressed, however, that the level of knowledge on human rights was not perceived to be high among most of the community respondents and the reticence to entertain the applicability of human rights in the *Jirga* may be in part because of the conflation of 'Western values' and human rights, and a lack of knowledge about international and national human rights standards. This in effect places human rights in the same category as the extreme interpretations of Sharia law, i.e. the imposition of an external set of values on Pakhtun society.

As a result there were those who argued strongly that "The *Jirga* is blamed for violation of human rights, but in reality *Jirga* is something very special to Pakhtun culture. *Jirga* has incorporated different opinions and learning from various cultures in order to improve conflict resolution and therefore promoting peace".⁴⁰ These responses, coming from female members of the communities, indicate that there is a core set of values that many would find hard to compromise were the *Jirga* to be adapted to be in-line with human rights as understood outside of the region.

That is not to say there is no dissent, and a few female respondents in the group discussions and several male respondents in the key informant interviews outlined substantive concerns about the *Jirga* in general, which included some elements of human rights. This is also important as respondents in the individual interviews tended to be more educated and politically more moderate than those from the communities themselves. There are thus clear tensions between what is acceptable within the communities and what would be acceptable to the rest of Pakistani society, and this discussion is not simply the imposition of 'western' human rights values but about including those values that are enshrined in the Pakistani Constitution and the Quran.

³⁷ In this case the 2000 Peshawar High Court ruling on *Swara*.

³⁸ It is important to note the participants were in general more concerned about an external idea of justice being imposed on their society than anything else. In general they did not necessarily recognise certain practices as being problematic (such as ensuring equal access to the *Jirga*) from any perspective, let alone a human rights perspective.

³⁹ Group discussions (female respondents), Swat, May 2011.

⁴⁰ Group discussions (female respondents), Swat, May 2011.

Women's rights

While there are some general human rights concerns about the use of *Jirga*, there are some specific issues relating to women's rights which primarily focus on issues of access, participation, representation, fairness and the use of punishments and practices such as *Swara*. The reality is that local leadership outside of the district headquarters is almost entirely dominated by men and, as a result of the fact that the *Jirga* is the main social system which regulates all facets of Pakhtun life, those who control the *Jirga* control society.

Swara⁴¹ is the process through which a conflict is resolved by giving a girl in marriage to another family. It is not clear how prevalent *Swara* is, but a study carried out in 2006 indicated there were sixty cases in a three month period in two districts (Mardan and Swabi).⁴² Recent media coverage of *Swara* cases has suggested the practice may be increasing in some areas.⁴³

While some female respondents did not necessarily consider *Swara* in principle to be negative, they were concerned that its usage has changed. "The concept of *Swara* has been very positive but with the passage of time it was wrongly practised. With change in times, environments and progress it is now important to discourage this practice."⁴⁴ Also, while male participants in group discussions in Swat did not say that they would like to see this custom discontinued, they did show a lot of sympathy towards the treatment towards women "...*Swara* is good in the way that it brings peace between the disputing parties but it is bad in the sense that it makes the life of the girl miserable".⁴⁵

Male participants in group discussions in Dir showed less sympathy towards the impact of *Swara* on a girl's life and said it is just the way it is, "...*Swara* is practised in our society and we need to respect our *Jirga* values ... we are ready to ask for her consent but we cannot give any rights".⁴⁶ However, while some may feel it has been useful, others believe it is an un-Islamic practice, "Under *Swara*, innocent girls are given to the rivals as a tool to reach a compromise. While it has proved to be a very effective tool for bringing compromise, it sacrifices the life of an innocent girl – this is total violation of Islamic teachings and the universal concept of human rights".⁴⁷

These competing views complicate efforts to understand which elements of de facto jurisprudence (the mixture of *Pakhtunwali* and Sharia law) should be applied in these regions. It is not as simple as passing a law banning the practice because the Peshawar High Court ruled in 2000 that *Swara* was unlawful. It is a reality and openly practiced by the *Jirga* system, which would require more than the passing of laws from a distant formal judiciary to address.

