





# Regional Assessment, Traditional Dispute Resolution: RC East

## Rule of Law Stabilization Program – Informal Component

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## INTRODUCTION

During Phase 1 (April 2010 – August 2011) and Phase 2 (September 2011 – July 2012), the Rule of Law Stabilization Program – Informal Component (RLS-I) prepared a series of district assessments profiling the traditional dispute resolution (TDR) mechanisms in districts in RC East (shown on the map on the cover of this report) in which RLS-I implemented its program. This report synthesizes the findings of those district assessments, including information about dispute types, dispute resolution actors, and the district’s dispute resolution practices, processes, and principles in order to highlight regional trends. Furthermore, some additional data collected by the RLS-I Monitoring and Evaluation unit during Phase 2 has been incorporated to supplement the findings of the district assessments. The information contained in this regional assessment is based on RLS-I research in the districts of Bati Kot, Bihsud, Dara-I Nur, Jalalabad municipality subdistricts 1 and 4, Kama, Kuz Kunar, Rodat, Shinwar/Ghani Khail, Surkh Rod, (all in Nangarhar province), Puli Alam (Logar province), Mihtarlam and Qarghayi (both in Laghman province), and Nurgal (Kunar province).

The Phase 1 and Phase 2 district assessments’ objectives were three-fold. The first objective was to gain an in-depth understanding of the nature of disputes, the context surrounding those disputes, and the choices Afghans make regarding settlement of their disputes within the district. The second objective was to use this information to design implementation activities fulfilling RLS-I’s objectives of stabilization and sustainability, including which activities should be conducted, when and where activities should be held, and which community members are best positioned to participate in the RLS-I program and help it achieve its program objectives. The third objective was to enable the RLS-I field teams to build relationships based on trust and rapport with various community members and state actors in the district, which is essential for the successful implementation of program activities.

### Data collection

RLS-I collected the data for this TDR regional assessment during program Phases 1 and 2. RLS-I used research tools, further refined between Phases 1 and 2, to conduct an average in each district of 25 semi-structured interviews (15 male, ten female) and two male and two female focus groups with a minimum of seven members each. In preparation of this TDR regional assessment, three additional interviews were conducted in November 2012 to confirm regional trends identified from a review of the district assessments. In total, this regional assessment reflects qualitative data from over 700 respondents.

Male respondents for the district assessments usually included elders involved in TDR (*jirgamars*), elected or appointed community leaders (*arbabs*, *maliks*, *khans*, *wakils*), district-level government and formal justice sector actors, local religious leaders (*mullahs* and *mawlawis*), former *jihadi* commanders, current and former members of various village and district level *shuras*, and teachers and headmasters. Female respondents included members of Parliament, employees of NGOs, midwives, teachers, members of Community Development Councils (CDCs), seamstresses, embroiderers, housewives, *spinsary*, wives of *mullahs* and *mawlawis*, and other respected women from representative ethnic groups of the villages. Locations for the interviews were selected based on security, accessibility, ethnic diversity, population dynamics, and presence of disputes.

## REGIONAL BACKGROUND INFORMATION

### ***Regional geography and demographics***

This regional assessment focuses on the provinces of Laghman, Logar, Nangarhar, and Kunar, in the RC East area of Afghanistan. These four provinces share borders with one another and with the provinces of Nuristan and Panjsher in the North, Kapisa and Kabul in the west, and Paktiya to the south. The majority of the population of Laghman, Logar, Nangarhar, and Kunar provinces are Pashtuns, although there are also a number of pockets with significant Tajik, Pashai, or Hazara populations and other ethnic groups.

The east of the Afghanistan is densely populated, with a total of approximately 2,662,000 inhabitants. Nangarhar province, including the urban area of Jalalabad municipality, has a population of 1,436,000, Kunar province (population 428,800), Laghman province (population 424,100), and Logar province (population 373,100) are much smaller by comparison.<sup>1</sup>

### ***Regional political and economic context***

Located along the ancient silk route that connects the landlocked Afghanistan with Pakistan and the Indian subcontinent, Nangarhar and its provincial capital, Jalalabad are ancient centers of trade and commerce. Beginning with Babur, the founder of the Mughal Empire, Jalalabad, gained prominence as a seat of power and served as the winter capital for various Afghan empires including the Ghaznowid and Abdali, until the reign of the last king, Zahir Shah.

During the civil war and Taliban rule, the Nangarhar region declined as the breadbasket of Afghanistan, as it was once known, shifting away from food and other cash crops toward opium production. Since 2001 Nangarhar has once again become an area known for its large-scale production of fruits, rice, and sugar cane. The limited arable land has led many individuals, particularly the younger generation, to pursue trade and business and to seek higher education. In Logar, Laghman and Kunar provinces, while still largely agricultural areas, limited availability of land and as well as problems with ensuring reliable irrigation have made it more difficult to sustain an agricultural livelihood. Many young people from these provinces have moved to the urban areas of Kabul or Jalalabad in search of educational opportunities and jobs. In many areas of Nangarhar province, farmers compete with *kuchi* (Pashtun nomads) over pastureland.

The past three decades of war and conflict have transformed the social and political structures of eastern Afghanistan in general and of Nangarhar and Kunar provinces in particular. The emergence of powerbrokers, including some former *jihadi* commanders who came to power by controlling means of violence rather than through traditionally recognized paths to elder status, has disrupted the social hierarchy. In some areas of Nangarhar and Kunar provinces, some of these powerbrokers have proven to be at least as powerful as the government. The powerbrokers sustain their influence through income derived legally and illegally. However, the lack of government control in some areas has enabled other groups, including the Taliban, to challenge the powerbrokers for control.

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<sup>1</sup> Afghanistan Central Statistics Office Population Projections (2013) (<http://cso.gov.af/Content/files/Settled%20Population%20by%20Civil%20Division..pdf>, accessed 2 May 2013).

## KEY FINDINGS

### ***Traditional dispute resolution (TDR) is primarily used to solve civil disputes***

TDR in its various forms represents the most frequently used dispute resolution mechanism in eastern Afghanistan, particularly for civil (as opposed to criminal) disputes. In urban and peri-urban areas, TDR often works in close cooperation with formal justice sector actors, while in remote districts and areas with limited government control, TDR might also address criminal disputes.

### ***The formal justice system is used primarily for resolving criminal cases and complex civil disputes***

The formal justice system normally addresses all types of criminal cases as well as more complex or difficult civil cases. The *Huqooq*, district governor, and at times the courts, refer many civil disputes, and the civil components of some criminal cases, to TDR.

### ***Formal and informal justice sectors collaborate in many districts***

The formal justice sector and TDR elders in many districts of the east have established ties. TDR representatives usually deal primarily with the district governor<sup>2</sup> or office of the *Huqooq* (the district-level representative of the Ministry of Justice). However, in some districts TDR elders also work with other formal justice sector actors. For example TDR actors may refer a criminal dispute to the prosecutor or the prosecutor may request TDR elders' assistance with investigating a dispute in a remote area. While no legal framework for formal and informal justice sector collaboration exists, nearly all districts report some form of interaction and registration of TDR decisions with the formal justice sector occurs.

### ***TDR combines Shari'ah and customary law in resolving disputes***

More than in other areas of Afghanistan, assessment respondents noted that in various districts of eastern Afghanistan, depending on the population make-up, type of dispute, and other factors, TDR elders apply *Shari'ah* to some extent but rely primarily on the customary practice of their communities. While the application of customary law occurs in some areas by default (due to elders' limited knowledge of *Shari'ah*), elders in some districts prefer to apply the more familiar and trusted customary law to ensure compliance with their decisions.

### ***TDR faces various challenges in RC East***

Similar to other parts of Afghanistan, respondents in RC East noted that the TDR system is susceptible to outside influence by powerbrokers but occasionally also by government officials and, in some areas, by the Taliban. Another challenge to TDR identified by many disputants is elder coercion of disputants to accept TDR decisions and TDR's reliance on the use of *machalgha* (disputant deposits or bonds binding them to the TDR decision) to ensure that disputants accept TDR decisions, even if they perceive them to be unfair.

### ***Women in some areas of RC East participate in TDR forums to a limited degree***

Relative to other parts of Afghanistan, women in RC East enjoy somewhat more access to TDR as disputants as well as the possibility to participate in TDR as decision makers. Where female community *shuras* have been established, women can address disputes female disputants bring to them directly. However, as in all other areas of Afghanistan, women are very rarely, if ever, allowed to participate with

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<sup>2</sup> In many districts the district governor or *woliswal*, as the "gatekeeper" of the district center, determines which formal justice actors TDR practitioners interact with.

men in traditional *jirgas*, and in rural and conservative areas women have no opportunity to participate in TDR unless they nominate a close male relative as their representative.

