

The Resolution of Land Disputes



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1 Project Context

Afghanistan's justice institutions have made strides in extending services throughout the country and improving citizens' access to justice. Despite this progress, in much of the country, especially rural areas, community-based dispute resolution (CBDR) bodies, such as jirgas and shuras, continue to play a vital role in helping community members peacefully resolve disputes.

The Government of the Islamic Republic of Afghanistan recognizes the important role that CBDR plays in ensuring that communities can access justice, while also helping lessen the burden on the court system. In its National Justice Sector Strategy the government committed to studying this issue and developing strategies to ensure that CBDR decisions are respected, provided they comply with “Islamic law, [the Afghan] Constitution, and human rights.” In local communities, CBDR providers are likewise eager to understand how they can effectively coordinate with government officials. Local residents also want to understand how to protect their property rights, including those obtained through CBDR processes. Finally, many women have expressed a desire to ensure that they are treated fairly and given standing in CBDR processes.

The following CBDR Guidelines incorporate Afghan law and CBDR best practices in a document targeted at CBDR providers. The CBDR Guidelines detail the best methods to resolve land disputes, which are both the most common sort of dispute in Afghanistan and one that, when left unresolved, can escalate into violent confrontations. The CBDR Guidelines also lay out how CBDR providers can effectively link with the Government while promoting the just and equitable settlement of disputes. The CBDR Guidelines in turn include best practices that help ensure that the rights of all citizens, especially women, are promoted and protected.

The process of developing the CBDR Guidelines began when TetraTech and The Liaison Office (TLO), an Afghan NGO with long experience in CBDR, brought together roughly 25 CBDR providers, 15 women's leaders and ten government officials in Jalalabad for a series of CBDR Forums. TLO moderated participant discussions at the CBDR Forums on a variety of topics such as the necessary and proper content of customary land documentation, how to investigate a land dispute, and how to ensure that the rights of all interested parties, especially women, are respected in inheritance disputes. Forum participants also discussed how to most practically link CBDR with the state justice system and how to ensure that CBDR processes respect the rights of all users, especially women. The opinions and views expressed by the participants form the basis of the CBDR

Guidelines, which were additionally presented to and approved by the CBDR Forum participants. As such, it is important to emphasize that while TLO and TetraTech played a role in documenting the CBDR Guidelines, the content was determined and approved by community members.

The following CBDR Guidelines first outline provisions of Afghan law that encourage CBDR, and then highlight CBDR best practices.

2 Community Based Dispute Resolution in the Afghan Legal System

Multiple provisions of Afghan law recognize CBDR as a legitimate form of dispute resolution. Under Afghan law, CBDR decisions can have the same status as private contracts and in some instances the same effect as court decisions. Understanding how CBDR providers can most effectively cooperate with the courts and other government bodies can help ensure that CBDR decisions are respected.

Afghan law also imposes some important limitations on what type of matters are appropriate for CBDR. In particular, serious violent crimes such as murder or kidnapping should be reported to government officials, such as the police. Afghanistan's Constitution and its laws also reflect the views of the Hanafi mahdhab and protect the right of women to own property and receive their inheritance rights. Thus it is important to ensure that the rights of women are upheld when undertaking investigations and settling land disputes.

Below you can find some guidance on legal provisions that demonstrate that both CBDR and the rights of women are already a recognized part of Afghan law. Understanding these laws can help you when deciding how to cooperate with government officials that might be in your area.

2.1 Afghanistan Civil Code

The Afghan Civil Code lays out the basic laws that all Afghans should follow in their relations with each other. It encourages people who have personal disputes to find compromises to solve their problems, especially when there is disagreement over who owns land. When people decide to ask CBDR providers to help them find a just compromise, the decision of CBDR providers can be the same as a contract of sale, which is a private agreement between two people that a court can enforce. CBDR decisions can also have the same status as court decisions, if the dispute is registered with the courts and the judge recommends that the case be referred to a CBDR body, such as a jirga or a shura. Here are some of the relevant legal provisions from the Civil Code

- **Article 1297:** Reconciliation (compromise) is a contract which resolves a dispute and ends hostility on the basis of disputant's mutual consent.
- **Article 1306:** When one person claims a specific property and other person agrees, reconciliation (compromise) over the specified property is valid and this shall be deemed as a sale contract.

- o **Comment:** These articles mean that CBDR decisions can gain legal status as valid contracts that the court will recognize. However, keep in mind that all parties must voluntarily agree to the CBDR decision, and courts will probably not accept a CBDR decision for some types of cases, such as criminal cases.

- **Article 1313:** When reconciliation (compromise) is satisfactorily concluded, the dispute ends and what is agreed upon (monetary compensation, etc) becomes the claimant's property which could not be returned to the defendant.
 - o **Comment:** If the settlement is the claimant's property, he owns it. In turn, if the other party refuses to pay the claim, he is illegally holding the claimant's property, as if he had stolen it from the claimant.

2.2 Code of Civil Procedure

Afghan law provides for clear links between CBDR and the court system. This is similar to many countries where people with disagreements are encouraged to solve them through other ways before using the court. Working in cooperation with the courts helps ensure that the decision is very strong and will be recognized by the Government.

To increase the chances that the court recognizes a CBDR decision the two parties should put their claim in writing and make sure it is recorded with the court, which can then ask the parties to use CBDR to settle their dispute. The parties can conclude a settlement, with the aid of CBDR providers (referred to as conciliators in the Code of Civil Procedure) before or during a case: the earlier the settlement, the better.

- **Article 230:** The court shall recommend the assignment of conciliators in cases where the court senses willingness on the part of the parties for settlement.
 - o **Comment:** If the parties register a dispute with the court, the judges may recommend that they try to settle the dispute through a CBDR process. The judges may also recommend mediators that the parties can use (although the parties remain free to choose other mediators). The parties should also tell the judge if they would like him to refer the dispute to CBDR.
- **Article 231(1):** If the parties to the claim settle their differences prior to the commencement of the court proceeding, their settlement is put in writing and their dispute is brought to an end.
- **Article 231(2):** If the settlement takes effect during the court proceedings, the settlement is recorded in the decision and a judgment is issued allowing the settlement and an end to the dispute between the parties.
 - o **Comment:** If a trial is going on, and the parties reach an agreement to settle their dispute, the judges must make that settlement part of his decision. This procedure will give the settlement the same legal status as a court judgment.

2.3 Law on Elimination of Violence against Women

Afghanistan's constitutional and statutory laws protect the rights of women and are based on the views of the Hanafi mahdhab. This includes the right to inherit land and to be

treated equally in land disputes. This is so important, that if you don't respect women's property or inheritance rights, you could even go to jail. Several laws establish the rights of Afghan women. The importance that the government places on protecting women's rights is reflected in the Law for the Elimination of Violence against Women.

- **Article 33:** A person, who prevents a woman from inheriting her share in an inheritance, shall be sentenced to short-term jail, not more than one month.
 - o **Comment:** Women have inheritance rights under Afghan law. If you prevent a woman from exercising her legal rights, you might go to jail.
- **Article 34:** A person who grabs (takes over without permission) a woman's private property, or prevents her from using it, shall be sentenced to a short jail term, not more than three months, and the woman's full rights over the property shall be reinstated.
- **Article 38:** If a person intentionally denies his/her familial relationship to a woman in order to deprive her of her inheritance or other Sharia and legal rights, and if a court subsequently finds a familial relationship, that person shall be sentenced to a short prison term of not more than 6 months.
 - o **Comment:** A woman's property belongs to her, in the same way that a man's property belongs to him. If you deprive a woman of her property, or try to deny her property rights, you could go to jail.