The concerns about women's access to *Jirga* will be examined in the section below focusing on the challenge of inclusivity. Looking at women's rights, in this region there are deeply entrenched social values where Pakhtun men have the right to regulate a woman's body, thoughts and emotions. So while there is an admixture of Islam within *Pakhtunwali*, the latter has been interpreted and practiced to exercise, justify and reinforce patriarchal authority. As one respondent explained, "If a woman approaches (which is rarely) to a *Jirga* it brushes them off, saying, 'domestic issues need to be resolved within the family.' The attachment of the matter of honour with the body and behaviour of the women has further complicated such a situation for women, because it is the male who decides in the tribal society as to which appearance and act of the women is bringing honour and which one is bringing dishonour for him and the family as whole."⁴⁸

Given that *Nang* or *Namus* (honour, particularly of women) is among the most fundamental notions of *Pakhtunwali* used in some areas, it means that a central interpretation of protecting female chastity is also about protecting male respect. Therefore, in the case of any real or imagined violation of these boundaries, drawn by men, *Pakhtunwali* ultimately gives a man the right to even kill a woman under his authority

⁴¹ *Swara* is also known as *Badal-I Sulh* and *Vani*.

⁴² Stophonourkillings, 2006, *Research study on Swara launched*, available at www.stophonourkillings.com/?q=node/873, accessed 5 December 2011

⁴³ Dawn, 2011a, *Prayer leader, five others get bail in Swara case*, 17 August 2011, available at www.dawn.com/2011/08/18/prayer-leader-five-others-get-bail-in-swara-case.html, accessed on 5 December 2011; and Dawn, 2011b, *No specific law exists to check Swara cases* 24 October 2011, available at www.dawn.com/2011/10/24/no-specific-law-exists-to-check-swara-cases.html, accessed 5 December 2011.

⁴⁴ Group discussions, Swat, May 2011.

⁴⁵ Group discussions, Swat, May 2011.

⁴⁶ Group discussions, Lower Dir, May 2011.

⁴⁷ Group discussions, Swat, May 2011.

⁴⁸ Interview, May 2011.

with impunity. Despite this, some of the more educated female respondents suggested that it is incorrect to depict women as wholly disempowered and that they are able to exert a limited influence in society within Pakhtun cultural norms. There is also a tension between hardline Islamic legal interpretations supported by militants, the more common Hanifi Islamic legal interpretations prevalent in local practices of Islam and the practice of *Pakhtunwali*. In some respects *Pakhtunwali* is not the most progressive form of jurisprudence for women in the area, particularly as it sanctions *Swara* which is prohibited by both militants and more moderate mainstream Islamic teaching (as well as state law as noted above).

There have been prior attempts to increase awareness about women's rights, but this has not always been welcomed. As a male respondent in Lower Dir explained "...an organisation made an attempt to create awareness about women rights, while we appreciate the effort, I strongly say that our women are enjoying basic women's rights which are not given in Europe and other developed countries. We are aware of the status of women, they make good teachers and they receive university level education and other capacity building trainings. A survey should be conducted to determine who is happier, a women in Dir or a woman in Europe ... I say strongly that our women will be happy with us."⁴⁹

Simply explaining women's rights is unlikely to engender local support and using the terminology of women's rights may itself be to the detriment of interventions. Any support for increased awareness on topics of human rights or women's rights should be done in a manner sensitive to local contexts and in support of local voices calling for such changes.

Inclusivity

Currently, the *Jirga* system is not representative or inclusive of the communities it serves, with marginalised and vulnerable groups, including women and minority groups, excluded from directly participating in and influencing *Jirga* decisions.

At present, women are not allowed to participate directly in *Jirga*, however they can be represented by entrusting a male member to advocate for them. Women's engagement has traditionally been constrained by the predominance of male *Jirga* members and their reluctance to encourage female participation. As one respondent noted, "The *Jirga*, a purely male institution, neither sanctions women as member, nor witness or a complainant. Women may access *Jirga* only through a male relative. In case of grievances against her male relatives, no recourse whatsoever is available."⁵⁰

Despite this, both male and female participants from Swat strongly advocated for female participation in *Jirga*, saying that "Today women face various challenges and they are more educated and aware of their problems and therefore should get an opportunity to participate in the *Jirga* decision process."⁵¹ In fact, there was a strong trend among most respondents groups that women's participation can benefit not only women but the *Jirga* more generally, as long as it is in-line with overriding social mores. As a participant pointed out, "...logically women can take part in *Jirga*; if they can appear in courts before strangers, they should be able to become *Jirga* members and participate in a system where they feel and get more respect."⁵² Female participants added: "Women make up half of the population, therefore, a major portion of problems and disputes are directly linked with this half of the population. Women, therefore, have a natural right of representation."⁵³ Another female participant added: "The modern woman is very different, she is the best person to understand her own problems, given *Jirga* is the best mechanism for justice, she should be given direct

⁴⁹ Group discussions, Lower Dir, May 2011.