### **Equality in justice outcomes in TDR**

Women in RC East face significant challenges in obtaining equality in TDR outcomes as, in many rural areas, customary law is applied. In some areas of the east, particularly in multi-ethnic and urban areas, a more prevalent application of *Shari'ah* in TDR provides women more equitable justice outcomes. Men, as well as women, at times struggle to receive fair TDR outcomes in RC East. Many male disputants complain that the misuse of *machalgha*, the influence of powerbrokers, and bias in favor of more affluent and influential community members often leave ordinary disputants with TDR decisions that they perceive as unfair.

## **TYPES OF DISPUTES**

### **Ethnic, tribal, factional, and political disputes**

As in other parts of Afghanistan, power politics in the east either causes or fuels many of the dispute types described below, particularly disputes related to land, water, and other resources. Respondents in several districts mentioned political disputes, including those over the appointment of individuals affiliated with certain tribes and ethnic groups to government posts as well as semi-official positions, such as the head of a National Solidarity Program (NSP) *shura* on the district level. Another example involves long-standing disputes between or among tribes or sub-tribes over access to land and other resources. The ability to control these resources is often seen as a way to establish or confirm power within a district. More than in other areas of Afghanistan, control over cross-border trade plays an important role in ensuring a strong political power position for a tribe or community.

### **Land**

Land disputes are among the most common dispute types in eastern Afghanistan. Even more than in other areas of the country, in many provinces of RC East a large population must share limited areas of fertile land, leading to conflicts over land distribution, boundaries, and passage rights. Respondents, particularly those in Jalalabad municipality (Nangarhar province), report a large number of cases of individuals claiming *shafa* (right of first refusal) to purchase neighboring property. Furthermore, with land having been frequently redistributed in Nangarhar province and other provinces in the east, land owners often have false, incomplete, or no ownership documentation, which allows others to challenge their ownership. The fact that many landowners have spent significant time abroad as refugees means that resolution of these disputes may be complex and difficult.

Land grabbing<sup>3</sup> also constitutes a significant challenge. For example, in Jalalabad municipality, a judge provided an estimate of "... around 70% of government land and 30% of private properties ..." having been seized by powerful individuals. In rural areas, the problem of land grabbing is also prevalent, as impoverished farmers expand onto neighboring lands and cultivate it. In some districts, *kuchi* have been fighting with farmers over rites of passage and the use of pastureland that in some cases they have used for generations but are now denied access to because the land has been sold or is now used as farmland.

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<sup>3</sup> Land grabbing in this assessment is defined as gaining possession of a piece of land by force, regardless if the person grabbing the land is retrieving his legally owned property or whether property is taken from someone who has a legal claim to the land. Frequently, multiple parties are involved in the grabbing of land belonging to the government, which is most of the time not able to expel those who have claimed the land.

Several respondents pointed out that the resolution of land disputes by applying customary practices has contributed to new land conflicts. When old disputes have been resolved by dividing the disputed land in the spirit of compromise, reconciliation, and community harmony, the dispute often reemerges when the rightful owner eventually learns of his ownership rights under the law and attempts to reclaim his land.

### **Water**

Together with land disputes, respondents reported water disputes to be the most frequent in RC East. The typical water dispute centers on access to irrigation canals and violations of water-sharing agreements between farmers. Along the main irrigation canals, the community representatives in charge of water management (known as *mirabs*) often attempt to prevent the outbreak of disputes over water. In the east, however, these individuals are not as prevalent as some other areas of Afghanistan. The overuse of the available water supply in combination with droughts has caused water levels to decline in many areas. As a result, even constant monitoring of the volume of available water and careful allocation will not be enough to meet even the basic irrigation needs of all community members. Due to the increased number of cases and their greater complexity, water disputes now tend to occur more often than in the past. The absence of dedicated individuals supervising the fair distribution of available water can result in disputes escalating into violence.

In urban and peri-urban areas, water disputes have also become more frequent as households drill individual wells rather than relying on the community well present in most areas. Depending on whether the private wells conflict with those planned by land developers or whether the wells in question are in a residential area, either a development *shura*, such as a Community Development Council (CDC), will try to resolve the issue or the *wakil-e guzar* (a liaison between the community and the government) will deal with the issue and, if necessary, refer the case to government authorities.

### **Inheritance**

Inheritance conflicts also present a major source of disputes in the east. The limited supply of fertile agricultural land or property for business development in urban areas often sparks family disputes over the use of land after the death of the owner. In the east, inheritance conflicts involving brother or cousins are reportedly frequent. Returning refugees and internally displaced persons (IDPs) complicate matters, as upon their return they demand the inheritance shares to which they believe they are entitled from estates that have been settled long ago. While women claiming inheritance after learning that they are entitled often presents significant problems in other parts of Afghanistan, respondents from districts like Puli Alam (Logar province) noted that inheritance claims have long been adjudicated according to *Shari'ah*, hence avoiding this problem. In more conservative areas, like Shinwar/Ghani Khail district (Nangarhar province), where women are accorded less rights, this still presents an issue.

### **Family and women-related disputes**

In the east, family and women-related disputes form one of the most difficult categories of disputes since, due to conservative cultural norms; these conflicts are often mediated only within families by women of the household or by close male relatives. Only when their initial mediation attempts fail and the conflict escalates are outside community members approached to intervene. Inter-family disputes may arise over abuse by in-laws of girls or women in various types of forced marriages (*baad* or *badal*), which are still practiced to some extent in some areas. Less frequently mentioned by respondents were disputes arising from elopement, infidelity (or accusations thereof), kidnapping, and wives' unhappiness in polygamous marital arrangements. Also of concern in some areas of the east is the customary practice of members of

particular tribes, such as the Shinwari, using women and girls as payment for gambling and other debts, which often results in abusive treatment of the victim and inter-family conflict. Members of the same groups are at times also known to sell women. Societal gender role expectations also foster conflict as families are criticized for their daughter's or wife's role as a schoolteacher or female *shura* member. While elders reportedly attempt to resolve these disputes by applying *Shari'ah*, some disputants demand solutions based on local customary law to restore their honor, which often puts elders in a difficult position.

### **Criminal disputes**

In the east, respondents did not name criminal disputes as a separate type of dispute, but noted that such cases usually arise from the escalation of disputes over matters related to land, water, inheritance, and the escalation of family-related disputes. Criminal matters are at times referred to government authorities, particularly when the victim's family is satisfied with a fine or prison term for the offender. Criminal offenses other than murder, such as theft and assault, might be referred by the formal justice system to the TDR system, depending on the circumstances. These could include the presence and capability of formal justice actors to handle a criminal case, the willingness of the parties to accept the decision of the formal justice sector or TDR actors, the relative power of the disputants or their supporters, and other factors.

In some areas of the east, the line between crimes that should be referred to the government and those that can be dealt with by TDR seems to be blurred. For example, in Mihtarlam district (Laghman province) there appears a distinction between intentional and unintentional murder cases. The latter reportedly often stay within the TDR system so that the parties to the conflict can be reconciled and thereby avoid the case coming under the jurisdiction of the formal justice system, while the former are normally referred to the formal justice sector. In the east, as in other parts of Afghanistan, it is common for the formal justice sector to cooperate with TDR elders to ensure that all aspects of a dispute are addressed by allowing TDR elders to deal with the civil law aspects of a criminal matter, while the formal justice sector retains jurisdiction over the criminal law aspects. Occasionally, reconciliation between parties to a criminal dispute can positively affect the ruling of the formal justice sector actors, who often take into account *nanawati* (a ritual request for forgiveness) on behalf of the perpetrator as a basis for reducing the punishment for a crime.

### **Other disputes**

Business- and resource-related disputes reportedly occur often in the large commercial hub of Jalalabad municipality (Nangarhar province) as well as in the other provincial centers and along the border with Pakistan. Commonly reported disputes types in this category include conflicts over access to electricity; rights to harvest wild pine nuts, cumin, and caraway seeds on the mountains around populated areas; distribution of harvests derived from shared land; distribution of materials provided by the government and NGOs; and unpaid debts.

Traffic accidents killing people and animals were also reported frequently by respondents throughout the districts surveyed, in particular those along the highway that connects the Torkham border crossing with Kabul.

