



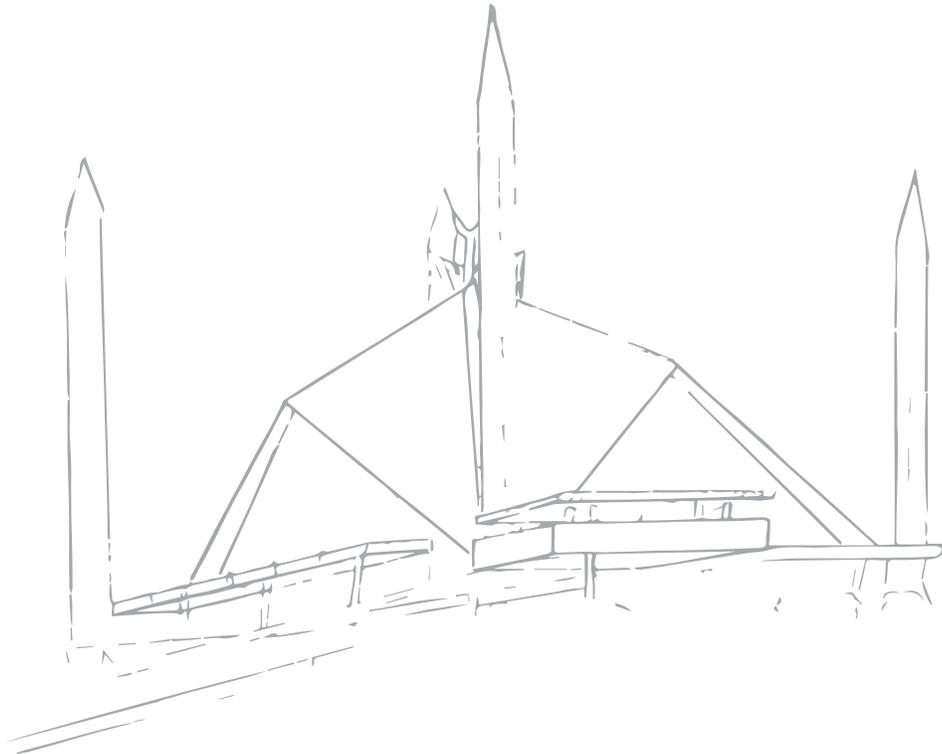
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## A Legal Framework for the Jirga Community Mediation in Khyber Pakhtunkhwa

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### Abstract

*Generally, in the Pushtoon community in Khyber Pakhtunkhwa (KP), neighbourhood disputes are resolved through the Jirga system which is the oldest and still one of the most typical dispute resolution mechanisms. Despite the importance of the Jirga system in ensuring the administration of justice and harmony in the Pushtoon community in various ways, it has also been subjected to several criticisms due to its informal structures which may sometimes lead to grave injustice to the parties or violate human rights. On the other hand, there is also no specific legal framework governing the community mediation. Authors are of the opinion that the government bodies should handle the administration of justice in accordance with the existing laws in KP rather than allowing some individuals with no proper knowledge on justice to settle the dispute by making use of the traditional Jirga system within their limited intellectual capacity which at times lead to grave human rights violations and injustices. Accordingly, this paper proposes a comprehensive legal framework which covers community mediation from all dimensions by giving importance to the traditional Jirga dispute resolution methods in place in KP and also learning experiences from other suitable jurisdictions.*

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**Keywords:** *Jirga, Khyber Pukhankhwa. Unwritten rules Mediation elders.*

## 1. Introduction<sup>1</sup>

Community mediation is a method in which neighbourhood disputes are resolved in an amicable manner by adopting mediation process with the intention to maintain good relationships among the neighbours. In other words, it is a mediation procedure adopted by the disputants to resolve their neighbourhood disputes within their community.<sup>2</sup> Neighbourhood disputes may arise from following conducts such as “nuisance in the neighbourhood, trespass, family feuds, landlord and tenant issues, neighbourhood squabbles involving children, pets and animals, use and maintenance of driveways, cars, bright lights, party walls and trash disposal;<sup>3</sup> noisy neighbours, boundary disputes, trees and gardens maintenance with near boundary, installing CCTV cameras that straight neighbours house;<sup>4</sup> parking in an uncooperative way, doing renovation work which damaged neighbouring property;”<sup>5</sup> and so forth. Sometimes, neighbourhood disputes may escalate further and can become more serious problems if it is not well taken care of.<sup>6</sup>

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<sup>1</sup> Some parts of this article were previously published as research articles titled “‘Jirga and Dispute Resolution in Khyber Pakhtunkhwa: A Critical Analysis’ in *Journal of Islamic Law Review*, 15:1, (2019), 63-79;” and “‘The Legal Position of Community Mediation in Khyber Pakhtunkhwa: A Critical Analysis’ in *Journal of Islamic Law Review*, 15:2, (2019), 241-258”. This article and the abovementioned two articles are outputs of a research project granted by International Islamic University, Malaysia under the IIUM Research Initiative Grant Scheme (Publication) [P-RIGS] (Project No: P-RIGS18-014-0014).

