

Afghanistan Research and Evaluation Unit
Case Study Series

Community-Based Dispute Resolution Processes in Kabul City



Rebecca Gang

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Acronyms

AREU	Afghanistan Research and Evaluation Unit
CBDR	community-based dispute resolution
FGD	focus group discussion
NGO	nongovernmental organisation

Glossary

<i>ekhtyar</i>	grant of decision-making authority
<i>hawza</i>	district police department
<i>huqooq</i>	civil cases department, arm of the Ministry of Justice
<i>islah</i>	restorative dispute resolution principle, meaning the promotion of peace and social cohesion through mediation and reconciliation
<i>jalasa</i>	meeting set up for the mediation of disputes (Dari)
<i>jirga</i>	meeting set up for the mediation of disputes (Pashto)
<i>mahr</i>	Sharia rule of financial compensation to wife in a divorce initiated by the husband; also described as a dowry
<i>mullah</i>	spiritual leader, also known as a sheikh among Shiites
<i>qawm</i>	form of solidarity group that is flexible in scope; defined by tribe, clan, ethnicity, locality or other characteristics as determined by the group
<i>qawmi</i>	of the qawm; <i>qawmi shura</i> is a shura of the qawm
<i>urf, urfi</i>	custom, customary
<i>shura</i>	community-level governance body
<i>shura-i-mahal</i>	literally, “shura of the location”; community-wide shura
<i>wakil</i>	literally, “representative”; official community representative to the district
<i>wasita</i>	middleman
<i>wasita bazi</i>	literally, “to play middleman”; to use one’s connections to facilitate dispute resolution at the district level

1. Introduction

Over the course of the last three decades, Afghanistan has gained an international reputation for being unbound by the rule of law. Yet, at no point in its tumultuous history has Afghan society descended into anarchy; across the country communities have been able to maintain stability and social order despite the chaos surrounding them.¹ Depending on the particular conditions in a given community—its location, demographic characteristics, tribal, religious, or ethnic traditions, or the dynamism of its leaders—traditions of local autonomy were catalysed by the absence of state government, or in others, by a rejection of or opposition to the state itself.² Central to the efficacy and sustainability of this system has been the element of dispute resolution—of ensuring local stability through the provision of an artful balance between locally rooted understandings of justice and peace.

It is commonly estimated that 80 to 90 percent of dispute resolution in Afghanistan is currently conducted through community-based processes. Previous research has shown broad trends in the way dispute resolution is practiced at the community level and why it is prioritised, including an emphasis on peace-building and community stability, and factors such as speed, efficiency, minimal expense, and a preference for local autonomy. This research has also shown a great diversity of customary practices between regions and by social groups.³ Recognising the substantial role that non-state justice plays in the Afghan context, national and international stakeholders involved in justice sector reform and rehabilitation are increasingly seeking ways to support community-based dispute resolution practices. A significant part of this approach has focused on examining the value and possible mechanisms for linking state and non-state justice systems. This heightened interest from policymakers led stakeholders in the research community to engage more deeply with questions pertaining to how Afghanistan’s plural legal systems function in practice, the principles that underscore legal decision-making, how these might differ across regions and populations, and how such practices and values might affect broader issues of governance in Afghanistan today.

The Afghanistan Research and Evaluation Unit (AREU)’s Community-Based Dispute Resolution (CBDR) series⁴ was therefore launched in 2006 to support policy and programming in the field of justice sector reform and rehabilitation. It aimed to do this by providing in-depth, qualitative knowledge on common dispute types and processes used in dispute resolution at the community level, principles and sources of legal authority deployed in these processes, and existing links between state and non-state actors in the management of disputes. Additionally, the series sought to shed light on issues of gender equity and human rights protection within CBDR. The series focused its research on rural communities in eastern, central and northern provinces of Afghanistan to get a sense of the similarities and differences in community-based resolution practices across the country.⁵

1 Thomas Barfield, “Afghan Customary Law and Its Relationship to Formal Judicial Institutions” (Washington, DC: United States Institute of Peace, 2003), 4.

2 Barfield, “Afghan Customary Law,” 3-4.

3 Please see the bibliography for a list of studies on state and non-state dispute resolution in Afghanistan.

4 Studies of non-state dispute resolution in Afghanistan commonly use terms such as “customary law,” “informal justice” and “traditional dispute resolution.” Designers of this research series felt that the term “community-based dispute resolution” was more reflective of the multiple legal authorities deployed in non-state resolution, as well as its adaptive yet somewhat regularised nature. In this study, “community” is used to describe a “unit of residence to which households belong” (see Adam Pain and Paula Kantor, “Understanding and Addressing Context in Rural Afghanistan: How Villages Differ and Why” (Kabul: Afghanistan Research and Evaluation Unit, 2010), 17). As this study is situated in an urban environment, the terms “neighbourhood” and “community” will be used interchangeably.

5 Research sites included Balkh, Bamyan, and Nangarhar. See Rebecca Gang, “Community-Based Dispute

This, the final case study of the series, examines CBDR in one neighbourhood of Kabul City to determine the effects of the urban environment on dispute resolution practices. Specifically, this study analyses the impact of demographic diversity, exposure to war-related violence, patterns of long-term displacement, proximity to state services, and ongoing social change on the practice, efficacy and legitimacy of CBDR and its links to state processes and actors. The study analyses how factors unique to the capital and its urban environment affect the practice of dispute resolution at the local level. By doing so, it seeks to provide a meaningful basis for comparison with similar studies in more isolated and homogeneous rural areas.⁶

This study primarily sought to describe CBDR processes as they function, the principles that inform them, and why people choose to use them in one neighbourhood of Kabul City. However, the articulate responses of those interviewed inspired a more nuanced examination of what justice means, what makes dispute resolution legitimate and how this relates to community members' relationships to the state. Specifically, informants made a point of emphasising the delicate balance between justice and peace and how this is managed through the strategic deployment of customary, state and Sharia law. They discussed how local mechanisms for self-governance were modelled after traditional customary practices in some ways, yet in others were responsive to internal social changes as well as governmental and nongovernmental pressures toward institutionalisation. Their descriptions regarding the extent of cooperation between state and non-state dispute resolution actors created an image of points on a continuum as opposed to distinct systems within which, essentially, mutual collaboration amplified the authority of both sets of actors in their own spheres. Finally, community members aggressively rejected the characterisation that their lives and their disputes are bound primarily by ethnic divisions. Although they acknowledge that the instrumentalisation of ethnicity remains a troubling legacy of the country's civil war, they insisted that other factors such as changes in the distribution of wealth and power, the devastating impact of chronic poverty, and extralegal decision-making by political leaders tend to be much more significant in fomenting and perpetuating disputes.

Other important findings were gleaned from the implicit lessons underlying the statements of those interviewed. These included insights on the threat of state action, an enforcement tool almost universally favoured by state and non-state actors alike. While certainly the most effective means available to those responsible for keeping the peace, this tactic is generating increasing levels of alienation from and fear of the state—a pattern which may have negative consequences in the long-term. While state and community-based resolution practices were consistently described as being intimately connected and mutually dependent, practitioners from both systems adamantly stressed their distinctiveness when questioned directly. Whether due to statutory or ideological pressures, the assertion of divisions according to legitimacy, legality, formality and informality were striking and could be undermining joint administration of dispute resolution in the long-term. Further, informants' pained descriptions of disputes that could not be resolved by either the state or community-based resolution mechanisms highlighted the precarious and gap-ridden nature of rule of law as a whole in Afghanistan, and the frustration this elicits from its citizens.

It may be that the most important finding is with regard to the plural nature of the

Resolution in Balkh Province" (Kabul: Afghanistan Research and Evaluation Unit, 2010); Deborah Smith with Shelly Manalan, "Community-Based Dispute Resolution in Bamiyan Province" (Kabul: Afghanistan Research and Evaluation Unit, 2009); and Deborah Smith "Community-Based Dispute Resolution in Nangarhar Province" (Kabul: Afghanistan Research and Evaluation Unit, 2009).

6 A synthesis of the CBDR series is forthcoming.

legal system itself. For those interviewed, the greatest strength of dispute resolution in Afghanistan today is the freedom to choose which resolution mechanism is appropriate in the circumstances. Rather than hoping for a unified, uniform legal system, the majority of those interviewed place priority on strengthening state and non-state justice within their own spheres. Disputants' attach great importance to being able to turn to one where the other has not succeeded—not to compel enforcement of an existing decision, but to seek other avenues that will build upon the legal decision-making that preceded it. Dispute resolution actors in the state and the community already hold a shared idea of how they can and should work together—they are only hindered by the state's incapacity to administer state law and to protect citizens from the abuse of power by state and local actors free to act with impunity.

The remainder of this case study is organised as follows: section two outlines key research objectives and findings; section three discusses research methodology, ethical considerations and important demographic factors; section four examines the social and political conditions that have shaped CBDR practices in the research site; section five describes the dispute resolution processes operating within the research site, the actors involved, and the factors disputants consider in choosing between state and non-state resolution forums; section six investigates key conceptual points at work among district and community-based resolution practitioners; and section seven offers some concluding observations. These are followed by an appendix of selected case summaries, a social demography chart and bibliographic materials.

2. Key Research Objectives and Findings

The Afghanistan Research and Evaluation Unit's Community-Based Dispute Resolution research series focuses on examining four central research themes:

1. The processes used in resolving or regulating disputes at the community level
2. The legal and normative principles used by community and district-level actors in dispute resolution decision-making and enforcement
3. The degree of cooperation, competition and procedural linkage between community and district-level dispute resolution bodies and actors
4. Equity within these processes, with a particular focus on gender. Gender equity itself was analysed with regard to women's ability to: access dispute resolution processes at the community and district levels; contribute to and influence these processes; serve as decision-makers in resolving or managing disputes; and secure decisions that meaningfully protect their rights and interests.

Principle findings in relation to these four themes as examined in the Afshar neighbourhood of Kabul City are as follows:

Process, adaptability and pragmatism

- Family- and community-based mediation is the most widely used form of dispute resolution in the research site. State processes are generally used as a last resort and in this sense can be seen as an alternative to the primary tools of CBDR.
- CBDR processes are not static and do not rest on an unchanging version of tradition and custom. While traditional practices provide a model for some CBDR processes in the research site, Afshar's multi-tiered resolution structure is an adaptive response to government incapacity, desire for local autonomy, demographic shifts and ongoing social change in the community.
- CBDR processes in the research site were heavily influenced by social factors including: exposure to conflict-related violence, shared histories of long-term displacement, diverse and shifting demographics, and changing normative values.

Principles, sources of authority, and legitimacy

- CBDR decision-making draws from Islamic, state and customary rules, and a mix of shared and *qawm*-specific normative values. CBDR processes involve consideration of evidence and witness testimony, local understandings of equity, and outcomes that emphasise distributive and restorative justice.⁷ Central to their decision-making process, CBDR practitioners work to strike an appropriate balance between a sense of justice through the recognition of individual rights and broader community peace and stability.
- State and Sharia law are often used strategically to support the individual rights of disputants, while customary principles generally prioritise cohesiveness within a larger group.

⁷ Distributive justice is concerned with the fair allocation of resources among community members in an attempt to ensure that resolution addresses the underlying economic or resource-driven causes of conflict. Restorative justice places strong emphasis on the needs of both victims and offenders, seeking to restore the dignity, peace, and relationships of and between victims and offenders.

- While CBDR processes may not always and immediately resolve a dispute, they are valued for their ability to regulate or contain disputes that could otherwise erupt into violence.
- In the research site, CBDR is seen as an effective and necessary response to state corruption, incapacity and excessive bureaucracy. Attendant to this is the frequent use of referral to the state as a threat to facilitate participation in and enforcement of CBDR decisions, by state and non-state actors alike. While highly effective, this pattern may be reinforcing overly negative images of the state among community members, thereby elevating levels of distrust and precluding positive interaction in the long-term.

CBDR and the state

- While a majority of disputes are handled solely through family and community processes, those that warrant state intervention are most often managed through the serial or simultaneous collaboration of state and community-based actors. Community members appreciate this collaboration, while at the same time, value having the ability to choose between pursuing resolution through state and CBDR processes as distinct resources.
- There is a limited demand in the research site for documentation and registration of CBDR decisions by the state, as state registration is not seen as required for sustainable enforcement of CBDR decisions. Rather than formally linking state justice and CBDR, community members wish to see improvements in state justice mechanisms as a separate system. This would ensure a viable alternative to CBDR, either in the first instance or as a matter of appeal.
- District actors often duplicate community-based mediation principles and practices in order to avoid subjecting community members to state judicial processes. Although district and community-based actors recognise these practical similarities, they uniformly assert a distinction between district and community processes. This is based on conceptions of legitimacy versus legality, and formality versus informality.
- The presence of intractable disputes and the ease with which disputants can reject enforcement of both state and CBDR decisions pointed to significant gaps in rule of law in the country as a whole.

Gender equity and resources for women

- While women may be constrained relative to their male counterparts, there is space for women to access, participate in, and influence CBDR processes. In Afshar, women's participation is increasingly welcomed due to social factors such as urbanisation, higher levels of education, and people's exposure as refugees to alternative perspectives on women's social roles.
- Sharia law was the most frequently used source of authority for the protection of women's rights and interests at the community and district levels. Instances where protection for women failed were commonly the result of poor access to information, restricted physical and social mobility, negative reputation in the community or a lack of actively protective male relatives.
- Women's access to community and district actors varied by dispute type, with strongest participation in household matters and land or inheritance-related issues. Younger and more educated women in the research site were able and willing to approach district bodies established specifically to address human rights claims and family disputes, although social restrictions still precluded access for many.

- There are times when CDDR decisions do not adhere to generally accepted notions of human rights. However, this is not a product of the design of Afghanistan's justice system or CDDR itself as much as it is a consequence of prevailing gender roles and relations in the country more generally.

3. Research Methodology

The goal of the research was to enrich the existing body of work on dispute resolution in Afghanistan through a qualitative survey of CBDR practices in an urban environment. The study was designed around four central objectives:

1. to understand the kinds of disputes commonly regulated by community actors and the processes used in resolving or managing disputes at the community level
2. to examine the principles and sources of law deployed by state and non-state dispute resolution actors
3. to understand patterns of co-management in dispute resolution between key actors at the district and community levels
4. to examine issues of gender equity in community-based dispute resolution, with an emphasis on women's access to various processes and the conditions under which women's rights and interests are acknowledged or denied.

3.1 Selection of informants and analytical methods

The research team began by conducting informal conversations with community members to build rapport.⁸ Researchers then selected informants and focus group discussion (FGD) participants in several ways. First, researchers selected key informants, mainly *wakils* (community representatives). These were integral in identifying community members who were or had been involved in specific disputes, managed either strictly within the community, through district processes, or via a combination of both. Researchers used a snowballing technique to identify additional informants. These included opposing parties in particular disputes; neighbours, family members or others with first-hand knowledge of disputes; individuals with specialised knowledge of dispute resolution processes; and particularly knowledgeable or communicative residents who were likely to contribute valuable information to the study. Researchers encouraged informants and FGD participants to discuss their own perceptions and experiences of local dispute resolution processes in general and disputes in which they had been involved or had detailed knowledge, with an emphasis on what made a particular resolution process or outcome legitimate and sustainable.

Key informants were also essential in identifying the main district-level actors involved in dispute management and resolution, including the district prosecutor, head of the district police department, head of the criminal investigations unit of the district police, head of the *huqooq* (district civil cases department), and the head and a caseworker from the district police's family guidance department. District-level informants were essential for gathering information on existing links between district and community-based resolution processes and actors, including how far district actors are involved in community mechanisms, and the processes involved in referring cases between the systems.

Fieldwork took place between February and May 2008. In total, researchers conducted individual in-depth interviews with 14 men and 10 women from the community, along with seven district actors (six men and one woman). It also ran six FGDs: three

⁸ The author was not involved in the design of research methodology or data collection for this study. This section presents the research process as described by one national researcher involved in data collection.

with men and three with women.⁹ Researchers sought to achieve an ethnic balance among informants and FGD participants; as it happened, they discovered a relatively representative demographic mix among community members who were involved in particular disputes or were the most articulate regarding dispute resolution in the area. With minor exceptions for triangulation or clarification of findings, researchers collected data in one round to minimise the burden on informants and FGD participants.

Determining the reliability of data was managed in four ways: by asking researchers to record their own observations and reactions to interviews in daily field notes and to compare interview data with their broader experiences of CBDR in Afghanistan; by comparing interviews with district and community actors on their own dispute resolution processes and those of one another; by sharing initial data analysis with community members through single-gender FGDs at the end of the research to ensure accuracy, clarity and to gather reactions and further input; and by situating findings within an in-depth review of secondary source materials.

Interviews were conducted by a gender, age and ethnically-balanced research team (Pashtun, Hazara and Tajik). This was instrumental in building trust and rapport with informants and FGD participants at all levels, and improved communication by linking informants with researchers of the same language group. Interviews and FGDs took place in the language preferred by informants and FGD participants (Dari, Pashto and Hazaragi in this site) and were recorded in written notes. Where note-taking raised concerns over privacy and confidentiality, researchers reproduced interview outcomes immediately after concluding the session. The research team discussed translations at length to ensure precision of meaning; specific terms used to refer to dispute resolution practices, principles and institutions are preserved in their original language throughout this paper.¹⁰

Data analysis focused on exploring informants and FGD participants' descriptions and opinions regarding individual disputes, identifying patterns of dispute types, causes, and selection of resolution processes, and understanding the complex relationships between community and district actors in conflict management. A representative selection of detailed case summaries from the interviews is included in the annex to show how these themes and sub-themes play out in the context of actual disputes.

3.2 Site selection, ethical considerations and important demographic factors

Researchers used several criteria when selecting which area of Kabul City to conduct the research. It was important that the community was large enough to include several different extended and separated families¹¹ and a diverse mix of *qawm* groups;¹² that

9 A Social Demography Chart is provided in the annex.

10 Definitions of terminology used by informants and FGD participants are included in the glossary.

11 Extended families contain multiple generations or branches of a single family; separated families contain a single nuclear family unit.

12 *Qawm* is a flexible concept used to describe a form of solidarity group that serves as the basis for multi-faceted social networks. *Qawms* can be based on a range of sociological constructs, including tribe, clan, region or village of origin, extended family, or professional, religious or ethnic group. Rather than suggesting a fixed identity, individuals use the notion of *qawm* to express a "portfolio of identities" based on the identity, expectations or political ideology of the person to whom he or she is speaking. See Thomas Barfield, *Afghanistan: A Cultural and Political History* (Princeton: Princeton University Press, 2010), 18, 22; Bernt Glatzer, "War and Boundaries Significance and Relativity of Local and Spacial Boundaries," *Weld des Islams* 41, no. 3 (2001), 385; Olivier Roy, *Islam and Resistance in Afghanistan* (Cambridge: Cambridge University Press, 1986), 12; and Massoud Karokhail and Susanne Schmeidl, "Integration of Traditional Structures into

the population included returnees and recent migrants;¹³ that a range of disputes were ongoing and being managed within the area, including inter- and intra-*qawm* disputes; and that potential informants and FGD participants were willing and able to discuss these matters in detail. Responding to these criteria, researchers selected one section of a neighbourhood in Afshar—an area with a population of approximately 3,000 families of varying ethnic, religious, linguistic, regional, educational and social backgrounds, as well as experiences of migration and displacement.

It is standard practice to protect the confidentiality of informants and FGD participants by omitting specific details about the location of research sites. In this instance, however, the history of the site is critical to understanding the context in which informants' and FGD participants' experiences of conflict and dispute resolution are embedded. Confidentiality has instead been maintained by omitting specific personal, geographic, and dispute-related details. Researchers were extremely sensitive to the potential emotional burden on interviewees of discussing conflict-related violence in particular, creating a supportive environment for informants and FGD participants to address the issue should they so choose, but refraining from direct questioning.¹⁴

Informants and FGD participants were initially unwilling to participate in the research without financial compensation, given the extent to which Kabul has been saturated with governmental and nongovernmental development programming, financial aid and dispute resolution services. Community leaders were integral in overcoming this resistance by explaining to residents how the study would be used to contribute to future policy and advocacy initiatives regarding the development of Afghanistan's justice system.

Afshar's neighbourhoods occupy the hillsides surrounding Afshar Mountain, in the western part of the city leading to Qargha Dam and the hills of Paghman Province. The neighbourhood is arranged in a way that reflects the durability of social segmentation, migration patterns¹⁵ and the ongoing impact of war-related violence.¹⁶ Sayeds¹⁷ live in an intentionally homogeneous sub-section of the neighbourhood; Tajiks live in a somewhat homogeneous area, although are more inclusive of other groups; Hazara and Qizilbash¹⁸ families are relatively integrated; Pashtuns, comprising the smallest demographic subset, are interspersed primarily among the Tajiks.

the State-Building Process: Lessons from the Tribal Liaison Office in Loya Paktia" (Berlin: Heinrich Boll Foundation, 2006).

13 The implications of this distinction are explored in section four.

14 These issues are handled directly in AREU's Legacies of Conflict Series. See Emily Winterbotham, "Legacies of Conflict in Afghanistan: Healing Complexes and Moving Forward in Kabul" (Kabul: Afghanistan Research and Evaluation Unit, forthcoming).

15 Migration patterns in Afghanistan tend to coalesce around shared social networks that preserve connections to the migrant's area of origin, while allowing for new networks to be generated in the urban environment. (See Gilles Dorronsoro, "Kabul at War (1992-1996): State, Ethnicity and Social Classes," *South Asia Multidisciplinary Academic Journal* (2007), <http://samaj.revues.org/index212.html> (accessed 27 February 2011); Alessandro Monsutti, "Cooperation, Remittances and Kinship among the Hazaras," *Iranian Studies* 37, no. 2 (2004); Alessandro Monsutti, "Afghan Migratory Strategies and the Three Solutions to the Refugee Problem," *Refugee Survey Quarterly* 27, no.1 (2008)). It is thus not surprising that new migrants to Afshar come from just a handful of districts outside of Kabul, with some groups represented entirely by individuals from a single village. To protect the confidentiality of informants and FGD participants, specific areas of origin are not mentioned in this study.

16 These issues are examined in section five.

17 Often inaccurately described as Arabs, Sayed people claim descent from the Prophet Muhammad and can be affiliated with any ethnic group or religious sect. For more on Afghanistan's ethnic makeup, see Barfield, *Afghanistan*, 24-31.

18 A group of Shiite Turkish origin, see footnote 32 for further details on their migration to the area.

Afshar is one of Kabul's many informal settlements—an area that is not incorporated in the city's master plan and does not comply with formal land access requirements.¹⁹ This has two primary effects on residents. First, residents frequently experience land tenure insecurity resulting from customary or absent title documents. Community informants and FGD participants routinely described ownership and transfer of land through customary deeds, oral testaments, informal rental agreements or squatting; no informant or FGD participant mentioned transfer through official state mechanisms. Although customary land transfers provide a cheap and efficient way around the bureaucratic wrangling of state process, this lack of regulation can itself leave residents vulnerable to conflict through competing claims, forceful occupation or eviction, unauthorised transfer of communally held property, or extralegal distribution by those in power.²⁰

Second, residents live with a chronic lack of access to municipal resources, including roads, electricity, sewerage, drinking water, health and educational facilities, garbage removal and other services.²¹ During the research period, water supply pipelines were being installed in the area; in the meantime, residents purchased water from a supply truck and hauled it up the hill on foot or by donkey along a network of small, unpaved pathways. The nearest girls' school is roughly an hour's walk from the neighbourhood and the boys' school even further. A majority of parents in Afshar strive to keep at least one child in school (girls as well as boys), although the distance generates concern regarding transport expenses and security.²² Most residents complain of the hardships that follow from lack of inclusion in the municipal plan. However, mistrust for the current regime is so high (even among those more used to the state's role in service provision) that residents banded together to thwart state efforts to include the area in a revised municipal plan—a move that would have likely paved the way for the formalisation of existing landholdings and the extension of much-needed services.²³ This tension is best articulated by two FGD participants, both community leaders:

If the government counts us as citizens and our area is to be considered part of the city, then we must be given the same facilities as citizens in other urban areas. The mayor should clean our streets, and make sure we have canals to bring us water. Look at the mud everywhere here—it is better in rural areas where at least people have built their own water systems.