3 Best Practices for Resolving Disputes

It is important to try to ensure that CBDR processes respect the laws of Afghanistan and help people resolve their issues. As just discussed, the Afghan Civil Code and Code of Civil Procedure help make this possible, especially by allowing CBDR decisions to be recognized as contracts or as a part of a court decision.

At the CBDR Forums, Government officials and community leaders discussed CBDR issues and agreed that the following best practices will help CBDR providers improve how they can resolve disputes and help them link their efforts with the Afghan state. Particular attention was given to land disputes and the question of how to protect the rights of women.

The CBDR Guidelines now introduce best practices that CBDR providers can follow when people ask for a dispute to be settled, including: the investigation of disputes (with a separate sub-section on inheritance disputes); the proper content of customary documentation; and how to finalize decisions and ensure they are enforceable.

3.1 Dispute Consideration

There are important steps you can take when a case is first brought to you, even before the investigation of the dispute begins.

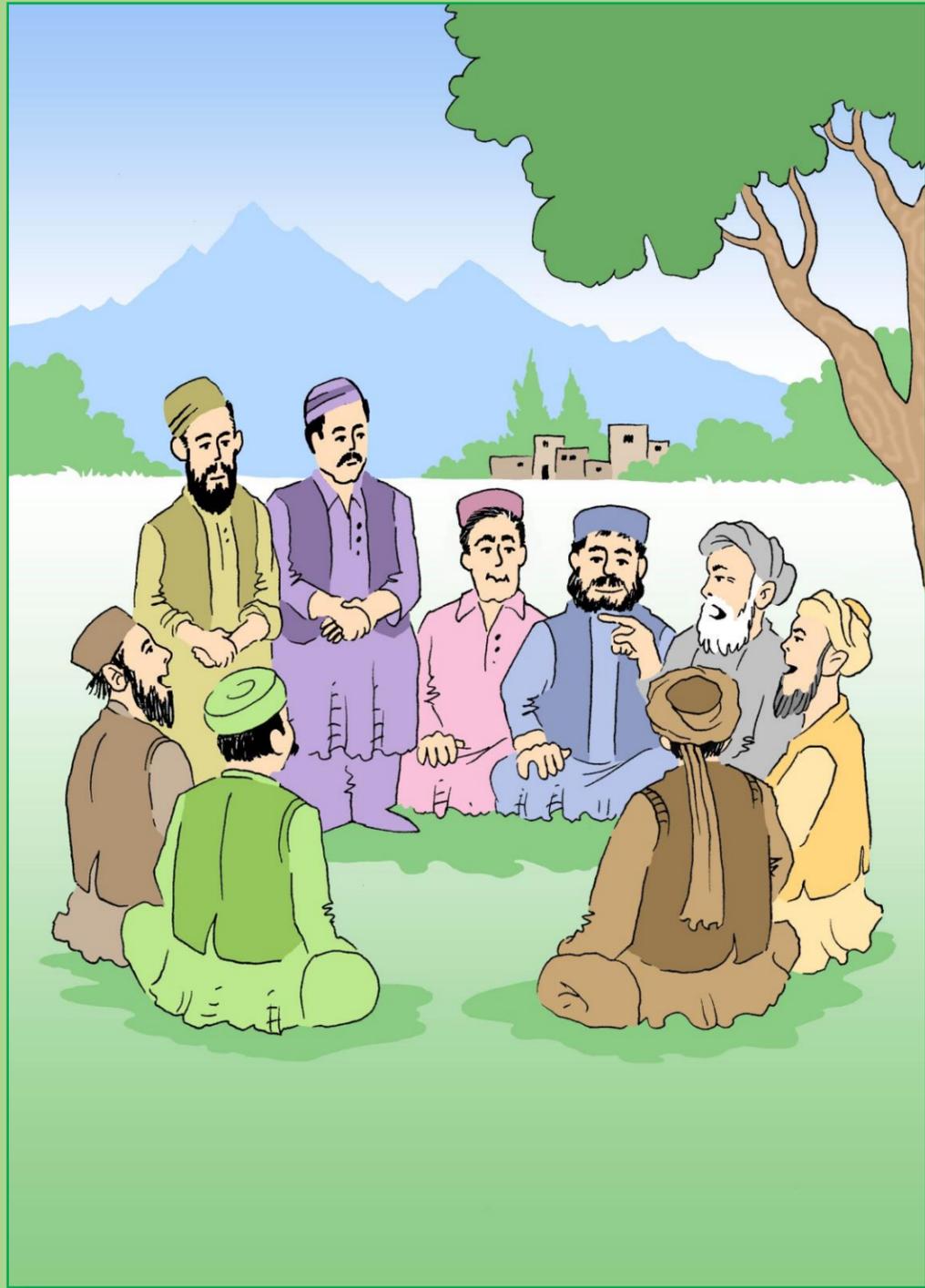
As soon as you are approached by the dispute parties, you should explore answers to the following questions:

- Who are the dispute parties and how are they related to one another?
- What is the dispute about? If it is about land, what kind of land is it (farmland, desert, etc.)?
- Do your best to ensure that your decision will be respected by the courts. This means you should try and make sure that you are respecting the relevant articles of the Afghan Civil Code and Code of Civil Procedure. One way of doing this is to register your dispute with the court and then have both parties ask the court to refer it for CBDR.
- If you are not sure how to make sure that the courts will recognize your decision and authority as a CBDR provider, you can ask a judicial officer or other government official, whether active or retired.
- When a case is referred to you by a government authority (District Governor, Chief of Police, Judge, Huquq Department) for CBDR, liaise closely and coordinate your efforts with relevant official(s).