<sup>2</sup> Mohammad Naqib Ishan Jan and Ashgar Ali Ali Mohamed, *Mediation in Malaysia: The Law and Practice* (LexisNexis Malaysia Sdn Bhd: 2010), pp. 157-158.

<sup>3</sup> Ashgar Ali Ali Mohamed, “Mediation can keep the peace between disputing neighbours” *New Straits Times* (24 April 2018) <<https://www.nst.com.my/opinion/letters/2018/04/361030/mediation-can-keep-peace-between-disputing-neighbours>> (accessed on 09 April 2020).

<sup>4</sup> Sarah Clark, “The Most Common Neighbourhood Disputes” *ProblemNeighbours* (20 August 2019) <<http://www.problemneighbours.co.uk/common-neighbourhood-disputes.html>> (accessed on 09 April 2020).

<sup>5</sup> Heizel T, “5 Annoying Things your Malaysian Neighbours Do That You Can Sue Them For” *Ask Legal*. <<https://asklegal.my/p/5-things-your-malaysian-neighbours-do-that-you-can-sue-them-for>> (accessed on 09 April 2020).

<sup>6</sup> John Gray, Moira Halliday and Andrew Woodgate, *Responding to Community Conflict* (York Publishing Services Ltd: 2002), p. 10; Muhamad

According to the National Association for Community Mediation (NAFCM) in the United States (US), “community mediation offers constructive processes in resolving differences and conflicts between individuals, groups, and organisations. It is an alternative to avoid destructive confrontation, prolonged litigation or violence. It gives people in conflict an opportunity to take responsibility for the resolution of their dispute and control of the outcome. Community mediation is designed to preserve individual interests while strengthening relationships and building connections between people and groups, and to create processes that make communities work for all”.<sup>7</sup> Usually, in community mediation, both disputant parties sit together in the presences of a community mediator or mediators who are neutral to the parties and they assist them to clarify the issues as well as problems, know about their opinions, and find out a settlement to the problems.<sup>8</sup>

The practice of settling disputes outside the courts has been part of the culture in different provinces of Pakistan in various forms. Punjabis resolve their disputes in the community through *Panchayat*;<sup>9</sup> Pushtoons resolve conflicts by *Jirga*;<sup>10</sup> Sindhis resolve disputes through *Faislo*; and Balochis resolve conflicts by *Balochi Jirga*.<sup>11</sup> Disputes are inevitable in all human communities and can occur among individuals, families, groups, or even nations.<sup>12</sup> Pushtoon community is not immune from having disputes. The

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Hassan Ahmad, Ihtesham Ullah Khan, Mohammad Naqib Ishan Jan and Nuarrual Hilal Md. Dahlan, “The Legal Position of Community Mediation in Khyber Pakhtunkhwa: A Critical Analysis”, *Journal of Islamic Law Review*, 2019, Vol. 15, No. 2, 241-258, pp. 241-242.

<sup>7</sup> National Association for Community Mediation, “Purpose” <<https://www.nafcm.org/page/Purpose>> (accessed 09 April 2020).

<sup>8</sup> Muhamad Hassan Ahmad, n. 6, at p. 242.

<sup>9</sup> Abid Ghafoor Chaudhry, Aftab Ahmed, Shaheer Ellahi Khan and Sajjad Hussain, “Perception of Local Community and Biradari on Panchayat: An Exploratory Anthropological Study of Biradari in Village Saroki, District Gujranwala, Pakistan”, *Advances in Anthropology*, 2014, Vol. 4, No. 2, p. 54.

<sup>10</sup> Sherzaman Taizi, *Jirga System in Tribal Life* (Area Study Centre, University of Peshawar: 2007), p. 3.

<sup>11</sup> Ghulam Hussain, Anwaar Mohyuddin and Firdous Mahesar, “Conflict Resolution Mechanism in Rural Sindh: Rationalizing Life-world of Peasants”, *Voice of Intellectual Man-An International Journal*, 2013, Vol. 3, No. 2, pp. 35-36; Muhamad Hassan Ahmad, Ihtesham Ullah Khan and Mohammad Naqib Ishan Jan, “Jirga and Dispute Resolution in Khyber Pakhtunkhwa: A Critical Analysis”, *Journal of Islamic Law Review*, 2019, Vol. 15, No. 1, 63-79, p. 64.