### **Escalation, revenge**

Many of the above dispute types often escalate when not resolved immediately or when a disputant views the TDR outcome as unjust and seeks revenge. Disputes that have not been fully resolved in the formal or informal justice system can also escalate and lead to acts of revenge. In order to prevent escalation, TDR actors stressed the importance of achieving full reconciliation of the disputants and restoration of community harmony. However, respondents noted that this was sometimes difficult or impossible,

especially when powerbrokers attempt to manipulate TDR outcomes. In some areas of the east, such as in Shinwar/Ghani Khail district (Nangarhar province), the application of customary law still leads to revenge killings, although tribal elders acknowledge that the application of customary law to justify revenge killings is contrary to Afghan statutory law and *Shari'ah*.

### **Underlying factors**

The factors underlying disputes in the east of Afghanistan do not vary significantly from those in other parts of country. Respondents frequently cited illiteracy, general lack of education and awareness of Afghan law and *Shari'ah*, poverty, unemployment, scarce resources stretched thin by a growing population and harmful or unsustainable customary practice as factors underlying conflicts. A perceived lack of respect for human rights, particularly women's rights, and the welfare of the overall community are also seen as contributing factors. Even formal justice sector actors like the *Huqooq* and prosecutor of Bati Kot district (Nangarhar province) remarked that the government's inability to implement and enforce the law allows disputes to arise from violations of law.

Beyond these factors, respondents from several districts in the east also highlighted the problem of powerbrokers and their destabilizing influence, particularly with regard to violating property laws, being involved in corruption, as well as manipulation of TDR and, to some extent, formal justice outcomes.

## **JUSTICE SECTOR ACTORS AND THEIR RELATIONSHIPS**

### **TDR actors**

#### **Mediators<sup>4</sup>**

Mediators are typically tribal elders – *spingiri* in Pashto – educated people, and others respected for their dispute resolution skills and who are likely to be voluntarily selected by disputants as members of a *jirga* or representatives to a *shura*<sup>5</sup>. This position is traditionally inherited patrilineally and requires a certain age and maturity. Mediators can operate independently; act as members of a *jirga*; or belong to institutionalized, permanent *shuras* such as the now defunct Independent Directorate of Local Governance (IDLG) District Community Councils (DCC) formerly sponsored by USAID's Afghan Social Outreach Program (ASOP), district and village *shuras* that are part of the National Solidarity Program (NSP), or informal standing tribal or ethnic councils. Recently, other powerful actors who gained prominence through business connections or access to power due to their status as a militia commander have assumed the role of mediator in *jirgas*

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<sup>4</sup> "Mediator" is used here due to its frequent use in translations. The function of a mediator, elder, or *jirgamar* in resolving disputes is a combination of the roles of arbitrators and mediators in other legal regimes. As mediators, informal justice sector actors try to arrive at decisions that reconcile and are acceptable to the disputants and that restore harmony to the community. As arbitrators, they may rely on their status as authority figures to impose various forms of compensation and to order the disputants to reconcile.

<sup>5</sup> Both *jirgas* and *shuras* are TDR mechanisms that are present in the east of Afghanistan. *Jirgas* are *ad hoc* assemblies of tribal elders convened to make specific decisions or resolve a specific dispute by consensus. In contrast, *shuras* are established permanent councils of respected community members. *Shuras* are often registered with GIRoA, represent the interests of their community to other institutions such as GIRoA bodies, and are often involved in resolving local disputes. *Shuras* are the more dominant TDR mechanism in the east; Community Development Councils (CDCs), District Development Assemblies (DDAs), and Afghan Social Outreach Program (ASOP) *shuras* are present in the majority of districts in the region. For the sake of simplicity, this regional assessment generally uses the term *jirga* to refer to both *jirgas* and *shuras* that deal with dispute resolution. When appropriate, the particular TDR forum will be specified.

or *shuras*, but they are rarely held in the same esteem as traditional elders, as they are often perceived as biased or coercive and lack experience in mediation and knowledge of both customary law and *Shari'ah*.

### **Maliks and wakil-e guzar**

*Maliks*, usually appointed or elected at the village level, often take part in TDR processes, either by acting as liaisons between the community and state actors who have been called in to resolve a dispute, or by participating directly in TDR. In eastern Afghanistan, these community leaders often enjoy greater community standing than in other parts of Afghanistan and are often approached to help the individuals in their areas with obtaining government identification documents or government assistance in any other matter. In the east, they are also known to liaise with formal justice sector actors and inform them about disputes that require government attention or intervention. A *wakil-e guzar* fulfills a similar function in more urban settings. Given the high population density of some of the subdistricts in Jalalabad municipality (Nangarhar province), a *wakil-e guzar* is often responsible for only a single city block or small neighborhood. Due to their connections with the government, *wakil-e guzar* are often also asked to assist in the coordination of delivery of services such as water and electricity.

### **Shura members**

#### *IDLG District Community Councils (DCC) or "ASOP shuras"*

Many respondents mentioned the dispute resolution activities of the justice committees of the now-defunct IDLG DCCs known in some areas as "local *shuras*". Respondents noted that the membership of these district-wide *shuras* was often ethnically, tribally, and geographically representative of the district and that these *shuras* were therefore able to resolve disputes in areas where ethnic, tribal, or factional tensions had often prevented traditional TDR mechanisms from doing so. While support or at least indifference seems to prevail toward these IDLG-supported *shuras*, respondents from some districts such as Qarghayi (Laghman province) reported that they perceived the DCC as imposed and heavily affected by corruption. Therefore, they avoided engaging with this district-level *shura* and instead turned to village-level tribal elders for dispute resolution. In areas where the DCC was well regarded, the District Governor often provided an unofficial link between the DCC and the government representatives in the district, although his functions are not officially related to the DCC. Larger or more complex disputes were often referred to the DCC and its justice sub-committee.

At the time of compiling this assessment, most DCCs no longer officially existed, although in some areas the DCCs or their justice committees and their dispute resolution functions continue on an unofficial basis.<sup>6</sup>

#### *National Solidarity Program (NSP) district and village-level shura members*

In nearly all areas of eastern Afghanistan, the NSP program has established village-based Community Development Councils (CDCs) and District Development Assemblies (DDAs). These were initially intended to address only community development issues but have since emerged in many places as local dispute resolution mechanisms. In the majority of cases, when a dispute is not directly related to a development issue, disputants approach these *shuras* to obtain information about how and where best to

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<sup>6</sup> The DCCs have 40-45 members and usually include three sub-committees: justice, development, and peace/reconciliation/security. In many of the districts where DCCs are now defunct, the justice sub-committee members continue to work.

have their dispute resolved. Elders of these *shuras* often volunteer to assist disputants in taking their case to formal justice sector actors or to explore the option of forming a *jirga* or having the dispute heard by a *shura*. In some cases, disputants might ask the *shura* they first approach, as a whole or some of its most prominent members, to resolve their dispute. Many NSP *shuras* members have received conflict mediation training and are also well connected to district government officials. As a result, disputants reported satisfaction with the dispute resolution capacity of NSP *shura* members on several occasions. In some areas of the east, a significant number of women are involved in women's NSP *shuras*. In urban and peri-urban areas in particular, female disputants to some degree have been able to approach female *shura* members for advice and assistance in resolving their disputes. In this way, a few female disputants have been able to access a TDR mechanism directly, rather than having to ask male family members to represent them. While the prevalence of female NSP *shuras* is reportedly not as widespread in the east as it is in the north of Afghanistan, female disputants have more direct access to TDR through them, particularly in Jalalabad municipality (Nangarhar province).

## **Women, family, and youth**

### *Women*

Women still have only limited roles as TDR actors in eastern Afghanistan. Although some are active in TDR mechanisms, as described above, the majority of women tend to be involved in dispute resolution only within their homes or in their immediate neighborhoods. In less conservative areas, women have been known to participate in *shuras* and women's groups that serve as referral mechanisms for female disputants or even as a dispute resolution mechanism for minor conflicts. In more conservative communities or remote areas, women are largely prevented from participating in dispute resolution due to strict local cultural prohibitions against women appearing in public or interacting with unrelated men.

Regardless of the environment, wives of prominent *jirgamars* and religious leaders often play small but important roles in traditional TDR processes. For example, they may be asked to investigate a dispute among female community members and inform their mediator husbands of the results, to be shared with a *jirga* or *shura*, or act as witnesses in TDR proceedings. Prominent and respected older women in the community (known as *spinsary* or "gray-headed women") often participate in the traditional Pashtun practice of a ritual request for forgiveness (known as *nanawati*), when women from an offender's family, together with community elders and local religious leaders, go to the home of the victim's family to ask forgiveness to end the animosities.