⁵⁰ Interviews, Swat, May 2011.

⁵¹ Group discussions, Swat and Lower Dir, May 2011.

⁵² Group discussions, Swat, May 2011.

⁵³ Group discussions, Swat, May 2011.

representation in the *Jirga*.⁵⁴ Some research participants indicated support for the creation of separate, women-only *Jirgas*, or possibly mixed *Jirgas*.

However, there were concerns about the current security situation and the degree to which the male members of their families would be happy with their female relatives travelling locally. But one respondent noted that, "... women can become a *Jirga* member while keeping cultural sensitivities in mind." He added that "... women can be given representation if Sharia allows it... we should follow the Afghanistan model where women have been given comparatively better representation".⁵⁵

There was also significant resistance to increasing female participation from religious leaders who suggested, for example, that women's testimony was worth only half that of a man's.⁵⁶ Identifying ways in which women's participation can be improved would need to be carefully calibrated to reflect differing social mores and traditions within and between communities in different *tehsils* and union councils.

Apart from women's participation in *Jirga*, there were also concerns raised about which members of society were selected for a *Jirga*. Some of the groups interviewed as part of the research would support attempts to encourage a broadening of participation in the *Jirga* process. Youth respondents argued that every strata of society should be given proper representation, and should be proportional to population and should include "... *Falah-i Tanzeem* [social organisations], NGOs, government institutions and CBOs... [t]his will also broaden the scope of the *Jirga*."⁵⁷ Younger respondents wanted to see a broader selection of *Jirga* leaders and the creation of a formal office, which would move meetings from a *hujra* (a place of guests and gatherings for the male population in the community) to a permanent community hall.

The selection of *Jirga* members and the *Jirgamaar* in particular was identified as being critical to ensuring credible and fair resolutions. Both male and female respondents felt that the most important criteria for a *Jirga* member is their knowledge of the local customs and that they should have earned respect in the area, be honest and be well respected among the community (though defining this is problematic). In other words, as each village and region practices their own traditions, values and customs, the member should be knowledgeable and well versed in the local traditions and regulations. The specific tribal position of a potential *Jirga* member was another factor to be taken in to consideration in member selection. The members should also be unbiased and just when resolving conflicts and disputes. Lastly, they said that the leader of the *Jirga* should have no personal interest in the decision of a dispute.

There are potential ways of identifying leaders which would be more controversial. For example, the levels of education were also identified by some respondents as being important in defining who should be eligible for *Jirga* membership. While some more educated elders and young people supported education as a positive criterion, several other elders (including many who were not educated) said that formal education was not a pre-requisite. Given the fact that literacy levels in the region are low it is likely leaders will continue to emerge with low levels of formal education or, to take another potential criterion, low levels of awareness of human rights. It is not particularly relevant to suggest here what is or is not important, but simply to note that externally derived lists of what is and is not required may not be readily accepted by all parts of the local civilian leadership upon whom the legitimacy of the *Jirga* system rests.

External impetus or pressure for change, for instance to broaden participation, risks generating resistance among communities who are likely to seek to protect what is seen as an integral part of their identity. Therefore substantial effort is required to

⁵⁴ Group discussions, Swat, May 2011.

⁵⁵ Group discussions, Swat, May 2011.

⁵⁶ Interview with Religious Scholar, Swat, May 2011. The Quranic quote which is interpreted variously to support the idea states "... and get two witnesses out of your own men and if there are not two men then a man and two women such as you choose for witnesses so that if one of them errs the other can remind her..." [Al-Qur'an 2:282].

⁵⁷ Group discussions, Lower Dir, May 2011.

promote and foster local voices calling for change in the context of a central and provincial political process, including using *Jirga* through its leaders to modernise *Jirga* practices, at their own pace.