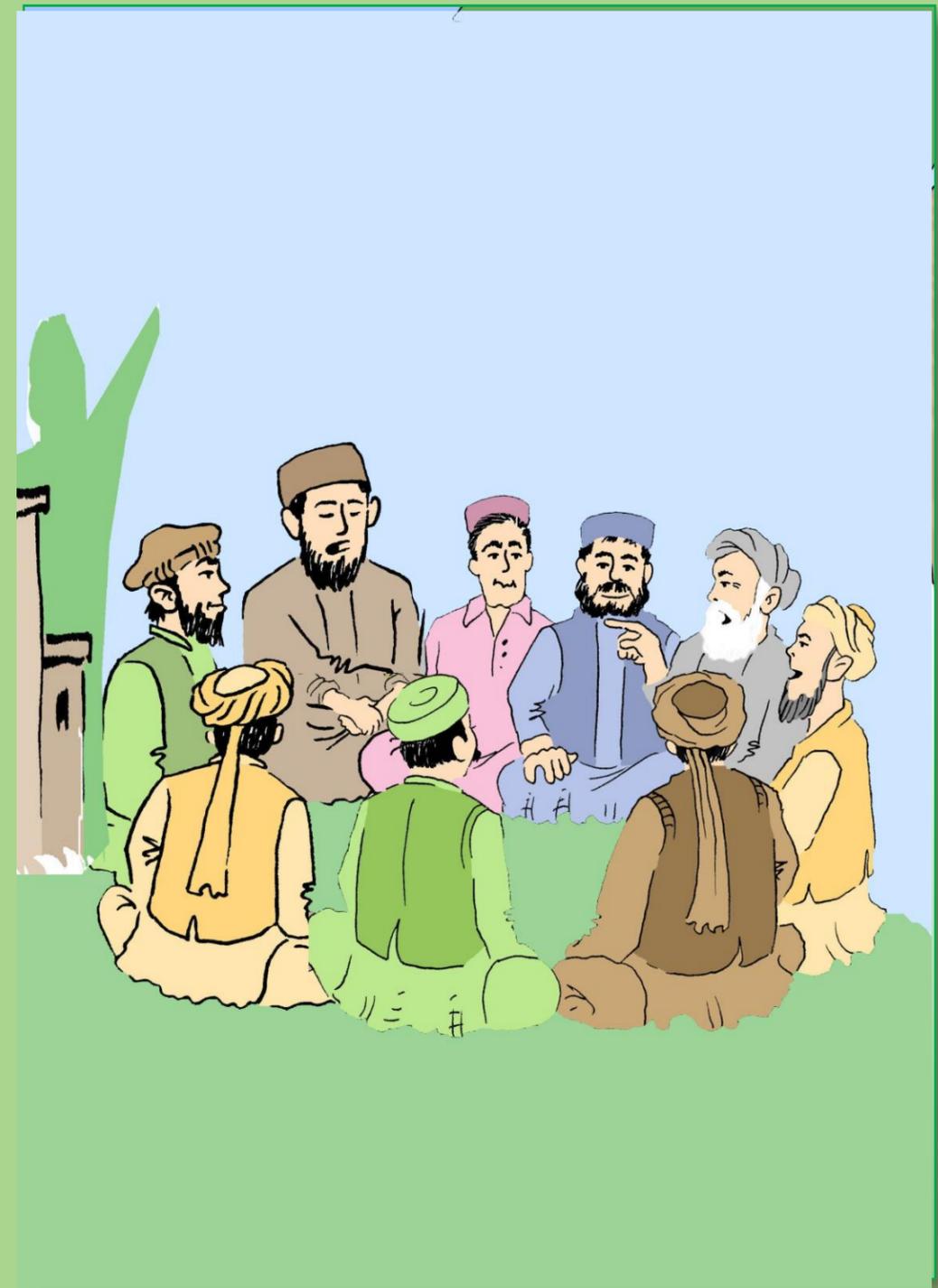
3.2 Dispute Investigation

Once you are asked to consider a dispute, you will need to thoroughly investigate it. That means talking to a large number of people and examining all available documents. In many cases, it will also mean getting information from, or deciding disputes that involve, women. This section provides some guidance on how to do that respectfully.

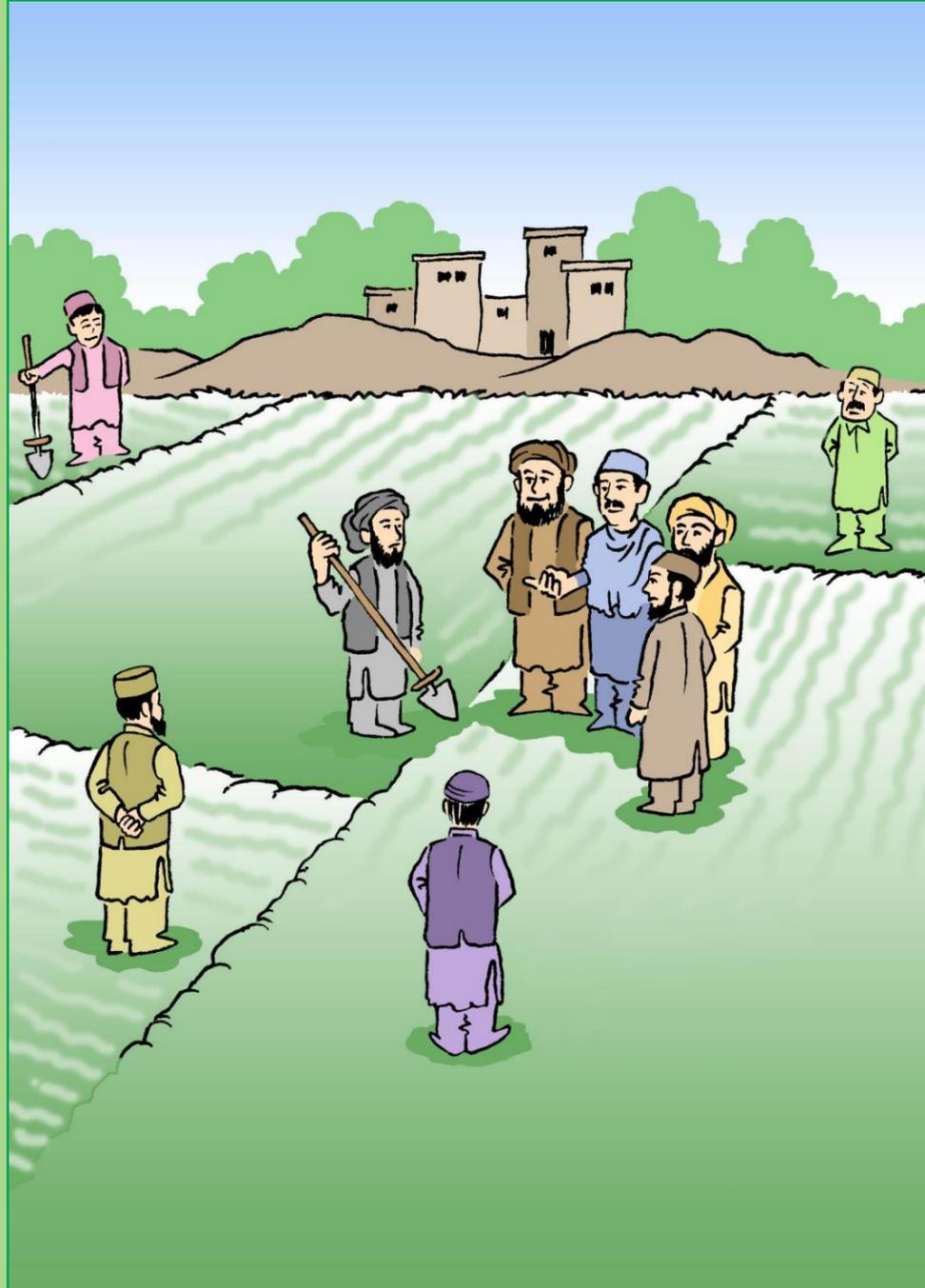
First, when you are investigating a land dispute, you should get information from:



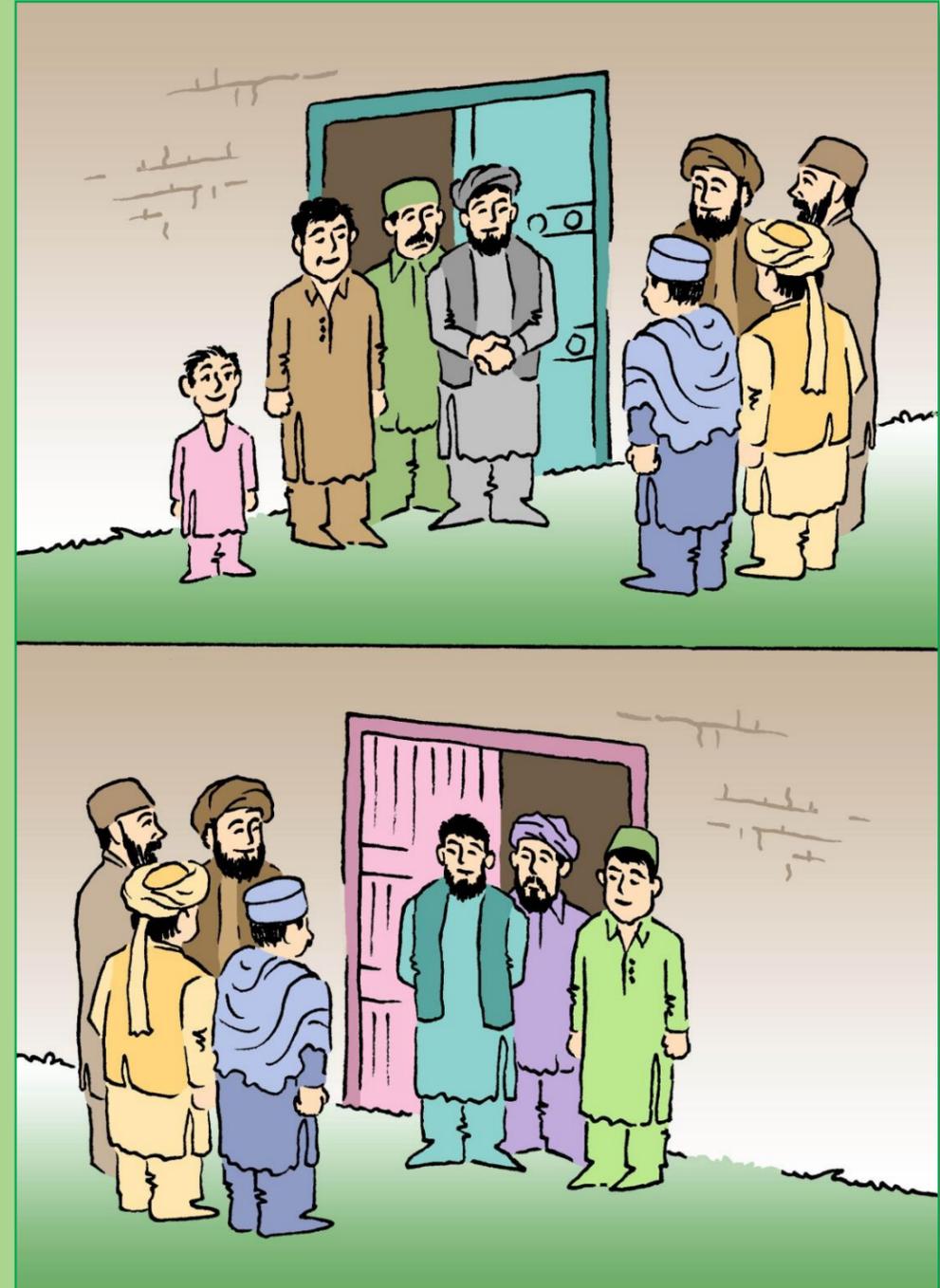
• The dispute parties;



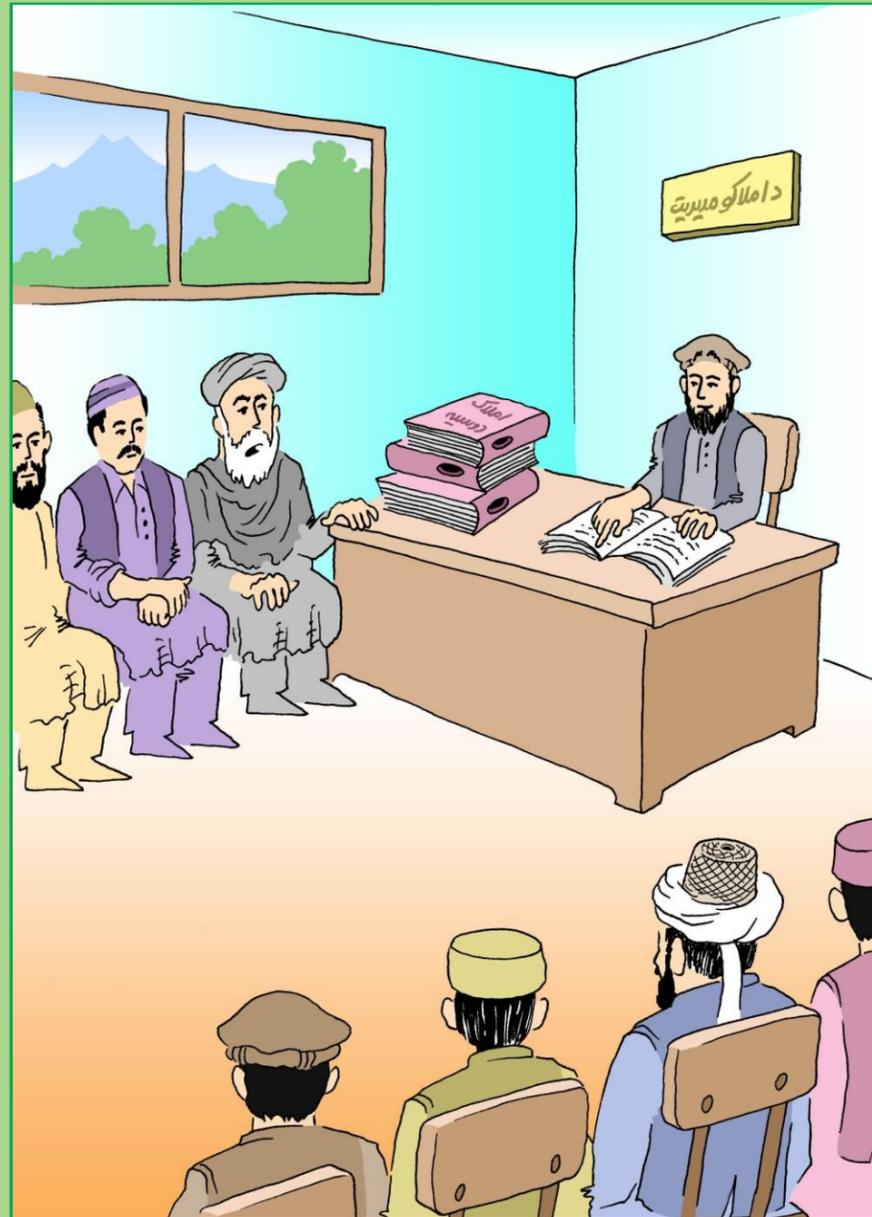
• Local elders closest to the dispute;



· Neighbors of the dispute parties;



· Relatives of the dispute parties;



- Local government officials, especially the Cadastre or other bodies holding land records;



Examine all documentation of ownership, if available (recent documentation with complete information is the most useful; old, damaged or incomplete documentation is less useful).



- If you think official state documentation has been forged, take it to the relevant government office - such as the archive/documentation department of the provincial Court of Appeals and/or to the relevant department at the municipality;



- If you think customary documentation has been forged, take it to the local elders who allegedly made it.