### *Family members*

Respondents described family members as often being the first to mediate a dispute within the family, especially if it involves the women of the household. The family will call on outside mediators only if the dispute cannot be resolved within the family. Even if a *jirga* is convened to resolve a family dispute, its members are often relatives, in part to keep information about a family's affairs private. Women are normally not allowed to represent themselves in TDR proceedings; hence, a close male relative, known as a *mahram*, is usually required to act as a representative. Families are also instrumental in *nanawati* to reconcile disputants, in part because the ritual requires the families of the disputants to prepare elaborate meals for each other as part of the reconciliation process.

### Youth

The participation of youth in TDR varies among communities in the east and is usually less frequent than in the north of Afghanistan. Typically, only sons of mediators observe the *jirga* process in preparation for a future role. Particularly talented young men occasionally play an active role in resolving disputes, either as replacements for a father who is a prominent tribal elder or because they have already inherited the title of tribal elder upon the death of their father.

### Religious leaders

As in other parts of Afghanistan, religious leaders play an important role in dispute resolution in the east. However, few religious leaders, particularly *mullahs*, are perceived to have sufficient education in Islamic law to allow them to effectively monitor the correct application of *Shari'ah* in TDR proceedings. Respondents in the east noted that when village *mullahs* are part of a *jirga* their recommendations might therefore be based more on customary law than on *Shari'ah*. Most community members reported that the presence of religious leaders, especially if these religious actors are *ulema* or *mawlawi*, lends legitimacy to TDR decisions and therefore makes the decisions more acceptable to disputants and thus also easier to enforce. In some areas of southeast Nangarhar province, individual respondents claimed that while a *mullah* might be present in some *jirgas*, it is no secret that the majority of the decisions are based on the particular customary law of the tribe that dominates the area and that there is little or no effort to gear decisions toward *Shari'ah* compliance.

### Community residents

As in the other regions of Afghanistan, residents of urban areas and villagers are often the first to intervene in disputes and to report them to village elders or government authorities. Residents of the area where a dispute arises might also assist TDR elders and formal justice sector actors in the investigation of the dispute. A large proportion of village residents in the east have become involved in dispute resolution through the region's many *shuras*, such as the NSP *shuras*. By becoming involved with such TDR forums, villagers and, to a lesser extent, residents of urban areas have received training in basic legal rights and dispute resolution techniques. These factors have reportedly contributed to fewer conflicts growing complex as community members help resolve disputes before they escalate.

### Government officials

Government officials in the east are sometimes asked to participate in TDR in their capacities as tribal elders, particularly when the government official is from the district where the dispute occurred and has long-standing ties to that community. Some officials who acknowledged having been *jirga* members or having participated in TDR in another capacity noted that they were under the impression that government officials were not formally allowed to do so. Some government officials reported that they did not participate in TDR directly, but only helped to organize *jirgas* to resolve difficult disputes initially referred to formal justice sector actors. Government officials who reported some involvement in TDR also remarked that their involvement gave the *jirgas* greater credibility, thereby helping with implementation of the decisions. Relative to the north or the south of Afghanistan, government officials in the east appear to be more involved in TDR as members of a *jirga*, in a supervisory function, or just lending support for a decision made by a *jirga* (see Provincial and District Governors, below, for more detail).

## State actors

### Provincial and District Governors

According to respondents from a majority of the districts surveyed in RC East, Provincial and District Governors are involved to at least some extent in the justice sector and often have close relationships with TDR elders. While provincial governors are involved in very big disputes, they are rarely involved in local or district level dispute resolution.

Particularly in areas where not all formal justice sector actors are present or have assumed their posts only recently, TDR elders generally refer disputes first to the District Governor, who are often perceived as gatekeepers to the formal justice sector and government generally. The District Governor hence acts as the disputants' main point of contact for referral of disputes to the *Huqooq* or the courts. In many cases, District Governors simply refer cases to elders rather than involving the *Huqooq* or courts. The dominant role of the District Governors in TDR in the east becomes clear from a few examples. In Qarghayi district (Laghman province), the District Governor was reportedly dictating to disputants which tribal elders to put on a *jirga* or would appoint himself as the *jirga* "supervisor". While in some districts direct involvement of the District Governor was appreciated because it lent legitimacy to the *jirgas* convened by TDR elders, in Qarghayi district the *jirgamaran* perceive the District Governor as meddling and interfering with TDR.

### Provincial and District Chiefs of Police

In the east, Provincial and District Chiefs of Police are often more involved in TDR when compared to the north and to some extent to the south, particularly when tribal elders call upon them to provide assistance in arresting an accused wrong-doer or investigating a case. In Jalalabad municipality (Nangarhar province), the respective Chiefs of Police in the sub-districts are often the first to be approached to stop a dispute and to begin the investigation. Once the District Chief of Police is involved, he may refer the dispute to the prosecutor's office, continue to investigate the case, make arrests, and assist in the enforcement and monitoring of court verdicts as well as TDR decisions. The latter usually happens only if a formal justice sector actor or the Provincial or District Governor has asked or instructed the District Chief of Police to do so. In the case of TDR decisions, enforcement assistance and monitoring by police officials may also take place if TDR elders have registered a TDR decision with government authorities.

### Courts

The courts in the east deal primarily with criminal cases and rely heavily on the TDR system to address the majority of the disputes pertaining to civil law and, in some cases, even criminal matters. Referrals of such disputes to tribal elders often occur either through the office of the *Huqooq* or the District or Provincial Governor. In districts like Bati Kot (Nangarhar province), the courts also register some *jirga* decisions, although respondents did not specify whether the courts review the *jirga* decision for compliance with Afghan law before accepting it for registration. While most government officials are happy to refer cases to TDR elders and then to register their decisions, many admitted that in parts of the east this was also done out of necessity because the courts lacked the capacity to resolve all the cases brought to them due to a shortage of professional staff (not all authorized positions are filled), and the reported lack of administrative support from the Ministry of Justice. Respondents in the east also made it clear that they generally perceived district and provincial courts to be corrupt and slow. Nevertheless, in spite of these perceived shortcomings, the majority of respondents in the districts surveyed in the east recognized that the courts are where criminal matters and complex civil disputes should be addressed. Many disputants noted that land disputes, which often require evaluation of old documentation and the issuance of new official

documents, are seen as a government matter and therefore are perceived as falling under the courts' jurisdiction.

### **Prosecutors**

While prosecutors are reportedly present in many districts in the east, respondents rarely mentioned them, most likely because disputants have limited interaction with this formal justice sector actor. Some respondents noted that, after an initial investigation, the police usually handed over their findings to the prosecutor who would then pass the matter to the courts, the *Huqooq*, or the District Governor. In a few remote areas or areas under the control of anti-government elements and therefore inaccessible to the prosecutor and his staff, such as parts of Logar province, TDR elders reported having assisted the prosecutor's office in investigating disputes.

### ***Huqooq* department**

The *Huqooq* is the Ministry of Justice branch at the district level responsible for mediating minor civil disputes or referring disputants to the appropriate justice mechanism. If the office of the *Huqooq* determines that a dispute includes aspects pertaining to criminal law, the case will be referred directly to the formal justice sector; if the case is a civil matter, the disputants are usually given the choice of having the dispute resolved through TDR or the formal justice sector. The office of the *Huqooq* also reviews and registers some TDR decisions, whether or not the *Huqooq* had originally referred the dispute to the elders. Generally better educated, the *Huqooqs* in RC East garner greater community respect and appear to play a more significant role in advising disputants on the appropriate justice forum and in referring disputes than their counterparts in the south.

RLS-I monitoring and evaluation data collected in districts in RC East shows that the rates of both TDR decision documentation and registration are relatively high in comparison to other regions of Afghanistan.<sup>7</sup> While the documentation and subsequent registration of TDR decisions is comparatively high in the east, the number of decisions brought to the *Huqooq* for registration that are actually reviewed for legal compliance before being accepted for registration is the lowest of all three regions (north, south, and east).<sup>8</sup>

As in other parts of the country, some respondents in the east claimed that they perceived *Huqooq* representatives to be corrupt and cited, for example, demanding of bribes from disputants before referring their cases to the formal justice sector or when TDR elders or disputants attempt to register decisions with the office.