<sup>12</sup> Sheriff Folarin, “Types and Causes of Conflict”, (2015): 1-2, <<http://eprints.covenantuniversity.edu.ng/3241/1/Folarin%2025.pdf>> (accessed on 09 April 2020).

common reasons for disputes among Pushtoons are exchange marriage between two families; rejection from marriage after engagement; theft; robbery; enmity; cousinhood; revenge for any personal matter; honour killing; money; loan; land; property and so on so forth.<sup>13</sup> Volumes of disputes are still settled through the Jirga system among Pushtoons in KP. The following discussions only focus on how neighbourhood disputes are resolved through Jirga in KP.<sup>14</sup>

## 2. Resolving community disputes through the jirga system

The origin of Jirga is not traceable in an apparent form and it is believed that it has been practiced in resolving disputes in some part of the world since time immemorial.<sup>15</sup> The literal meaning of Jirga is “assembly” or “gathering” of the party for the solution of a dispute and it is a type of autonomous body.<sup>16</sup> Jirga can be held not only at a family level but also, in a larger scale, at tribal level or national level or even at international level, for instance, among the Pushtoons of Pakistan and Afghanistan, etc.<sup>17</sup>

The proceeding of Jirga is held in *Hujra* (a public place),<sup>18</sup> mosque, and guest house or even under the shadow of a big tree. Generally, the Jirga members sit in a circle together.<sup>19</sup> In minor cases, the Jirga takes two or three days and, in major cases, it may take a long time. In the beginning of a Jirga, both disputant parties are given a specific time to present the problem. During the preceding of Jirga, the members of Jirga will try to understand the nature of the problem and provide the mainly mediation services between disputant parties with their best capacity. No party is given any preferential treatment and all are treated equally. Albeit the Jirga always holds in public place, the crowd is not permissible to take part or hinder the Jirga during the

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<sup>13</sup> Sher Ahmad Wazir, “The Role of Jirga in Conflict Resolution in FATA: A Case Study of North Waziristan Agency”, (M.Phil. Thesis, University of Peshawar, Pakistan Study Center, 2010), 97-106.

<sup>14</sup> Muhamad Hassan Ahmad, n. 11, at p. 66.

<sup>15</sup> John McK. Camp II, “The Athenian Agora”, (American School of Classical Studies at Athens, 1986), 6.

<sup>16</sup> Barakatullah and Imran Ahmad Sajid, “Jirga System in Pakhtun Society: An Informal Mechanism for Dispute Resolution”, *Pakistan Journal of Criminology*, Vol. 5, No. 2, (July-December, 2013): 45.

<sup>17</sup> John Strawson, *Law after Ground Zero*, (London, Glasshouse Press, 2017), 3; Muhamad Hassan Ahmad, n. 11, at pp. 66-67.

<sup>18</sup> Mughal B. Khan, Abdul R. Ghumman and Hashim N. Hashmi, “Social and Environmental Impact of Hujra”, *Journal of Environmental Justice*, Vol. 1, No. 4, (2008):195-196.

<sup>19</sup> Barakatullah, n. 21, at 45-46.

proceedings. In the proceedings, the Jirga members give time to both parties and witnesses to present their stance regarding the issue.<sup>20</sup>

After hearing and investigating, the Jirga members give a neutral and acceptable solution to the dispute. Commonly, the verdicts are based on the *Shari'ah* and the local Pushtoon traditions. However, before announcing the verdict in public, the Jirga members take the consent from both parties. This practice is known as power of attorney (*Waak* or *Ikhtiar*) and, through this practice, the Jirga obligates both parties to adhere to the verdict.<sup>21</sup>

The Jirga system allows any party to appeal against the judgment and the unsatisfied party may even request for another Jirga.<sup>22</sup> If any disputant party fails to obey the decision of Jirga (called turning the face from the Jirga verdict - *Makh Arawal*), then Jirga body has the right to enforce its ruling in anyway. The Jirga can impose sanctions on the disobedient party which may be a huge fine and other punitive forms.<sup>23</sup> The Jirga provides safety to the oppressed and weak people. It plays a very important role in ensuring the preservation of justice and harmony in the community.<sup>24</sup>

For a successful Jirga, there are some basic principles to be followed in a proceeding such as transparency, freedom of expression, accountability of Jirga members, and message of harmony.<sup>25</sup> The Jirga can be held at any level of the society for various purposes. Mostly, commentators have divided Jirga into the following types such as Community Representative Jirga (*Ulusi* or *Qaumi* Jirga); Third Party Jirga (*Shakhsi* Jirga); and Grand Jirga (*Loya* Jirga).<sup>26</sup> The following discussions only focus on how

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<sup>20</sup> Muhamad Hassan Ahmad, n. 11, at p. 68.

<sup>21</sup> Pashtun Archives, "Jirga - The Pashtun Judicial System", <<http://pashtunarchives.blogspot.com/2012/05/Jirga-pashtun-judicial-system.html>> (accessed on 09 April 2020); Muhamad Hassan Ahmad, n. 11, at p. 68.