— Wakil A, 58, FGD 2

The government comes here sometimes to tell us that we should pay some taxes for our houses, but we are very poor people. We tell them: "From hungry people, what can one take to eat?" (Az goshna che bana, ke gada bokhora?)

— Mullah, 60, FGD 3

19 Yohannes Gebremedhin, "Preliminary Assessment of Informal Settlements in Kabul City" (Kabul: USAID Land Titling and Economic Restructuring in Afghanistan (LTERA), 2005), 4.

20 These issues are reflected, respectively, in the Returnee Property Dispute, Yar Gul's Case, the Sold House Inheritance Dispute, and the Mosque Dispute. See also Gebremedhin, "Preliminary Assessment," and Colin Deschamps and Alan Roe, "Land Conflict in Afghanistan: Building Capacity to Address Vulnerability" (Kabul: Afghanistan Research and Evaluation Unit, 2009).

21 For more on the connections between informal settlements and lack of access to services in Kabul, see Wahid A. Ahad, "Workshop Notes on Natural and Man-Made Disaster Risks of Kabul City," http://www.preventionweb.net/files/section/230_KabulDRRPresentation.pdf (accessed 27 February 2011), and Stefan Schutte, "Searching for Security: Urban Livelihoods in Kabul" (Kabul: Afghanistan Research and Evaluation Unit, 2006), section 4.1.2.

22 For example, informants and FGD participants spoke of the traffic-related deaths of as many as eight local children in recent years as well as fears of kidnapping, particularly of girls.

23 See the Municipal Plan Dispute in the annex.

Reflecting the community's relatively marginal status, the majority of households involved in this study experience high levels of under- and unemployment, along with the physical and mental effects of grinding poverty.²⁴ Among men, primary sources of income include irregular wage labour, office work, and the operation of small shops. Older male returnees who participated in this study expressed great frustration at their inability to secure the kind of skilled employment they had before the war, while others said they had refused positions with the Karzai government due to its questionable reputation. The majority of female informants and FGD participants were housewives, with two running neighbourhood bakeries and another involved in carpet-making to make ends meet. Poorer households, commonly those headed by women or by a man who is unable to work, are often compelled to send one or more of their children into the labour market.

Although poverty levels are lower in urban as compared to rural areas of Afghanistan as a whole, studies show that urban households with an un- or under-employed head of household are as likely to be below the poverty line as their rural counterparts.²⁵ Evidence from this study also suggests that although returnees more commonly own their homes and thus have fewer expenses than those forced to rent, they are as likely as newer migrants to suffer from chronic poverty. Still, prior access to education and employment in professional or governmental sectors has created an important class hierarchy in Afshar. This is delineated predominantly by literacy levels, access to knowledge and social connections as opposed to financial resources.²⁶ Informants and FGD participants linked financial resources to the exercise of power, but not necessarily to authority or status.

Community leaders commonly cited poverty as the main cause of disputes in the neighbourhood. It was seen as a major factor in cases related to the individual rights of women, in particular forced marriages, as well as to some of the most severe violence in the research site. As the relative of an influential community leader described:

One night a female neighbour ran to our house screaming that her husband was trying to kill their children with a knife. The wakil went and found the man, took the knife from him and brought him under control. The man explained that they didn't have any food and it was better for him to kill the whole family than for them to die of hunger. The whole community was informed about the issue, everyone advised the man that he should not do this and many people provided help to the family. I don't know what happened after that.

— Sayed woman in her 20s, informant 20b

Given their location within Kabul's city limits, residents of Afshar are accustomed to the role of UN agencies and national or international nongovernmental organisations (NGOs) in the provision of aid and services. However, their involvement has also contributed to disputes, distrust and competition among residents.²⁷ Two male informants involved in land disputes mentioned their experiences of corruption (real or perceived) among

24 See Schutte, "Searching for Security," section 4.2; Jo Beall and Daniel Esser, "Shaping Urban Futures: Challenges to Governing and Managing Afghan Cities" (Kabul: Afghanistan Research and Evaluation Unit, 2005). For statistics on poverty and employment levels in Afghanistan see Government of Afghanistan (GoA), *National Risk and Vulnerability Assessment [NRVA] 2007/8* (Kabul: GoA, 2009), section 4.2. Although this does not speak directly to conditions in Kabul, it is a helpful analytical tool.

25 NRVA, section 6.2.

26 See, for example, the Municipal Plan Dispute in the annex.

27 See, for example, the Red Crescent's role in the Mosque Dispute and in Yar Gul's Case in the annex.

lawyers working for a well-known international NGO. Others discussed how NGOs have been given a bad reputation by the frequency of theft committed in their name; in one case the purported representative of a national NGO absconded with between 500 and 1,000 Afghanis (US\$10 and 20)²⁸ collected from each household, supposedly for a program to assist widows. Competition for access to aid has generated physical violence and reputational damage among female residents, between husbands and wives, and between ethnic groups.

²⁸ Currency conversions are based on the prevailing rate at the time of the research, which was 50 Afs to one US dollar.

4. Afshar—Setting the Scene

Neither interpersonal conflicts nor the mechanisms designed to manage them arise in a vacuum. For the rule of law to take root in a given society, legal practices and principles must be seen as legitimate. Rules that shape dispute resolution must derive from shared, meaningful social values and be logically linked to how these are administered.²⁹ As the scholar Martin Krygier describes:

*Whatever we decide them to be...legal conditions themselves depend on conditions that are not legal. For they all have to do with the social reach and weight of law, which are matters of sociology and politics, as much as of law. Indeed, social and political questions are central ones to ask about the place of law in a society, and they will be answered differently in different societies, whatever the written laws say or have in common. This is not because the law has no significance, but because the nature and extent of that significance depend on so many factors outside, or underlying, the law itself.*³⁰

It is therefore crucial to begin this case study by examining the complex set of social and political factors that have shaped Afshar residents' ideas and expectations regarding what justice means, how best to pursue it, and the state's role in that process.³¹ Factors that had particular resonance include: exposure to war-related violence, extended displacement, significant demographic shifts, the instrumentalisation of ethnicity, economic marginality, and significant social change largely related to the rights of women. These will be examined briefly here to help frame the analysis that follows.

4.1 The instrumentalisation of ethnicity and its impact on local demographics

Prior to 1978, Afshar was mainly populated by the Qizilbash and Hazara—two Shia-practicing groups which, albeit under dramatically different circumstances, had attained a degree of inclusion within Afghanistan's state apparatus.³² Sayeds of Shia descent are also known to have inhabited the area for generations.³³ Many Afshar residents were employed by state institutions and, unlike their rural counterparts, looked to the government for resolution of disputes beyond those that could be

29 Martin Krygier, "The Rule of Law: Legality, Teleology, Sociology," in *Relocating the Rule of Law*, ed. Gianluigi Palombella and Neil Walker, 45-69 (Oxford: Hart Publishers, 2008), 60.

30 Krygier, "Rule of Law." Emphasis in original.

31 This analytic approach finds support in the work of Antonio De Lauri, "Legal Reconstruction in Afghanistan: Rule of Law, Injustice and Judicial Mediation," *Jura Gentium: Journal of Philosophy of International Law and Global Politics* 6 (2010), 18.

32 The Qizilbash have inhabited the Afshar area since as far back as the 1730s, when they were brought to the area as soldiers under the Persian ruler Nadir Shah Afshar. Abdur Rahman Khan strategically incorporated the Qizilbash during the earliest days of Afghan statehood as key military, economic and educational leaders. See Barfield, *Afghanistan*, 29, 96; Louis Dupree, *Afghanistan* (Princeton: Princeton University Press, 1980), 59, chart 6; and Olivier Roy, *Islam and Resistance in Afghanistan* (Cambridge: Cambridge University Press, 1986), 50. Hazaras were first brought to Kabul as slaves at the end of the 19th century. Beginning in the 1950s, Hazaras primarily from central Afghanistan began migrating to Kabul, catalysed by a potent sense of religio-nationalism and a shared history of discrimination, and seeking economic, educational and political opportunities. By the end of the 1970s, Hazaras comprised as much as one-third of Kabul's population. See Roy, *Islam and Resistance*, 52; Dorronsoro, "Kabul at War"; and Barfield, *Afghanistan*, 26.

33 Although it is uncertain when Sayeds originally migrated to the area, it is clear that they are almost uniformly from one small village in a neighbouring province.

managed at home.³⁴ This demographic pattern held until 1992, when the onset of civil war in Afghanistan transformed Kabul into a battleground and began an extended shift in social and civic relationships that continues to affect the country as a whole today.³⁵

Afshar residents were largely uninvolved in the resistance to Soviet occupation—the conflict was kept out of the city, and many Afsharis benefited considerably from Soviet expansions of the state bureaucracy. However, with the fall of the Najibullah regime, resistance forces sought to gain control of Kabul, which quickly became the epicentre of a volatile political contest. As the unifying force of religious jihad ebbed with the retreat of the Soviets, mujahiddin leaders had to find a way of marshalling support for this new phase of conflict. So began a project of politicising macro-level ethnic identities, in many cases transforming what had been highly nuanced regional and ethnic solidarity groups into presumed markers of political affiliation.³⁶ This instrumentalisation of identity was effective in mobilising resources, but with it came a new wave of group-based violence driven by ethnic affiliation.³⁷

For Afshar residents, this process would have dire consequences. By December 1992, the uneasy alliance between mujahiddin factions had begun to unravel.³⁸ By this time, Afshar had become a stronghold of the *Hizb-i-Wahdat*, a party hewn together by its members' double minority status as Hazaras and Shias.³⁹ For almost a year, skirmishes had been ongoing between *Wahdat* and two parties affiliated with the Sunni-dominated Islamic State of Afghanistan (ISA): the *Ittihad-i-Islami*, a predominantly Sunni Pashtun group led by Abdul Rashid Sayyaf, and the *Jamiat-i-Islami*, a predominantly Tajik group led by Ahmad Shah Massoud and Burhanuddin Rabbani. These groups often directly targeted the Hazara civilians living in Afshar, while *Wahdat* was known to have directed violence against non-Hazara civilians elsewhere in the city.⁴⁰

34 Historically, the Afghan state focused on consolidating its authority and administrative reach within its urban centres, leaving rural areas to develop semi-autonomous systems of self-governance. One effect of this was to instil different views among urban and rural Afghans regarding the role of the state and their place within it. For background information on patterns of state-building in Afghanistan, see Barfield, *Afghanistan*; Dupree, *Afghanistan*; Glatzer, "War and Boundaries"; Barnett Rubin, *The Fragmentation of Afghanistan: State Formation and Collapse in the International System* (New Haven: Yale University Press, 2002); and Astri Suhrke and Kaja Borchgrevink, "Negotiating Justice Sector Reform in Afghanistan," *Crime, Law and Social Change* 50, no. 3 (2008), 223-43.

35 For important background information on this transition, see Dorrnsoro, "Kabul at War," and Barfield, *Afghanistan*.

36 This was particularly effective among the Hazara, who had been mobilising on the basis of their marginal social identity since at least the 1950s. See Dorrnsoro, "Kabul at War."

37 In the context of research and policymaking today it is critical to understand that Afghanistan's civil war was not the result of ethnic competition as much as it deployed ethnicity for political purposes. Key Afghan studies scholars argue that misplaced assumptions regarding Afghanistan's potential for ethnic disintegration contributed to a process of political reconstruction that unjustifiably and problematically amplifies ethnic competition. For important arguments in this regard, see Thomas Barfield, "Afghanistan is Not the Balkans: Ethnicity and its Political Consequences from a Central Asian Perspective," *Central Eurasian Studies Review* 4, no. 1 (2005), 2-9, and Conrad Schetter, *Ethnicity and the Political Reconstruction of Afghanistan* (Bonn: Center for Development Studies (ZEF), 2010).

38 The Islamic State of Afghanistan (ISA) was tenuously held together under a negotiated agreement known as the Peshawar Accords of 1992. The ISA began to disintegrate when Burhanuddin Rabbani, the second holder of what was meant to be a rotating presidency, managed to extend his term by means seen as illegitimate by several parties, including the *Wahdat* and its new allies, the *Hizb-i-Islami* (led by Gulbuddin Hekmatyar) and the *Junbish-i-Milli Islami Afghanistan* (led by Abdul Rashid Dostum). Dorrnsoro, "Kabul at War." See also Barfield, *Afghanistan*, 249-50, and Thomas Barfield, "Problems in Establishing Legitimacy in Afghanistan," *Iranian Studies* 37, no. 2 (2004), 285.

39 *Wahdat's* successes in recruitment may have had more to do with political pressure than genuine Hazara nationalism, however. See Dorrnsoro, "Kabul at War."

40 Human Rights Watch (HRW), "Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of

The situation escalated in the early months of 1993. *Wahdat's* rejection of the ISA, its strategic holdings atop Afshar Mountain as well as parts of central and eastern Kabul, and its alliance with Gulbuddin Hekmatyar's *Hizb-i-Islami* and Dostum's *Junbish* party, made Afshar a key target in the government's attempts to gain control over the city. Civilians were not warned of the impending attack—*Jamiat* operatives purchased the silence and cooperation of allied Shiite fighters stationed to the north and west of Afshar. As the operation began, *Wahdat* forces scattered, leaving their Hazara constituents to the mercy of predominantly Pashtun (*Ittihad*) and Tajik (*Jamiat*) forces. The attack immediately descended into a wholesale massacre of Afshar residents.⁴¹

The Afshar Massacre, as it has come to be known by many, holds significance in national as well as local history, serving as a symbol of the descent into civil war as well as the transformation of the conflict into one expressed in ethnic and religious terms.⁴² Factional fighting would go on to reduce Kabul's population from approximately 1.6 million in 1992 to 500,000 by 1996. Significantly, all informants and FGD participants interviewed for this study who were living in Afshar during the time reported fleeing as a result of violence. According to one prominent member of the community, of 1,200 families only 36 remained for the duration of the civil war—specifically, those who could afford to pay for the protection of the commanders who now occupied the area.

While there is little evidence of ethnic-based disputes in Afshar today, residents are keenly aware of and sensitive to this history, as well as how it has informed current state-building efforts. Without prompting from researchers, informants and FGD participants repeatedly asserted that any existing ethnic or religious tension was to be blamed on the mujahiddin and was now being actively erased. Yet at the same time there remain reasons to hold on to ethnic divisions. First, many residents are survivors of violence fuelled by a discourse of ethnic hatred for which there has been no transitional justice process to date. This has created conflicted feelings among residents, who simultaneously experienced targeted killings based on ethnic identity, the betrayal of co-religionists, and survival through the kindness of individuals from supposedly opposing groups. Second, the government's promotion of ethnic equality in democratic institutions has upset traditional patterns of distribution in economic, educational and political institutions at a time of considerable economic hardship. It is thus not surprising to find a preoccupation with ethnicity in such a diverse neighbourhood as Afshar, as well as tension between those trying to move past the ethnicisation of disputes and those who still see such divisions as important.

Community leaders in the research site have thus constructed a system of local governance that accounts for residual ethnic tension while strengthening the community as a whole by easing competition and increasing cross-ethnic collaboration. To date, these mechanisms seem to have been successful, as only one dispute in the research site was found to have ethnic overtones.⁴³

Following the end of major hostilities in 2002, approximately half of original residents returned to Afshar, leaving a large amount of land available for the flood of in-migrants to Kabul.⁴⁴ According to data amassed on refugee movements, returns to Afshar would

Impunity" (New York: HRW, 2005), section III.A: April-December 1992; Dorronsoro, "Kabul at War."

41 HRW, "Blood-Stained Hands," section III.C: February 1993: the Afshar Campaign.

42 HRW, "Blood-Stained Hands."

43 See the Mosque Dispute.

44 Out of 24 community-level informants, 11 were returnees and 13 were in-migrants from rural areas;

Box 1: Perspectives on ethnic tension in Afshar

In Afghanistan, [ethnicity] was never a problem until the mujahiddin brought disunity and made people enemies of each other. Before, one would never say “he is Hazara or Pashtun or Tajik,” but during the civil war Pashtuns killed Hazaras, Hazaras killed Pashtuns, Tajiks killed Hazaras and Pashtuns, Sunnis killed Shias, Shias killed Sunnis. Now it is not like this. The people are united, they know that killing is not good and they are tired of fighting.

– Qizilbash man in his mid-40s, informant 1

Before the mujahiddin came, all the qawms accepted each others’ words. When Hazara elders made a decision the Tajik people accepted it and the same if Tajiks decided something affecting Hazaras. Disunity and fighting between the qawms came after the mujahiddin, they are responsible for this. But now, thank God, these issues are decreasing day by day.

– Hazara woman in her early 60s, FGD 4, participant 6

During the Daoud and Zahir Shah regimes, they didn’t pay attention to the Hazara people. The Hazaras were very poor and living in terrible conditions, and only a small percentage were literate. But now things are better than before. Our people have now gained access to higher education. Many of us are working in the army and police and in different ministries across the country...I was here in Afshar during the civil war. We stood and fought together until the mujahiddin created disunity between us. Then, they broke our backbone and killed many of our Afshari people, Hazaras, Sayed and others, but most of the people killed belonged to the Hazara qawm. The bodies of the dead were left in the street for one year until we could return to collect the bones. We burned the bones and buried them in a mass grave. We want to build a mosque near the martyrs’ grave, but the Sayed people living there now won’t allow us. They want to build a mosque there for the Tajiks, Pashtuns and Sayeds to create unity between different ethnic groups, but this does not include us and my people want to fight them.

– Hazara elder, informant 5

I was an eyewitness during the war. There were maybe 30 Pashtun households that didn’t experience any loss during the attack here because the head of their party was very powerful and strong.

– Hazara elder, informant 3

There was one jalasa [meeting] about a dispute with my neighbours. All of the elders in the jalasa were from one qawm and my husband was alone. They don’t like Pashtuns. All of them are Shiite. They say that we are dirty and won’t eat anything from us.

– Pashtun woman, informant 18

The people of this area plan to demonstrate against the government and block the main roads. The reason is that the government distributed aid to Pashtun people in a nearby area where mostly Hazara people are living. There was a battle here against the Hazara people, they are poor and many don’t have their own houses, but the government has distributed aid to Pashtun residents that is beyond their percentage of the population. It is really unjust.

– Wakil A, FGD 1

have likely begun at this time. However, most informants and FGD participants date their return to the area approximately four to five years from the time of interviews— as data collection was conducted in 2008, this places the majority of returns to between 2003 and 2004.

out of 33 FGD participants, 16 were returnees and 17 were in-migrants from rural areas. For a discussion of high rates of urban in-migration among returning refugees, see IRIN News, “Kabul Facing Unregulated Urbanisation,” <http://www.irinnews.org/Report.aspx?ReportId=75508>, 26 November 2007 (accessed 27 February 2011).

Although many migrants originated from relatively isolated rural areas of Afghanistan, almost all had been exposed to life in urban or mixed-ethnicity environments while in displacement.⁴⁵ Additionally, all refugees regardless of provenance had been exposed to the discrimination, insecurity and instability of extended displacement. As explained by several informants and FGD participants, managing disputes was particularly risky in this context. Engaging in any sort of conflict could exacerbate already heightened levels of vulnerability, resulting in extralegal fines, summary incarceration or deportation. The shared experience of displacement thus catalysed a social phenomenon no Afghan regime had successfully been able to produce: a sense of Afghan national identity.⁴⁶

In the refugee camp [in Pakistan] there was no distinction among Afghan refugees in terms of ethnicity. No one was saying, "Oh, you are Tajik, you are Pashtun or Uzbek." There were only elders and the people.

– Prosecutor, informant 13

In Iran, no one would say "this is this qawm and that is that qawm," Afghan people there were just Afghans. They liked each other or they didn't. In Afghanistan the people had issues with each other in the past, but it has changed now. No one says anymore, "You are Tajik or Hazara or Pashtun." This behaviour finished during migration. When people came back, they saw their own Afghans and they were happy.

– Hazara woman, 35, FGD 6, participant M

This developing national identity was accompanied by an increasing appreciation for the state's role in providing services that many refugees, predominantly the rural and urban poor, had never experienced before.⁴⁷ Urban returnees and rural migrants thus brought with them a host of new demands and expectations regarding the role of the state, particularly relative to dispute resolution. Informants and FGD participants in the research site remained engaged in ideological debate regarding the appropriate role of the state in dispute resolution—a conversation heavily informed by returnees' diverse backgrounds and experiences of extended displacement. While some eschewed state incapacity in favour of a vision of the community that maximises self-governance and social cohesion, others' preference for state processes reveals lingering social divisions.

Across Afghanistan, local self-governance structures are anchored by a member of the community elected by residents to serve as official representative to the district. In Afshar, this figure is known as the *wakil*.⁴⁸ *Wakils* gain their authority in large part by the degree to which they are recognised as part of the formal governance structure

45 See Ghazal Keshavarzian, "The Transformation of the Afghan Refugee: A Study of the Impact of the Displacement Experience on Afghan Women and Children Living in the Islamic Republic of Iran and Pakistan" (Master's Thesis, Fletcher School of Law and Diplomacy at Tufts University, 2005), and Khalid Koser and Susanne Schmeidl, "Displacement in the Muslim World: A Focus on Afghanistan and Iraq," in *The Brookings Institute Project on U.S. Relations with the Islamic World: Doha Discussion Papers*, 8-21 (Washington, DC: Brookings Institute, 2009). One of the more important contributions to analysis on this and other issues pertaining to effects of displacement on Afghan identity is Pierre Centlivres and Micheline Centlivres-Demont, "The Afghan Refugee in Pakistan: An Ambiguous Identity," *Journal of Refugee Studies* 1, no. 2 (1988), 141-152.

46 See Glatzer, "War and Boundaries."

47 Keshavarzian, "Transformation of the Afghan Refugee."

48 Although the figure of the community representative is almost universal across Afghanistan, the term used to describe this role is highly variable. Other terms include: *arbab*, *qaryadar*, *malik*, *kalantar*, and *mesher*. See for example: Gang, "CBDR in Balkh"; Smith, "CBDR in Nangarhar"; and Smith with Manalan, "CBDR in Bamiyan."

Box 2: Debating the state's role in dispute resolution

The active nature of this debate was evident in one FGD (FGD 4) involving women from different ethnic groups. Approximately half had lived in Kabul or Afshar prior to the civil war, while the remainder were post-2003 migrants from rural areas:

I do not agree that the government's role in taking responsibility for resolving disputes is a thing of the past. The government has the job now. Every task has its own place: if you are sick you go to the doctor, if you want to study you have to go to school. It is the same if people have disputes—they have to go to the police or the court so that the government can resolve their issues. People can take their small disputes to the whitebeards—if there is an asphalt road then there is no need to take the rough one—but people should be able to go to the government for dispute resolution.

– Pashtun in-migrant in her mid 40s

But then why do we have these experienced whitebeards? They resolve disputes well and people respect them a lot.

– Hazara returnee in her mid 40s

You are right, but then what is the government for?

– Hazara returnee in her early 50s

Among male informants and FGD participants, returnees who had been involved with the government prior to displacement were particularly articulate on the role of the state today:

Our Afshar was destroyed in the civil war. When the Karzai government came, our people were very happy. We had expectations that they would rebuild our houses and roads, but this government hasn't done anything for the people of Afshar. The government workers, from the very bottom to the top, are just looking for money. They don't think about the development of the country. Therefore, now people don't expect anything from them.

– Hazara elder, informant 5

People should resolve their disputes through the government because real governments are for the service of the people. But we do not have this expectation from this government—if our people face any problems they must try to resolve their disputes through the elders or shura [council].