There are also many instances that there are disputes over the inheritance of land. When this occurs it is important to remember that women have the right to inherit property. As a result, there are some additional steps that need to be taken when deciding on inheritance matters, and you will want to work with religious leaders, women's leaders, and government officials to determine the correct rules. For these situations you should do the following at the beginning of your investigation:



- Talk to all adult family members within the extended family: both to those who might be eligible get an inheritance, and to those who might not;
- Talk to both men and women;



- Identify a muharam for talking with women in the family directly;

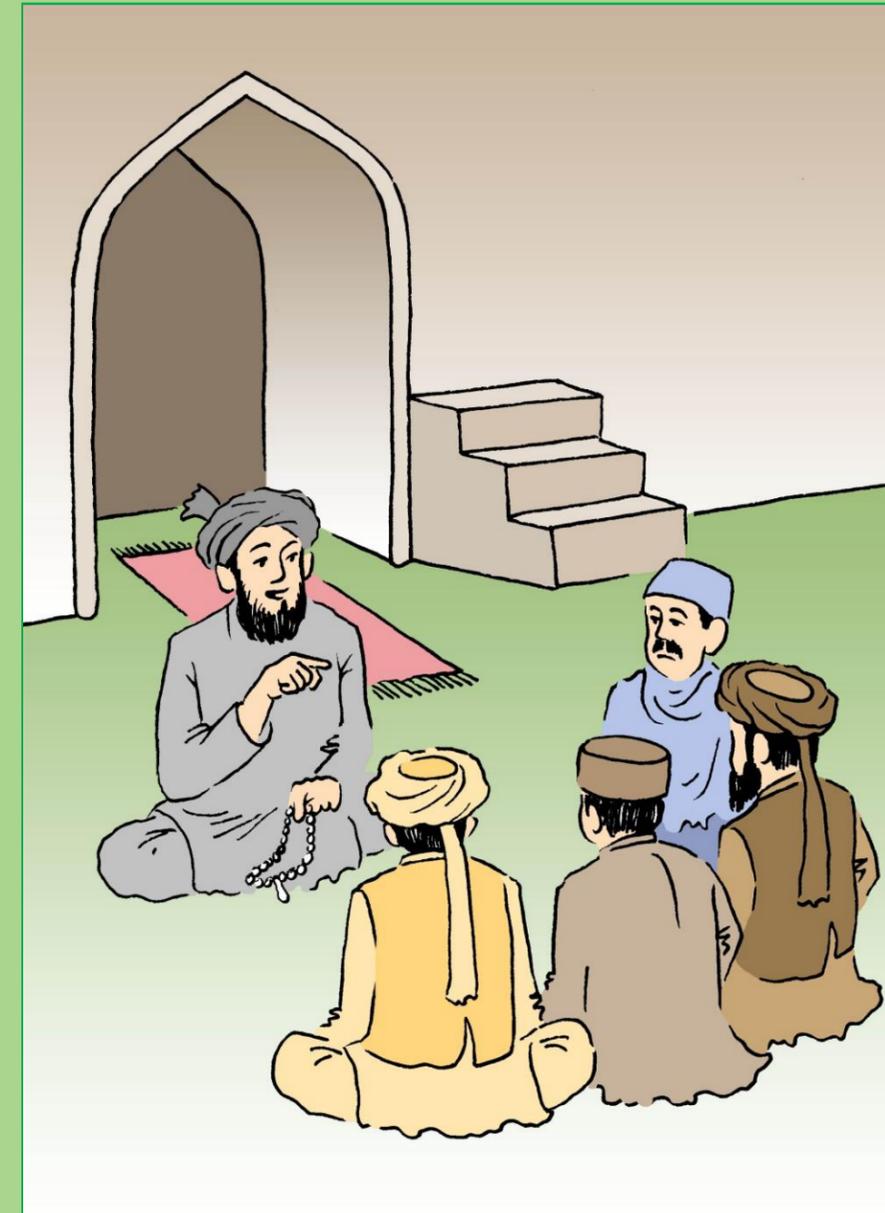


- If there is no trustworthy muharam, you might want to interview women from behind a curtain.

In turn, once you have completed your initial investigation of the dispute, the advice and actual involvement of local experts on inheritance law/rules need to be sought. Consider the points listed below carefully:



- If you are in the city, consult with relevant government officials. These officials might have records and shed light on facts on an inheritance related dispute.
 - Many lawyers and government officials, such as judges, will also know the Afghan law pertaining to inheritance.

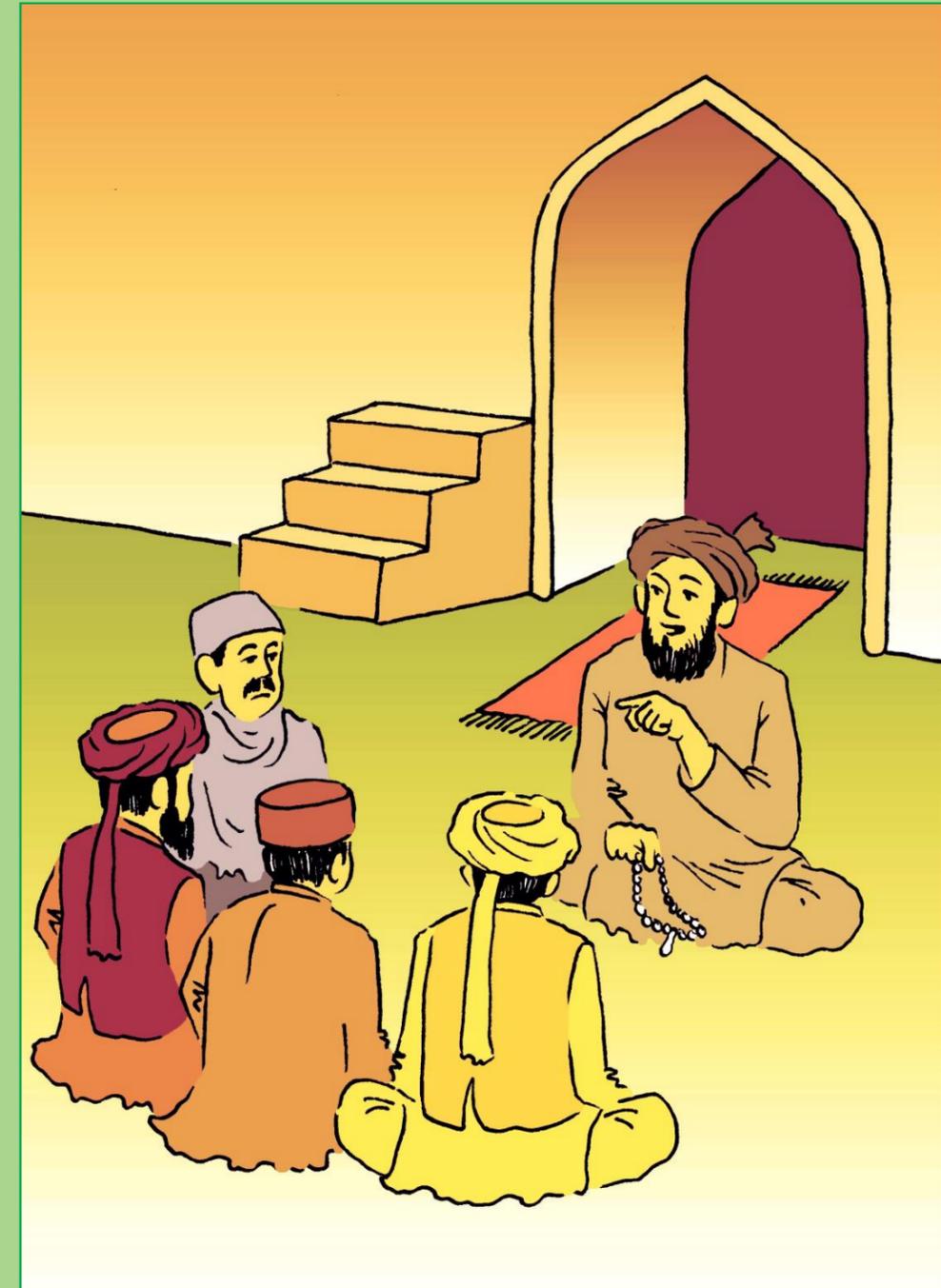


- In addition, both in urban centers and the countryside you can consult with local mullahs or other religious scholars;
 - But only established religious scholars would know the proper rules of inheritance and their application.