<sup>22</sup> Abdul Qadir Mushtaq, Umer Yaqoob and Muhammad Usman Javaid, "Role of Jirga in Pakhtoon Society an Analysis with Special Reference to Justice Dispensation", *JPUHS*, Vol. 29, No. 2, (July-December, 2016): 14.

<sup>23</sup> James W. Spain, *The Way of Pathans*, (Karachi: Oxford University Press, 1972): 50-51.

<sup>24</sup> Pashtun Archives, n. 21; Muhamad Hassan Ahmad, n. 11, at p. 69.

<sup>25</sup> Fakhr-ul-Islam, Faqir, Khan and Malik Amer Atta, "Jirga: A Conflict Resolution Institution in Pakhtoon Society", *Gomal University Journal of Research*, Vol. 29, No. 1, (June, 2013): 17; Muhammad Nawaz Khan, n. 20, at 13; Muhamad Hassan Ahmad, n. 11, at pp. 69-70.

<sup>26</sup> Muhamad Hassan Ahmad, n. 11, at pp. 70-73.

the Third Party Jirga is used to resolve the neighbourhood disputes in KP.

The “Third Party Jirga” is formed in resolving a conflict between either two persons or families. In this Jirga, the mediators are selected from both sides and the parties have to consent for the nomination. The selected members have to be impartial in the process. Normally, the Jirga will announce a verdict. If any party fail to accept the verdict, it will then try to convince the respective party to agree to accept the decision willingly.<sup>27</sup> However, the Jirga also has the power to organise a *Badraga* (a volunteer security force raised to secure and protect the proceedings of a specific Jirga) for the awareness of the whole community about the process and the decision. Generally, the following steps are involved in the third-party Jirga.<sup>28</sup>

After occurring a dispute, one of the parties approaches a specific member of the community known as mediators (*Jirgamar*) to explain the dispute and request for his involvement. Sometimes, both the disputant parties decide to settle their conflict through the third party. Then, the mediator moves forward and starts initial hearing from both sides. The mediators may sometimes advise the parties to include other suitable persons to the case too. Jirga mediator creates a channel of communication between the parties. If the issue is minor, then the Jirga settles down the matter easily. When the issue is a major one, then the mediator may ask the party to give their power of attorney and, normally, the parties give unconditional power of attorney to the mediator in order to decide the dispute. In serious matters, the parties may even be asked to deposit security bond. The Jirga hears the parties face to face or sometimes one after the other depending on the situation. In the process, the mediators try to express openly in front of both parties, but sometimes the parties are only told the good side of the story with the intention to search for common grounds for a settlement. After discussing and clarifying the issues presented by both parties, examining all available evidences, and applying the traditional Pushtoon code; the Jirga passes a judgment that has to be accepted by both parties. If a party views that the judgment of Jirga is injustice, then

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<sup>27</sup> Hassan M. Yousufzai and Ali Gohar, “Towards Understanding Pukhtoon Jirga”. Just Peace International (2005), 47-48 <<http://restorativejustice.org/rj-library/towards-understanding-pukhtoon-jirga/6318/#sthash.xYmTcqIO.dpbs>> (accessed on 09 April 2020).

<sup>28</sup> Muhamad Hassan Ahmad, n. 11, at pp. 71-72.

that party can convene a more suitable Jirga to meditate and review the matter.<sup>29</sup>

Third Party Jirga is mainly used for the resolution of dispute between two individuals or families and accordingly this type of Jirga aims to resolve the disputes among the parties without having to go to court, and generally the Jirga members can give the amicable solution. However, every party to the dispute has the right to go to court to claim their legal rights as the Jirga members should not stop any party to look for a legal redress from a court of law.<sup>30</sup>

### 3. Major issues and challenges in the jirga system

Albeit the Jirga system has been very crucial in ensuring and preserving justice and harmony in the Pushtoon community in various ways, on the other hand, it has also been subjected to the following criticisms.

#### 3.1. Unwritten nature of the jirga system

The main criticism of Jirga is that its rules are unwritten and it processes in informal manner. In resolving disputes, Jirga normally uses the religious and traditional rules which may vary from one scholar to another or from one tribe to another. Furthermore, applicable rules are not as clear as a written code for criminal and civil matters for the Jirga members to apply them to the disputes. Besides, there is no specific record of the disputes that have been settled by the Jirga.<sup>31</sup> Hence, the inconsistencies of the application of both substantive laws and procedural rules are widespread in all types of Jirga. In contrary, the common law system offers a court of law that is performed according to the written statutes; constructed on legal evidences; and applied the judicial precedent, i.e., *stare decisis*, for the judicial consistency. In fact, the Jirga system has been consistently practiced even by the common people those who do not have a formal legal education and it serves well in resolving disputes in the community. Of course, it could be more fruitful if the Jirga system can be formalised, to the extent it is possible, under a legal framework

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<sup>29</sup> Hassan M. Yousufzai, n. 27, at pp. 49-50; Muhamad Hassan Ahmad, n. 11, at p. 72.