– Wakil, FGD 1, participant Gh

During Zahir Shah and Daoud Khan's time, at least we had a stable government. Every country's government has some problems, even in the US or UK. But here, now, we don't even have a government. We don't have a framework of law.

– Qizilbash man in his early 50s, FGD 3, participant S

I lived in Iran as a refugee for 26 years. They had a good and stable government, where everything was regulated under the law. When I returned to Afghanistan, I didn't think there was any government at all. Even if someone kills another person, I haven't seen anyone put them in jail or even question them. Now when I see the police in the city I turn my face away.

– Sayed man, 29, FGD 3, participant A

I think we shouldn't blame the government for all of our problems. Our problems are all the result of the communists who invited the Russian troops to Afghanistan. Now everyone is complaining about the government, but I think we should be helping to build it. I don't have any expectations from the government these days, but I believe that if we should all contribute to the government if we can.

– Hazara elder, informant 3

by district officials, signified by their possession of the district stamp. Conceptually, *wakils* are meant to be impartial, representing community members and supporting dispute resolution activities without regard to social identity. This is in contrast to *qawm*-based elders, who are in many ways expected to prioritise the interests of their group members. However, this idea of representative governance is undermined by the historical strength of patron-client politics⁴⁹ in Afghanistan—a pattern that was further entrenched by conflict-related violence and social upheaval.⁵⁰ Many informants and FGD participants thus assumed that all community leaders are influenced in their decision-making by family, ethnic and/or religious affiliations and choose their representatives accordingly when in need of assistance.

This analysis was substantiated by the actions of the two Hazara groups in the area, which were demarcated by area of origin. Neither group felt adequately represented by the neighbourhood's existing *wakils*—a Qizilbash, a Sayed and a Tajik—and thus each selected their own *wakil* to represent them before district authorities. The two Hazara *wakils* had not yet been approved by district officials at the time of the research, however, and thus were performing without district authorisation or access to the district stamp. Other community members who do not feel adequately represented within local governance structures or do not subscribe to the authority of local actors generally choose to manage disputes themselves or submit them to state or district authorities.⁵¹ This diversity of opinion can be seen in the following comments:

When people choose the wakil, everyone tries to select someone from their own qawm. The wakil will only listen and give benefits to his own qawm members. Benefits will never reach the other people.

– Hazara woman in her 40s, FGD 5, participant A

We don't listen to the wakil anymore because he wanted to take money from us with the help of our neighbour or sell our land to another person. Their plan was to divide the money between themselves. After that we took our dispute to the district police headquarters.

– Tajik woman in her 30s, informant 19

It is good for people to take their disputes to the wakil. If they take them to their elders, people might say that these qawmi elders are taking the side of their relatives. If the dispute is between members of two qawms then the elders from both qawms will sit, but the elders will take the side of their own qawm members.

– Hazara woman in her early 50s, FGD 6, participant L

It is clear that the experience of both the immediate and long-term effects of the civil war continue to shape the daily lives of Afshar's diverse population in numerous

49 Patron-client politics is classically defined as a cluster of relationships “consisting of a power figure who is in a position to give security, inducements, or both, and his personal followers who, in return for such benefits, contribute their loyalty and personal assistance to the patron's designs.” James Scott, “Patron-Client Politics and Political Change in Southeast Asia,” *The American Political Science Review* 66, no. 1 (1972), 92.

50 On patron-client politics and the impact of social upheaval in Afghanistan see Rubin, *The Fragmentation of Afghanistan*, 42; Amin Saikal, “Afghanistan's Weak State and Strong Society,” in *Making States Work: State Failure and the Crisis of Governance*, eds. Simon Chesterman, Michael Ignatieff and Ramesh Thakur, 193-210 (New York, Tokyo: United Nations University Press, 2005); Sarah Lister, “Understanding State-Building and Local Governance in Afghanistan” (London: London School of Economics, Crisis States Research Centre, 2007), 3; and Jennifer Brick, “The Political Economy of Customary Village Organizations in Rural Afghanistan” (Washington, DC: Central Eurasian Studies Society, 2008).

51 See section five, as well as Yar Gul's Dispute in the annex.

ways. Experiences of war-related violence and extended displacement both created and eased ethnic divides. In catalysing both a sense of national identity and dramatic demographic change, it brought together a new ethnically, religiously, and regionally diverse community. The next section will explore how the processes that have evolved to manage dispute resolution in the research site are a reflection of these social and political factors.

5. Afshar's Multi-Tiered CBDR Structure—Processes, Actors, Principles and Choices

This section introduces the processes and actors involved in dispute resolution in the research site. It highlights how disputants determine appropriate forums for dispute resolution, the decision-making principles and sources of authority and legitimacy involved, and strategies relative to enforcement of resolution agreements. The section also offers observations on women's ability to access, participate in and influence decision-making in CBDR, as well as women's increasing use of district-based resources in cases involving individualised, human rights-based claims. Finally, it explores the relationship between community- and district-based actors in dispute resolution, specifically the overlap in dispute management roles, as well as the principles or conceptual devices used to delineate spheres of authority.

5.1 Small-scale and family mediation

The most common mode of resolution in the research site was small-scale mediation conducted by a respected elder or elders, usually at the request of one or more parties to a specific dispute.⁵² Small-scale mediation is used to manage disputes of a private nature, such as those rooted in household affairs, and minor disputes that do not require extensive support. Resolving disputes within the family or immediate social network is the stated preference for most informants and FGD participants. Doing so helps protect privacy and reputation, maintains the appearance of family or *qawmi* unity, prevents further conflict through rapid, inexpensive, equitable and restorative dispute resolution,⁵³ and avoids the social and financial costs of resolution through state process.

Small-scale mediation is also the most frequently used resolution method for minor disputes arising outside of household affairs. These are primarily conflicts of a less contentious nature or involving lower financial stakes between members of the same *qawm*. Disputes in this category commonly include loan default, accidental injury, or matters related to possession or transfer of small portions of land and property. An example of this was seen in Kobra's Inheritance Dispute, in which a woman sought realisation of her son's entitlement to a portion of his deceased father's estate against the wishes of her brother-in-law (the son's uncle). According to informants and FGD participants who spoke on this point, members of the same *qawm* have a stronger impetus to resolve disputes quickly and quietly in order to protect the reputation and cohesiveness of the group. In contrast, disputes between members of different *qawms* were said to pose a greater threat to the stability of the community as a whole and are thus managed through a more structured and public process.

In an effort to keep the resolution process as private, efficient and effective as possible, disputants tend to select elders for small-scale mediation (including neighbours, street representatives, *qawmi* elders, the mullah and the *wakil*) based on their physical or

⁵² Several terms were used to describe these sessions in the research site, including: *jalasa* (Dari), *jirga* (Pashto), and *maraka* (a Pashto term used most frequently by Hazaras in the research site who originate from Pashtun-dominated areas of Ghazni Province). For purposes of this paper, "small-scale mediation" will be used to signify this concept except where informants and FGD participants used one of the mentioned terms.

⁵³ Restorative justice promotes "reparation for injury, reconciliation between the parties involved, and the reinforcement of community/collective equilibrium and cohesion." De Lauri, "Legal Reconstruction," 17.

relational proximity, subject matter expertise, local knowledge, and reputation for strong values and honesty. As in other areas of Afghanistan, the role of the mullah in dispute resolution has largely decreased, except in cases directly governed by Sharia rules such as inheritance division and family law matters, where the mullah is required to assist in the determination of rights.⁵⁴

The majority of CBDR in the research site is conducted by respected elders referred to as “whitebeards” (male) or “whitehairs” (female).⁵⁵ While almost any male with a positive reputation in the community is likely to be considered a whitebeard, selection criteria become more skills-oriented as leadership roles become more specialised. Every extended family will thus have one or more male and female elders, while the most capable or respected of the male elders in a locality or *qawm* group will be chosen as street representatives or *qawmi* elders. In addition to moral requirements, *wakils* must possess the skills and knowledge required to navigate district and municipal structures. Informants and FGD participants point out that community leaders of various types are selected according to merit rather than wealth or status, and that the emphasis on positive reputation increases the strength of mediated outcomes. The ability of community members to determine who will be involved in the mediation of their disputes and to observe and participate in the process also serves as an accountability mechanism for decision-makers.⁵⁶ As one FGD participant describes:

There is transparency between the people and the whitebeards. The people choose certain whitebeards because they know who is honest, respected and has a good background in the community. When the whitebeards come to resolve the dispute, they remember that the people chose them for these reasons. They think, “I must be honest to maintain my good reputation in the community.”

– Sayed man, 29, FGD 3, participant A

It is likely, however, that factors such as wealth, family status, employment, political influence, and access to legal or extralegal power structures are also directly or indirectly considered based on the responsibilities attached to specific roles in the community.⁵⁷

In the majority of cases, disputants are left to initiate CBDR processes in their own time, as it is generally considered unacceptable to interfere in another person’s private affairs. As disputes persist or become more violent, however, community leaders may intercede to protect individual parties or the reputation, autonomy and stability of the *qawm* group or community as a whole. In the three examples of this seen in the research site, *qawm*-

54 See, for example, Gang, “CBDR in Balkh,” 19, 21.

55 Iterations of these terms are to be found across the country and the Central Asian region. See Gang, “CBDR in Balkh”; Smith, “CBDR in Nangarhar”; and Smith with Manalan, “CBDR in Bamyan” for Afghanistan, and for a comparison from Kyrgyzstan, see Judith Beyer, “Imagining the State in Rural Kyrgyzstan: How Perceptions of the State Create Customary Law in the Kyrgyz Aksakal Courts” (Halle, Germany: Max Planke Institute for Social Anthropology, 2007).

56 The analysis is substantiated in the work of Ali Wardak, “Jirga—A Traditional Method of Dispute Resolution in Afghanistan” (UK: University of Glamorgan, 2003), 8-9.

57 Responsibility for dispute resolution in Afshar differs in one significant way from patterns seen in other parts of Afghanistan and the broader region. Research has shown that Sayeds are often relied upon as community mediators based on their perceived structural neutrality. Thought to be descendants of the Prophet Muhammad through his daughter Fatima, Sayeds exist outside of prevailing ethnic and tribal genealogies. In Afshar, Sayed elders are certainly involved in dispute resolution and number among those individuals who have been chosen as *wakils*, but they do not appear to hold a special position as mediators in the research site. For research on the role of Sayeds in dispute resolution across Afghanistan, Central Asia and the Middle East, see Nile Green, “Blessed Men and Tribal Politics: Notes on Political Culture in the Indo-Afghan World,” *Journal of the Economic and Social History of the Orient* 49, no. 3 (2006), 344-360, as well as the work of Ernest Gellner and Fredrik Barth.

based elders intervened to re-establish equilibrium between members of the same *qawm*: in Maryam's Divorce Case, to quell neighbourhood gossip regarding the abuse and the risk of escalating violence between the families; in the Exchange Marriage Divorce Case, to address the deterioration of relationships between two families evidenced by the eruption of a street fight and to secure the release of several male family members arrested as a result of the fight; and in the Bicycle Dispute, again to restore peace between two families caught up in a violent altercation resulting from a street accident. External interventions of this sort are also commonly seen in instances of chronic or more severe domestic violence, as described here:

Twenty days ago there was a woman who was threatening to burn or kill herself because her husband and father-in-law were beating her severely every day. When I heard this news I called someone I knew in the district police to come with me to the woman's house for resolving the dispute.

– Hazara elder, informant 3

In another example, the catalyst for external intervention was not so much to address an instance of domestic violence as to preserve the stability of the relationship between a prominent male community member and his son. This highlights the existence of a “tolerated residuum” of abuse⁵⁸ in the research site, more likely a reflection of prevailing gender relations in the country as a whole than a feature of this community in particular:

Once I was weaving carpet in the house and I made some mistake, so my older brother slapped me. At that time my father saw me crying and became very angry, he beat my brother and took a knife to him. Later, someone informed the whitebeards about what had happened and they called a meeting in the mosque between my father and brother. The whitebeards blamed my father and told him, “your son is your daughter's brother, what is wrong if he slaps her? Your son contributes to the expenses of your daughters, so he has the right to correct them if they do something wrong.” My father agreed with their words and after that my father and brother hugged and apologised to each other.

– Sayed woman in her early 20s, informant 20b

In most cases, disputants chose to convene small-scale mediations in their own yards or guest rooms. Resolution practitioners may also decide to hold sessions in a neighbourhood mosque if a neutral space is required to mitigate tensions (as seen in Maryam's Divorce Case). Linked to priorities of speed, equity and pragmatism, there are two consistent procedural requirements in small-scale mediation: disputants must be physically present or adequately represented, and parties must assure their consent through an oral grant of decision-making authority (*ekhtyar*) to selected elders. Where disputants cannot be present, for example in disputes involving incarcerated individuals, women unwilling or unable to attend, or those lacking mental, physical, or legal capacity, they are most commonly represented by a respected male family member, *qawm*-based elders, or the *wakil* of their area.

5.2 Shuras: Qawm and community

In more complex, long-standing, or financially driven cases, dispute resolution may require a more structured process than small-scale mediation. This is often the case when small-scale mediation is unsuccessful, disputes are more complicated or contentious than elders feel capable of managing independently, or if the nature of a dispute requires broader

⁵⁸ For a fascinating discussion of how a tolerated residuum of sexual violence can be constituted by legal and social responses to that abuse, see Duncan Kennedy, “Sexual Abuse, Sexy Dressing, and the Eroticization of Domination,” in *Sexy Dressing, Etc.: Essays on the Power and Politics of Cultural Identity*, 126-214 (Cambridge, MA: Harvard University Press, 1993).

community involvement to ensure legitimacy and enforceability of negotiated outcomes. A common theme within these more complex cases is the risk they pose to community stability as a whole, often due to demonstrated or potential violence. Physical fights were relatively common in the research site, often over minor offenses and even involving female combatants (see, for example, the Bicycle Case and the Domestic Violence Case).

In these types of cases, disputants or mediators most commonly refer the matter to one of the community's *shuras* (councils) in the first instance or as a matter of appeal. In the research site small-scale mediation sessions (described alternately as *jalasas*, *jirgas*, or *marakas*), were contrasted with *shuras*, which were described as standing self-governance institutions mandated to support issues facing the community as a whole. Mediation of more serious disputes often took place within community *shuras*, and with a greater sense of formality than those that took place independently.⁵⁹ As described by the (Pashtun) head of police:

A jirga is a group of influential elders who are selected by the disputants to resolve their dispute according to time-honoured local custom and tradition. A shura, on the other hand, is a group of community representatives who sit to resolve problems that the community itself is facing. Shura members sometimes participate in jirgas, but they are not the same.

– Head of police, informant 30

There are two primary types of *shura* in the research site, each with its own loose sense of jurisdiction. *Qawm*-based *shuras* manage disputes between members of the same *qawm* (see, for example, Maryam's Divorce Case and the Bicycle Dispute), while the multi-ethnic *shura-i-mahal* (community-wide *shura*, literally "shura of the location") handles disputes between members of different *qawms* or those requiring more intensive management by community leaders. Two examples of disputes deemed appropriate for management by the *shura-i-mahal* were seen in the research site: in the Returnee Property Dispute competing claims to a house emerged following the extended displacement of the original owner; in the Sold House Inheritance Dispute, a daughter sought to evict the bonafide purchaser of a family home unlawfully sold by her mother. While members of different *qawms* were involved in both of these cases, the disputes were seen to warrant more extensive management due to the fact that in both cases disputants had been unable or unwilling to finalise resolution through state courts. A National Solidarity Program (NSP) *shura* has also been established in the research area, but this was rarely mentioned by informants or FGD participants and never in relation to dispute resolution.

The primary function of community-based *shuras* in the research site is to manage community affairs, such as resource distribution, infrastructure needs, and community welfare issues. In Afshar, however, both *qawm*-based *shuras* and the *shura-i-mahal* have become increasingly involved in dispute resolution as a response to state incapacity and illegitimacy. Community leaders felt compelled to provide mechanisms for self-governance in the absence of effective state institutions, as well as to protect

⁵⁹ There is significant variation as to how the terms *jirga*, *maraka* and *shura* (all of which can be loosely translated as "meeting" or "council") are used across the country. While in the CBDR research sites these terms were sometimes used interchangeably to describe hoc councils for resolving specific disputes, *shuras* tended to be more permanent in their membership, often taking on an ongoing governance role. However, even within this context the level of institutionalisation in Afshar's *shuras* was notable. Here, informants and FGD participants used the term *shura* to refer to a standing body involved in local governance and dispute resolution, in contrast to specific mediation sessions described as *jalasas*, *jirgas*, or *marakas*, depending on the language of the user. Thus, *jalasas* can occur within or outside of the *shura*, depending on the weight of decision-making called for by each dispute. This is possibly a direct or indirect response to the institutionalisation of governance in present state-building efforts, for example through the *shura*-building exercises of the National Solidarity Program, but would require further research to draw any conclusions.

Box 3: Afshar's shuras—combining tradition and innovation

I have lived here in Kabul for a long time, and I have also lived in rural areas. In the past, many disputes in the rural areas were resolved by local elders through jirgas or jalasas, but in the cities it was different. If someone faced a problem, the disputant first took his problem to the government because the government was good. Today people complain that the government has become too corrupt and they want to keep their distance. This is a very big problem for the people, as well as for the stabilisation of the government.

– Hazara man in his mid 60s, Retiree from Public Service Department¹

When I came to Afghanistan in 2004, I voted for Karzai. I was happy that a good government had been settled. When I saw that Karzai was giving so many high positions to former commanders, I understood that he would not be able to control the government. Now, this government is not taking care of the people, it has sold out the Afghan people. For this reason, the government can resolve the disputes of rich people who can pay, but poor people can only go to the local elders for resolution.

– Qizilbash man, 45, Disputant in Sold House Inheritance Dispute, informant 1

We made these shuras just to provide facilities for the people. We try to resolve the people's problems so that they don't have to go to the government.

– Sayed man, 45, informant 2

Since a very long time ago, disputants collected their neighbours and elders to resolve their disputes. If disputants didn't accept the decision, then the whitebeards referred their case to the government. This was our custom and tradition. In the past there wasn't any kind of shura, but now people come to the shura for resolving their disputes.

– Hazara man, 45, FGD 2, participant Gh

These days, especially during Karzai's time, the shura has a very big role in working with the government, the NGOs and among the people. If someone has a property dispute and they take it to the government they will use up their money and physical energy until only their bones are left. It doesn't matter who is Hazara or Qizilbash or Pashtun because every qawm has a representative in the shura.

– Mullah, 60, FGD 3, participant M

¹ This man was encountered during initial phases of data collection and was not included as an informant or FGD participant.

community members from a state seen as extractive and corrupt (a fact made clear in the eyes of community members by the assignment of high level former mujahiddin commanders to key governmental posts).⁶⁰ While many informants and FGD participants suggest that they simply revived the processes they had relied on in the rural context, the institutionalisation of Afshar's *shuras*, their role in dispute resolution, and their intentional inclusion of representatives from all present solidarity groups is a pragmatic response to both state incapacity and demographic diversity.

⁶⁰ It must be noted that a majority of Afshar's older male residents were most certainly involved in fighting during the Soviet resistance and subsequent civil war. Now elders of the community, many of these individuals were likely involved in some of the same atrocities that undermine the authority of state actors at the national level. As this was not a focal point of the study as well as being an incredibly sensitive issue, researchers were careful not to investigate individuals' roles in past conflict too closely. It is therefore uncertain what kind of role former commanders play in the administration of CBDR in Afshar today. The author has since heard, however, that a recently-elected *wakil* in the area has been identified as a former commander who was involved in civil war-era violence and retains inappropriate links to non-state military forces.

Male elders involved in dispute resolution in the research site frequently discussed how Afshar's tiered *shura* system was designed to manage even the most problematic conflicts, forcing *shura* members to think strategically about how to maximise legitimacy and sustainability of decision-making in the absence of coercive force. Their solution was to create institutions that balanced long-standing customary practices with the demands of regulating behaviour in a complex, highly dynamic and diverse urban environment.⁶¹

Qawm-based *shuras* comprise the first tier, protecting the reputation and unity of the each group by internally regulating the behaviour of its members. There are six *qawm*-based *shuras* in the research site, broadly reflecting its demographic makeup: the Qizilbash, Pashtuns, Tajiks, Sayeds, and two Hazara groups, from Bamyan and Ghazni. However, as Afshar's population grew and diversified, a second tier was required. Community leaders thus designed the *shura-i-mahal*, a multi-ethnic community *shura* to manage larger-scale and more destabilising conflicts. In the words of the *shura-i-mahal*'s chairman:

We decided to build a shura with members representing every ethnic group in our area. By choosing members from different groups, we absorb the people under them and are able to resolve the disputes of people from all groups. When our decisions are implemented, our decision-making becomes more effective. Now, people will not reject the decisions of the shura and disputes will not be repeated again in the future.

– Qizilbash elder, head of the *shura-i-mahal*, informant 7

***Shura* process and principles—mechanisms for establishing legitimacy and durability**

More so than *qawmi shuras*, the *shura-i-mahal* has a clear structure, including an elected chairman, a dispute resolution specialist⁶² and a clerk, each with specific tasks and reporting requirements. Area *wakils* are also members of the *shura-i-mahal*; given their status as official conduits between the community and the district they are often essential in initiating the *shura* process, inviting key participants, and documenting *shura* decisions. The *shura-i-mahal* meets weekly to discuss issues or disputes that have arisen during the week, while additional sessions are scheduled for the management of specific disputes.

Qawmi and community *shura* resolution procedures resemble those used in small-scale mediation, but more formalised. As in *jirgas* or *jalasas*, *shuras* require that disputants be present or adequately represented in proceedings regardless of gender, but here authority must be given in written form. Likewise, in addition to any personal representatives, disputants must nominate three respected individuals to represent their interests to the *shura*. Parties are required to present their version of events, witnesses, and physical evidence (including customary or Sharia land ownership documents, bills and contracts, and even doctors' reports in cases of domestic violence or other injury). Disputants must then leave the venue so that their representatives, other parties and subject matter experts can openly deliberate. Disputants are usually called back within two to four

61 Although CBDR practices in rural areas have also been impacted by displacement, conflict-related violence, shifting forms of power and many other factors, the effect of these factors seems heightened in the urban context. This is likely due to the magnifying effect of urbanisation—specifically increased population movements, lower levels of social cohesion, the drive toward institutionalisation, and greater proximity to new and ever-changing state resources. This is an issue that will be explored directly in the forthcoming CBDR synthesis paper.

62 It is unclear from the data how this person came to be chosen as the *shura-i-mahal*'s dispute resolution specialist. As he does not have any formal legal training, it is likely that his selection was based on his demonstrated skills in dispute resolution.

hours for a reading of the decision. If *shura* members have not been able to reach a resolution, they will develop plans to prevent outbreaks of violence while the dispute is ongoing, such as a negotiated truce. An example of this was seen in the Mosque Dispute where political solutions were unsuccessful, necessitating a mutual strategy for the prevention of violence as the dispute remained unresolved.

In most cases of successful mediation, the *shura's* clerk records details of the agreement in a document that is signed (or thumbprinted) by disputants, witnesses and *shura* members. All decisions, even those delivered orally, are recorded in the *shura's* register book which is held by the group's dispute resolution specialist. As stated by many *shura* members and the *wakils*, registration of *shura* decisions increases the durability of mediated agreements among community members by serving as a public accountability mechanism. None of the informants involved in disputes resolved in this manner expressed concern that their resolution agreements were not registered with the state, as registration with community *shuras* was seen as insurance against resumption of the dispute at issue.⁶³

As in other levels of CBDR, selection of representatives in *shura*-based mediation is strategic, based on personal connections, subject matter expertise, perceptions of neutrality and reputation. Here, however, the selection process is more finely calibrated to maximise the legitimacy and thus the durability of decision-making.⁶⁴ In the most contentious cases, *shura* members even invited important social actors from outside the community to participate when increased legitimacy was necessary to ensure an end to hostilities, as seen here:

I selected the wakil and two whitebeards from different ethnic groups [to represent me in front of the shura] because first of all, they are well known in the community to be just and everyone respects them. Secondly, they are impartial—I know they won't resolve the case in anyone's favour. Even though they are not my friends, we [the disputants] are the same to them.