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<sup>7</sup> For example, in the east, 57% of elders from six districts in three provinces reported that in their communities, documentation of TDR decisions takes place; where documentation takes place, elders estimate that 69% of all decisions are documented. For survey districts from all three regions (RC North, RC South and RC East), on average 48% of the elders reported that decisions are documented; where decisions are documented, elders estimated that 58% of all disputes in their community are documented. Furthermore, of all the decisions reported as documented in the RC East survey districts, on average only 48% of the elders reported that these decisions are registered with government officials; where registration takes place, elders estimated that 49% of the documented disputes are registered. Across the three regions (RC North, RC South and RC East) 28% of elders noted that documented decisions are registered; where decisions are registered, elders estimated that registration occurs for 42% of all documented disputes.

<sup>8</sup> RLS-I monitoring and evaluation data showed that when TDR decisions are registered, they are reviewed for compliance with Afghan law or *Shari'ah* about 51% of the time in the east, but 76% of the time in the north and 67% in the south.

## **Department of Women’s Affairs (DoWA)**

While a few respondents mentioned that DoWA representatives are present in the provincial capital of Nangarhar, no further information was provided about DoWA's effectiveness and role in dispute resolution or whether representatives are active in other provinces or districts.

### **Perceptions: formal justice system**

In most of the east, the formal justice system is used primarily to address criminal matters and complex or difficult non-criminal disputes. According to respondents, this is because the formal justice sector is perceived as able to implement criminal punishments and enforce complicated decisions in non-criminal matters. Several respondents mentioned that disputants’ primary concerns with the formal justice system are the extensive time it takes to consider and resolve cases; the perception that formal justice system is plagued by corruption; and the perception that power and money rather than evidence are considered in reaching decisions. The absence or inaccessibility of formal justice sector actors in some areas forces disputants to turn to TDR, even when they would have considered taking a dispute to formal justice in spite of these concerns.

While the formal justice system is popular and widely used in the provincial centers, particularly in Jalalabad municipality (Nangarhar province) and surrounding districts, many rural residents expressed some mistrust of the formal justice system, citing unfamiliarity with its procedures and the perception that formal justice sector actors do not understand or appreciate the customs of the rural population. In particular, representatives from Shinwar/Ghani Khail district (Nangarhar province) noted that they are suspicious of the formal justice sector when it comes to decisions concerning family disputes. In such disputes, the respondents expressed a preference to apply customary law exclusively. In addition, several courts are unable to enforce their decisions effectively in rural areas while TDR decisions, if fair and just to all disputants, are enforced effectively through voluntary compliance and community pressure. Even several formal justice sector actors from various districts noted that, in light of corruption and long waiting periods before court decisions, they understood the desire of disputants to engage with the formal justice sector only in cases, such as a murder, that require government involvement.

### **Perceptions: informal justice system**

The perception of TDR in general is positive among elders, disputants, and many government officials in the east. Among disputants, TDR elders are often perceived as pillars of their community who aim to find the best solutions for disputants and the community; many disputants reported that they were not sure whether formal justice sector actors apply the same standards to their decision-making. While respondents occasionally accused the informal justice sector of bias or corruption through the misuse of *machalgha*, many reported that similar problems exist in the formal justice sector and that disputants are asked multiple times for bribes by formal justice sector actors. The majority of formal and informal justice sector actors and many disputants identified the connections to and extensive knowledge of their communities as primary strengths of TDR elders and the informal justice system. Respondents also value the TDR system for its accessibility in remote areas. Many disputants and elders cited TDR’s cost-effectiveness and speed in adjudication as distinct advantages over the formal justice system. Perhaps most fundamentally, respondents cited TDR's role in reconciling disputants and maintaining community harmony as an essential traditional function - something the retributive formal justice system is usually ill-equipped to address.

## Current status of TDR

In many districts of the east, the TDR system continues to play a major role in the provision of justice. According to most respondents, TDR continues to be used to deal with nearly all non-criminal matters and selected criminal matters, where either the formal justice sector is not easily accessible or in cases where formal justice actors have agreed to resolve a criminal dispute together with TDR elders, with the courts resolving the criminal law aspects and TDR elders resolving the non-criminal aspects (e.g., compensation to the victim's family and reconciling the disputants). Although it varies by district, several tribal elders noted that there was less misuse of *machalgha* in the past. Elders who reported increased misuse of *machalgha* explained that some *jirgamaran* are suspected of manipulating justice outcomes so that disputants are likely to reject a decision. When disputants reject a decision, the *machalgha* can be retained by the *jirga* and is, reportedly, often distributed among the *jirgamaran*. Given that *jirgamaran* often rely on the instrument of *machalgha* as an enforcement mechanism, it can be difficult to discern intentional misuse from the overreliance on *machalgha*.

## Formal-informal justice sector collaboration

There are both institutionalized and *ad hoc* linkages between the formal and informal justice systems in most districts of eastern Afghanistan, mostly because this region has a long history of interaction between the government and community elders. According to respondents from various districts in RC East, the quality and quantity of interaction reported varies widely from district to district. However, most respondents agreed that the referral by the informal justice sector to the formal justice sector of disputes involving criminal matters usually works well and that registration or endorsement of TDR decisions by a government representative has also become routine in many, but not all, districts. In some districts, where cooperation was reported, it was described as only very limited. However, few respondents could explain the exact procedure for referral and registration, which indicates that procedures for these interactions vary not only between districts but also depend on who approaches the government in each district and on the willingness of specific district formal justice actors to collaborate. Respondents also noted that, when the District Governor or key formal justice sector actors change, most elders have to work to reestablish procedures that worked well under the previous official.

## Women as dispute resolvers

Relative to the south, women in the east play a greater role in dispute resolution, but they are still restricted from direct participation in *jirga/shuras* processes. Although women in the east play a significant role in dispute resolution within their immediate families and neighborhood and are frequently able to support their husbands, acting as *jirgamaran*, by functioning as liaisons between female disputants and the *jirga*, they cannot sit on *jirgas*. However, in selected areas of the east, particularly the more urbanized and culturally progressive, women are able to serve on development shuras (e.g., CDCs) and other community councils that occasionally address disputes. While the east is ahead of the south in women's roles as dispute resolvers, there are nevertheless fewer geographic areas in the east where women are given opportunities to participate in public life, including serving on *shuras*, when compared to the north.<sup>9</sup>

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<sup>9</sup> With regard to women's participation in TDR, the east is significantly ahead of the south but behind the north. Fifty-eight percent of respondents mentioned women's participation in TDR in the east, but about 80% of the respondents in RLS-I's survey in the north said women could participate in TDR. Only 15% of respondents in the south reported women's participation in TDR. For the purposes of this assessment, women's participation in TDR defined not only as direct participation in a *jirga/shura* as a decision

## Outside influences

Throughout the surveyed districts in RC East, tribal elders, disputants, and female respondents reported that outside influence is present in many TDR proceedings, but the extent of that influence varies widely. Women in particular reported that TDR is plagued by corruption and comes under pressure from outsiders such as powerbrokers, commanders, and wealthy community members. Tribal elders, particularly those who participate in *jirgas*, defended themselves against these accusations by stating that they had little choice but to do as told when under threat from third parties. Disputants usually noted that internal forces attempting to manipulate *jirga* proceedings by bribing *jirga* members to favor a particular outcome presented a greater problem. Responses indicated that Taliban or government influence on TDR is minimal in most locations.

## TDR PROCESS AND PRACTICES

### Selection of forum

Similar to the south and the north, several factors determine the selection of forum for dispute resolution in the east: how TDR elders come into contact with the dispute, the type of dispute, and the accessibility of, and disputants' general preference for, the various dispute resolution mechanisms.

In the east, particularly in rural and remote areas, tribal elders and community members are usually the first to intervene in a dispute. Unless it concerns a family or women-related matter, tribal elders usually volunteer to address the dispute through a *jirga* or by taking the dispute to the district center to gain endorsement from the district governor or a formal justice sector actor (usually the *Huqooq*) to resolve it. Respecting traditional cultural norms, disputants and family members usually attempt to resolve family-related disputes within the family. If that fails, a *jirga* is usually convened consisting of elder family members and possibly the village *malik* (usually related to the families) to prevent sensitive information from being shared with outsiders. Smaller disputes involving fighting between children and neighbors are sometimes resolved by respected elder women in the community. Criminal cases are usually reported to, and subsequently dealt with by, the formal justice sector, except in remote or insecure areas where formal justice sector actors are unavailable. In such situations TDR elders usually address both civil and criminal matters.