<sup>30</sup> Muhamad Hassan Ahmad, n. 11, at pp. 72-73.

<sup>31</sup> Ali Wardak, "Jirga-A traditional mechanism of conflict resolution in Afghanistan", *Institute of Afghan Study Center*, (2003): 3-4.

with the intention to offer proper structures and procedures for the purpose of rendering justice.<sup>32</sup>

### 3.2. Human rights issues in the jirga system

Another major criticism on Jirga system is with regard to the violation of human rights in some cases. Some commentators criticise that the accused person could not enjoy enough rights and sufficient time to defend oneself because the Jirga proceedings are not in line with the national legal system. Sometimes, Jirga forces one party or the other to accept and implement its decision and the parties needed to comply with it due to the social pressure from the community. There is also lack of check and balance on what the Jirga does and decides as in the mainstream State organs such as executive, legislative and judiciary. The Pakistan Supreme Court even once made a remark pertaining to Jirga and Panchayat by saying that it is the violation of the Universal Declaration of Human Rights (UDHR).<sup>33</sup>

The Jirga system is also under severe criticisms for the violence of human rights especially against women in some cases. Some examples of these human rights violations are noteworthy of discussing in brief in this part. In 2011, “a Jirga agreement between different political parties prohibited 18,000 registered women from voting in by-elections” in Kohistan, KP.<sup>34</sup> In 2013, Rubina - a 12 years old girl - was being forced by a Jirga to marry an older man in Doong Darra, Upper Dir District. She appealed to the Chief Justice of the Supreme Court of Pakistan to provide her with safety from such a forced marriage.<sup>35</sup> Similarly, in 2014, Amna - 11 years old girl - was forced to marry to a man elder three times her age as compensation for her uncle having raped a girl in Grilagan, Northwest Pakistan. She was one of the two girls given to the aggrieved family through a Jirga decision and finally she needed to marry the brother of the girl who had been raped

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<sup>32</sup> Hassan M. Yousufzai, n. 27; Muhamad Hassan Ahmad, n. 11, at p. 74.

<sup>33</sup> DAWN News, “SC Holds Jirgas Violative of Pakistan’s World Commitments”, 17 January 2019, <<https://www.dawn.com/news/1458038>> (accessed on 09 April 2020).

<sup>34</sup> Zia Ur Rehman, “Sorry, you still can’t vote”, *The News*, (4 December 2011), <<https://jang.com.pk/thenews/dec2011-weekly/nos-04-12-2011/dia.htm#2>> (accessed on 09 April 2020).

<sup>35</sup> Nazish Brohi, “Women, Violence and Jirgas”, National Commission on the Status of Women (NCSW), Islamabad Pakistan, (2016): 6, <[http://af.org.pk/gep/images/publications/Research%20Studies%20\(Gender%20Based%20Violence\)/NB%20NCSW%20JIRGAS.pdf](http://af.org.pk/gep/images/publications/Research%20Studies%20(Gender%20Based%20Violence)/NB%20NCSW%20JIRGAS.pdf)> (accessed on 09 April 2020).

by her uncle.<sup>36</sup> In 2015, a Jirga declared that women should not be allowed to vote in elections and this resulted disenfranchising over 12,000 women voters in the constituency in Darel Valley, Diamer District. The Jirga members comprised of religious leaders and candidates of political parties from the said region.<sup>37</sup>

Apart from the above mentioned incidents of human rights violation, the honour killing practices through the Jirga system is also very much alarming. According to the reports prepared by Aurat Foundation, the total number of 475 women in 2008; 604 women in 2009; and 557 women in 2010 were killed in the name of honour and mostly the decision was made by Jirga or Panchayat system.<sup>38</sup> In 2016, it is reported that more than 70 cases of honour killings were ordered through the Jirga system. These incidents happen mainly in the rural areas where rigid traditional rules are in practice. The Jirga members in those areas are not really aware of existing human rights and domestic laws.<sup>39</sup> Of course, there are volumes of cases that can be discussed in this part as many more cases happened in different areas of Pakistan where the Jirga system is being used to resolve disputes. These kinds of human rights violation incidents happen due to the fact that the government of the country does not have proper control over the conducts Jirga system through a proper legal framework.<sup>40</sup> Therefore, authors are of the opinion that it is very crucial to have a comprehensive legal framework governing all Jirga proceedings in KP.