– Hazara elder, disputant in Returnee Property Dispute, informant 3

The head of the association for all Qizilbash people was also invited to the shura. The wakil invited him because he is a very knowledgeable and very important man. Because this was a somewhat complicated case, the wakil wanted someone there who could make the mediation more formal and valuable to the disputants.

– Qizilbash man, 45, *shura-i-mahal* dispute resolution specialist, informant 8

Both of these quotes refer to the Returnee Property Dispute, a case of competing house ownership claims. Note that *shura* members prioritised inclusion of a well-known Qizilbash elder from outside of the neighbourhood, despite the fact that neither disputant is from that *qawm*. This choice illustrates the weight of personal reputation and the quest for neutrality over the perceived advantage of ethnic affiliation in many cases.

In general, disputants seek access to *qawmi shuras* and the *shura-i-mahal* through an elder or *shura* member with whom they have had prior contact. Most often, these elders will attempt to dispatch the matter themselves, referring it on to the relevant *shura* only if they are unsuccessful. This pattern was demonstrated throughout CBDR processes in

⁶³ Further discussion on the documentation and registration of decisions is found in section seven.

⁶⁴ For a more theoretical discussion of this idea, see Antonio Palmisano, "On Informal Justice in Afghanistan," in *Afghanistan: How Much of the Past in the New Future*, eds. Giandomenico Ricco and Antonio Palmisano 37-74 (Gorizia, Italy: Institute of International Sociology, International University Institute for European Studies, 2007), 47-8.

the research site, by family elders, street representatives, *qawmi* leaders, the *shura-i-mahal's* dispute resolution specialist, as well as every district officer interviewed for this study. While this practice may have to do with accruing debt for social patronage, a likelier cause is a general culture of interpersonal conflict mitigation seen across Afghanistan as well as a common desire to avoid state intervention.⁶⁵

For disputes between members of different *qawms*, the *shura-i-mahal* increases its procedural and substantive legitimacy by incorporating the customary requirements of parties as deemed appropriate. In addition to the basic principles of peace-building, equity and pragmatism, inclusion of ethnically or regionally specific customary rules may also be negotiated at the beginning of the *shura* process as part of securing informed consent. In the Returnee Property Dispute, for example, the *shura* decided to resolve the case according to specific Pashtun customary rules to increase one side's commitment to the outcome. Other practices mentioned by informants and FGD participants include taking a monetary guarantee (*machalga*) from parties to ensure adherence to mediated agreements, enforcing punitive compensation payments (*deya*, *jirmonha*), or ordering the responsible party to offer apologies (*uzr*) in the manner most acceptable to the opposing side.⁶⁶

In the most serious disputes, displays of forgiveness and acceptance commonly include women to underscore the responsible party's shame for causing harm, as well as the depth and genuineness of the apology. This is most commonly practiced in Pashto-dominated areas and is referred to as *nanawati*.⁶⁷ In the Bicycle Dispute, women from the family deemed responsible for unnecessary escalation of the conflict led a procession to the home of the opposing side in a display of *nanawati*. Respectful of the gravity of the circumstances, members of the opposing side had swept the path leading to their home and were prepared with an offering of a headscarf to the women to signify acceptance of the apology. Women can also be used strategically to pass on requests for demands or to elicit support from community or district actors. An example of this was seen in Yar Gul's Wall Dispute, where one side deployed their mother to request the support of district authorities, knowing that she would cut a more sympathetic figure. This practice can also be used to force a change in behaviour, as explained by the main informant in the case:

Here is what matters: that woman came to my house and asked me to let her build her wall. It is not good for me to reject her. When a woman comes to someone's house it is a very heavy thing. Everything should be accepted. I told her, my honour (ghairat) won't allow me to reject you, go ahead and build your wall where you like.

Shura-i-mahal members state, however, that they will not order customary resolution mechanisms that they consider to be illegal, un-Islamic or socially destabilising, such as revenge killings, extreme corporal punishment or *baad* (the exchange of women to resolve a dispute).⁶⁸ While *shura* members recognised the potential efficacy and

65 See Thomas Barfield, "Culture and Custom in Nation-Building: Law in Afghanistan," *Maine Law Review* 60, no. 2 (2008), 355; and Dupree, *Afghanistan*, 249.

66 See other instalments in AREU's CBRD series for case studies of regionally specific customary resolution practices.

67 Louis Dupree defines *nanawati* as "the right of asylum and the obligatory acceptance of a truce offer" (Dupree, *Afghanistan*, 126). Ali Wardak argues that a more precise definition is that offered by M. Ibrahim Atayee, specifically: "seeking forgiveness/pardon and the obligatory acceptance of a truce offer" (See Wardak, "Jirga," 11, citing M. Ibrahim Atayee, *A Dictionary of the Terminology of the Pashtun Tribal Customary Law and Usages* (Kabul: The Academy of Sciences of Afghanistan, 1979), 65-67.

68 *Baad* involves giving one or more women to an opposing group to settle a blood feud or other violent

appropriateness of these methods in certain cases, they explained that in the context of the *shura-i-mahal* the legitimacy of decisions depended on the collective acceptance of principles and practices deployed therein. Further, as part of finding a balance between individual demands for justice and collective needs for peace, resolution outcomes must be seen as logically calibrated to the particular circumstances of each case. As can be seen in the following comment, this logic was not static, but was changing as considerations of economic hardship and human rights became more of a priority in the research site.

Dispute resolution is very much about addressing the unique principles of a violation. For example, if someone steals something according to Sharia his right hand should be cut off. If someone commits adultery (zina), he should be stoned to death. If someone kills someone, the victim's family should take revenge (qesas).⁶⁹ In every qawm, in every province, the custom of baad still exists. But, I tell people these practices are not allowed in Sharia. It is not logical, for example, that if one person kills another that a girl, who doesn't know anything, hasn't done anything, is given to the other family. When this happens, the only result is that more people become harmed or guilty.

—Mullah, 60, FGD 3, participant M

At all levels of CBDR, legitimacy and enforceability are derived by balancing the rights of the violated party against the need to restore peace and stability among disputants and their families. Thus, alongside notions of basic fairness, a central principle to dispute resolution in the research site and in CBDR in Afghanistan more broadly is that of *islah*, where peace and reconciliation are pursued as a central goal of mediation.

The most important thing when resolving disputes is to restore peace between the two sides of the dispute. At the end of the dispute, the responsible party should cook food for their former opponents. The families should come together in the home of the responsible party for a shared meal. After the food, when everyone is drinking tea, the whitebeards will make both sides of the dispute stand and hug each other. This will make everyone happy and finalise the resolution of the dispute. This is the most important thing.

— Sayed man, 29, FGD 3, participant A

At the same time, however, outcomes are commonly evaluated through the lens of the “common good” or the stability of the community as a whole, which necessarily includes the reparation of damages to parties as individuals.⁷⁰ Specifically, pragmatic issues such

conflict. Women exchanged in this way are often subjected to a lifetime of abuse in revenge for the cause of the initial dispute, leading many national and international human rights advocates to condemn Afghan CBDR practices more generally. The practice seems to be largely in decline, however. Only one instance of *baad* was reported to have occurred in the research site, although more cases from rural areas were recounted to researchers in this study. For descriptions of these practices in context, see Smith, “CBDR in Nangarhar”; and Smith with Manalan, “CBDR in Bamiyan.” For a critique of these practices from a human rights perspective, see for example, Women and Children Legal Research Foundation (WCLRF), “Bad: Painful Sedative” (Afghanistan: WCLRF, 2004); and Wahida Paykan, “Afghan Girls Suffer for the Sins of Male Relatives,” <http://iwpr.net/sw/node/14860>, 3 April 2009 (accessed 27 February 2011).

⁶⁹ *Qesas* is the Sharia principle of proportional remedy. Among informants and FGD participants, it is commonly described as a mechanism for taking revenge, but always in a manner calculated to fit the crime. Generally, *qesas* rules prescribe corporal punishment of the responsible party or financial compensation to the victim and set the appropriate limit under each remedy.

⁷⁰ For a comparison regarding the individual versus the group as a unit of measure in dispute resolution in Islamic and non-Islamic jurisdictions, see Mohammad Abu-Nimer, “Conflict Resolution in an Islamic Context,” *Peace and Change* 21 (1996) 22-40. For how this issue relates to resolution practices in Afghanistan, see De Lauri, “Legal Reconstruction,” 17-19; Palmisano, “On Informal Justice,” 46; and Jonathan Eddy, “Rule of Law in Afghanistan: The Intrusion of Reality,” *Journal of International Cooperation Studies* 17, no. 2 (2009), 16-17.

as economic capacity, family circumstances and other factors are incorporated into decision-making to ensure that resolutions are perceived as fair to all involved, and thus durable in the long term.

CBDR practitioners thus tend to avoid hard findings of fault even as they establish parties' respective degree of harm and determine restorative solutions accordingly. This was particularly evident in the various factors used to calculate responsibility and appropriate compensation amounts in the Bicycle Dispute (reparations required for escalating the conflict, assaulting a woman and medical expenses resulting from the fight); Traffic Case (anticipated loss of wages for unintentional injury to be paid in installments by economically-constrained driver, coupled with the driver's release from jail), Returnee Property Dispute (awarding possession to the original owner while compensating the occupier for improvements to the property), and the Sold House Inheritance Dispute (protection of the bonafide purchaser in exchange for choice of financial or land-based compensation calculated by a neutral property dealer).

CBDR practitioners argue that individualised punitive approaches, such as those commonly found in the courts or even in Sharia, are not always enforceable or sustainable in the long-term as they do not account for the marginal economic conditions of those most likely to commit punishable acts. This type of decision-making thus risks doing harm to the offender's family, thereby undermining local stability. This principle was deployed in the Traffic Case, where the father of the accident victim sought mediation in part out of sensitivity to the harmful economic effects of the continued incarceration of the driver. In one telling quote from an area wakil, it is the need to balance justice and peace, individual rights and group stability that makes the pragmatism of customary law so attractive:

Sometimes Sharia law creates a problem for us, because Sharia never ignores the rights of the individual. With customary law, we can tell one side of the dispute to ignore some aspect of their rights and give this to the other side to satisfy them and finish the dispute. In other words, if we take one rope and two disputants and ask them both to pull from each side, if one side doesn't give a little to the other, then perhaps the rope will break and both of them will fall down. The people who mediate should be experts in finding this balance.

—Wakil, informant 23

Alignment of decisions with community stability rather than individual rights can result in outcomes that may appear unjust to those situated outside (and often inside) these solidarity groups. In the Exchange Marriage Dispute, for example, a woman was forced to divorce at the behest of her family. In this case, two sets of siblings were exchanged in marriage; when the relationship of one set dissolved, the woman of the second set was forced to leave what she felt was a satisfactory marriage. On one hand, this practice can be interpreted as a violation of the human rights of the woman who wished to remain married. On the other, the second divorce was argued by the parents of the woman and by a portion of resolution practitioners involved in the case as necessary to complete the severing of familial relationships. The second divorce was further justified as a move to protect the woman involved—was she to stay with her in-laws, she could be subjected to abuse as revenge for the insult of the first divorce. Although demanding the second divorce against the wishes of the wife was clearly a violation of Sharia law, all parties to the resolution (excluding the woman and the mullahs) felt that customary practices would better serve the needs of both families.

5.3 CBDR: Sources of authority⁷¹ and enforcement in the absence of force

CBDR practitioners in the research site do not have access to the coercive force required for the enforcement of decisions that are non-consensual. For this reason, practitioners must work to ensure the enforceability of their decisions by grounding them in shared community values of equity, fairness, prohibitions against unjust enrichment, and, as described earlier, the principle of *islah*. However, CBDR decision-making is not based on abstract notions of peace and harmony.⁷² As in any legal system, CBDR draws legitimacy from being predictable, non-arbitrary, and grounded in local understandings of customary, Sharia and state law.⁷³ While CBDR practitioners principally deploy customary norms in their decision-making, state and Sharia legal principles are also strategically incorporated, particularly in cases that evoke the rights of women.

Reliance on Sharia law was consistently used to support the rights of women and their children in inheritance claims (Kobra's Inheritance Dispute), to gain access to financial maintenance in cases of divorce, in child custody negotiations (Exchange Marriage Divorce Case) and even in support of a love marriage between members of different ethnic groups. The following example highlights the use of Sharia-based rules and values to protect the rights of women in the research site:

My mother had a dispute with my father when he remarried and kicked her and her children out of the house without any money or household items. Although my mother believed that it was not appropriate for women to go to the district or to the whitebeards with this kind of problem, she still went to the whitebeards and asked that they organise a jalasa. My mother and father both sat in the jalasa. The whitebeards said to him, "This is a respectable woman. You remarried and kicked her out of the house with nothing. Aren't you afraid of God?" Then my father agreed to give my mother financial maintenance (naqafa) for herself and for us.

—Qizilbash woman, 25, FGD 5, participant B

In another instance, community elders untangled a dispute caused by the multiple engagements, four in total, a father made for his daughter by invoking state rules on marriageable age. Marriageable age in Afghanistan is 18 for boys and 16 for girls, but in this case community leaders incorrectly stated that it was 18 for both. Community members must know of instances in which their leaders have supported marriages below the age of 18, yet in this instance, elders were able to constitute a state rule by speaking it from a position of authority.⁷⁴ By resting the decision on (imagined) state requirements, mediators were able to deflect personal responsibility for the decision while restoring economic loss to the families of the would-be husbands, allowing each family a graceful exit from a potentially volatile conflict.⁷⁵ Deflection to the state

71 The notion of how authority is designated and experienced within a given community is one that continues to warrant the attention of political and social scientists. For purposes of this paper, the concept of authority in the research site is understood as a contextually-driven combination of Max Weber's ideal types of legal-rational, traditional and charismatic authority. See Max Weber, *The Theory of Social and Economic Organization* (New York: US, Free Press, 1964).

72 See De Lauri, "Legal Reconstruction," 20-1, on the "myth of mediation."

73 For a discussion on the significance of primary rules of obligation and secondary rules of recognition in establishing legitimacy in the Afghan legal context, see Eddy, "Rule of Law in Afghanistan," 10-12.

74 For discussion of how the idea of the state can be constituted by local actors, see Beyer, "Imagining the State." For a discussion of legal majority in customary and Islamic law in Afghanistan, see Palmisano, "On Informal Justice," 64.

75 Engagement prices collected by the father of the girl ranged from 100,000 to 400,000 Afs each, or

was also evident in the Returnee Property Dispute, where fault for the existence of competing title deeds was placed squarely on the municipality. Once fault was taken off the table, *shura* members were able to craft an equitable division of costs associated with shifting possession of the property.

Complicating the resolution process is the changing nature of commonly-shared values in the research site as a result of the social and political factors presented earlier. While the vast majority of informants and FGD participants continue to experience Afshar's CBDR mechanisms as faster, cheaper, more satisfying and more durable than state processes, there is significant debate among residents regarding the validity of recent changes to the social norms that govern decision-making. In other words, although the rules themselves have not changed, there is no longer universal agreement on how and when these rules should apply to the behaviour of community members.⁷⁶ While this has not substantially undermined the stability and authority of CBDR processes, diverse perspectives on what social norms should be and how they should be applied is likely to persist as a source of tension within the community.

Box 4: Displacement and Social Change

Many families migrated to foreign countries during the war—they stayed for a long time and learned about different cultures in these places. Now that many have come back, they talk about new problems like good quality schools or the environment. There is a big difference in the minds of people who left and people who stayed, our ideas are different. Returnees are open to new ideas, but those who stayed behind during the war are closed—they can only think like it is still war.

— Hazara elder, informant 3

The women who have lived in Afghanistan are adapted to their environment. But the women who have come from Iran have seen different things and they want those things in Afghanistan, even if they are not available here. This is creating problems among some families who have come from Iran.

— Hazara elder, informant 5

In the past, people hadn't seen the rest of the world. After they migrated to other places they saw and learned many things. For example, in the past, girls didn't have permission to go to school and they would be married very young. Now, girls can study and choose when to marry. In the past, people's eyes were dark. They didn't think about the next generation. They thought, "I have lived this life and it is nothing more to do with me." Now people think about the next generation, they think "this happened to me and it shouldn't happen to the next generation. The next generation should have education and other services and be calm."

— Pashtun woman, 45, FGD 4, participant 5

In the past when a woman married she couldn't return to her father's house for two years. Now, if a woman marries, after two or three days she can go to her father's house. In the past, if people married a young girl to an old man, the girl couldn't say anything. Now, the girl can say that she doesn't agree and her family will accept that.

— Hazara woman, 33, FGD 4, participant 7

In the past, a woman's in-laws would beat her if she made too much noise kneading the dough for bread. In the past, when people made stew the good part was for men and the women didn't get any of the meat. Now, women decide what they want to cook and they will be asked what they want to eat. So, [laughing] we can say there have been lots of changes.

— Hazara woman, 50, FGD 4, participant 6

This diversity of opinion is evident among informants and FGD participants, whose perspectives are informed by generational differences and areas of origin, but also in many cases the length and location of their displacement, together with the ideas and educational opportunities many were exposed to as refugees. These shifts in what were once more commonly held values are particularly palpable when discussing the rights and roles of women, whose exposure to different social structures and, for many, to economic productivity, education and freedom of movement, has had a significant impact on social relationships.

At all levels of CBDR, disputants are generally held responsible for pursuing implementation of their own decisions. Given their lack of coercive force, community leaders tend not to follow up on the outcome of mediated agreements, assuming instead that disputes have been effectively resolved if they are no longer a topic of discussion among community members. However, CBDR practitioners can deploy three main enforcement mechanisms where necessary. These include the use of social reward and stigma, denial of future mediation services, and threats to refer the case on to state authorities.

Parties are consistently rewarded for participating in CBDR, which is intimately connected to the idea of upholding the reputation and autonomy of the individuals involved and the wider community. This is effective given that community processes are in many ways tied to one's sense of honour and credibility,⁷⁷ as seen here:

The opposing party said, "I gave my authority to the jirga, so any decision they make is acceptable to me. Even if they order me to sell my house with everything in it, I would still respect the jirga's decision."

– Shura member involved in mediation of the Bicycle Dispute

At the same time, community leaders typically encourage the idea that the external pursuit of dispute resolution is inherently shameful given the wastefulness of inefficient process and public airing of community business. As the following statements suggests, residents are inclined to agree:

Even if people have a big dispute, they will still try to resolve it through the whitebeards. They will not take it to the district because it will bring about a bad reputation. For as long as that person is alive, members of the qawm will say bad things about them.

– Sayed woman, 55, FGD 4, participant 1

If the disputants are rude and disobedient then they will not accept the decisions of white beards.

– Hazara man, 45, FGD 2, participant Gh

Alternatively, elders can threaten parties who do not participate in or adhere to mediated agreements with their refusal to assist in any subsequent disputes they may have. This denial of services isolates non-cooperative community members and plays on local fears of state process, thereby acting as a deterrent among future disputants and reinforcing the authority of community elders. Further, CBDR practitioners recognise that their authority could be undermined by revisiting disputes once disputants have rejected the outcome of prior mediation. One exception to this was seen in the Sold House Inheritance Dispute, where one party's rejection of previously agreed terms was based on legitimate grounds, namely a lack of independent ingress to the compensatory property.

⁷⁷ See also Palmisano, "On Informal Justice," 71.

After we resolved their dispute once before and they didn't follow through with the outcome, most of the shura members decided that they would not come together and resolve the dispute again. Personally, I would sit and discuss the case again but the real problem is that if we come together again for resolving the dispute, we will damage our reputation. If we try to resolve the dispute after they've broken the first agreement, they will just break the next agreement. We are also unsure about what to do in this regard.

—Head of the *shura-i-mahal*, informant 7

Finally, community leaders often use the threat of state action to scare disputants into line as well as to bolster their own authority by signifying familiarity with processes beyond common knowledge.⁷⁸ Community leaders deploy this threat in ways seemingly calculated to target disputants' greatest fears, whether of expense, time wasted, incarceration, sexual assault, or being forced to accept a decision that is not consensual or perceived as legitimate. That these fears have been absorbed by community members is evident in the tales they tell of others' experiences with district processes. In one example, an informant described how a knife fight between brothers was witnessed by surrounding neighbours. Although acknowledging the instability such violence presented to those living in the area, the informant described how the district's demand of a 30,000 Af\$ (US\$600) fine as a result of the fight forced the family to give their house up for rent and return to their extended family compound in another part of the country.

At the same time, community leaders increase the stakes of this threat by letting community members know that should parties violate a mediated agreement, cases are unlikely to be referred to district actors in a positive light. In one example, a female disputant similarly deployed the state as a threat to compel her opponent into agreeing to mediation. Her threat was effective in that it played on his fears of the time, expense, but most significantly, the reputational cost of being sued by his former sister-in-law (see Kobra's Inheritance Dispute).

Box 5: Self-enforcement as the product of legitimacy

In every case, our shura emphasises finding resolution in a short time and without asking any money for this service. On one side, our people are very poor, and on the other side, if the shura asks for money the value of our shura will be gone and no one will come for resolution. We want to maintain the good reputation of our shura.

— Hazara elder, informant 5

In my thinking, this shura is for the people and by the cooperation of the people. If the people do not cooperate with us, then we cannot accomplish anything. This is the basis of our dispute resolution system.

— Qizilbash elder, head of the *shura-i-mahal*, informant 7

People must accept the decisions of the whitebeards because the whitebeards do not make decisions that are unreasonable or harmful for the people.

— Sayed woman, informant 14

When I tried to talk to the disputant about resolving his land dispute he told me to go away. He said, "This is not your problem, only I can solve it." I said, "It is not only your problem, it is the community's problem. Let me help you." But he pushed me and told me to go away, and said that he would resolve the matter through the district.

— Hazara elder, regarding Yar Gul's Wall Dispute

78 See Beyer, "Imagining the State," 2, 12.

Box 6: CBDR uses of the state as a threat

We called her husband and said: “This is a family issue and you should resolve it among yourselves. If this matter goes to the police, not only will it take a lot of time and money, but the district will hand this woman over to the human rights office, who will put her in the shelter for women who are victims of violence. This woman will be without a husband, you will be without a wife, and your children will be orphans. You have to tell your father to stop beating her, it is not humane. If after today we hear that your father is beating your wife, then we will do something against you.”

– Hazara elder, informant 3

If the disputants don’t accept the decision of the whitebeards, then we will send the case to the district. But we will also give a recommendation to the district officials that the disputants are very disobedient people so that they will send the case to the provincial authorities and make it even more complicated.

– Sayed elder in his 50s, informant 4

I said to her father: “Please tell your daughter not to inform the district about her claim. If you inform the police, they will come and take you to Pul-i-Charki prison. We don’t have good police in our country—they will make other problems for your daughter.”¹

– Hazara elder, informant 5

The wakil and the elders get upset with people when they do not agree with their decisions. They refuse to resolve any disputes of these people ever again, which forces people to go to the government and spend their money for resolution. The whitebeards tell them that they will have to accept any decision that the government makes, even if is not fair.

– Sayed woman, 35, informant 15

¹ Note that in this case the daughter would not be dissuaded. She took her divorce claim to the human rights unit of the district police headquarters, with no ill effect to herself or her father.

Since they rely on the consensual nature of their decision-making for purposes of enforcement, CBDR practitioners are conscious of the reasons for their legitimacy in the community and seek to resolve disputes according to the priorities of their constituents. Just as preserving one’s reputation is a mechanism for maintaining the accountability of elders involved in dispute resolution, successful and sustained enforcement of CBDR decisions increases respect for and authority of decision-makers. However, in a system based on the consent of the governed there is little community members can do when disputants refuse to comply.