The researchers observed that the participants in general were very protective of the *Jirga* system and any comment made, especially those that revealed faults, were constructed in an apologetic and defensive way, for example, “Even if there are a few weaknesses in *Jirga*, it does not mean that *Jirga* should be blamed for that. It’s because *Jirga* was never guided by the state”.⁵⁸ Thus, despite criticism of the *Jirga* within Pakistani society and beyond, the *Jirga* system continues to represent a core element of *Pakhtun* social order. Respondents in both Swat and Lower Dir indicated that they preferred *Jirgas* (as a concept) to the formal system, in part because the formal system was deemed to be costly, corrupt and time-consuming and *Jirgas* were perceived to be more reliable and faster. Several respondents discussed *Jirga* as if it were the prevailing legal system in the area in part because of its cultural and historical importance. Given how *Jirga* is regarded, there are strong opinions and sensitivities about how it should be improved.

As this section has demonstrated, the *Jirga* should not be idealised, and there are real challenges when considering if and how to engage with it. Despite the concerns about inclusivity, corruption, and human rights, including women’s rights, underlying all of the responses was the conviction that the *Jirga* is a vital part of *Pakhtun* society and culture. Irrespective of external interventions by the state or international partners, the *Jirga* will remain a central part to justice provision for some time to come and ignoring the *Jirga* system risks allowing one of the drivers of the insurgency, i.e. injustice, to be exploited in the future.

***Jirga* as a conflict transformation instrument?**

Recent experiences of militancy have highlighted the significance of the *Jirga* system as a conflict transformation instrument, reuniting different parts of society in Swat and Lower Dir. While conflict has ended in these districts, the transition back from military to civilian rule has been greatly delayed and peaceful reconciliation between different members of the communities still needs to take place. The underlying pressures which gave rise to militancy in the first place have not necessarily subsided. Renewed conflict remains a real threat in the eyes of local residents, especially when the Pakistan Army withdraws from Swat creating a vacuum in terms of leadership and defence, which could lead to another crisis in law and order. There is also a risk that Taliban forces may try to attack these areas again and may seek revenge against *Jirga* members and other community leaders.

“...post-conflict Swat needs a forum which can reunite the society and such a function can be well performed by Jirga.”

Female community member, group discussion, Swat

There was consensus among those consulted that *Jirga* is a suitable mechanism for conflict resolution and reconciliation in this post-conflict transformation phase, primarily because it reflects pre-existing social norms and is an expression of *Pakhtun* society. The importance of *Jirga* to *Pakhtun* culture meant that it was the system that *Pakhtun* leaders reached for to resolve conflicts associated with Taliban extremism and to prevent the Taliban from expanding their influence in new areas. The flexibility and proximity to the communities they serve lend *Jirgas* particular appeal over official systems.

Jirga can address conflict at multiple levels, as one civil society member in Swat noted, “at the individual level *Jirga* addresses issues that impact parties involved in a dispute

(land, water, marriage) and at the community level *Jirga* works to resolve issues that impact the entire community (building of a mosque, school).” Some respondents felt that institutions like the *Jirga* were necessary to foster local level reconciliation, as one female respondent in Swat said “...after the military operation now it is time to work towards uniting people and ensuring peace in the region. This can be done through *Jirga*.”

However, considering all the challenges identified in previous sections of this report, it becomes clear that there are significant considerations which need to be explored if *Jirga* is to be externally supported as a process of conflict transformation. That in mind, the *Jirga* system is the preferred option for conflict resolution, despite its weaknesses, and must be recognised as the dominant justice system in PATA.

4

Conclusions and recommendations

THE REALITY IN PATA is that justice provision has been and is insufficient to meet the demands of the local population. Through a combination of state neglect and a lack of willingness to bring clarity to the judicial system or engage with the existing informal mechanisms which include the *Jirga*, opportunities have been provided for militant groups to exploit perceived and real injustices in their campaign to replace the state in KP. The violent counter-insurgency by the Pakistan Army and the devastating floods of 2010 and 2011 have brought substantial challenges to the region, which will take it years to recover from.

Despite efforts to address the physical reconstruction, little has been done to clarify the judicial system in PATA – and therefore justice provision and access to justice – a task which has been made more complex by the imposition of state sanctioned Sharia courts in 2009. It is clear that multiple systems of justice provision will exist in the region for years to come, but in order to close down the opportunities for militants and extremists to exploit grievances among the population, all actors need to take responsibility for addressing the underlying concerns of justice provision, identifying and implementing reforms that are needed across the judicial system and strengthening the linkages between formal and informal justice mechanisms.