#### **4. A critical analysis of the legal position of community mediation in Khyber Pakhtunkhwa**

At this juncture, it is pertinent to examine critically the existing laws governing the community mediation in KP before designing a comprehensive legal framework for the Jirga community mediation. Accordingly, this paper analyses the relevant legal provisions under various types of laws in order to discover the legal status of community mediation in KP.

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<sup>36</sup> *Ibid.*

<sup>37</sup> *Id.*

<sup>38</sup> Maliha Zia Lari, "A Pilot Study on: Honor Killings in Pakistan and Compliance of Law", *Aurat Publication and Information Service Foundation*, Pakistan, November (2011), 1.

<sup>39</sup> Nadia Agha and Zamir Ahmed, "Prevalence and Nature of Violence against Women in Pakistan: A Six-month Content Analysis of a Pakistani Newspaper", *Pakistan Journal of Criminology*, Vol. 10, No. 1, (January, 2018): 109.

<sup>40</sup> Muhamad Hassan Ahmad, n. 11, at pp. 74-76.

In 2002, the Civil Procedure Code 1908 (CPC) has been amended and encourage a court, as it deems fit and with the consent of the parties, refer a civil case to any ADR mechanism which includes 'mediation' and 'conciliation' or any other means as such.<sup>41</sup> Furthermore, when a case is referred to mediation, the court will wait for a mutual settlement and decide in accordance with that settlement agreement between the parties if they managed to reach to a settlement.<sup>42</sup> The court may further grant, on such terms as it thinks fit, the plaintiff permission to withdraw from such suit or abandon.<sup>43</sup> It is observed that the role of ADR mechanisms, including mediation, in the civil justice system of Pakistan has becomes quite significant after the amendment of the CPC in 2002.<sup>44</sup> However, despite the introduction of the court-annexed mediation under the CPC, there are no details rules which govern the conducts of mediation, the training and qualifications of mediators, and the mediation centres. In this regard, one of the Judges of the Supreme Court of Pakistan, Justice Tassaduq Hussain Jillani, mentions that: "Notwithstanding the legislative and executive measures taken, the Courts have not made use of section 89 of the CPC very frequently. There is more than one reason for this. Firstly, for any new scheme to succeed, institutional support is a *sine qua non* which has been mostly lacking. Secondly, not much has been done for training and capacity building of the judges. And thirdly, the amendments in the CPC were not followed by amendments in the rules for procedural details to invoke ADR techniques".<sup>45</sup>

The Family Courts Act 1964 also has provisions allowing the court to refer a case to ADR mechanisms. Only when the compromise is not possible between the parties, the Court may

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<sup>41</sup> Section 89(A) and Order X, Rule 1(A)(III), the Civil Procedure Code 1908 (as amended in 2002).

<sup>42</sup> Order XXIII, Rule 3, the Civil Procedure Code 1908 (as amended in 2002).

<sup>43</sup> Order XXIII, Rule 1, the Civil Procedure Code 1908 (as amended in 2002).

<sup>44</sup> See *Messrs Alstom Power Generation through Ashfaq Ahmad v. Pakistan Water and Power Development Authority through Chairman and Another* PLD [2007] Lahore 581; *Dr. Mrs. Yasmin Abbas v. Rana Muhammad Hanif and Others* PLD [2005] Lahore 742; Muhamad Hassan Ahmad, n. 6, at pp. 244-245.

<sup>45</sup> Hasan Awais and Muhammad Amir Munir, "Alternative Dispute Resolution (ADR) in Trial Courts of Pakistan: A Practical Approach towards New Era of Timely Justice as a Means of 'Justice for All'", Report of 8<sup>th</sup> Judicial Conference, Law and Justice Commission of Pakistan, (2018), p. 13; Muhamad Hassan Ahmad, n. 6, at p. 251.

proceed with the trial and record evidence of the parties.<sup>46</sup> As in the case of the CPC, the Family Courts Act 1964 does not mention in detail how the compromise or reconciliation should be conducted between the disputing spouses. Therefore, in practice, the judge sometimes leaves the parties alone in his chamber to discuss the matter on their own. For example, in the case of *Mst. Ajminah Bibi v. Bakhtyab R/o* [2008] Wari Dir Upper KP (Civil Suit no. 26/3FC), the parties were advised to avoid traditional advocacy. Then, they opted for direct communications and the reconciliation was successful after two or three hearings.<sup>47</sup> This may be fine for some peace loving couples but things may also go wrong if the parties are hostile against one another.<sup>48</sup>