Perhaps unintentionally, this reliance on the threat of state process to enforce decisions mediated at the community level has contributed to a negative feedback cycle in the research site. Afshar’s multi-tiered *shura* system was designed by community leaders only after they could no longer expect to turn to the state for support in dispute resolution, although many continue to hope for the rise of a capable government in the future. While using negative images of the state is effective in increasing local authority in the short term, CBDR practitioners are ultimately undermining the area’s long-term incorporation into state systems. This way particularly evident in the Municipal Plan Dispute, where fear of the extractive behaviour of the state precluded the neighbourhood’s access to needed state services through inclusion in a revised municipal plan. This pattern is potentially harmful for residents specific to municipal services, but may also be increasing local tendencies to oppose state intervention in all matters.

Box 7: If there was no corruption?

If the district didn't take bribes, I still think people would prefer to take their disputes to the whitebeards. People in the district and the court behave in a bad way. They question us about our disputes disrespectfully, so our people prefer to resolve issues in the jalasa.

– Hazara man in his 50s, informant 16

People have a very positive opinion regarding local mediation because the people who sit with you treat you like family members. Jalasa members make good decisions and without spending money for even one cup of tea.

– Sayed woman, informant 14

People don't like the district because when they resolve an issue the disputants are forced to accept it. The district just decides without thinking if the people are satisfied with the decision or not.

– Hazara whitehair, informant 17

My opinion is different from the others. I think that it would be better if people took their disputes to the government, because sometimes the whitebeards are also corrupt. Some whitebeards have good relations with just one disputant, and not so good with the other, so they might favour one side over the other.

– Sayed man, 50, FGD 3, participant K

Further, use and enforcement of CBDR rests to a great extent on the perceived corruption of the state, as many community members have never directly encountered state resolution processes. While corruption levels are genuinely high throughout the Afghan state and particularly in the justice sector, the idea that *all* state processes are wholly corrupt is undermining some that may not be. For example, in describing the Traffic Case, informants saw evidence of corruption in the police's demand for a fine to release the driver's car from the impound lot. Although state-issued penalties for criminal negligence in operating a vehicle are seen around the world, in the research site this common municipal strategy was perceived as public theft.

Still, even among the diverse opinions of informants and FGD participants, it is much more the pull of CBDR's legitimacy rather than the push of state corruption that informs respondents' choice of mechanisms.

5.4 Women's access to CBDR, decision-making authority and social change

Negative reactions to CBDR as a viable source of dispute resolution in Afghanistan are commonly related to concerns over women's ability to access, participate in and secure equitable outcomes in practices rooted in customary norms. These concerns are reflected in studies that highlight outcomes that violate the human rights of women in Afghan society. This study therefore specifically sought to examine issues of gender equity as practiced within CBDR processes in the research site.

Women's involvement in dispute resolution was most commonly mentioned in relation to disputes that arise within the household. These most private of disputes commonly include low-level domestic violence against new wives, escalation of disputes among children by their mothers, or conflict between sisters or co-wives regarding access to domestic resources. In a society where exposure of women to outsiders is commonly a cause of

Box 8: Reproductive versus productive decision-making

If we look at Afghan customs, we know that women have a strong role in their families but outside of the family it is a little difficult. We don't have a women's shura in our community because if the women have any problems they are free to come to the men's shura and the men will cooperate with them. Our women are a very important part of our community, but in each family the women just advise the men while the men ask the women to make the decisions about the family.

– Sayed man, 29, FGD 3, participant A

I know that women are very important and I know that life without a wife is very difficult, but we don't want to let them out of the house. Believe me whenever I want to buy one pencil or one spoon I ask my wife for her advice. Her advice is very important to me because on these things women know a lot more than men. But on other issues like the government, policies, planning, decisions, and these kinds of issues it is difficult to ask my wife.

– Qizilbash man, 50, FGD 3, participant S

Our qawm has a shura meeting once a month. Women can participate in that meeting if the issues they are discussing relate to the women, like if the people's money will be spent on a wedding or ceremony or funeral, or if the whitebeards need to talk about whether to spend money on building a street or a mosque in the area.

– Hazara woman, 30, FGD 6, participant S

great shame, these types of disputes rarely even come to the attention of male household members.⁷⁹ Instead, disputes among women tend to be self-managed or mediated by female elders, as seen in the following comments:

If women have any disputes they resolve them in the house through a whitehair from the family. Taking the disputes of women out of the house is not good. The men won't let the women take these disputes outside, so it is up to the women to resolve it amongst themselves. Most of the time the women don't even let the men find out about these issues, the women keep it secret.

– Hazara woman in her late 30s, informant 21

My mother is a whitehair of the qawm here. She sits and advises women within the qawm if they have any issues among their relatives. She resolves their disputes in a very good manner, so our qawm has respect for my mother and accepts her advice. We women, even if we have big problems and disputes, we never go to the district or the wakil. We resolve the issue among ourselves and don't take it out of the house.

– Young woman⁸⁰

Female elders are considered the most appropriate resource to mediate household disputes given the degree of authority they hold over domestic matters. Across Afghanistan, decision-making by women is almost always limited to the domestic realm except where men are absent or incapacitated. At the same time, there is a degree of expectation regarding women's participation in local governance on topics considered relevant to women—an arena they feel has been rapidly expanding in recent years as described earlier.

It is interesting to compare these comments on the restricted nature of women's role in decision-making with the degree of social change experienced by women as a result

⁷⁹ For support of this assertion, see De Lauri, "Legal Reconstruction," fn 64.

⁸⁰ The identity of this woman cannot be determined from the field notes, so it is uncertain as to whether she was included as an informant or FGD participant.

Box 9: Women's access to the state

It is a very bad thing for women to go to the district. Even if a woman doesn't have a man at home, it is still bad for her to go—much worse than if she goes to the jalasa. Women are only for housework and for taking care of their children. Going to the district and the shura or jalasa is men's work.

– Sayed woman, informant 14

My sister-in-law wanted to go to the district but her husband didn't let her. He asked her, "Do you want me to be embarrassed and faulted in front of the qawm? They will talk about us and laugh because of you."

– Pashtun woman, informant 18

We can say that women are different from each other. Some don't have permission to go out, but some don't have anyone to speak up for them so they have to go to the district and these places by themselves.

– Tajik woman in her 30s, informant 19

Yes, I myself took my case to the district police and to the court. In the past women were not allowed to take their cases to the district or anywhere else, but now we are able to do so.

– Hazara woman, 40, Omer's mother in Omer's Murder case, informant 22

More women could go if there was a female judge in the court. Women can share their heart's problems with other women, but not with men.

– Qizilbash woman, 25, FGD 5, participant B

of the exposure to urban norms or social patterns that migration brings—including their elevation into public life. The pace of this change was noted, albeit with some reservations, by several male FGD participants. While they acknowledged the importance and value of women's increased standing, they asserted that the people and culture of Afghanistan were simply not yet ready to embrace it fully, or that it should evolve in a religiously and culturally appropriate fashion:

Women are also human, and we have very strong women in our community. Look at our parliament, we have very qualified and active female senators in parliament. They have a direct role in implementing the constitution and they make sure that the voices of the people reach the government. But now, our community is illiterate. We need more time to reach the civilised countries.

– Qizilbash man, 38, FGD 3, participant R

I agree that women should have a shura, but they should be sure to make the shura according to the rules of Islam. For example, they should keep their hijab (head covering) and they should pray on time. But this is impossible in Afghanistan. It is possible in other countries, but [pointing out the window] this is our life, this is our street. It is impossible. The government should first take care of all of the other things we need.

– Qizilbash man, 50, FGD 3, participant S

Increases in the participation and protection of women within community and district-based dispute resolution practices due to shifting social values are evident in the research site. While many male and female community members feel that these changes are positive, they are also experienced as a harbinger of instability and disruption. What is clear, however, is that these changes are unfolding on a daily basis—through the efforts and ideas of community members themselves, and in a way that is meaningful and sustainable within the community.

5.5 When all else fails, the district⁸¹

Despite fears of corruption, time and expense, there are a variety of circumstances that can propel a dispute beyond the community to the realm of state processes. In the research area, cases most commonly referred to state actors were those of heightened severity, where CBDR processes were likely to extend or exacerbate the conflict.⁸² Common circumstances in such cases included: disputants unwilling to accept a community-mediated agreement or wanting to access resolution mechanisms unavailable within the community (Domestic Violence Dispute); community leaders unable to reach agreement or feeling that the subject matter was beyond their mandate; disputants not recognising the authority of community leaders (Yar Gul's Wall Dispute); death or injury leading to arrest of one or more parties (Bicycle Dispute, Omer's Murder, Traffic Case); or criminal acts requiring the expertise of state investigators.⁸³ Alluding to the pervasiveness of corruption in the district, many informants and FGD participants stated that the choice between state and local processes was often determined by a disputants' access to sufficient resources to pay for bribes and connections to influential *wasita* (middlemen) in district offices.⁸⁴

Although research was not conclusive in this regard, analysis suggests the diversity of conditions and frequency with which informants and FGD participants are willing to access state authorities could be due to factors such as proximity to and awareness of various state services; higher levels of acculturation to the state's responsibility for dispute resolution; the heterogeneous demographic of the population; and patterns of social change arising from displacement and urbanisation, especially concerning the rights of women.

Given the research site's location within Kabul City, community members have access to a wide variety of district-level actors and processes for dispute resolution. These include bodies typically seen in other parts of the country, such as the district prosecutor, courts, police and civil cases (*huqooq*) departments as well as resources currently functioning only in Afghanistan's provincial centres, specifically the human rights and family guidance unit located in the district police headquarters.

While Afshar residents can approach these resources directly, the majority do not, relying instead on the *wakil* in his role as an official conduit between the community and the district. As described by the district prosecutor:

There is only one person in the community who is recognised by the government, and that is the wakil. He holds the district stamp and any document he signs will be seen as valid in the municipality. Every official in the municipality has the wakil's telephone number. Other members of the shura do not have any stamp and they are not recognised by the government.

81 Among informants and FGD participants in the research area, state processes were commonly referred to in relation to the *hawza* (district police headquarters), *nahia* (municipal headquarters) and *huqooq* (civil cases department). In practice, however, the term *hawza* was used as a catch-all term to signify state process as contrasted to CBDR.

82 For validation of this analysis, see Palmisano, "On Informal Justice," 72.

83 This was seen in the context of robberies in the neighbourhood, although no examples of this are included in the annex.

84 These middlemen are known as *wasita*, while the process of using middlemen to bypass formal rules for quick results is known as *wasita bazi*, literally "playing middlemen." The use of middlemen was seen in Yar Gul's case and the Sold House Inheritance Dispute. In some ways, this tracks on to a problem seen around the world: that formal adjudication tends to be to the advantage of those with wealth and influence. See Palmisano, "On Informal Justice," 44-5.

However, dependency on the *wakil* to direct disputants to the appropriate district bodies is highly variable. While the least educated community members were unable to articulate the differences between the district police headquarters (*hawza*), civil cases department (*huqooq*) or municipality (*nahia*), the majority of residents (albeit men more so than women) were familiar with the jurisdiction of district resolution bodies by dispute type, such as criminal, civil, or family-related. This is likely the result of higher literacy levels among this portion of Afshar residents, but also of greater expectations of and familiarity with the state in the urban context. Residents with connections among district officials and those who reject the authority of community leaders (often one and the same) consistently approached district actors independently, eschewing the role of the *wakil* entirely.

Female informants and FGD participants consistently exhibited awareness of the human rights and family guidance units—the district’s primary support services for divorce and domestic violence—regardless of age, education level, or area of origin.⁸⁵ However, willingness to access these resources was significantly affected by demographic factors. Whereas older, less educated women of rural origins tended to seek out external support services as a matter of last resort, younger, urbanised and more educated women were more comfortable accessing these resources as an expression of their human rights to choice in marriage, freedom from abuse, and higher education.⁸⁶ This dynamic highlights the ongoing negotiation of social norms in the research site, one that pits custom-driven prohibitions against women’s access to external bodies against knowledge-driven normalisation of women’s rights to state support services. Case workers at the family guidance unit acknowledge the complexity and sensitivity of the issues brought before them, explaining that the best they can do in most circumstances is explain the girl’s position to her family members in the hope that they will support her. Women’s access to other state bodies, in particular the district police and the court system, was similarly affected both by the individual woman’s access to information and familial support, and also the nature of the harm directed against her.

Even among those familiar with district structures, referral through the *wakil* is often preferable due to his reputation and connections among district authorities. Some district actors value the role of the *wakil* to such an extent that they may not even accept the claims of disputants who have either rejected a decision facilitated by the *wakil*, or have approached district actors independently. Although in some ways this practice supports the authority of CBDR structures, it also undermines their voluntary and consensual nature while increasing the risk that the *wakil* will be seen as just another middleman.

5.6 District bodies: Sources of law and enforcement in the presence of force?

The structure of state legal procedure in Afghanistan in many ways acknowledges widespread preferences for mediation and other forms of restorative justice. This is especially true for two of the main sets of authorities operating in the research site:

85 According to district officials, the human rights and family guidance units were established in order to increase gender-sensitive services to women and families while decreasing corruption among police staff in these kinds of cases. At the time of the research, these offices had been operational for about nine months. Notably, no other organisations were mentioned by women in the research site. Further, female informants and FGD participants showed almost complete lack of awareness that female judges were actively serving in Kabul while emphasising that this would be extremely beneficial. An interesting research project would thus be to examine information dissemination and awareness-raising among women on judicial resources for women.

86 As researchers were not able to speak to this cohort of young women directly, this conclusion is drawn from interviews with two staff members at the district’s family guidance unit.

the *huqooq*,⁸⁷ and the human rights and family guidance units of the district police. As the heads of both bodies stress, their role is to attempt resolution of disputes that come before them through mediation and counselling, referring on to court processes only if parties are unable or unwilling to settle. A similar pattern emerged regarding the district police; this revolved less around having a specific mandate as it did on their central obligation to maintain public order and their authorisation to issue warnings in this regard.⁸⁸ District actors expressed an almost identical set of guiding principles in mediation as those described by community actors, the most significant difference being that district actors spoke of their mediated decisions as being outside of their legal obligations, in contrast to community-based practitioners. This is likely the result of conceptual divides between legitimacy and legality, and formality and informality, which are explored in the next chapter.

For the most part, district actors will only initiate formal investigation, prosecution or adjudication when disputants refuse to cooperate in the mediation process or adhere to mediated agreements. The main exception to this pattern in the research area was when parties specifically requested prosecution in particularly violent cases, such as rape and murder.⁸⁹

District-level informants uniformly expressed respect and appreciation for the work of CBDR practitioners in effectively and sustainably resolving disputes, reducing district caseloads and preventing the escalation or re-ignition of violence. While approval is commonly grounded in respect for local customs, a few state actors justified their reliance on CBDR processes by reference to the constitution. According to the head of the family guidance unit:

If a dispute is resolved by community elders before it comes to us then it is fine, we don't have to do anything. We have articles in our constitution about the elders—it tells us to respect the culture and customs of the people. Resolving disputes through the elders is one of these customs, that's why we can't interfere when they make decisions. If the elders refer a case to us, however, then we will resolve it according to the law.⁹⁰

State actors interviewed for this study had greater access to coercive force and expressed a strong sense of obligation to uphold state law. However, those interviewed were unanimously reluctant to subject district residents to state process, which they describe as complicated, time-consuming, expensive and potentially harmful to disputants or their families. In the words of the district prosecutor:

If a case is formally filed with the government, it is very difficult to resolve it in a short time because it has to pass through all stages of the legal process. One case takes a minimum of three or four months, depending on how complicated it is. As I think, my idea might not be good for you or for someone else, but if disputes are resolved by community elders now that the shura is established, then it is good for everyone...

For example, when we hear of fighting between teenagers who have not reached the legal age for imprisonment, we work with the elders to solve this dispute

87 See United Nations Assistance Mission in Afghanistan (UNAMA), "The Huqooq Department: An Analysis of its Procedures, Functions and Needs" (Kabul: UNAMA, 2010).

88 See *Police Law* (Official Gazette no. 862), 2004 (SY 1384), Articles 5 (Duties and Obligations) and 10 (Notice and Warning).

89 See the Rape Case and Omer's Murder in the annex.

90 The author suspects that this informant is most likely referring to Article 130 of the Afghan Constitution (2004), on sources of law for judicial interpretation.

in the community. It is not good to send the file of an accused child into the court system. We give some slight warnings to them, like slapping them, and we take a guarantee from the father and the wakil that they will not fight again in the future. But I myself don't refer cases to the courts because I understand the situation of the people, especially those who are weak economically. If we refer them to the courts, they will have a hard time releasing themselves as the process is very long. It is good for the police department and for the people to resolve their disputes through the community.⁹¹

District authorities also expressed concern about the legitimacy of state decisions, as adversarial outcomes are often considered unfair by residents and are therefore impossible to enforce. This was seen in two cases in the research site. In the Sold House Inheritance Dispute, the court's decision to reward the total value of the property to the claimant against a bonafide purchaser prompted community leaders to deem the verdict unconscionable and begin mediation afresh. In Omer's Murder, an aggrieved mother complained to the presiding judge that the sentence he had given to her son's killer was wholly inadequate; in response to this, he encouraged her to pursue further resolution through community channels.

District actors interviewed for this study were also conscious of community leaders' distinct advantage in generating the local knowledge and authority necessary to effectively manage civil and criminal cases. In one example, a member of the *shura-i-mahal* describes how a land dispute was referred back to the community from the *huqooq*.

The huqooq referred the case back to us by sending an order letter to the wakil, who transferred it to the head of the shura. In that letter it was written, "You people know better about this case, we don't have the information. Both of the disputants have Sharia deeds and neither appears to be fraudulent. For this reason, we are sending this dispute to your shura as you will be able to determine who is right and who is wrong."

– Dispute resolution specialist of the *shura-i-mahal*, speaking of the Returnee Property Dispute

District police officials further acknowledge the deficit of trust they experience among community members, creating a situation where the police will not conduct local investigations unless they are accompanied by community leaders. As the head of the criminal investigations unit explained:

If there is a claim of some serious crime, we go to the wakil in order to identify the house of the accused person. Any time we go to the area, we ask the whitebeards and the wakil to come with us inside the house of the accused person so that in the future they cannot claim that we stole something from them or did something else wrong. We are not familiar with these people, but the wakil and whitebeards are.

– Head of criminal investigations unit, informant 32

District informants thus consistently deploy CBDR practices and principles in civil and criminal matters, often working serially or simultaneously with community leaders. This degree of cooperation is less complicated in civil matters, where district actors keep the majority of cases off the records by mediating disputes in lieu of filing paperwork to initiate a formal claim. In criminal cases, the process is somewhat more complex, particularly when the starting point for district-community collaboration involves the release of an incarcerated community member.

91 For validation of this perspective, see De Lauri, "Legal Reconstruction," 22-23.

5.7 Splitting criminal jurisdiction: The rights of God versus the rights of man

Although statutory law grants exclusive jurisdiction in criminal matters to the state, district actors appreciate that they are not always best situated to understand or manage the root causes of violence among community members. Further, district officials acknowledge that the arrest and prosecution of individual actors may in fact have negative outcomes for community members, such as the loss of income to an entire family (Traffic Case) or the escalation of violence between groups of disputants (Bicycle Dispute).

To support the idea of shared jurisdiction in criminal matters, district informants relied on the Islamic legal concepts of *huqooq-ul-Allah* and *huqooq-ul-ibad*. Translated literally, *huqooq-ul-Allah* means “the rights of God,” but is used as a specific legal term to signify the ruler or state’s responsibility to uphold the social good.⁹² In contrast, *huqooq-ul-ibad* is understood as the bundle of rights designated to individuals as members of society.⁹³ Hence, a criminal incident can be understood as having two components: statutory violations requiring incarceration or fines, and personal violations requiring forgiveness, compensation or revenge. An example of this is found in the Traffic Case: district police released the driver of the vehicle after his payment of a fine for violating state traffic codes (*huqooq-ul-Allah*) to give the family of the accident victim an opportunity to make amends with the family of the driver (*huqooq-ul-ibad*). This two-pronged solution satisfied state requirements while preventing future conflict and ensuring the well-being of both families. Although only a subset of actors at the community level had the vocabulary to articulate this jurisdictional split, many informants and FGD participants seemed to have a general understanding of the concept. This can be seen, for example, in the words of Omer’s mother:

I wasn’t satisfied with the court’s decision because they sentenced him for seven years. Three years have passed and after four years he will be released and he’ll be able to happily walk everywhere. Because of this I am not happy with that decision. The court said to me that I should go to our area and resolve it through the whitebeards. I will demand that the whitebeards find a way to pay me 100,000 Afs (US\$5,000) because I am in debt and this is the money they took from my son’s pocket when they killed him. If they don’t pay me the money, then the government should give that boy to me and I will punish him. It is up to me to murder, to punish or to take property for my son’s blood. It is a matter of blood for blood. Even though a long time has passed, if I see his mother or father I will do something to them. It is up to me.

Enforcement of district-based mediation is grounded in the same strategy seen at the community level: the threat of state action. Like community leaders, district officials faulted state process for its length, expense, risk of corruption, and lack of cohesion to community values. After all, district officials are just as much a product of their society as anyone else. Hence, instilling fear of state processes was commonly seen by district informants as the most effective and expedient means of eliciting acceptance of mediated agreements. This was commonly done through the use of police and prosecutorial discretion, where district actors issue a warning with the promise that

92 Anver M. Emon, “Huquq Allah and Huquq Al-Ibad: A Legal Heuristic for a Natural Rights Regime,” *Islamic Law and Society* 13, no. 3 (2006), 329.

93 Emon, “Huquq Allah and Huquq Al-Ibad,” 329. See also Palmisano, “On Informal Justice,” 48-9.

future infractions will be met with the full extent of state process.⁹⁴ In one case resolved by the family guidance unit, the threat of referral to the family court was used against a husband to force him to stop beating his wife, and then again to force the wife to accept her husband's promise to desist. The husband in this case was so fearful of the shame of being seen in the family court that he volunteered to sign a statement committing himself to life in prison if he beat his wife even one more time. Examples of how this strategy is used by district actors are described as follows:

We are involved in many domestic violence cases, in which we advise both sides, find the source of the problem, and help them to resolve their issues between themselves. When we are successful in the mediation we write down the agreement including a promise never to commit the violence again, take their signatures, and keep a copy of the letter. It isn't the proper legal way, but we also tell them that if they violate the agreement in the future we will put them in prison or send them to the provincial police headquarters. It's not legal, but we want to frighten them so they don't beat their wives again and again.

– Case worker at the family guidance unit, informant 33

To make sure that disputants don't get involved in any other disputes, we make them sign a guarantee letter. We tell them, "if you fight again in the future, the whitebeards will not be permitted to resolve your dispute, that this will be the work of the police." We tell them, "when you come under the hand of the police it is difficult to be released in a short time, and sometimes it can also be very expensive."

– Head of district police, informant 30

Although effective, threat of state action may not always address the underlying causes of domestic disputes. In one example described by a case worker at the family guidance unit, a father was forcing his daughter to follow through with an engagement to a much older man prompted by the father's inability to feed his remaining children. When the case worker threatened the father with prosecution should he continue to force the marriage, the father quickly responded that he would cancel the engagement, that she could finish her education and make her own decisions regarding marriage in the future. The existence of this office and the willingness of the father to adhere to human rights standards are important to acknowledge in the context of Afghanistan today. However, if crushing poverty was the original catalyst for the engagement, one has to wonder about the aftermath of this case for the daughter, her father and other siblings.