Be aware that good practices in relation to women's inheritance disputes are very similar to those for men's.

- In urban areas, try to work with the Nangarhar Department of Women Affairs or female civil society leaders to help investigate women's inheritance cases;



- In rural areas, try to work with local ulama who are known to have expertise on inheritance law;

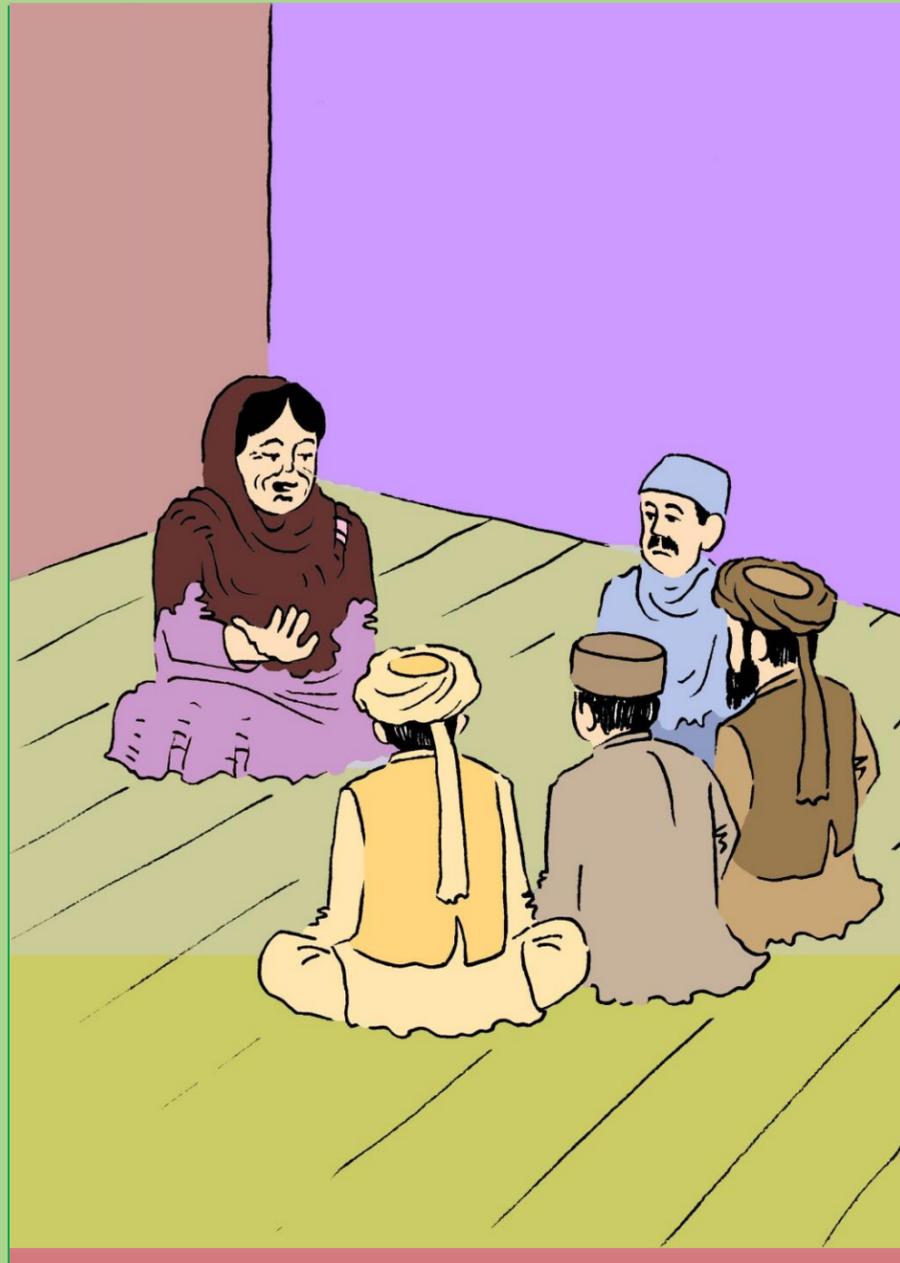


3.3 Negotiation

After you've investigated the case, you will probably need to negotiate with the parties to reach a mutually acceptable outcome. The negotiation should be fair to all parties and take their interests into account. It is especially important to ensure that everyone is treated justly. Always remember that women and individuals from minority groups have full rights and are due the same justice as other Afghans.

At the negotiation phase ensure that:

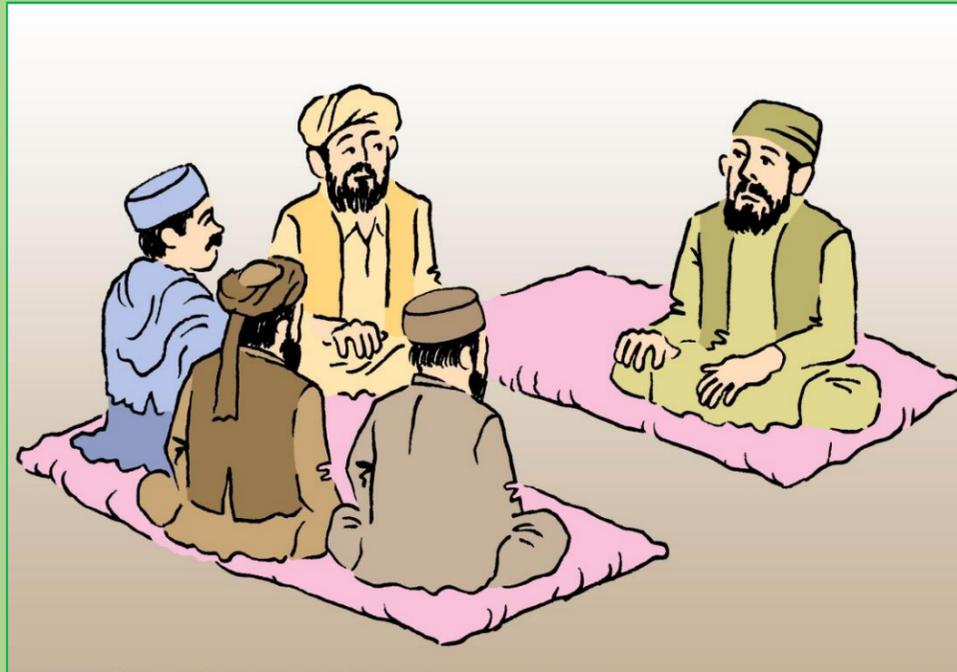
- In some areas, older and more experienced local women may also help you investigate women's cases;
- If there is a women's shura in your area, it might be able to help you as well.