The Small Claims and Minor Offences Courts Ordinance 2002 was enacted for the purpose of providing inexpensive and expeditious disposal of small claims and minor offences. It allows the Court - at any stage of the proceedings - may conciliate, arbitrate, mediate or resolve the claim or offence through '*Salis*' (the person acting as a conciliator, a mediator or an arbitrator)<sup>49</sup> or any other person either on the application of any party or otherwise and also there is a possibility of 'amicable settlement' between the parties with their consent.<sup>50</sup> *Salis* is mainly responsible to "facilitate negotiations between the parties and steer the direction of discussion with the aim of finding a mutually acceptable solution; and assist the parties in reaching an agreement".<sup>51</sup> The Small Claims and Minor Offences Courts Ordinance 2002 encourages the court to refer the case for the amicable settlement which includes ADR mechanisms such as arbitration, mediation, conciliation or even any other lawful means as long as it is mutually agreed upon by the parties. Although it provides some detail guidelines such as preparing the list of arbitrators, mediators, or conciliators and their responsibilities; conducting such amicable settlement; and challenging an award or a decree on any ground; these are not enough to have an efficient arbitration, mediation, conciliation

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<sup>46</sup> Section 10(4), the Family Courts Act 1964; Muhamad Hassan Ahmad, n. 6, at pp. 245-246.

<sup>47</sup> Qazi Attaullah and Lutfullah Saqib, "Tracing the Concept of Negotiation in Law, Pakistani Legal System and Sharī'ah", *Jihāt al-Islām*, 2017, Vol. 11, No. 1, pp. 53-68.

<sup>48</sup> Muhamad Hassan Ahmad, n. 6, at pp. 251-252.

<sup>49</sup> Section 2(g), the Small Claims and Minor Offences Courts Ordinance 2002.

<sup>50</sup> Section 14(1), the Small Claims and Minor Offences Courts Ordinance 2002.

<sup>51</sup> Section 2(a), the Small Claims and Minor Offences Courts Ordinance 2002; Muhamad Hassan Ahmad, n. 6, at pp. 246-247.

service as each of these ADR process needs detail rules on its conducts, trainings of personnel, and the venues to conduct such processes.<sup>52</sup>

The Shariah Nizam-E-Adl Regulation 2009<sup>53</sup> provides some informal dispute resolution methods by providing that a court may refer any civil or criminal case to '*Musleh*'<sup>54</sup> or '*Musleheen*'<sup>55</sup> before recording of evidence with the mutual consent of parties.<sup>56</sup> Once the case is referred as such, *Musleh* or *Musleheen* - after hearing the parties, their witnesses, and perusing the relevant documents as the case may be<sup>57</sup> - will have to decide the case in accordance with the *Shari'ah*<sup>58</sup> and submit a report to the court within the stipulated time.<sup>59</sup> Only when the court is satisfied with the opinion expressed by *Musleh* or *Musleheen* in accordance with the *Shari'ah*, it will announce the judgement accordingly. The parties, of course, still have the opportunity to submit objections to such report and the court will again hear the parties and decide about the correctness or otherwise of the objections.<sup>60</sup> If the opinion is not in accordance with the *Shari'ah*, the court will treat the opinion as null and void and start its proceedings for decision of such dispute.<sup>61</sup> The irony here is that, in some cases, the *Shari'ah* itself is subjected to various interpretations by numerous scholars. Accordingly, it would be difficult to apply a particular ruling if there are two or more views but somehow contradictory in relation to a particular issue. Although it obliges the court to

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<sup>52</sup> Muhamad Hassan Ahmad, n. 6, at p. 252.

<sup>53</sup> The Shariah Nizam-E-Adl Regulation 2009 has been applicable to the Provincially Administered Tribal Areas (PATA) of the North-West Frontier Province, except the Tribal Areas adjoining Mansehra district and the former State of Amb. Although these areas have already been integrated into Khyber Pakhtunkhwa (KP) under the 31<sup>st</sup> Amendment of the Constitution of Islamic Republic of Pakistan 1973, the KP government decided to promulgate an ordinance to maintain this Regulation for those areas. See Pakistan Today, "KP govt to introduce ordinance to preserve Nizam-e-Adl, other regulations in PATA" (29 May 2018) <<https://www.pakistantoday.com.pk/2018/05/29/kp-govt-to-introduce-ordnance-to-preserve-nizam-e-adl-other-regulations-in-pata/>> (accessed on 09 April 2020).

<sup>54</sup> The term '*Musleh*' has an Arabic origin and literally means 'peace-maker' or 'reformer'. In this context, the person acts as a mediator for the settlement of dispute.

<sup>55</sup> The term '*Musleheen*' is the plural form of the term '*Musleh*'.

<sup>56</sup> Section 13, the Shariah Nizam-E-Adl Regulation 2009.

<sup>57</sup> Section 13(4), the Shariah Nizam-E-Adl Regulation 2009.

<sup>58</sup> Section 13(5), the Shariah Nizam-E-Adl Regulation 2009.

<sup>59</sup> Section 13(2), the Shariah Nizam-E-Adl Regulation 2009.

<sup>60</sup> Section 13(6), the Shariah Nizam-E-Adl Regulation 2009.