5.8 High stakes cases: A category of their own

Informants and FGD participants presented three types of cases that do not conform to the loose framework described in previous sections. These are cases involving high social or financial stakes, murder, and intractable disputes. Although there is little pattern to the management of these most problematic of disputes, certain factors are nonetheless likely to inform disputant and community leaders' choices regarding

⁹⁴ It is important to note that a similar practice exists in countries with a robust rule of law. Justice sector professionals may lawfully use the threat of future criminal prosecution to shape the behaviour of an accused in a present criminal matter. Rather than send juveniles to court, for example, police and prosecutors in the US and Canada may withdraw a charge with a threat or warning of future prosecution if the behaviour in question is not modified. The use of police or prosecutorial discretion in this regard is similarly based on social values of leniency, community and family stability, and judicious use of scarce state resources, as well as an acknowledgement of the inappropriateness of formal procedure in some circumstances. Thanks to Sarah Han for insight on this point.

appropriate resolution process. These include social stratification based on access to knowledge, divergent relationships to the state, and the ability of well-connected or powerful parties to avoid the authority of existing legal mechanisms.

Executive action

The first exceptional case type includes those where the social or financial stakes are particularly high, such as in disputes over large parcels of land or entitlement schemes. Outcomes of these types of cases are likely to affect a large group of people, generally bound together as a solidarity group. Most commonly, high stakes cases are managed as a form of class action, involving a lead representative advocating on behalf and at the direction of a larger group. Two points emerge as particularly important when examining high stakes cases: first, that social identities are solidified and instrumentalised as part of a class-based advocacy strategy, and second, that neither community or state justice mechanisms are seen to have the capacity or authority to resolve such issues. As a result, resolution attempts in these cases commonly involve lobbying at the highest levels of the executive branch along patronage networks informed by particular aspects of group identity. Examples of this approach were seen in two cases in the research site, one based on ethnicity and the other on a broader identification as Afsharis.

In the Mosque Dispute, competing claims over access to land for the construction of a mosque were transformed into an ethnic contest expressed through competing views on the best way to facilitate post-conflict healing in the community: memorialisation of the past versus peace-building for the future. At no point in the management of this case did representatives on either side consider approaching state or non-state legal bodies for resolution. The dispute was in many ways the result of prevailing patterns of informal land distribution by those in power; further, disputants anticipated the inability of any justice sector body to reach an enforceable decision. Both sides thus sought out the support of powerful political advocates from their own *qawm* groups: on one side Vice President Karim Khalili, on the other the Country Director of the Red Crescent Society. Perhaps due to the recognition that overly expedient and extralegal decision-making contributed to the dispute itself, neither political advocate has done a great deal to bring the case to resolution, while leaders of the opposing groups struggle to prevent the commission of violent acts on either side.

In the Municipal Plan Dispute, local residents thwarted attempts by the municipality to incorporate Afshar in an expanded municipal plan, despite the desperate need for state services in the area. Confronted with requests to regularise their land holdings through a tax payment in anticipation of the municipal expansion, informants described how a lack of access to information rendered them unable to respond effectively. Describing themselves as illiterate and incapable, the group sought out literate, urbanised community members whom they felt would be best situated to manage the situation. Explaining their approach as if there were no other option, leaders of the literate group decided to secure an exemption from the tax (and the municipal plan) by directly lobbying President Karzai regarding their historical, if informal, entitlement to the area.⁹⁵ Karzai allowed the exemption, removing the immediate source of the conflict while precluding community members' future access to municipal services. People's tendency to identify themselves according to their access to knowledge not only entrenches a hierarchical class structure, but highlights the feelings of ignorance and inferiority experienced by many rural community members. At the same time, these moves illustrate community

⁹⁵ It is unclear from interviews why this issue was important enough to President Karzai to warrant a personal audience.

members' keen understanding of the degree of access and authority granted to more educated, urbanised members of society.

In these cases, resolution is complicated by the politicised nature of disputes and the recognition that informal solutions often contributed to and are likely to exacerbate conflict. The practice of executive lobbying underscores several points about Afghanistan's governance structure as a whole: that the judiciary does not hold exclusive jurisdiction over legal claims in the minds of Afghanistan's citizens and leaders, that complex legal problems are readily transformed into political questions, and that governance strategies continue to be rooted in the politics of patronage.

Murder and intentional injury

In the realm of murder and intentional injury, informants and FGD participants offered articulate yet divergent arguments regarding appropriate jurisdiction, resolution principles and outcomes. While some community members argued that murder cases should fall within the sole jurisdiction of the state, others hold that only customary practices are appropriate and effective given the implications to family and community stability. Because only one murder case was observed in the research site (Omer's Murder), details of these customary practices will not be included here.⁹⁶

Intractable disputes

The third type of exceptional cases are those that have become intractable: these disputes either cannot be resolved or decisions implemented, usually due to the refusal of one or more parties to submit to state, non-state or executive authorities. This type of case can be further complicated by the intermittent advocacy of one or more patrons, usually powerful people with connections to state or independent military or police forces. Like high stakes cases, multiple and often conflicting informal solutions (such as extralegal distribution of land, executive or police orders) can exacerbate conflict and undermine attempts at legal resolution.

5.9 Concluding remarks

Several intractable disputes were seen in the research area, posing different levels of risk to the equilibrium of the greater community. These included Yar Gul's Case, the Mosque Dispute, Omer's Murder and the Domestic Violence Divorce Case. The frequency with which such disputes arise should be seen as symptomatic of the larger challenges facing the country: weak state governance haunted by a lack of legitimacy, lack of authority, and competition among justice-related bodies.

The research site thus contains a complex mix of dispute resolution processes and values that reflect the rich demographic diversity of its inhabitants. Many of the mechanisms and principles seen in Afshar are common across Afghanistan: family-based and small scale mediation; *qawm*-based governance structures; an emphasis on privacy, honour, peace-building and equity; and a lack of clear separation between state and non-state actors in many disputes. Others are more uniquely adapted to the specific needs of the environment: a multi-ethnic *shura*; the incorporation of district bodies specifically for domestic disputes; the ubiquitous and heavy-handed use of the state as a threat; and executive lobbying. By providing this mix of tools, community leaders have attempted to maximize the legitimacy of local mechanisms while building a broader sense of community

⁹⁶ This topic will be explored in detail in a synthesis of the CBDR series, forthcoming.

among residents. District cooperation with local structures amplifies authority on both sides, thereby increasing the impact and efficacy of state interventions when required.

The authority of Afshar's system of self-governance is challenged by several factors, however. The first of these is the changing nature of shared social values as community members are increasingly exposed to alternative visions of state power, social services, educational and employment opportunities, and notions of individual human rights, particularly for women. CBDR practitioners' willingness and positive efforts to incorporate these shifting dynamics into their decision-making processes probably accounts for why CBDR continues to hold as much legitimacy as it does in Afshar today. The second of these is the number of cases that slip through the cracks between community and state justice mechanisms, the intractable and political disputes that are often caused and perpetuated by the abuse of power and the wholesale weakness of the state as an entity. These failures in the rule of law are perhaps more symptomatic of the state and society itself than of conditions specific to Afshar.

6. Conceptual Divisions

A major finding of this study is that, in practice, state and community-based dispute resolution processes form a continuum of justice-related services in Afghanistan. Within this continuum, ideas, values, tools and outcomes overlap or are identical and actors work collaboratively, either in sequence or simultaneously, to reach durable solutions. At the same time, however, this fluidity breaks down at the theoretical level, where both district- and community-based resolution practitioners consistently assert a conceptual split between their roles and responsibilities. This pattern was most clearly observed where concepts of legitimacy versus legality, and formality versus informality were concerned, distinctions which had an impact on the documentation and registration of mediated agreements.

6.1 Notions of justice and legitimacy versus legality

Throughout this paper, much of the analysis regarding the principles, processes and outcomes of dispute resolution has been spoken of in terms of legitimacy. It is a strong sense of legitimacy that makes CBDR decisions effective, sustainable, durable and satisfying for Afghar residents—but what does this actually mean?

In evaluating a legal system, legitimacy means that there are rules, those rules are known, non-arbitrary and predictable, they define when a violation has occurred, they provide a process for achieving meaningful and enforceable remedies, and are understood and accepted by the people they govern. But rules are not what lives at the heart of a legal system. It is instead the notion of justice that animates law, instils meaning, and determines whether or not a decision is valid and enforceable. The question of how justice is defined and whether it can be achieved is particularly salient in the Afghan context, where the legitimacy of the state and community-based leaders is often linked to their ability to deliver justice.⁹⁷

In his recent study of legal reconstruction efforts in Kabul, Antonio De Lauri pushes the reader to “consider how justice, even before referring to law, is tied to the concepts of ‘right’ and ‘wrong’...These are socially constructed categories that although apparently stable, are continuously subject to reformulations caused by contamination from the spheres of culture, religion, and law as well as by events and social transformations.”⁹⁸ Legal decisions are considered to be just “exactly because they apply primary norms that are close to the sensibility of the people.”⁹⁹ Justice, in other words, is a concept which draws its authority from the values and expectations of society broadly, but even more so how these concepts are experienced by individuals in times of crisis. Ideally, social definitions of justice will track on to the written rules that comprise a state’s system of statutory law, but this is not always the case. The notion of justice is further complicated by the need to emphasise peace-building solutions in the Afghan context, as a response to social conditions that prize consensual decision-making coupled with an endemic lack of coercive enforcement tools. Legitimacy in dispute resolution thus rests in the balance of these competing interests.

Throughout the research, informants and FGD participants described a fluid relationship between district and community-based processes. However, when it came to direct

97 On how this idea relates to the current project of state-building, see Stephen Carter and Kate Clark, “No Shortcut to Stability: Justice, Politics and Insurgency in Afghanistan” (London: Chatham House, 2010).

98 De Lauri, “Legal Reconstruction,” 16.

99 Eddy, “Rule of Law in Afghanistan,” 17.

questions on this relationship, district and community-based resolution practitioners were adamant in drawing a distinction between their respective practices based on the concepts of legitimacy versus legality. While district and CBDR practitioners uniformly described state processes as “formal,” defined by their adherence to all required stages of codified procedure, and therefore legal, they described community processes as legitimate, despite being “informal,” not pursuant to state rules, and therefore illegal. Still, district and community practitioners were unanimous in their conclusions that CBDR’s lack of legality did not undermine its legitimacy. Rather, it was the departure from lengthy, expensive, often corrupt and thus arbitrary state process that provided disputants with the sense of justice they often feel is missing from state decisions. Informants further tied the legitimacy of CBDR decision-making to an additional factor: that community-based processes consistently balanced local notions of fairness, the protection of collectively understood rights, and community stability, both in extending compassion and delivering punishment as required in the circumstances. Examples of this run throughout the paper, from a mother’s refusal to accept seven years’ incarceration as fair punishment for her son’s violent murder (Omer’s Murder), to a father’s efforts to release the man who seriously injured his son from jail (Traffic Case), to a prosecutor’s reluctance to prosecute offenders he knows to be economically deprived.

Resolution practitioners in the research site are keenly aware of the differences between the social and legal components of justice, and the related weaknesses in their own systems. Community actors lament the lack of legal force to their decision-making, which relies only on the commitment of community members to a set of shared social values. However, the problem runs much deeper for district actors; bound as they are to uphold their legal rules, they recognise their hollow formality and often feel pressured to avoid applying them if they are to perform a legitimate and effective function in society. It is this conceptual divide between the legitimate and the legal that has entrenched a further division, that between formality and informality. This dilemma is well articulated by district-level informants, quoted here at length:

We can’t do anything without consideration of the law of Afghanistan. Our responsibility is just to investigate a case and prepare a file for referral onto the courts. We don’t resolve cases in our department because we don’t have that power or authority. But sometimes, if a case comes to us first [and has not been registered in any other department] and it is not a complicated issue, we will resolve the case here. If disputants tell us that they want to resolve their dispute in court then we are compelled to refer them, but if the parties agree then we won’t allow the dispute to become bigger. We try our best to satisfy the disputants, to pursue islah between them, or we send them back to the shura. If they accept our decision, we sign a letter stating that both disputants consented to resolve their dispute here, but we don’t write that this issue was resolved by the government legally. Formal decisions are those which pass all stages of the government process.

– Head of the *huqooq*, informant 31

No, we don’t recognise the shura as formal. It is not part of the government so we cannot send criminal cases there, because criminal cases need to be resolved according to the law. But, I should tell you, that sometimes according to the traditions of the Afghan people it is possible to deliver a case back to the shura or the whitebeards. It is good for us to let them take their disputes back to their communities, but we do have to pay attention to the law of the government and implement it over the people.

– Head of police, informant 30

We cannot accept decisions of the shura or the elders because it is the police's job to implement the law. Still, if a criminal and victim agree to the shura or whitebeard's decision, then there is no need for the police to interfere. If one of the parties doesn't agree with the decision, they can come to us and we will investigate the case according to the law. In the future, if either side faces a problem they can come to us or if they want to resolve the issue again through the whitebeards they can, but they have to hold the jalasa in our office so we can see the evidence. I have to say that if people resolve their issues among themselves it is better for them. We never want people to come to the police for these kinds of problems because we don't want their issues to become more complicated. We want people to resolve their issues more effectively and as easily as possible. Also, people are more likely to agree to the decision and follow it if it is resolved [by jalasa in our office] or by the shura or elders.

– Case worker in the family guidance department, informant 26

When asked whether he ever took part in dispute resolution with community elders or *shura* members, the head of the family guidance unit was adamant that he did not, asserting that “when people resolve their disputes by *shura*, it is not legal because the *shura* is not formally registered with the government. We have law and we obey the state law.” In the same interview, however, he went on to describe how he and his team members mediate approximately 80 percent of the disputes that come before them. In his own words:

As I told you, we don't have authorisation to make decisions. Our office is just for consultation, and we have no way of enforcing our decisions on people in any case.

[Later]: When small cases come to us, we resolve them with the help of the disputants' relatives and elders. We talk to them and advise them, and then the elders of each side talk to them separately. For us, the judgement of the elders and the satisfaction of both sides are very important. Because we are Muslim, we want to resolve people's issues through negotiation. If we are successful, we prepare a letter explaining the history of the dispute and the terms of the agreement and we give it to the disputants. We register the decision in our records, but informally. We never register this kind of dispute resolution letters officially in the district because the shura and the elders are not formally recognised in the district system. This practice is a kind of cooperation with the people, because they don't have time to resolve their problems through district process. People here are very poor.

Despite the known pervasiveness of these practices, state actors likely feel they cannot be forthright about the tools they most commonly use to manage disputes considering their mandate to apply the letter of the law.¹⁰⁰ Still, it is important to reflect on the extent to which they are willing to deviate from state procedure in order to craft dispute resolution agreements that fit with local needs and understandings of what makes decisions legitimate, as opposed to legal.

6.2 Effects on documentation practices

District and CBDR practitioners' insistence on a conceptual divide between state “formality” and community “informality” has also had significant impact on local practices of documenting and registering CBDR decisions. Unlike in some rural areas,

¹⁰⁰ This lack of openness was certainly exacerbated by the presence of the research team, and the potential futility of assuring confidentiality when an informant's reputation and employment could be on the line.

where distance from the state seems to have increased the authority of formal documentation,¹⁰¹ in Afshar the legitimacy of state decision-making is so limited that such registration within state bodies seems to be much less of a priority to disputants and resolution practitioners. Some informants describe actively trying to avoid these processes for the additional burden and attention from authorities they may garner. In the vast majority of cases, informants and FGD participants were content with verbal agreements or written agreements registered “informally” with district or community practitioners. Where disputants felt that they needed more assurance—most commonly seen in the case of women afraid to return home to situations of domestic violence—security was not derived from formal registration, but through the promises of practitioners to intervene in case the agreement was broken. Even in land cases, where resolution so often hinges on the possession of formal documentation, the prevalence of informal tenure systems in the research site minimised demands for formal registration. Community members’ emphasis on local notions of fairness, equity, and other factors as measures of legitimacy meant that confidence in the durability of CBDR decisions was derived not through registration with state institutions, but through the reputations of practitioners. This was further reinforced by their assurances to offer supportive testimony should the dispute arise again in the future.

The identification of such a conceptual divide raises questions of how to link these two systems in a way that fills the gaps that undermine rule of law in Afghanistan. It is true that many in the community see the benefits of formally engaging with state authorities, through registration of CBDR decisions in particular. Community members did not suggest that registration was necessary for reasons of enforcement or protection of human rights, however, but primarily because this would legalise CBDR decisions for use as formal evidence in case of failed enforcement at the community level. Yet there is a stronger sense that affiliating too closely with the state would detract from the legitimacy of community processes. In many ways, CBDR gains its authority from being distinct from the state, from being an autonomous process, from shielding community members from the outside:

If the shura becomes governmental [i.e. formalised] then it will be like the government. If people know that the shura is formal and depends on the government, I don't think people will bring their disputes to it. Because our government is weak, people don't trust in it. Only if people continue to respect and support the shura will it be able to have an effective role in dispute resolution.

– Sayed man, 50s, FGD 3, participant K

While state actors may be open to the idea of participating in community *shuras*, observing the process, ensuring that no corruption or human rights violations are taking place and offering insights on the law, local concerns regarding the *shura*'s reputation and independence would likely result in the creation of *shuras* in name only, pushing genuine CBDR practices deep underground.

101 See Gang, “CBDR in Balkh.”

7. Conclusions

As with the other case studies in AREU's CBDR series, the research conducted in Kabul focused on four central themes: the processes used in managing disputes at the community level, the principles and sources of authority that legitimise dispute resolution at the local level, the relationships between community- and district-level dispute resolution processes and actors, and equity within these processes, particularly as experienced by women.

The way informants and FGD participants in the research site experience CBDR demonstrates that these processes are highly dynamic in a number of ways: in their design, in the collaboration of district and community actors, and in the protection and new resources offered to women. The most significant observations gathered from the residents of Afshar kind enough to participate in this study are as follows:

- *The adaptive nature of Afshar's multi-tiered self-governance structure:* By examining key social and political factors that have shaped Afshar's population and physical environment, one can see how community leaders' choice to combine *qawm*-based *shuras* with a multi-ethnic community-wide *shura* is a direct response to state incapacity, desire for local autonomy, and the needs of a diverse and dynamic population. Having multiple sites of dispute resolution, and allowing disputants to approach the forum they feel is most appropriate for them, has contributed to a sense of the system's legitimacy among the vast majority of community members. This portfolio of options increases the efficacy and durability of dispute resolution practices in the area.
- *The shifting nature of social values in the urban context:* As a result of key social and political factors (including experiences of conflict-related violence, histories of displacement, the instrumentalisation of ethnicity, demographic shifts and exposure to alternative societal arrangements), Afshar is undergoing a dramatic shift in its collective values. This is most clearly evidenced by ongoing debate on the role of women, their access to community-based processes, and the increasing acceptance of younger women's reliance on district resources to advocate for their individual rights. While these shifts may be destabilising to CBDR processes in Afshar in the short term, the system's ability to adapt ensures that these new ideas will be gradually incorporated into local decision-making in the long term. What is key is that these debates are happening internally and at a pace tolerable to community members, making any shifts in ideas and practices legitimate and sustainable over time.
- *The complex and increasingly negative relationship to the state:* Although autonomy in the management of dispute resolution increases the efficacy and legitimacy of CBDR, reliance on the state as a threat is potentially creating a negative cycle in the area. CBDR and district actors are fomenting higher and higher levels of distrust and distance from formal state processes in order to increase their own grip of localised rule of law in the community. While this has been an effective enforcement tool in the short term, this strategy could result in the increasing isolation of the area, precluding community members' access to much-needed state and municipal services in the future.
- *The existence of dispute types that are not manageable by any currently operative justice institution:* Three types of cases identified in the research site did not seem to fall conclusively under the jurisdiction of either community or state-based resolution actors; these included high stakes cases, murder and intractable

disputes. Some of these disputes highlighted the role of informal political solutions in causing and perpetuating disputes, while others illustrated fault lines in the basic acceptance of the social contract among some segments of the population. This finding sheds light on one of the most pressing problems facing Afghanistan today: that many people in the country are simply unwilling to submit to being governed and have little reason to reconsider this position.

- *The conceptual division between legitimacy and legality in community versus state-based dispute resolution:* Despite fluid practices that render community and state-based dispute resolution more like points on a continuum than distinct justice systems, community and district-level dispute resolution practitioners strenuously insist on important conceptual divisions. CBDR is described as legitimate yet informal, while district processes are seen to be legal and formal yet illegitimate. Although this divide logically inspires a desire to find ways to effectively link these two systems, community and district-based informants and FGD participants involved in this study are concerned about what affect any formal links may have on the current equilibrium between the systems. As such, interventions in this regard should be minimal or even avoided entirely, lest they undermine the stability and efficacy of the dispute resolutions mechanisms as they currently stand.

Annex 1: Case Summaries

Sold House Inheritance Dispute

Qabir's home ownership rights were challenged by Fereshta, who argued that her mother, Zainab, had sold family property without her consent. Although Fereshta secured a series of favourable court decisions entitling her to the full value of the property, the decision proved unenforceable. Qabir, Fereshta and Zainab turned to the *shura-i-mahal* for resolution. This story demonstrates the following:

- *Women's ability to access and participate in the state justice system, and the personal nature of this decision*
- *The existence of legal mechanisms to protect women's rights in state law and CBDR*
- *The impact of social considerations in CBDR decision-making*
- *Lack of enforcement capacity within the state justice system*
- *How abuse of authority by district officials creates push factors towards CBDR*
- *CBDR resolution principles, including equity, fairness and pragmatism*
- *Local perspectives on what makes a legal decision just*

Background to the dispute

Qabir returned to Afshar from displacement in approximately 2004. Qabir found his family home destroyed, prompting him to purchase a new home from a widow, Zainab, through her son. At the time of purchase, the son was under the age of legal capacity to contract. Qabir states that this was the reason he took a customary deed instead of a state-issued title. He explained that customary deeds were common in the area, and that the exchange had been witnessed by community leaders. This arrangement also suited Zainab, who wanted access to the sale price as quickly as possible due to reasons of poverty.

Qabir lived in the house for three years without incident, until another woman, Fereshta, appeared claiming that the house was her inheritance and had been sold without her permission by Zainab, her mother. Unbeknownst to Qabir, Fereshta had already claimed successfully against him as an unlawful occupier in the primary, appeals and Supreme Court. The Supreme Court had ordered that Qabir must vacate, whereafter Fereshta would take full possession of the property.

One morning, the police summoned Qabir to the district *huqooq*. Qabir emphasised that the head of the *huqooq* spoke to him very disrespectfully, demanding to know why he had occupied the property and arguing that his customary deed was invalid. Qabir then describes how the head of the *huqooq* offered to resolve the dispute in his favour if Qabir gave him 5,000 Afs. When he refused, Qabir watched as Fereshta handed the official 20,000 Afs to force the transfer of the property. Qabir cursed the official and left.

A few days later, an enforcement panel from the *huqooq* came to Qabir's house to demand that he vacate the premises. The *wakil* intervened, explaining that he would immediately convene the *shura-i-mahal* to resolve the dispute.

Resolution process

As the issue had become such a public one, many elders and other community members attended the *shura* session in addition to the *wakil*, the *shura's* dispute resolution

specialist, Fereshta, Qabir, and Zainab's son (Fereshta's younger brother). Zainab did not feel comfortable to attend, and had given prior authorisation to the *shura-i-mahal* through the *wakil* to resolve the matter as they saw fit.

Qabir, Fereshta and Zainab's son each described their version of the case. It was at this point that the *shura* learned that Fereshta had been disinherited by her father many years ago.¹⁰² Only after his death did Fereshta try to claim her portion of the estate, to find that her mother had already sold the house.

The *shura* threw out the decision of the courts, agreeing unanimously that the decision was unjust: Qabir had purchased the house in good faith, and should not be penalised for a dispute that was between Zainab and Fereshta. After approximately three hours of discussion, the *shura* members decided that Zainab should either compensate Fereshta for the value of her inheritance or hand over title to a portion of the family land in Wardak Province of comparable value. Qabir would be permitted to retain full ownership of the house. Fereshta chose to take the land in Wardak and everyone placed their thumbprints on a decision letter drafted by the *wakil*. The decision was recorded in the *shura's* register and each party was given a copy of the letter for their own records.