This report has focused on the informal system represented by the *Jirga* and has highlighted its great strength among communities in Swat and Lower Dir districts in the Malakand division in KP. These strengths include its ability to provide accessible justice, respect and reflect the social mores and culture of the region and act as a method of conflict transformation. The *Jirga* is however not a perfect institution and respondents highlighted concerns about the inclusivity of the institution which has been steadily corrupted in recent years. There is a need for *Jirga* to ensure that individual human rights are not contravened by the processes of the *Jirga*, to become more representative of the populations it serves by being more inclusive as well as ensuring that decisions by the *Jirga* do not use judgements such as *Swara* which could harm women and young girls.

Recognising both the strengths and weaknesses inherent in the *Jirga*, the research findings have identified three key outcomes:

- 1 Reform of the wider judicial system is crucial for preventing future conflict; strengthen the functional linkages between formal and informal mechanisms and clarify the status and potential of *Jirga* to complement the judicial system.
- 2 A more representative and inclusive *Jirga* system will improve access to justice for all members of society and reduce local tensions and conflicts in PATA: adapt the customary system to include marginalised and vulnerable groups.
- 3 Time-honoured *Jirga* plays a constructive and effective role in conflict transformation and resolution: enhance the understanding and use of *Jirga* in contributing to reduced levels of militancy in PATA.

In response to the three key outcomes from this research, the following recommendations are made to the Government of Pakistan, international donors and civil society that wish to promote peace, security and justice in Pakistan.

1 Reform of the wider judicial system, including strengthening linkages between formal and informal sectors and clarifying the status of *Jirga* within this system.

- Support the strengthening of the *Jirga* system in the context of wider judicial reform, in close co-ordination with government and civil society.
- This requires an in-depth understanding of the *Jirga* system and the potential role it can play in conflict resolution and justice provision, and clarifying its status within the wider judicial system, for example, by mapping different *Jirgas* that exist and conducting a wider study on people's perceptions of *Jirga*.
- Provide longer-term and more strategic technical and financial support to enable sustainable reform to the *Jirga* and the wider judicial system, moving away from more piecemeal, short-term and pilot phase approaches and improving co-ordination and coherence between donors, government and civil society.
- Ensure that efforts to support the strengthening of the *Jirga* system are done in a consultative and participatory manner that is sensitive to cultural norms thus promoting locally-owned, -led and -acceptable reforms that take place over a reasonable period of time.

2 A more representative and inclusive *Jirga* system will improve access to justice for all members of society, including marginalised and vulnerable groups, and reduce local tensions and conflicts in PATA.

- Ensure that efforts to make the *Jirga* system more inclusive and representative are culturally sensitive and based on broad consultation, thus promoting locally-owned and led reforms that take place in a locally-acceptable timeframe.
- Promote evidence-based reforms of the *Jirga* system to ensure that marginalised and vulnerable groups including women, youth, disabled people and minority groups can participate and are better represented.
- Support community members' suggestions to improve representation through establishing separate or mixed *Jirga* to increase women's participation and ability to resolve their disputes through *Jirga*, and to increase youth engagement in *Jirga*.
- Support and promote education on human rights within communities to increase understanding and awareness of them in a context-sensitive manner, drawing on international human rights standards and those enshrined in the Constitution of Pakistan and the Quran, to inform the strengthening of the *Jirga* system.

3 Enhanced understanding and use of the role *Jirga* can play in reconciliation and post-conflict transformation to contribute to reduced levels of militancy in PATA.

- Identify and recognise the positive role *Jirga* can play during this post-conflict transformation phase to promote reconciliation within and between communities in areas recently affected by conflict.
- This should be informed by research, supported by the Government of Pakistan, the EU and others, that looks in more detail at the *Jirga*'s role in conflict transformation including how it can reunite and reconcile communities.
- Based on this, support co-ordinated efforts by civil society and the Government of Pakistan to maximise the positive role *Jirga* can play in building peace and reconciliation as part of wider efforts to secure sustainable peace and security in PATA.

ANNEX 1 Methodology

The main methodology applied in the research was group discussions, with a small number of individual interviews carried out in the field sites, Peshawar and Islamabad. Within the funding and time constraints this combination of structured interviews and focus group discussions were employed to maximise the range and number of respondents and the breadth of topics that could be covered by the research. The field sites included Swat and Lower Dir districts in Malakand division in the PATA (background information on the sites is included in the main report).