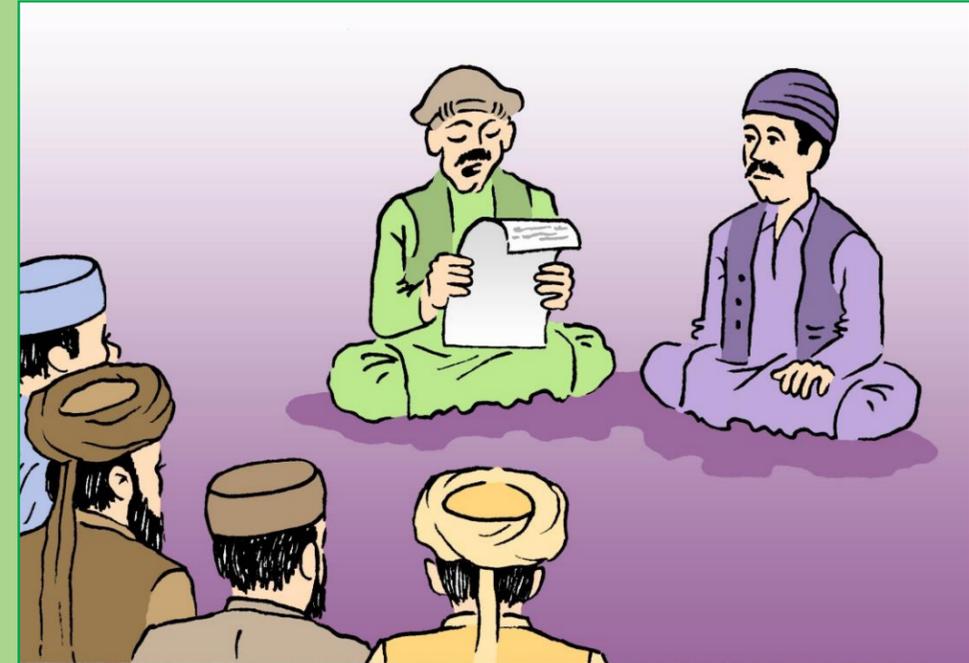
- When a party to a dispute is a woman, ensure that she is talked to directly, if possible, and/or a trustworthy muharam is representing her; seeking the advice of the Nangarhar Department of Women Affairs is recommended;



- When a party to a dispute is member of minority ethnic or religious group, ensure that he/she is talked to directly or is represented adequately; the involvement of a representative from the provincial Afghan Independent Human Rights Commission, or a shura or civil society body dedicated to representing minority rights, is recommended;



- All parties to the dispute are given protections to their privacy and talked to individually or as a group depending on the nature of a specific dispute and its dynamics;



- Statements/claims made by disputants are written and signed by them (if possible; otherwise try to find another person who can write, read the statement to the disputants, and have them put their thumb prints on it);

3.4 Decision Making

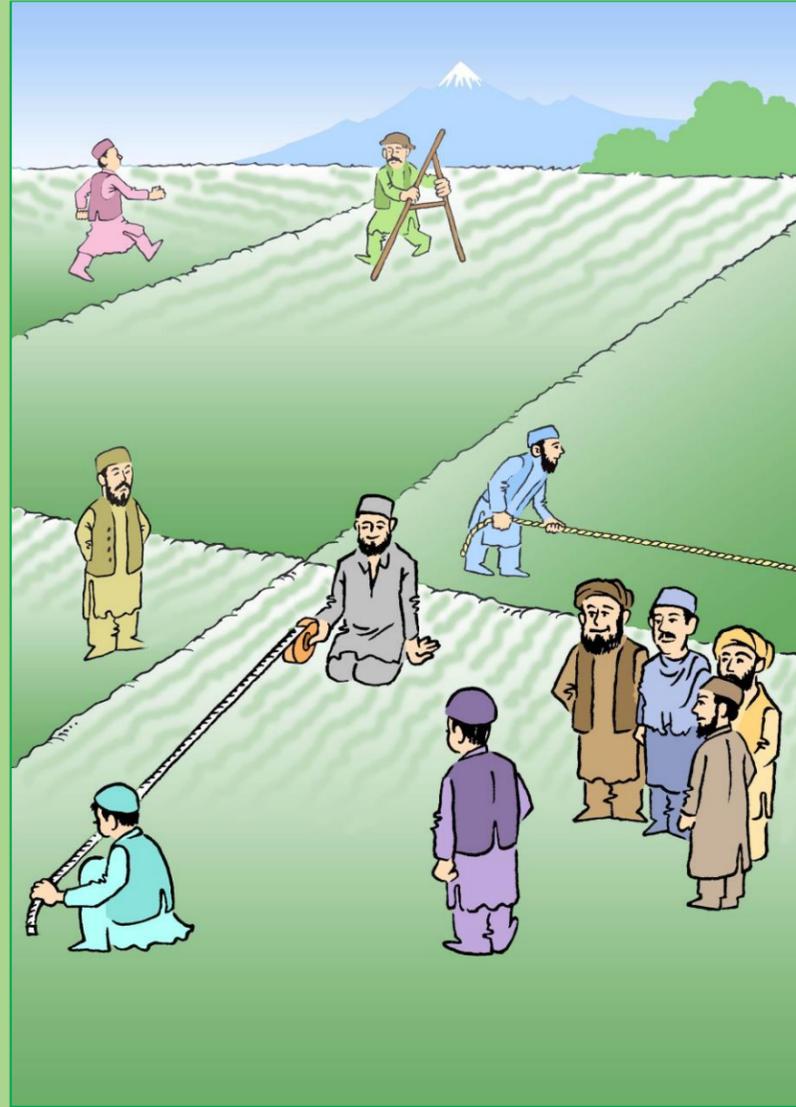
Once you have investigated the land dispute, and reached a negotiated agreement with the parties, you should give them a written document to reflect the parties' agreement and describe the land. As the Guidelines already discussed, the Afghan Civil Code gives you the possibility of getting this agreement recognized as a contract. Doing so might give you more enforcement options in the future, and will discourage parties from going back on their agreement.

Similarly, documents that include very detailed information and been approved by the government are best. Including all the necessary information below in the land documents will itself help prevent disputes later. This document should include:

1. Date;
2. Current residence of the relevant dispute parties;
3. ID card numbers of the dispute parties;
4. Full names of the dispute parties and the names of their fathers and grandfathers;
5. The price of the land in Afghani (if it is being sold);
6. The boundaries of the land;
 - If possible, describe land boundaries based upon permanent features, like large rocks or groves of trees;
7. The size of the land in meters or jeribs;
8. The type of land (irrigated, rain-fed agricultural, desert, residential, etc.);
9. Any water rights associated with the land;
10. Any other rights associated with the land (such as someone's right to cross the land);