When Fereshta saw that the land lacked a direct access route, she rejected the agreement and returned to Qabir demanding enforcement of the court's decision to vacate the Afshar property. Fereshta returned to the district prosecutor for assistance, who sent a letter to the *wakil* requesting that the *shura* attempt resolution a second time.

All parties were present for the second round of mediation, including Zainab. Additionally, Qabir brought a defense attorney (*wakil-e-modafe*) to ensure that his statutory rights were protected during the proceedings. The *shura* members decided that because the land in Wardak was unacceptable to Fereshta, Zainab should compensate her for the value of the Afshar property. This was determined to be 250,000 Afs, based on the independent appraisal of a local property dealer. Given Zainab's financial constraints, it was agreed that this amount should be paid in four instalments. An agreement was again drafted, signed, registered with the *shura* and a copy given to each party.

Outcome and its rationale

The *shura* members found the court decision to be unjust in that it shifted responsibility to Qabir when the dispute was in fact between Fereshta and her mother. Although *shura* members disagreed about the justness of Fereshta's disinheritance, on the whole they felt that Sharia inheritance requirements entitled Fereshta to a portion of the estate. Rather than prolong the dispute, Zainab chose to release the full value of the Afshar property to her daughter. Qabir has since heard that Fereshta remains unhappy to be dispossessed of the property itself, but so far no one has renewed the claim.

¹⁰² After the death of her husband during the civil war, Fereshta remarried to a local commander without first securing her father's permission. It was for this reason that she was disinherited.

Exchange Marriage Divorce Case

Two sets of siblings were linked through an exchange marriage. One couple was compelled to divorce when the other couple's tumultuous relationship destroyed relations between the two families. Presented by the *qawmi* elder who led the mediation, this story illustrates the following:

- *The tension between Sharia and customary law in pursuing the balance between justice and peace*
- *Sharia-based protection for women*
- *How family relationships may take priority over individual rights*
- *How existing gender hierarchies can deprive some women of self-determination, while allowing others to influence resolution outcomes*
- *Application of a "best interests of the child" standard in custody determinations*
- *The normalisation of corruption as a bureaucratic requirement*

Background to the dispute

A few years ago, Shakib and his sister Sharifa were given in an exchange marriage to siblings Anila and Anwar. Although Sharifa and Anwar were happy, Shakib and Anila fought constantly. About four months after the wedding, Anila declared that she could no longer live with Shakib. She returned to her father's home, where Sharifa and Anwar were living, and threatened to set herself on fire should she be forced back. At the time, both wives were pregnant with their first children.

Over the next few months, relations between the two families deteriorated until a street fight erupted between male relatives on both sides. Several of the men were arrested, including Shakib and Anwar. Shakib called Gholamnabi, a well-respected elder of their *qawm* (Sayed), to secure their release from the district police station. Gholamnabi did so with a payment of 5,000 Afs to the head of the district police and a commitment to prevent further violence.¹⁰³ Both sides gave Gholamnabi full authority to serve as their representative in resolving the dispute.

Gholamnabi agreed to lead the mediation process, but he instructed both of the men to find another representative so that he could remain impartial. Feeling that the dispute was an especially complicated one, Gholamnabi enlisted two local mullahs to participate. He explained that the strong reputation of these mullahs would increase the legitimacy and durability of any decision reached.

Resolution process

Gholamnabi, the two mullahs, the husbands and their fathers participated in the mediation. Although Sharifa wanted to remain married, Anwar concluded that since positive relationships between the families were no longer possible, there were no benefits to staying together. Gholamnabi and the mullahs tried to convince the men to remain married, arguing that Islam did not permit divorcing women while they were pregnant. The men insisted.

Outcome and its rationale

The mullahs concluded that Sharia law supported the dissolution of the first marriage, given the parties mutual dissatisfaction, but not the second marriage as there was no

103 It is unclear whether this was a fine for disrupting public order or an extralegal payment.

deficiency between the husband and wife. Based on the insistence of parties on both sides to pursue dissolution according to customary principles, however, the mullahs were compelled to determine the terms of each divorce according to Sharia rules. They ordered that the wives would retain physical custody of the children (both boys) until they reached the age of three at which point they would be transferred to the husbands' families.¹⁰⁴ The wives would not be permitted to remarry until their period of physical custody lapsed. During this time, the husbands would be required to pay for the children's maintenance. Additionally, because Anila had initiated her divorce proceedings, she would not be entitled to receive any payment from Shakib. Alternatively, as he had initiated the divorce, Anwar was required to give Sharifa 50,000 Afs as the return of her dowry (*mahr*).

Approximately one and a half years later, Anila remarried without hassle while Sharifa seemed to have fallen into a deep depression. Both women still held physical custody of their sons and seemed likely to continue doing so for some time, based on the mullahs' determination that the boys had become too attached to their mothers to be separated. While the former spouses had no contact, family members on both sides facilitated visits of the boys to their paternal homes.

104 This is closely aligned with state rules on child custody operating at the time. With the publication of the amended Shiite Personal Status Law, mothers may now retain custody of male children until they reach seven. It would be interesting to see if and how the publication of this law has affected child custody mediations in the area. See *Shiite Personal Status Law* (Official Gazette no. 988), 2009 (SY 1387), Article 194 (3), (Child Support).

Domestic Violence Dispute

First cousins Maryam and Najeeb were married a few years ago, but are no longer able to stay together due to severe tensions between Maryam and her in-laws. Elders from Maryam and Najeeb's *qawm* sought to mediate the dispute but were unsuccessful. This story illustrates the following points:

- *Effects of shifting social norms on family relationships*
- *Application of qawm-specific customs in CBDR*
- *Openness to community involvement when family disputes become disruptive*
- *Women's knowledge of and ability to access district resources for domestic violence and divorce, and increasing family support for this in some cases*
- *How district actors account for social values in implementation of state process*
- *How lack of authority and coercive force among CBDR practitioners can lead to intractable disputes*

Maryam and Najeeb, the children of two sisters, were married for about three years when the situation began to deteriorate. Najeeb's mother thought Maryam was lazy while Maryam felt unwelcome, her mother-in-law accusing her of having cursed hands and preventing her from doing many household chores. The dispute erupted when Maryam attempted to earn some money through piecemeal sewing without her mother-in-law's permission. It was at this point that Maryam began receiving beatings, at first only from her mother-in-law but soon from her father-in-law and then her husband. Maryam states that the beatings were initially minor but that they escalated over time.

After one particularly heated episode, Najeeb expelled Maryam from his house because she was unable to behave appropriately with his parents. Although her parental home was only next door, Maryam insisted on being escorted so she wouldn't be accused of running away. Najeeb refused, forcing her out the door. Seeing his daughter weeping and injured, Maryam's father got his pistol and readied himself to confront Najeeb and his father. Maryam and her mother begged him not to make the conflict any more serious.

As news of the dispute began to spread, the elders decided to organise a meeting of the *qawmi shura* to handle the matter. Maryam's father requested that Jamshid, an elder known for his dispute resolution skills, lead the mediation. Jamshid agreed and instructed both sides to bring five elders to represent them.

Resolution process

Jamshid chose to hold the mediation in the mosque, explaining that a non-neutral environment would have inflamed tensions further.¹⁰⁵ Maryam, Najeeb, and their fathers participated in the session; by this time, Maryam and Najeeb's mothers were no longer speaking and did not wish or were not welcome to attend.

Najeeb began by declaring that since Maryam could not live peacefully with his parents, he was ready to divorce her. Maryam responded that she did not wish to divorce Najeeb, but that she could only stay married to him if he agreed to live separately from his parents. Najeeb countered that this was impossible—his conscience would not let him separate from his parents, to whom he owed his life.

105 Informants used the Hazaragi term *maraka* in this case to describe the small-scale mediation.

Maryam consented to the divorce, but from the district's human rights unit instead of the mullah. Najeeb responded that he would only divorce through the mullah. Unable to secure decision-making authority from either side, the elders terminated the mediation and told the families to manage the dispute on their own. Elders from Maryam's family approached Najeeb's family a second time to attempt resolution, but were unsuccessful.

Outcome and its rationale

Maryam and her father subsequently approached the district's human rights unit to petition for a divorce. Staff from the human rights unit came to interview *qawmi* elders regarding the dispute and to encourage Najeeb to establish a separate household. Some of the elders attributed the cause of the abuse to Maryam's laziness, while others faulted Najeeb's mother for making things impossible for Maryam. The human rights unit cannot go forward with the divorce without the consent of both sides, and neither side is willing to initiate proceedings in the family court. In the meantime, Maryam continues to live with her parents.

Postscript:

Soon after the failed mediation, Najeeb's mother arranged for him to marry another of her relatives. During the engagement party, Maryam was bereft at the sound of the music next door and took herself to the district police headquarters to file a claim against Najeeb and his father. She returned with a policeman, who attempted to arrest the two men in the middle of the party. A local resident with ties to the district police office objected to the timing of the arrest and told the police to return the next day, offering himself as a guarantee should Najeeb not be present. This dispute remains unresolved.

Returnee Property Dispute

Fahim returned to Afghanistan after several years as a refugee to find his property occupied. After almost 18 months spent pursuing the case through state channels, Fahim and his opponent Sadat agreed to resolve the dispute through community mediation. Although this story is told from the point of view of a single, interested informant, it illustrates the following:

- *How weaknesses in the land tenure system leads to conflict in the research site, particularly involving returnees*
- *How excessive state bureaucracy creates push factors towards CBDR, including increased opportunities for and perceptions of corruption among district actors_*
- *The normalisation of corruption as a bureaucratic requirement*
- *The role of informal titling in property ownership disputes*
- *Examples of CBDR process, including selection of representatives, informed consent for decision-making authority, evaluation of written evidence, and use of resolution principles such as fair compensation and opposition to unjust enrichment*
- *Documentation and registration of resolution agreements with key community actors to increase enforceability and durability of CBDR outcomes*

Background to the dispute

Upon his return from extended displacement, Fahim discovered one of his properties to be occupied. A tenant living in the house told Fahim that he had rented the property from its owner, a man named Sadat. Fahim located Sadat and confronted him as to why he was claiming ownership of the house, asserting his own entitlement by showing his Sharia deed, tax receipts, and municipal records of utility payments. Sadat responded that he had lawfully purchased the property after a change in the municipal plan brought it to market a few years ago; he showed Fahim his own Sharia deed, tax and utility records.

Sadat approached the district *huqooq* to file a claim against Fahim for seeking to take possession of his property. Soon thereafter, a policeman appeared at Fahim's door to summon him to the *huqooq* for questioning. Fahim states that he received very harsh treatment from the head of the *huqooq*, which he suspects was the result of a bribe paid by Sadat. Both men showed their ownership documents to the head of the district *huqooq*, who referred them to the provincial *huqooq* office, which referred them to the Special Court for Refugee Land Disputes.¹⁰⁶ They were instructed to return with the appropriate claim and answer letters the following day.¹⁰⁷

When the head of the *huqooq* realised that Sadat was refuting Fahim's claim of ownership, he instructed Fahim to prepare another document—a reply to his opponent's answer.¹⁰⁸ When Fahim returned with the document, the head of *huqooq* added it to the case file and sent the two men on their way.

106 The Special Court for Refugee Land Disputes was created by presidential decree in 2003, with the goal of quickly processing the sizeable backlog of displacement-related land disputes. The Special Court soon became notorious for delay and corruption due to logistical and administrative challenges built in to its design, and was disbanded in 2007/8.

107 Legal documents such as this are commonly drafted by lawyers, called *darul-i-wakils*, who specialise in this task. Although similar practices are seen across the world, disputants in Afghanistan commonly object to fees charged for the drafting of legal documents. This practice has fostered questions over the legitimacy of a process that stresses complex written documents in a society with excessive levels of illiteracy.

108 Up to three rounds of claim and answer are permitted in Afghan judicial procedure.

After a few weeks, Sadat and Fahim returned to check on any progress in their case. The men were told that the process was long and complicated and they should return after three months. During this period, both men spent considerable time and money in the *huqooq* trying to facilitate a speedy and favourable outcome. After several months, they returned and were again sent away. After another few months without progress, Fahim proposed resolution through community channels. Sadat gratefully accepted, saying that both men would soon have spent more money in government offices than the property was even worth.

Resolution process

Fahim and Sadat visited the *wakil* individually to explain the details of the dispute. The *wakil* praised both men for their decision to bring the dispute back to the community and instructed them to choose three representatives for mediation in the *shura-i-mahal*. Sadat chose elders from his own *qawm*, while Fahim chose representatives based solely on their reputations for fairness and impartiality.

The *shura* members began by explaining the resolution process and possible outcomes to Fahim and Sadat, including the possibility of a wholesale transfer of the property from one party to the other. Once certain that the stakes were understood, the representatives asked Fahim and Sadat to sign a letter granting decision-making authority. After presenting their cases, Fahim and Sadat were asked to wait outside while the *shura* members deliberated. Approximately one hour later, the *wakil* informed the men of the *shura's* decision to grant ownership to Fahim in exchange for compensation to Sadat for construction costs accrued during his possession of the property.

Outcome and its rationale

The *shura* members concluded that Fahim and Sadat's ownership documents were both valid; any overlap in entitlement was attributed to the municipality. Because he was the original owner, Fahim would retake possession of the house. To ensure an equitable resolution and avoid future conflict, Fahim was ordered to pay Sadat 250,000 Afs. Sadat was required to destroy his ownership documents in front of the *shura* and vacate his tenant. The *wakil* recorded the terms of the agreement in a decision letter which was signed by Fahim, Sadat and the *shura* members. Fahim and Sadat each kept a copy, as did the *shura*, which recorded the decision in its dispute register.

Fahim and Sadat took copies of the decision letter to the *huqooq* to inform them of the resolution and to collect their files. The head of the *huqooq* declined to register the decision or hand over the files, explaining that the case must expire according to state process. Fahim is confident that the dispute will not rise again due to both men's commitment to the decision, Sadat's destruction of his ownership documents, the strong reputation of *jalasa* members, and the registration of the decision with the *shura-i-mahal*.

Kobra's Inheritance Dispute

Kobra, a woman in her mid-30s, was pregnant with her first child when she was widowed during the civil war. Several years later, Kobra sought recognition of her young son's inheritance rights to her late husband's land. Her claim was contested by her late husband's brother, Ibrahim, who argued that Kobra's remarriage negated any entitlement to the land.

Although this story is told from the point of view of a single, interested informant, it illustrates the following points:

- *Women's ability to initiate and participate in dispute resolution processes at the community level*
- *How concerns regarding the reputational, temporal and financial costs of state process can influence parties to resolve disputes at the community level*
- *The role of the mullah in determining inheritance rights*
- *Documentation and registration of resolution agreements with key community actors to increase enforceability and durability of CDR outcomes*

Background to the dispute

Kobra's family is originally from Bamiyan, though she has lived in Kabul all her life. While she was pregnant with her first child, her husband was taken during the attack on Afshar and never seen again. He was one of five brothers, four of whom were killed during the civil war. Ibrahim, the only surviving brother-in-law, took sole possession of the family house and surrounding land.

Soon after the birth of her son, Kobra remarried to avoid the difficulties of living as a widow. Her second husband works as a cart pusher, and she and her children weave carpets to support the family. Due to their poverty, Kobra decided to pursue her son's entitlement to his late father's portion of the family estate. Ibrahim disputes the claim, arguing that any rights Kobra may have had to the house and land were invalidated when she remarried. Kobra argues that she is claiming on behalf of her son, whose inheritance rights remain in effect.

Once Kobra decided to pursue the claim she first approached her father, a mullah, and her husband for their support and advice. Kobra then discussed the problem with the *wakil*, who gave her his support in mediating the dispute. Kobra gathered a small group of elders from the neighbourhood surrounding Ibrahim's home, who would have the best knowledge on the validity of any claim to Ibrahim's land. Despite encouragement from the *wakil* and elders, Ibrahim refused to attend the *jalasa*.

Although she feared the shame of taking the dispute to the district, Kobra threatened to take the dispute outside if Ibrahim continued to refuse to mediate. Worried about becoming involved in a protracted, public and likely expensive state procedure, Ibrahim finally agreed.

Resolution process

Kobra again collected the local elders, the *wakil*, her husband and father (in his dual role as her supporter and Sharia expert) to mediate a resolution to the dispute. Kobra convened the meeting in the yard of her home, choosing to represent her son's interests

herself. Acknowledging that this was at some risk to her reputation, she attributes her boldness to the support she received from her father and husband, her exposure to educated people, and her willingness to fight on behalf of her son at any cost.

Confirming that Kobra's argument was according to Sharia, the *jalasa* members worked to convince Ibrahim that his nephew's inheritance rights were valid and that Kobra was genuinely claiming on her son's behalf. After approximately two hours of discussion, Ibrahim agreed to give Kobra's son a small portion of the land.

Outcome and its rationale

Once Ibrahim agreed to the inheritance, the *jalasa* members negotiated about the size and location of the parcel.¹⁰⁹ The terms of the final agreement were recorded in a document, which was signed by Kobra, Ibrahim and all of the *jalasa* members. Kobra, Ibrahim and the *wakil* were each given one copy of the letter.

Kobra has since built a small house on the land that she will rent out until such time as her son is ready to sell it or take possession. During construction, Kobra twice faced difficulties from Ibrahim, who continues to live in the family house on the same land. Both times, Kobra was able to overcome these obstructions with the help of the *wakil*.

109 Kobra was either unable or unwilling to provide researchers with the final details of the agreement.

Traffic Accident Case

Siddiq accidentally injured Arif while driving his taxi. As a result, Arif spent three months in the hospital while Siddiq spent the same period in jail. Recognising that the situation was detrimental for both families, Arif's father sought to resolve the dispute with Siddiq's father through community mediation. Told from the perspective of the *shura-i-mahal's* dispute resolution specialist, this story illustrates the following:

- *CBDR resolution process: defining case type (criminal versus civil), finding of fault, calculation of compensation, uses of apology*
- *Registration of resolution agreements with key community actors to increase enforceability and durability of outcomes*
- *The willingness of state authorities to prioritise community-based mediation, even in some criminal cases*
- *The conceptual split in criminal jurisdiction between public and individual rights*
- *The normalisation of corruption as a bureaucratic requirement*

Background to the dispute

Siddiq, who lives in a nearby district, accidentally hit and seriously injured Arif while driving his taxi. Siddiq immediately took Arif to the hospital and contacted his father. Upon seeing the extent of Arif's injuries, Arif's father summoned the police, who arrested Siddiq pending an investigation.

With Siddiq still in jail three months later, Arif's father approached Salim, the *shura-i-mahal's* dispute resolution specialist to request assistance in resolving the dispute. Arif's father had come to feel that the issue was presenting a hardship for his and Siddiq's family, and that neither family had the money to pursue resolution through government channels. Salim agreed to facilitate mediation and called Siddiq's father to attend. Siddiq's father welcomed the invitation, explaining that his son was the sole breadwinner for the family and that his incarceration had taken a serious toll.

Resolution process

The *wakil* convened the *shura-i-mahal* to resolve the dispute, as Siddiq and Arif were from different *qawms*. *Shura* members decided to follow Pashtun customary terms to secure Siddiq's family's commitment to any outcomes. Salim took authority from both men, then asked them to wait outside while the *shura* deliberated.

After approximately two hours, the men were informed that Siddiq's family would be required to apologise and compensate Arif's family for wages lost during his recovery period. In exchange, Arif's father would accompany *shura* members to the district police headquarters to secure Siddiq's release based on their guarantee that the dispute was resolved and would not be revisited. No agreement letter was issued in this case, although Salim recorded the decision in the *shura's* dispute registry.

Outcome and its rationale

The *shura* concluded that although Siddiq was at fault, his injury to Arif was not intentional and thus should not be treated as a crime. The *shura* calculated fair compensation to be 40,000 Afs (US\$800): Arif had been earning 200 Afs per day as a day labourer and would be out of work for approximately six months in total.

Siddiq's father agreed, but requested permission to delay payment until Siddiq could amass the necessary funds once he was released from jail. A delegation approached the district headquarters to request Siddiq's release. Because Siddiq committed a violation of statutory traffic laws, he was required to pay two fines: one to district police for his release, and one to the traffic department for the release of his taxi.¹¹⁰

Salim explains that no agreement letter or guarantee was required in this case as both men welcomed the resolution. He further states that having a decision recorded in the *shura's* register is sufficient for enforcement purposes in the area. Salim is unsure whether Siddiq's father has paid the compensation as of yet, but assumes that there have been no further problems as he has not heard from either of the men again.

¹¹⁰ The traffic fine has basis in statutory requirements, while the payment to police is less clear. It seems that parties involved with this dispute were not able or interested in differentiating these fines, considering all payments to be evidence of district-level corruption.

Bicycle Dispute

A fight broke out among members of the same *qawm* following a bicycle accident between Rahul and Azim, during which several men and women were injured. Following the arrest of several men from Azim's family, *qawmi* leaders intervened to release the men and resolve the dispute internally. This story illustrates:

- *Women's access to and participation in dispute resolution processes at the community level*
- *Women's contribution to episodes of violence*
- *How concerns regarding the reputational, temporal and financial costs of state processes can influence parties to resolve disputes at the community level*
- *The willingness of state authorities to prioritise community-based mediation, even in some criminal cases*
- *Cooperation between district and community actors in dispute management*
- *How social relationships create added incentive to resolving disputes promptly within the community*
- *How reputation, respect for community leaders and principles of social cohesion contribute to enforcement of CBDR decisions*
- *The normalisation of corruption as a bureaucratic requirement*

Background to the dispute

Rahul, 16, lost control of his bicycle and knocked over three-year-old Azim, who was playing in the street. Both boys are from the same *qawm* and their families are distantly related.

Witnessing the accident, Azim's uncle admonished Rahul to be more careful and demanded compensation for the younger boy's injury. Rahul spoke back disrespectfully and pushed him, at which point Azim's uncle slapped Rahul in the face. The street flooded with people from both families punching, kicking and beating one another with sticks and rocks. Azim's family followed Rahul's family to their home to continue the fight—it was at this point that women from Azim's family physically assaulted Rahul's mother by hitting her and ripping her clothes. Men and women from both sides were injured, while Rahul required medical attention.

The fighting became so intense that witnesses grew concerned, particularly as the *wakil* of the area was not available to intervene. Someone in the crowd called to report the fighting to the district police. The police broke up the fight, arrested several male fighters and brought Rahul to the hospital.

As soon as the *wakil* and *qawmi* elders learned of the arrests, they approached the head of the criminal department at the district police headquarters to release the men, explaining that this was a dispute within the *qawm*, which could, and should, be resolved by *qawmi* leaders. The head of the criminal department agreed. No discussion was reported regarding management of the assault on Rahul's mother.

Resolution process

The following day the *qawmi shura* convened in the guestroom of Rahul's house, including disputants from Rahul and Azim's families, the *wakil*, members of the *qawmi shura* and the mullah. Women from both sides were present as observers and witnesses.

After confirming that both sides had given their authority, the *wakil* (a member of the same *qawm*) began by explaining that it was shameful for members of one *qawm* to fight—not only should they live peacefully for their own benefit, but such a public dispute gave other community members a reason to laugh at their *qawm*. The *shura* concluded that Azim’s family should apologise to Rahul’s family, compensate them for the cost of Rahul’s treatment, replace two bicycles that were destroyed in the fight, and pay a fine for the assault on Rahul’s mother. The decision was accepted by both sides in an oral agreement.

Outcome and its rationale

Based on their own observations and witness statements, the *shura* members determined that Rahul had not intentionally injured Azim. For this reason, Azim’s family should be held responsible damages resulting from the fight. With the exception of the assault to Rahul’s mother, the rest of the fighting had been fairly balanced such that no further resolution was needed in that regard.