Either one or both disputants may initiate formation of a *jirga*, in which case they are usually free to select the members at will, unless powerbrokers, commanders, or other influential individuals interfere with the selection process (see Selection, below). If a dispute is first brought to the District Governor or the *Huqooq*, they first determine whether it is solely a civil matter or also contains criminal elements. In the former case, the government officials usually refer the dispute to a trusted elder or a group of *jirgamaran* for resolution, generally with the disputants' consent. In the latter case, the government officials might refer the civil aspects of the dispute to TDR. In both cases, when government officials have decided how the dispute should be handled, some disputants have reported reduced freedom in selecting a forum, but that is not the case in all areas or with all types of cases. If the formal justice sector actors refer the dispute to a particular elder or group of elders (i.e., *shura*), the disputants are usually free to select the remaining *jirgamaran* and, in some cases, are free to reject the government's suggestions. Given the fluid nature of

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maker, but also includes representing oneself as a disputant, giving testimony as a witness to a dispute, providing background information to TDR elders, or acting as a character witness for one of the disputants.

state-TDR interactions and lack of formal guidance, these determinations are often influenced by individual personalities and power dynamics in each district.

While government officials are involved in selecting the forum for resolving some disputes in the east, in many of the more remote or less secure areas disputants do not involve government authorities at all.

In some cases government officials will refer a difficult dispute to the local DCC *shura* justice committees if it is still operating in the district. In ethnically and tribally diverse areas, government officials or disputants often refer disputes to specific tribal or ethnic *shuras*. For example, in Kulangar, a multi-ethnic village of Tajiks and Pashtuns in Puli Alam district (Logar province), there is a joint *shura* with an ethnically mixed membership that addresses all types of disputes arising in the community. In other areas, while there is no established *shura*, disputants, at times and as needed, invite elders from outside their immediate area to participate as impartial *jirga* members.

In the urban area of Jalalabad municipality, the forum selection process usually differs from that in other areas of the east. Disputes are usually first reported to the Afghan National Police, who then conduct a preliminary investigation before referring the case file to a formal justice sector actor. The formal justice sector actor will then examine the case to determine the appropriate forum to resolve the dispute. Formal justice sector actors from the Jalalabad municipality sub-districts 1 and 4 report that they must often persuade disputants to take their case to a TDR forum, as the accessibility and acceptability of formal justice in Jalalabad municipality makes it convenient for disputants to have their dispute resolved by the formal sector. In most other areas outside of Jalalabad municipality, with a plethora of TDR forums available and active state-TDR cooperation, parties to disputes pertaining to civil law usually resolve them through TDR but then have the decisions documented and registered with the formal justice sector.

### **Selection of TDR members**

Except in a few areas, the *ad hoc jirga* system prevails in the east, meaning that *jirgas* are not standing bodies and that disputants may freely select *jirga* members. Disputants are also allowed to request that any *jirga* member selected by the other disputant be removed from the *jirga* and replaced with someone acceptable to both sides. Normally, disputants select family members, relatives, trusted community members, and tribal elders who have good reputations for solving the particular type of conflict. While reportedly not common in all districts surveyed in RC East, a majority of respondents noted that many *jirgas* usually include at least one religious scholar to try to ensure that the outcome complies with *Shari'ah*. Male disputants are usually able to select any *jirga* member they trust, unless powerbrokers, commanders, or other influential individuals interfere in the process. Female disputants are often forced to rely on a close male relative, such as a brother, father or husband, to represent them in the *jirga* or select *jirga* members on their behalf. In the more urban and peri-urban areas it is often possible for women to select their own representative either directly or through a male relative.

Across the districts surveyed in RC East, there are aspects of TDR member selection that appear peculiar to specific districts and provinces. For example, in Nurgal district (Kunar province) respondents report that powerbrokers and members of the Taliban occasionally participate in *jirgas* in the areas where they have influence and if a case is of particular interest to them. Respondents from the same district also reported that if a case had been referred to TDR by the *Huqooq*, members of that office sometimes observe the *jirga* proceedings. In Dara-I-Nur district (Nangarhar province), respondents noted that if a case is very complex, members of the Provincial Council might also participate, while in Puli Alam district (Logar province)

district officials may join a *jirga* in their capacities as tribal elders. The respondents from Logar province also noted that it is even more common than in other areas of the east for government officials such as the District Governor or the District Chief of Police to participate in *jirgas* outside of the provincial center.

In urban environments such as Jalalabad municipality (Nangarhar province), disputants have the option to approach an established *shura*, such as those initiated by UN-Habitat<sup>10</sup>. These *shuras*, like district-level DCC *shuras*, usually have established membership; hence, disputants have very little power to veto members. Disputants are, however, often able to appoint additional representatives to the *shura*-led dispute resolution process. In a few areas, such as Jalalabad municipality and directly adjacent districts, female *shuras* are present and women disputants can approach them directly for dispute resolution. *Ad hoc jirgas* with a female membership do not exist in the east; however, some loosely formed groups of elder women dispute resolvers (known as *spinsary* groups) are present in some areas.

In the case of *shuras*, the number of members who address a given dispute is usually fixed and does not vary based on the type or the difficulty of the dispute. *Jirgas*, on the other hand, can vary significantly in size and membership, depending on the disputants' tribe or ethnic group, the type and complexity of the dispute, and other factors. For example, respondents from Puli Alam district (Logar province) noted that tribes and ethnic groups have a large impact on the size of a *jirga*: the Mangal and Zazai tribes reportedly form larger *jirgas* with up to 40 members, while Kharotai, Stanikzai, and Tajiks tend to prefer smaller *jirgas* with around 20 members. The challenge of feeding all *jirga* members is also often given as a limiting factor for the size of the TDR forum.

## Venue

A few respondents remarked that the TDR venue selection is an important factor in setting up a *jirga*. Some interviewees from Puli Alam district (Logar province), for example, noted that *jirgas* in their district are usually held either at mosques or guesthouses or at the homes of prominent tribal elders, powerbrokers, or other community members who can provide venues large enough to accommodate the *jirgamaran* and are able to provide food, etc. Respondents noted that if a *jirga* meets at a private home it is more likely that the justice outcome can be manipulated by the host in favor of the disputant most closely associated with the host, or even in favor of the host (when he has a personal interest in the outcome) and to the disadvantage of the disputants. All respondents welcomed mosques as venues for dispute resolution. In some areas, *jirgamaran* are allowed to use the District Governor's compound, which is perceived by a majority of disputants as a neutral. A few interviewees expressed the belief that meeting in the district center in the vicinity of government representatives encourages elders to cooperate more closely with the formal justice sector actors with respect to registration and enforcement of the resulting TDR decision.

## Authority

As in other regions of Afghanistan, a hallmark of the TDR process in the east is that all parties grant authority (*waak*) to the TDR body to decide their dispute. This obliges the disputants to accept and implement any decision made by a forum that has been granted full or binding authority. Unlike in the north or the south, it is possible in the east to grant only partially binding authority to a TDR forum. Disputants

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<sup>10</sup> UN-Habitat *shuras* were established to assist the poor residents of Kandahar municipality (Kandahar province), Jalalabad municipality (Nangarhar province), and Mazari Sharif municipality (Balkh province) to rebuild their environments. The program is founded on the premise that Afghans, be they returnees, IDPs, widows, demobilized soldiers, or vulnerable persons, have the capacity to assist in their own recovery, provided they have security and active support from authorities.

can stipulate, for example, that they will accept a decision only if it is based on *Shari'ah*. In the east, the negotiation of and payment by a disputant of a deposit (*machalgha*) to the *jirga* often accompanies the grant of authority. Whether *machalgha* is mandatory to complete the grant of authority varies by local TDR practice, dispute type, disputant character, and other factors. For example, in Dara-I-Nur district (Nangarhar province), it is not always necessary to provide *machalgha* along with the grant of authority, while in Jalalabad municipality (Nangarhar province) respondents reported that it is obligatory to do so in order for the *jirga* to start addressing a dispute. The practice of *machalgha* exists in Kunar province as well, but is referred to as *banda*. Although a written authority letter is usually considered evidence of the disputants' intention to cooperate with a *jirga* and to accept and implement its decision, nearly all respondents confirmed that it is usually the high *machalgha* deposits that disputants are required to make that ensures they will abide by the *jirga's* decision. This contrasts with the south, where elders emphasize the need for effective and impartial mediation skills to promote voluntary compliance in lieu of deposits.