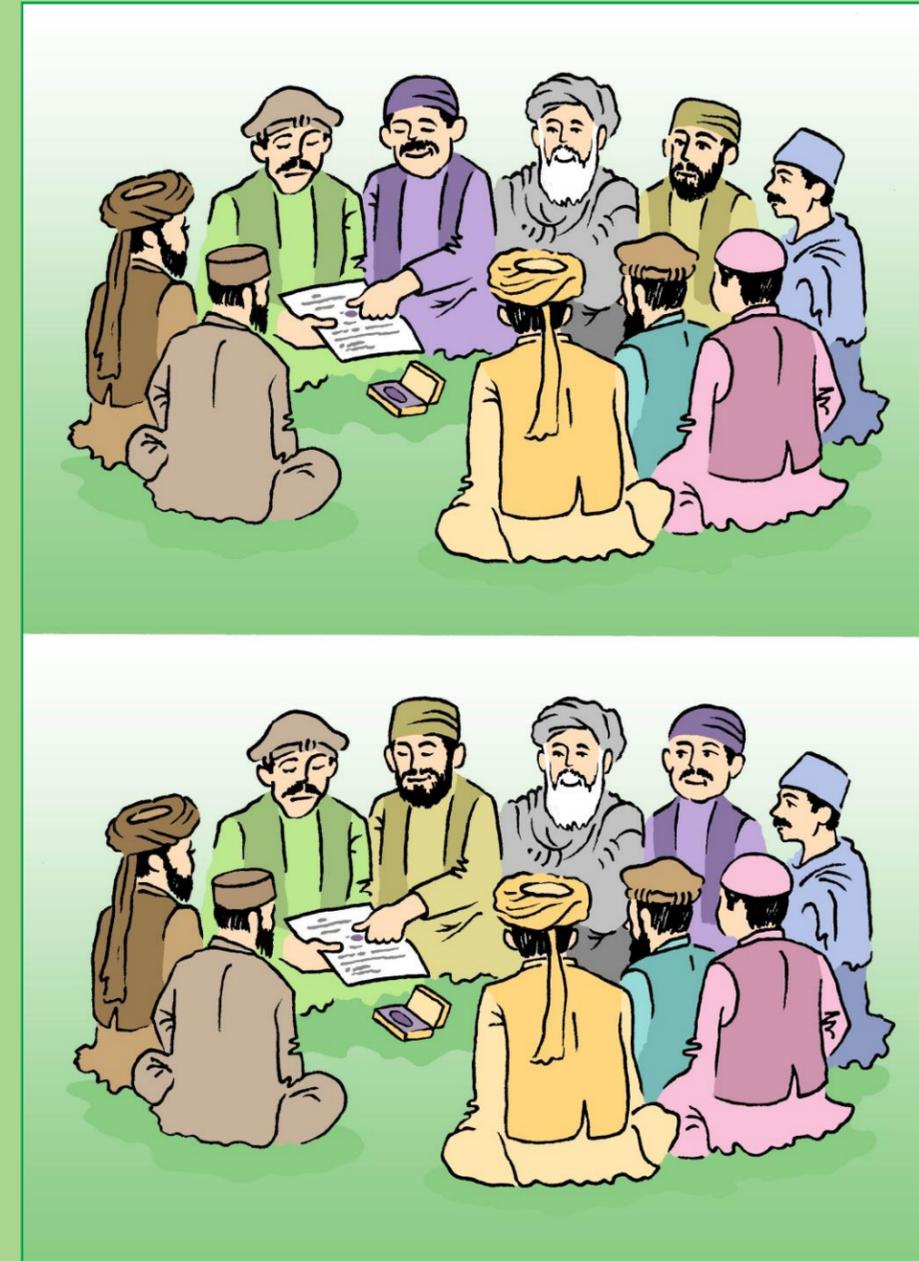
11. Full names of neighbors to the land and the names of their fathers and grandfathers;
12. The signature and/or thumb prints of the dispute parties;
13. Witness signatures from local elders - preferably a registered malik or wakil-e-gozaar;





It is advisable to get an engineer or surveyor to measure the land. If one is not available, find someone who knows land measurement. In order to avoid future disputes about the size of the land, try to use exact measures such as 'square meters' or jeribs.

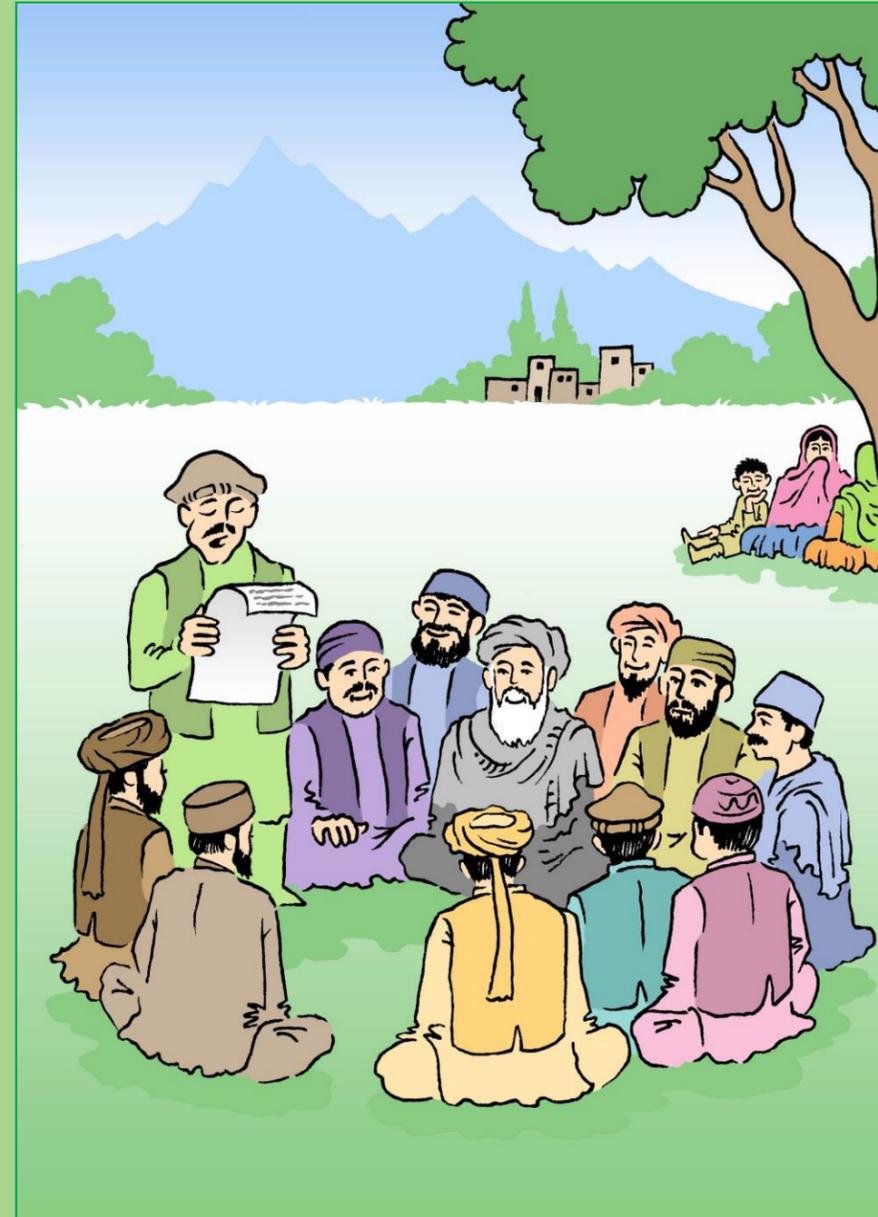
- One good technique is to cut a rope that is one meter in length and use it to measure around the land. However, you should avoid other traditional measurement methods, such as by the amount of seed or number of cows needed to plow the land. These methods can be imprecise, and lead to more disputes later.



- The final text of the CBDR based decision must be clearly communicated with all key stake-holders and agreed upon;
- The final text of the CBDR decision should be clearly carefully written on a headed 'Para-legal' paper (a document that gives information similar to an official document, and which might be useful to the government later) and signed/thumb printed by the dispute parties and the mediators.

3.5 Implementation

Whether or not the court or another government body is not involved, after a decision (pikra) is made and agreed upon by all stakeholders:



- It must be loudly and clearly read in the presence of the CBDR process members, dispute parties, and relevant members of the community;
- The main purpose of reading the pikra publicly is to communicate with community members the agreement or contract that the dispute parties have reached. As such, objections from the audience will not change the agreement that has been reached.



- Signed copies of the prikra might be given to the disputants, local jirga/shura and sent to the relevant judicial/state authorities, if appropriate;
- If it is a land dispute you also might want to go to the Cadastre or land registry office to make sure that the government knows who owns the land;



- The session shall be concluded by a public hug and handshake among the disputants.