For *qawmi* elders, a peaceful resolution was necessary to restore the reputation of the *qawm* in the neighbourhood. Azim’s mother explained to researchers that the resolution was fair given the extent of Rahul’s injuries; Rahul’s mother expressed disappointment that Azim’s family had repaired the old bicycles instead of providing new ones, but felt that it would bring shame to her family to raise the issue again. She was satisfied by Azim’s family’s promise to pay for additional medical costs should Rahul need further treatment. Both women expressed their lingering suspicions of one another, however: Azim’s mother suggests that Rahul’s side called the police, and therefore must have some connection in the district to support their claim. Rahul’s mother suspects that someone in Azim’s family must have bribed the authorities to secure a release from detention so quickly.

For purposes of enforcement, both families were asked to provide a certain amount of money to prevent fighting in the future. The oral agreement also stated that should either side resume hostilities, they would be required to go to the other family’s home and slaughter a sheep. While respondents admit that hostilities remain, both parties wish to avoid costs—in terms of both time, money and reputation—of disregarding the *shura* decision and involving district authorities.

Yar Gul's Wall Dispute

Yar Gul has been fighting with his neighbour Hamidullah for years over a shared boundary line. Hamidullah argues that he has the right to extend his compound wall, while Yar Gul urgently wishes to shield his daughters from the view of Hamidullah and his brothers. Neither the district or community authorities have been willing or able to secure resolution in the dispute. This story illustrates the following points:

- *Women's ability to influence dispute resolution at the community level*
- *Women's access to and participation in dispute resolution processes at the district level*
- *Lack of enforcement capacity among state and non-state actors, particularly where parties to a dispute do not recognise the authority of community leaders*
- *Issues related to informal land tenure in the urban context*
- *How abuse of authority by state actors can undermine decision-making and enforcement capacity of community leaders*
- *The normalisation of corruption as a bureaucratic requirement*
- *Where social inclusion is less important, individuals can more openly rely on wealth and violence*

Background of the dispute

In approximately 2003, Yar Gul brought his family to Afshar from their native Ghazni seeking better opportunities. Yar Gul and men from seven other families attempted to claim vacant parcels but were forcibly removed by police sent to guard the land, which had been donated to the Red Crescent Society. Yar Gul and the other men gathered at the office of a human rights organisation¹¹¹ to complain that they had nowhere else to go. Officials at the Red Crescent agreed to let the families stay, providing each with an informal ownership document. Yar Gul began building his house immediately, but owing to a lack of funds he was unable to complete the wall of his compound at that time.

Soon thereafter, the police arrived at Yar Gul's compound in the company of Hamidullah. The police informed Yar Gul that, with the support of a letter from the Interior Ministry, Hamidullah would be taking over the area just up the hill from Yar Gul. The police helped Hamidullah to line the area with rocks to signify his claim. When Hamidullah and his brothers returned to begin construction, he accused Yar Gul of moving the boundary rocks to reduce the area of Hamidullah's parcel. Yar Gul denied the accusation and refused to let Hamidullah build his wall beyond where the boundary stood at the time, arguing that any expansion would bring Hamidullah's wall too close to his own compound.

Resolution process

There is some discrepancy about what happened next. According to Hamidullah's sister, her brothers tried to resolve the issue through the area *wakil* and elders, but they beat one of the brothers when he refused to pay the *wakil* for the vacant land. Hamidullah's family did not trust the *wakil* or elders to resolve the dispute fairly because of the beating, and because the elders were from a different *qawm*. They chose to approach the district authorities for resolution, sending their mother on behalf of the family

111 No name was given in the transcripts.

because she was a widow and thus more likely to elicit the sympathy of local officials. A district official thereafter informed the elders that since the land was vacant no one had the right to prevent Hamidullah from claiming a parcel or to charge him for doing so.

Yar Gul's wife suspects that Hamidullah's family secured this decision through relying on a personal connection in the district (*wasita bazi*). According to Yar Gul, it was Hamidullah's mother rather than any district official that led him to agree to the expanded boundary wall. Hamidullah's mother, a white-haired widow, had appeared at Yar Gul's door crying, apologising on behalf of her sons, and begging Yar Gul to let them build where Hamidullah was insisting. Yar Gul agreed, acknowledging that his sense of honour would not permit him to refuse her.

The next year, Hamidullah's family again sought to expand their boundary wall. Yar Gul protested to the *wakil* who arranged a *jalasa* to mediate the dispute. The area elders measured and divided the land between the families. Both men signed a written agreement demarcating the boundaries and committing to a fine of 50,000 Afs (US\$1,000) should either side raise the dispute in the future. Again with the support of the district authorities, Hamidullah soon broke the agreement, expanding his own boundary and threatening Yar Gul should he attempt to complete the wall of his own compound. At Yar Gul's request, the elders tried to hold a second *jalasa* in the strip of disputed land. Hamidullah and his brothers pushed the elders off the land and told them the dispute was none of their business.

Outcome and its rationale

At the time of the research, the dispute remained unresolved. The district authorities continue to support Hamidullah's family. The area *wakil* and elders support Yar Gul's claim but refuse to intervene any further, acknowledging that they have no power over parties who do not consent to their authority.

For Yar Gul, the situation is intolerable. His most urgent complaint is that without his own compound wall, he has no way of protecting his teenage daughters from the view of Hamidullah and his brothers. Yar Gul has approached district and national authorities on several occasions without success, including the *huqooq*, the district police and the Ministry of Women's Affairs (his employer), even publicly admonishing an MP from Shomali for his ongoing support of Hamidullah. Yar Gul also sought the support of an international NGO involved in civil land disputes, but he suspects that their unwillingness to help is evidence of their affiliation with Hamidullah.

Threats from Hamidullah's family persist in the form of verbal and minor physical assaults to Yar Gul, his wife and children. Everyone in the area is fearful of Hamidullah's family, and rumours abound as to which commander or government official they are affiliated with to have become so powerful. Yar Gul and his wife would gladly sell to Hamidullah's family, but they believe Hamidullah's intention is to push them out rather than buy and they have no other assets. Yar Gul has taken to sleeping with a loaded rifle next to the bed, fearful of an overnight attack by Hamidullah and his brothers.

Omer's Murder

Zara's son Omer was beaten to death by young men from his neighbourhood. Confident that the government would deliver justice, Zara chose to prosecute but now feels that state justice has been inadequate. Although this story is told from the point of view of a single, interested respondent, it illustrates the following points:

- *The rapid escalation of physical violence where shame and honour are implicated*
- *How disparate notions of justice can undermine the legitimacy of state legal decisions*
- *Factors involved in forum choice, including the desire for punitive action*
- *The role of the wakil in managing disputes*
- *The conceptual split in criminal jurisdiction between public and individual rights*

Background to the dispute

Three years ago, Zara's son Omer and his friend, Raouf, were bicycling home from school when they crossed paths with a girl from their street. Raouf told the police that he had offered to let the girl pass first so that they wouldn't splatter her with mud. Whatever was said, however, the girl called for help. Witnessing the exchange, the girl's male relatives began to gather with knives and chisels. They called the girl's elder brother, Fayaz, to come take charge of the situation.

Omer and Raouf were suddenly surrounded by a group of about nine men, led by Fayaz. Raouf was hit in the back of the head with a rock but managed to run away and hide. Although Raouf had been the primary target, the men caught Omer, beating and stabbing him repeatedly. The men also allegedly robbed Omer during the attack. The men scattered, leaving Omer for dead. Raouf returned to carry Omer to the hospital.

Pursuant to government hospital policy, a hospital worker informed the district police about the two badly injured men so that they could initiate an investigation. The police called the *wakil* to gather background information regarding the dispute and to coordinate how best to handle the matter. By the time the *wakil* visited Zara and her husband at home, Omer had died; Raouf would succumb to his head injury three days later.¹¹² The *wakil* informed Zara that the district police had already arrested Fayaz and suggested that they hold an urgent *shura* meeting to resolve the dispute.

The *wakil* gathered elders from the two families in the mosque, ensuring beforehand that Fayaz's three representatives would agree to any demands from Zara's side. Although Zara's husband did not permit her to attend the meeting, she met with the *wakil* beforehand to ensure that her demands would be represented. Zara insisted that Fayaz be punished by the fullest extent of the law, as no apology or compensation would make up for her loss.

Resolution process

With mediation off the table, the *wakil* told the district police to proceed with the prosecution. In the end, Fayaz received a prison sentence of seven years and his accomplices were released without charge.

112 It is unclear how Raouf's family chose to handle the aftermath of his murder.

Acknowledging that the sentence was not likely to quell hostilities between the families, Fayaz's family approached Zara to suggest that they negotiate a secondary resolution. Whether this would have been effective or not is unknown. Shortly after Fayaz's sentencing, his parents submitted to an offer from a Kandahari man to marry their daughter in exchange for a generous bride price and the promise to secure Fayaz's release. The man quickly disappeared with the daughter, however. Soon thereafter, the parents also disappeared.

Outcome and its rationale

Zara was devastated by the seven-year sentence, having believed that government justice would mean a lifetime in prison for Fayaz. She expressed her dissatisfaction to the presiding judge, who suggested that Zara pursue further resolution at the community level.¹¹³ At the time of the research, Zara had not yet done so due to the sickness and death of another of her children.

When asked what further remedy she would seek, Zara stated that community elders should find a way to pay her 100,000 Afs (US\$2,000) to help with debt she has accrued since Omer's death and to compensate for the amount that was stolen from him during the attack. If she cannot be compensated, she argues that the government should release the boy into her custody so that she can punish him herself. In Zara's words: "it is now a matter of blood for blood."

113 It appears that Zara was able to attend and even speak out in court although she hadn't been permitted by her husband to attend the *shura* meeting. Unfortunately, there is no further information in the transcripts to clarify this point.

Municipal Plan Dispute

The *wakil* met with deep distrust and resistance among the local population when seeking to implement plans to bring Afshar into the municipal structure. A delegation of community elders managed to secure dispensation from the plan by directly petitioning President Karzai. Although this story is told from the point of view of a single, interested respondent, it illustrates the following points:

- *How deep distrust of the state precludes access to needed services*
- *Identification of class hierarchy delineated by access to knowledge*
- *The ability of community leaders to petition government officials at the highest levels, signifying the ongoing traction of patronage politics*
- *The willingness of the state to tolerate informal arrangements despite state law and mandates*
- *The normalisation of corruption as a bureaucratic requirement*

Gholamjan, who migrated to the area before the time of the Soviet occupation, was at home when the *wakil* and a municipal official appeared at his door. The *wakil* explained that the municipality wanted to incorporate Afshar into the city's master plan and that all residents would be required to contribute 6,000 Afs (US\$120). The money would be used to pay municipal taxes which would be recorded in a *safae*, a notebook of utility and other municipal payments often used to prove informal land ownership.

Gholamjan did not trust that the two men were collecting the money for honest purposes. He gathered his neighbours, who agreed that they were not educated enough to know what to do. The group sought out Afshar's literate community members to determine the correct course of action, selecting one man who was particularly knowledgeable about the workings of the government to represent them.

Resolution process

The *wakil* convened the *shura-i-mahal* to discuss the issue. Illiterate community members such as Gholamjan were invited, but largely deferred to the ideas of the literate men.

The literate men argued that many of the houses had existed for many decades and no government had yet challenged their right to be there. For this reason, residents believed they had an entitlement to the area and they did not trust the municipality's reasons for coming to collect any money from them now. The group determined that they would never accept such an incursion from the *wakil* or the municipality. Although he did not agree with their perspective, the *wakil* joined a few of the most respected elders as part of a protest delegation to President Karzai's office.¹¹⁴

Outcome and its rationale

Karzai told the delegation that he would call off the municipal plan and that the area would remain in the hands of the Afsharis. Gholamjan states that no municipal officers have been back to the area since. Residents still have no access to electricity, sewerage and running water, street cleaning services, local educational or medical facilities, or other services.

¹¹⁴ It is unclear why this dispute warranted an audience with President Karzai, but this degree of direct access was described so nonchalantly by informants such as to signify the practice as not unusual.

Mosque dispute

Two different *qawm* groups are disputing a parcel of land high on the Afshari hillside. The Hazaras says the land was given to them to build a mosque commemorating the victims of the Afshar Massacre, while the Sayeds argue that the land was given to them build a multi-ethnic community mosque (*masjid-e-jumma*). Although the dispute remains unresolved, the story illustrates the following:

- *How regime change, patron-based governance practices and irregular patterns of land tenure can create land-related conflict*
- *How government action can be required to resolve major land disputes, but can at the same time exacerbate conflict by authorising informal or ad hoc solutions*
- *How NGO involvement, as a parallel structure to the state, can exacerbate conflict by facilitating informal or ad hoc solutions*
- *The existence of intractable disputes, predominantly over land*
- *The role of community actors in the prevention of violence in the face of ongoing, irremediable dispute*
- *How disputes involving group rights over access to valuable resources can activate tensions along ethnic lines*
- *The normalisation of corruption as a bureaucratic requirement*

Background to the dispute

In 1993, many of Afshar's Hazara residents were killed during a targeted attack; survivors were forced to flee immediately. About one year later, a group of survivors returned during a lull in the fighting to burn and bury the bones of the dead in a mass grave high on the hill.¹¹⁵ Over the next few years, all remaining survivors fled Kabul as the fighting worsened.

Following the end of major hostilities, many survivors returned to the area with the mission of erecting a mosque to commemorate the Afshar martyrs. They discovered that the Red Crescent had established their offices just below the mass grave, and the surrounding area had been primarily repopulated by a group of Sayeds. Hazara leaders drafted a petition to second Vice President Karim Khalili requesting allocation of the area covering the mass grave for a memorial mosque.¹¹⁶ Khalili agreed and gave the petitioners an authorisation letter directing the municipality measure and officially designate the land.

Soon thereafter, the municipality sent a delegation from the property department (*Amlak*) to survey the area. Having learned that the delegation was coming, elders of the Sayed group arranged for their *qawm* members to begin digging the foundation for their own mosque. When the municipal officers arrived, the Sayeds' leader produced two letters: one showing that the land had been given to the Red Crescent by the government of Zahir Shah (1933-1973), and the other that a portion of the land had been donated by the Red Crescent's current director to the Sayed people for construction of

¹¹⁵ Residents were able to locate approximately 70 bodies at this time. For years after and even still today, bones continue to be found in wells and in building sites.

¹¹⁶ Vice President Abdul Karim Khalili is a Hazara from Wardak, which is close to disputants' area of origin. Khalili has been a leading member of the *Wahdat* party since 1989.

a congregational mosque. Not wanting to make matters worse, the municipal officers refused to complete the measurements, instead submitting a report outlining the competing claims. In reaction, members of the Hazara group prepared to attack the Sayeds. One of the senior Hazara elders talked them down, however, reproaching the group for their willingness to perpetuate the violent behaviours of the war and vowing to reach a compromise with the Sayed leader.

Resolution process

In the course of negotiations, the Sayeds invited representatives from the Hazara side to build the mosque with them but they refused. Sayed representatives brought the issue back to Khalili, who claimed ignorance of the competing claims and said that he would endorse any resolution reached by those involved. The Hazaras have sought support from the municipality, the attorney general's office and the courts, but to little avail. The Hazara leaders state that this is because they have no money to pay off local officials.

Outcome and its rationale

The dispute is ongoing. The Hazaras have become increasingly resentful of the Sayeds, who have refused to halt construction until the dispute can be resolved. The issue is further complicated by the presence of Fatima Gailani, the head of the Red Crescent in Afghanistan and a strong supporter of plans to build a multiethnic mosque. It is widely rumoured that Gailani is financially supporting the Sayeds through the Red Crescent's access to foreign funds. Due to threats from Hazara residents to raise arms against any Sayeds who commence building the community mosque, Hazara leaders are concerned about their inability to prevent future violence should the building plans continue to go forward.

Rape Case

Note that this case was only briefly described by the head of the criminal investigations department in the course of data collection. Although researchers were unable to gather sufficient data for a complete case summary, this vignette offers important insights on the following points:

- *Protections for women in state law and process*
- *Women's ability to access and participate in dispute resolution at the district level*
- *Sensitivity about and willingness to prosecute instances of rape and other forms of severe violence against women at the district level*
- *Cases in which victims may choose the relative privacy of dispute resolution through district channels*
- *The social value of having multiple systems available for dispute resolution*

Roya was living alone with her sister and the sister's husband. Although this was not considered the most appropriate arrangement, the women's parents were no longer alive and there were no other siblings with whom Roya could stay. Roya felt that her brother-in-law often behaved in a way that made her feel uncomfortable, but she tried to put these thoughts out of her mind. One day, Roya stayed behind at home while her sister and brother-in-law went out for a picnic. When they arrived at the picnic spot, the brother-in-law told Roya's sister to wait there while he returned to the house for something he'd forgotten. Back at the house and finally alone with Roya, he raped her. Afraid for her reputation and that of her sister, Roya told no one.

After some time, Roya was married to her aunt's son, who noticed on their first evening together that Roya was not a virgin. Although this amounted to just cause for termination of the marriage, Roya's husband doubted that Roya was at fault. As she began to weep, he sat with her until she was able to explain what had happened.

With her husband's support, Roya submitted a claim on her own behalf in the criminal department of the district police. The head of the criminal investigations department states that the brother-in-law was called in for questioning, after which the case was referred to the attorney general's office for prosecution in the primary court. The brother-in-law was convicted, and the conviction was upheld through multiple appeals. Given the nature of the case, the head of the criminal investigations department suspects that the brother-in-law remains in prison to date.

Annex 2: Social Demography Charts

Table 1: Informant Demography

Informant No.	Gender	Age	Employment	Ethnicity	Area of origin	Years in Afshar	Dispute?	Access to education?
1	M	45	Former military, part time shopkeeper	Qizilbash	Afshar	Returned 2004	Sold House Inheritance	Yes; in Russia
2	M	Mid-40s	Day labourer	Sayed	Wardak			No; illiterate
3	M	Elder	Retired military	Hazara	Ghazni	Returned 2003	Returnee Property Dispute	Yes; high school
4	M	50s	Shopkeeper	Sayed	Wardak	Returned 2003		
5	M	Elder	Unemployed, former government employee	Hazara	Bamiyan	Returned 2003		Yes; high school
6	M	45	Office support staff, Ministry of Women's Affairs	½ Pashtun, ½ Tajik	Ghazni	Migrated 2003/4	Yar Gul's Wall Dispute	
7	M	Elder	Head of <i>shura-i-mahal</i>	Qizilbash	Afshar			
8	M	45	Property dealer; Dispute resolution specialist, <i>shura-i-mahal</i>	Qizilbash	Afshar	Returned 2004		
9	M		Shopkeeper	Sayed	Wardak	Migrated 2003/4	Bicycle Dispute	
10	M	50s	Unemployed, former government employee	Qizilbash	Afshar	Returned 2004		Yes; class 14
11	M	55	Retired, <i>qawmi</i> elder	Hazara	Wardak	Migrated 2006/7		
12	M	Elder	Mullah	Hazara	Wardak	Many years in Kabul, not Afshar resident		
13	M		District Prosecutor	Pashtun	Kabul resident	Returned 2004		Yes
14	F		Housewife, carpet weaving at home	Sayed	Wardak	Migrated 2004	Bicycle Dispute	No; illiterate
15	F	35	Housewife	Sayed	Wardak	Migrated 2004	Bicycle Dispute	No; illiterate
16	M	50s	Unemployed	Hazara	Ghazni	Returned 2004	Municipal Plan Dispute	No; illiterate

17	F	Elder	Housewife	Hazara	Wardak	Migrated 2004		No; illiterate
18	F		Housewife	Pashtun	Ghazni	Migrated 2004		No, but from literate family
19	F	30s	Housewife	Tajik	Parwan	Migrated 2003/4	Yar Gul's Wall Dispute	No; illiterate
20a	F	40s	Housewife (mother)	Sayed	Wardak	Migrated 2002/3		No; illiterate
20b	F	20s	Unmarried daughter	Sayed	Wardak	Migrated 2002/3		No; illiterate
21	F	Late 30s	Housewife, carpet weaving with children	Hazara	Bamiyan	Returned 2003/4	Kobra's Inheritance Dispute	Yes; class 2, self-educated
22	F	40	Operates neighbourhood bakery	Hazara	Bamiyan	Migrated 2003	Omer's Murder	No; illiterate
23	M	55	<i>Wakil</i> , shopkeeper	n/a	n/a	Returned 2002		Y
24	F	Late 30s	Housewife	Tajik	Ghazni	Migrated 2003	Yar Gul's Wall Dispute	No; illiterate
25	F		Operates neighbourhood bakery	Sayed		Migrated 2004	Domestic Violence Dispute	
26	F	35	Caseworker at Family Guidance Unit	Tajik				Yes; class 6
30	M		Head of police	Pashtun				Y
31	M		Head of <i>huqooq</i>	Tajik				Y
32	M		Head of Criminal Investigations Dept	Pashtun				Y
33	M		Head of Family Guidance Department	Pashtun	Logar			Y

Table 2: FGD Demography

FGD Participant	Gender	Age	Employment	Ethnicity	Area of origin	Years in Afshar	Dispute?	Access to education?
FGD 1 (Male)								
S	M	52	Shopkeeper, shura member	Sayed	Wardak			
A	M	45		Sayed	Wardak			
M	M	47		Sayed	Wardak			Yes; literate
A	M	50	Day labourer	Hazara	Bamiyan			
Kh	M	55	Unemployed	Tajik	Bamiyan			Yes; literate
Gh	M	57	Wakil	n/a	n/a			Yes; literate
FGD 2 (Male)								
W	M	58	Wakil, shopkeeper	n/a	n/a			Yes; literate
N	M	64	Retired teacher	Qizilbash	Afshar			
Gh	M	45	Day labourer	Hazara	Ghazni			
M	M	50	Coppersmith by trade, unemployed	Qizilbash	Afshar			
T	M	37	Day labourer	Qizilbash	Afshar			
FGD 3 (Male)								
M	M	60	Mullah	Hazara	Wardak			Yes; literate
K	M	50	Unemployed	Sayed	Wardak	Migrated 2003/4		No; illiterate
A	M	29	Unemployed	Sayed	Wardak	Returned 2004		Yes; class 12, medical education disrupted by return
R	M	38	Unemployed	Qizilbash	Afshar	Returned 2003/4		Yes; class 12
S	M	50	Mosque servant	Qizilbash	Afshar	Returned 2003/4		No; illiterate
FGD 4 (Female)								
1	F	55	Housewife	Sayed	Wardak	Returned 2004		
2	F	35	Seeking outside employment due to poverty	Sayed	Wardak	Migrated 2003		
3	F	40		Hazara	Balkh	Migrated 2004		
4	F	45		Hazara	Ghazni	Returned 2004		
5	F	45		Pashtun	Nangarhar	Migrated 2004		Yes; self-taught at home

6	F	50		Hazara	Wardak	Returned 2004		
7	F	33		Hazara		Returned 2004		
FGD 5 (Female)								
A	F	40	Housewife	Hazara	Wardak	Migrated 2006		
B	F	25	Housewife	Qizilbash	Afshar	Returned 2004		
C	F	45	Housewife	Hazara	Wardak	Migrated 2003		
D	F	35	Housewife	Hazara	Wardak	Migrated 2003	Omer's Murder	
FGD 6 (Female)								
M	F	35	Housewife	Hazara	Ghazni	Migrated 2002/3		
A	F	50	Housewife	Hazara	Ghazni	Migrated 2002/3		
Z	F	40	Housewife	Hazara	Ghazni	Migrated 2007		
S	F	30	Housewife	Hazara	Ghazni	Migrated 2003		
Sh	F	30	Housewife	Hazara	Wardak	Migrated 2004		
L	F	50	Housewife	Hazara	Ghazni	Migrated 2003		

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