### **Evidence and other information**

Once the disputants have granted decision-making authority to a TDR forum, the *jirgamaran* start to collect information about the dispute and invite witnesses to provide testimony. Frequently, any documents related to the dispute, particularly property deeds or land use agreements are reviewed by the *jirgamaran*. As the *jirga* members develop an understanding of the nature of the dispute, the disputants are allowed to present their perspectives on the case. In most areas, especially in remote and rural parts of districts, TDR elders are in charge of making the necessary inquiries into the history and cause of a dispute. In Jalalabad municipality, however, formal justice sector actors take the lead in collecting evidence and information with regard to disputes they have submitted to TDR. According to Jalalabad respondents, this is largely due to the fact that in urban areas state actors refer disputes to TDR after they have determined that the nature of the dispute makes it appropriate for TDR. However, TDR elders in urban areas also conduct their own investigation. Respondents repeatedly stated that in most areas the majority of *jirga* members might already have some knowledge about a dispute in their community. Nevertheless, TDR elders nearly always conduct at least some investigation in order to ensure that all elders make a decision based on the same information and that the decision-making process appears impartial and unbiased.

### **Deliberative process**

The TDR deliberative process and its duration usually depend on the number of parties to the dispute, the complexity of the case, the type of TDR forum and its size, and to some extent the willingness of the disputants to accept the decision without reservations.

Disputants in the east usually grant full decision-making authority to the TDR forum, which then begins to collect information and to start deliberations. According to respondents, the deliberative process can take up to six months for a complex conflict or one that involves more than two disputant parties, especially where compensation for individuals killed must be determined. A simple dispute might be resolved in one day. Respondents reported two common scenarios for the deliberative process when it involves some form of corruption or manipulation. For example, respondents from Nurgal district (Kunar province) explained that TDR elders in their community often drag out the decision-making process in order to force the disputants to provide them with additional complementary lunches. While in this case the decision may ultimately be fair, the additional financial burden on disputants and the delay in arriving at a decision contributes to disputant dissatisfaction with the TDR process. In some cases, particularly when the TDR elders have collected large deposits (*machalgha*) from the disputants, the elders may make rapid decisions

without much effort to find a just and fair solution or intentionally manipulate the decision to force one or both disputants to reject the decision, thereby allowing the elders to keep the *machalgha*.

### **Sources of law**

The majority of respondents noted that while the primary objective of customary TDR is to find a solution that the disputants and, by extension, the community find acceptable, thereby reconciling the parties and restoring community harmony, efforts have recently been made to apply *Shari'ah*, which emphasizes rights and in some cases contradicts traditional reconciliatory mechanisms such as *baad*.

Female disputants and other women mentioned that while a trend is developing toward more *Shari'ah*-compliant TDR decisions, customary law continues to be applied more often than not, as many TDR elders lack an understanding of Islamic law or simply, in a few cases, prioritize reconciliation through TDR, even by harmful means (e.g., *baad* or land "compromises"), over *Shari'ah* and human rights (including women's rights, property rights, etc., depending on the dispute type and the measures taken to resolve it). In Shinwar/Ghani Khail district (Nangarhar province), for example, female respondents noted that the likelihood of a TDR decision being *Shari'ah*-compliant increases significantly with the presence of a religious scholars. Similarly, in areas where formal justice sector actors frequently review TDR decisions before registering them, respondents observed a trend toward more *Shari'ah*-based TDR. In spite of these positive trends, female respondents noted that TDR still faces significant challenges in avoiding negative customary practices like *baad* and *badal* that have been used traditionally in the Pashtun communities of the east to settle disputes involving severe injury or death. Although many cases in which *baad* would have been used in the past are now resolved by compensating a victim's family with money or land, in many districts the complete abolition of the practice remains a challenge.

In areas where collaboration between the informal and formal justice sectors is well developed, TDR is moving away from addressing all aspects of a dispute, including the criminal offenses, toward dealing only with the civil aspects, while the state adjudicates the criminal aspects. This cooperation often results in the effective resolution of a conflict as community harmony is restored through the TDR process while the formal justice sector applies the appropriate criminal punishment to the perpetrator. Respondents noted that this approach is particularly appreciated by community members when the formal justice sector, in determining the criminal penalty, takes into account decisions or actions resulting from the TDR process, such as forgiveness granted to the offender by the victim's family through *nanawati*.

### **Documentation and enforcement**

The majority of respondents in the east explained that TDR decisions are usually documented, unless the decision concerns small disputes, in which case the decision is announced orally. The documentation of the decision is mostly informal, consisting of a note of the decision accompanied by signatures or fingerprints of the disputants and key *jirga* members. While documentation in some form seems fairly common, registration of TDR decisions with government officials appears to remain largely *ad hoc* and unsystematic. In some districts of Nangarhar province, for example in Dara-I Nur, respondents noted that most *jirga* decisions with respect to disputes originally referred to the *jirga* by the state are registered with the state. If a powerbroker has been involved in a TDR decision or controls the area where the conflict occurred, the decision is usually recorded and the powerbroker receives a copy.

Enforcement of TDR decisions in the east is different from enforcement practices in the north or the south. While TDR forums throughout Afghanistan generally strive to reach decisions acceptable to both disputant parties and are therefore likely to be self-enforcing, respondents reported that *jirga* members in the east sometimes try to force disputants to accept decisions they are unhappy with and may not respect. *Jirgamarans'* admitted reliance on *machalgha* in the east, which deemphasizes mediation and disputant ownership of the TDR process and outcome relative to the south and north, contributes to this dynamic. The common use of *machalgha* often ensures that disputants have no choice other than to accept a decision even when they perceive it as unfair or biased; the fear of losing the often large sums of money or property given as deposits force disputants to comply. Respondents in some districts, such as Kuz Kunar district in Nangarhar province, also noted that it is not unheard of for disputants who reject a TDR decision to have their houses burned down or even to be threatened with expulsion from the community.

### **Appeal of TDR decisions<sup>11</sup>**

While respondents indicated that in theory it is possible to appeal a TDR decision, most noted that disputants rarely choose to do so to avoid losing the deposits, or *machalgha*, they made to ensure their compliance. If a disputant seeks to appeal a TDR decision, many respondents noted that formal justice sector actors would normally hear the appeal. In some districts of Nangarhar province, it is reportedly also possible to convene a second *jirga* to review the first *jirga's* decision, support it, or reconsider the dispute. A few female respondents also noted that when a *jirga* decision was not based on *Shari'ah*, they would appeal the decision to a court in the hope of getting a *Shari'ah*-compliant decision. In the districts of Laghman and Logar provinces that RLS-I surveyed, approaching the Taliban to appeal a TDR decision was also reported.

### **Equal access to justice and fairness of decisions**

A majority of respondents acknowledged that men and women do not generally have equal access to the informal or the formal justice sector. However, particularly in the more urban and peri-urban areas of the east, female disputants reportedly have greater access to TDR, as these areas usually have women's community *shuras* where female disputants can consult directly with female elders about how to have their disputes addressed without the intervention of a male representative. Women from more rural areas or from communities with very conservative cultural values have very limited access to justice due to cultural restrictions that prohibit their interaction with unrelated males. Women in very conservative areas such as the Shinwar/Ghani Khail district (Nangarhar province) also report receiving less favorable justice outcomes in TDR, as these communities apply conservative customary laws that accord few rights to women. The majority of respondents from other areas of RC East noted that, over the last decade, a trend has developed toward the application in TDR of Afghan law and *Shari'ah*, which grant more rights to women relative to customary law, particularly with regard to inheritance and family law matters.

More so than in the north and the south of Afghanistan, respondents in the east acknowledge that access to justice and just outcomes are manipulated through the requirement to furnish a disputant deposit (*machalgha*) and the corrupt practices associated with it. Unlike in the north and the south, *machalgha* is a fairly common practice in the east. Disputants who cannot provide this deposit are often unable to have their disputes resolved through TDR. Many respondents blame the central role that *machalgha* plays in

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<sup>11</sup> Under this heading, options for an appeal are discussed that do not actually constitute an appeal according to a western judicial definition but rather explore possibilities for disputants to get a final decision other than the decision issued by the first TDR mechanism that they have approached.

corruption in TDR and the associated manipulation of justice outcomes. A significant number of interviewees throughout the districts surveyed in the east mentioned that TDR elders make decisions that disputants perceive as unjust in order to retain the deposits when the disputants are unwilling to accept the decision. Respondents also complained of the influence of powerbrokers on TDR decisions as well as of bias based on a disputant's ethnic or tribal affiliation. Asking elders from third party tribes or ethnic groups to help adjudicate inter-tribal and ethnic conflicts reportedly often circumvents this bias. Despite these shortcomings of TDR, respondents noted that the TDR system is preferred by a majority of the population in the east for its quick, fair, and cost-effective solutions, particularly when compared to the formal justice system.