In total 14 FGDs were carried out in the two sites, 7 in each site, 4 including men and 3 women. The breakdown of FGD target groups is summarised in the table below. In total 113 respondents (61 male, 52 female) took part in the FGDs and a further 27 in the key information interviews (including 5 women). Partly because of the nature of Pakhtun society and the focus of the research, the *Jirga* which is a male dominated and community leader dominated institution, the representation of disadvantaged groups has been a challenge. The research design has attempted to balance the data from the male local leaders with input from young people and women but has not been able to disaggregate respondents by income levels or livelihood types. As a result the sample is likely to be weighted towards more affluent groups (i.e. local leaders) who may approve more readily with the *Jirga* system because they operate the system. Further the sample is likely to be better educated than the overall population because of the inclusion of both local leaders as well as civil society leaders. As noted in the recommendations future studies would require additional funding, time and personnel in order to overcome these limitations. A copy of the FGD discussion guide can be supplied upon request. The field work was carried out between May and October 2011.

Location	Target group	No. of Participants	Gender	Date
Swat	Community members/35–60 years of age	9	Male	11 May 2011
	Youth/18–35 years of age	11	Male	11 May 2011
	Community leaders/religious leaders	10	Male	12 May 2011
	Civil society (CBO, NGOs, youth groups, business community, media)	11	Male	12 May 2011
Lower Dir	Community/religious leaders	11	Male	13 May 2011
	Civil society (CBO, NGOs, youth groups, business community, media)	10	Male	13 May 2011
	Community members/35–60 years of age	9	Male	14 May 2011
	Youth/18–35 years of age	10	Male	14 May 2011
Sub-total male FGD participants		61		
Swat	Youth/18–35 years of age	10	Female	17 May 2011
	Community members/35–60 years of age	8	Female	17 May 2011
	Civil society (CBO, NGOs, youth groups, business community, media)	10	Female	18 May 2011
Lower Dir	Civil society (CBO, NGOs, youth groups, business community, media)	9	Female	19 May 2011
	Youth/18–35 years of age	8	Female	20 May 2011
	Community members/35–60 years of age	9	Female	20 May 2011
Sub-total female FGD participants		54		

The target groups that were identified attempted to ensure that there was equal male and female representation, with the exception of community/religious leaders who were exclusively male, reflecting Pakhtun society in the areas studied. As a result of the focus of the study on Pakhtun experiences of *Jirga* the respondents were exclusively

Pakhtun, though there are minority groups in both Swat and Dir, they were not the main focus of the study. Politically the group are generally socially and culturally conservative though there were no representatives of militant groups in the sample.

In total 27 respondents were interviewed in key informant interviews. This included 20 in-depth interviews in Swat and Lower Dir and 7 in-depth interviews in Peshawar and Islamabad. These interviews were used to interrogate findings from the FGDs and explore potential policy and programme responses to the issues identified by the local respondents. As a result the key informants include a range of both Pakistani and international actors who have experience of the *Jirga* system in PATA. The research team found it difficult to identify respondents who would willingly and openly discuss the *Jirga* given its sensitive nature. This contributed to the fact that the respondents were predominantly male in key informant interviews, with only two female respondents in Swat and Lower Dir, and three among the donor/international community interviews in Islamabad.

Swat

Key informant interviews May 2011

Civil society members including academics, legal experts, government officials, religious scholars, NGOs and students

Lower Dir

Key informant interviews May 2011

Civil society members including academics, legal experts, government officials, religious scholars, NGOs and students

Islamabad

Key informant interviews May–November 2011

Donors, international NGOs and NGOs

CAMP (Community Appraisal and Motivation Programme) is a national non-governmental organisation and works with some of the most underprivileged communities in Khyber Pakhtunkhwa and the Federally Administered Tribal Areas of Pakistan. CAMP works with communities and government departments to promote sustainable development, human rights, peace and security.

Saferworld works to prevent and reduce violent conflict and promote co-operative approaches to security. We work with governments, international organisations and civil society to encourage and support effective policies and practices through advocacy, research and policy development and through supporting the actions of others.

COVER PHOTO: The cover picture shows a Jirga in Malakand Division, 2011.

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ISBN 978-1-904833-86-4

Registered charity no. 1043843
A company limited by guarantee no. 3015948