## THE ROLE OF THE TALIBAN IN DISPUTE RESOLUTION

The presence and role of the Taliban in dispute resolution varies greatly across RC East. Respondents from Logar province noted that as the Taliban gain more control in an area, their role in and influence over TDR increases. Respondents in other areas of RC East report that the Taliban play only a very limited role in providing justice, as they are not strong enough to deal with disputes effectively. Of those interviewees who mentioned the involvement of the Taliban in the justice sector, some described the Taliban justice system as brutal and un-Islamic, while others lauded the fact that it was swift and effective. Respondents from Kama and Rodat districts (both in Nangarhar province) noted that they had no desire to return to the harsh enforcement mechanisms employed by the Taliban in the past.

In Nurgal district (Kunar province), respondents noted the most extensive involvement of the Taliban in the east in providing justice services. One tribal elder explained that the Taliban "... don't take part with us in all *jirgas*; however, if there is a dispute in an area where the government doesn't have access, usually there are Taliban and if there is a dispute in that area, the Taliban will definitely take part in that *jirga* as that is in their jurisdiction." Another respondent stated that "I haven't taken part in resolving a dispute that also had Taliban participating in the *jirga*; however, if there is one I am not afraid to take part in a *jirga* where Taliban exist because Taliban are not monsters they are just human like us and they say nothing to us nor do we [that would discourage interaction]." This appears to indicate that the Taliban participate in TDR but do not necessarily usurp or override the process.

In Puli Alam district (Logar Province), about half of the respondents noted that they consider the Taliban justice system as an alternative to TDR and the formal justice sector. Respondents believe that "... the people are happy with the decisions of Taliban because they decide in the light of *Shari'ah* and as we all are Muslims all our decisions and activities should be according to Islam anyway." Several interviewees said that the Taliban not only "... decide without *machalgha* and *waak* but also do not take bribes ..." and that they do not favor powerbrokers or rich and influential people. A member of the government judiciary noted that "... fortunately, this year fewer people have applied to the Taliban compared to the previous years when all people were taking their cases to them." Tribal elders noted that the Taliban system enjoys about the same level of popularity as TDR in remote areas of the district where the Taliban have a strong influence.

One government official from Mihtarlam district (Laghman province) noted with concern that greater engagement of tribal elders with the formal justice system might create security issues for these elders and other elders in remote parts of Laghman province, where the Taliban reportedly still have some power to interfere with TDR.

## ANNEX I: FORMAL JUSTICE ACTORS IN RLS-I PHASE 1, PHASE 2 AND PHASE 3 DISTRICTS IN RC EAST <sup>12</sup>

Name	Position	District
<b>KUNAR PROVINCE</b>		
Sikandar Shah	District Chief of Police	Nurgal
Mohammad Wali	District Governor	Nurgal
Fazal Rabi	Judge	Nurgal
Ahmad Zia	Prosecutor	Nurgal
Enayatullah	District Governor	Chawkey
Abdul Wahid	Executive Administrator of the District	Chawkey
Abdul Wahid	Judge	Chawkey
Fazal Rabi	Prosecutor	Chawkey
<b>LAGHMAN PROVINCE</b>		
Najeebullah	Prosecutor	Mihtarlam
Amiullah	Judge	Mihtarlam
Khalil ul-Rahman	District Chief of Police	Mihtarlam
Barat Gul	Head of the <i>Huqooq</i> Office	Mihtarlam
Matiullah	Head of Primary Court	Qarghayi
Mohammad Nasir	Attorney	Qarghayi
Painda Mohmad	Head of the <i>Huqooq</i> Office	Qarghayi
Samiullah Khan	Executive Administrator of the District	Qarghayi
Hafizullah	<i>Amir Qariajat</i> (Head of Villages)	Qarghayi
<b>LOGAR PROVINCE</b>		
Said M. Naeem "Khalwati"	Head of the <i>Huqooq</i> Office	Mohammad Agha
Sharifullah	Prosecutor	Mohammad Agha
Mir Said Ahmad	Judge	Mohammad Agha
Abdul Hamid	District Governor	Mohammad Agha
Gulab Mohammad Khateer	Head of the <i>Huqooq</i> Office	Puli Alam
Abdul Qayoom Noorzai	Attorney	Puli Alam
Abdul Hameed Najoomi	Head of Provincial Appeals Court	Puli Alam
Mohammad Munib Saadat	Head of Provincial Primary Court	Puli Alam
<b>NANGARHAR PROVINCE</b>		
Mashoq Khan	District Governor	Acheen
Esa Khan	Executive Administrator of the District	Bati Kot
Esmatullah	Attorney	Bati Kot
Matiullah	Judge	Bati Kot
Wahid Gul	Head of the <i>Huqooq</i> Office	Bati Kot

<sup>12</sup> This information from the RLS-I field offices in Logar and Nangarhar provinces is based on the interaction of RLS-I field staff with the formal justice actors present in the RLS-I program districts of Phase 1, Phase 2 as well as the first tranche of Phase 3. This information is current as of January 2013.

Name	Position	District
<b>NANGARHAR PROVINCE</b>		
Baz Gul	<i>Amir Qariajat</i> (Head of Villages)	Bati Kot
Mohammad Omar	<i>Amir Qariajat</i> (Head of Villages)	Shinwar/Ghani Khail
Haji Mir Baz Khan	Executive Administrator of the District	Shinwar/Ghani Khail
Mohamad Zubair	Prosecutor	Shinwar/Ghani Khail
Qyamuddin	Head of the <i>Huqooq</i> Office	Shinwar/Ghani Khail
Haji Zulmay	District Governor	Shinwar/Ghani Khail
Mohammad	Prosecutor	Shinwar/Ghani Khail
Mohammad Imam	Judge	Shinwar/Ghani Khail
Jan Mohammad	Prosecutor	Dara-I-Nur
Mohammad Akbar	Head of the <i>Huqooq</i> Office	Dara-I-Nur
Mohammad Asif	Executive Administrator of the District	Dara-I-Nur
Fazal Haq	Judge	Dara-I-Nur
Nasihullah	Communications Department	Dara-I-Nur
Mujiburrahman	Head of the <i>Huqooq</i> Office	Jalalabad municipality
Qazi Mohammad Rahim	Head of Civil Court	Jalalabad municipality
Qazi Abdullah	Deputy of Attorney General's Office	Jalalabad municipality
Aminulhaq	Head of the Police Station <i>Nahiya</i>	Jalalabad municipality
Habib Safi	Head of Police Station <i>Nahiya</i>	Jalalabad municipality
Abdul Ghafar	Attorney	Kuz Kunar
Hijrat Ullah	Head of the <i>Huqooq</i> Office	Kuz Kunar
Salih Mohammad	<i>Amir Qariajat</i> (Head of Villages)	Kuz Kunar
Gul Sharif	Judge	Kuz Kunar
Haji Abdul Ghafoor	Head of the <i>Huqooq</i> Office	Rodat
Ghulam Rafiq	Prosecutor	Rodat
Abdul Ghafoor	District Chief of Police	Rodat
Abdul Intezar	Executive Administrator of the District	Rodat
Hazrat Khan	District Governor	Rodat
Ibraheem	District Chief of Police	Kama
Lal Mohammad	Head of the <i>Huqooq</i> Office	Kama
Noor	Executive Administrator of the District	Kama
Abdul Qahir	Judge	Kama
Shafiq Ullah	Prosecutor	Kama
Mohammad Qasem	Judge	Surkh Rod
Bahaul Khan	Head of the <i>Huqooq</i> Office	Surkh Rod
Mohammad Waris	Prosecutor	Surkh Rod
Habib Safi	Deputy District Chief of Police	Surkh Rod
Mohammad Zaher	Head of the <i>Huqooq</i> Office	Bihsud
Shams Agha	Deputy Head of the <i>Huqooq</i> Office	Bihsud
Humayoun	Staff Member of the <i>Huqooq</i> Office	Bihsud
Mirza Ali	Deputy District Governor	Bihsud
Khan Mohammad	<i>Amir Qariajat</i> (Head of Villages)	Bihsud
Nik Mohammad	District Court Judge	Bihsud
Abdul Mahfooz	Prosecutor	Bihsud