<sup>61</sup> Section 13(5), the Shariah Nizam-E-Adl Regulation 2009; Muhamad Hassan Ahmad, n. 6, at pp. 248-249.

maintain a list of *Musleheen*, there is no mention of the qualifications of a *Musleh*. In addition, the place and the conducts of mediation as to where and how the *Musleh* or *Musleheen* should settle the dispute are not well covered under the Regulation. In addition, this is only applicable to a few selected areas in KP.<sup>62</sup>

The Khyber Pakhtunkhwa Police Order (Amendment) Act 2015 establishes a conflict resolution body called the 'Dispute Resolution Council' (DRC) in order to settle minor cases in an amicable manner without having to go to a court of law. It empowers the Provincial Police Officer to act as a mediator for petty cases.<sup>63</sup> According to the official report of KP police, the DRC has disposed of 5,381 cases out of a total of 7,797 in 2018 alone.<sup>64</sup> In this sense, the performance of the DRC is very impressive and can be a good example for the community mediation too. Nonetheless, it does mention detail rules governing the conducts of mediation, and the training as well as qualifications of mediators.<sup>65</sup>

It can be observed from the above legal analyses that there is no specific legal framework governing the community mediation, the training and qualifications of community mediators, and the community mediation centres in KP. Thus, there is a need to legislate a comprehensive legal framework which covers community mediation from all dimensions by giving importance to the traditional Jirga dispute resolution methods in place in KP and also learning experiences from other suitable jurisdictions.

#### **4.1. Legal framework for the jirga community mediation**

The Jirga system is ongoing solely with the acceptance of the society in KP without any control over the conducts of Jirga through a proper legal framework. The administration of justice through the services of Jirga system would be more fruitful with the support of the government if it can be formalised, to the extent it is possible, under a comprehensive legal framework with the intention to offer proper structures and procedures in handling community disputes.<sup>66</sup> It is suggested to enact a specific legislation

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<sup>62</sup> Muhamad Hassan Ahmad, n. 6, at p. 252.

<sup>63</sup> Article 186(A), the Khyber Pakhtunkhwa Police Order (Amendment) Act 2015.

<sup>64</sup> See Khyber Pakhtunkhwa Police, "Review of DRCs" <<http://kppolice.gov.pk/drc/review.php>> (accessed on 09 April 2020); Muhamad Hassan Ahmad, n. 6, at p. 249.

<sup>65</sup> Muhamad Hassan Ahmad, n. 6, at p. 253.

<sup>66</sup> Muhamad Hassan Ahmad, n. 11, at p. 76.

for Jirga community mediation rather than providing some rules or amendments in some other statutes. It is further recommended to include the relevant authorities that shall run the Jirga community mediation and its organisational structure in the said legislation. Accordingly, authors propose to enact a specific “Jirga Community Mediation Act” which deals with three essential components of community mediation, i.e., Jirga community mediation centre, Jirga community mediators, and standards of conducts for the Jirga community mediation.

#### **4.2. Jirga community mediation center**

First of all, the relevant ministry should establish a “Jirga Community Mediation Centre” under its administration at the High Court of KP in Peshawar. The branches of the mediation centre can be established in every district court, sub-divisional court, and police station of the province of KP for the swift, steady and secure Jirga community mediation processes. The ministry should also establish a “Jirga Community Mediation Board” at the provincial level to administer the whole Jirga community mediation system in KP. The ministry should appoint an appropriate number of qualified and experienced people with high moral standards as members of the said Board. The Board shall decide all matters with the majority vote. The Board shall elect one person among its members to be the Director in order to head the administrative matters as decided by the Board.

The Board shall provide a list of qualified and experienced people with high moral standards to act as members of the Jirga Community Mediation Board of each and every branch of the Jirga Community Mediation Centre at district court, sub-divisional court, and police station to the ministry for the approval. If it is satisfactory, the ministry shall appoint them as the members of the respective Jirga community mediation board across the province. Similarly, the respective board shall decide all matters with the majority vote in line with the directives issued to them by the Jirga Community Mediation Board at the provincial level. In the same vein, each board shall also elect one person among its members to be the Director in order to head the administrative matters. A director or member of a board, either at the provincial level or branch level, can be dismissed on the ground of any misconduct that may be prescribed under the Jirga Community Mediation Act and appoint a new director or member in the same manner.

In this fashion, each and every branch of the Jirga Community Mediation Centre has its own administrative body to carry out swift, steady and secure Jirga community mediation processes in line with the directives from the provincial authorities while maintaining the local customs in the respective tribal areas. Administratively, each and every Jirga Community Mediation Board of the branches of the Jirga Community Mediation Centre has the duty to submit a progress report and an audited financial report to the provincial Jirga Community Mediation Board that shall further submit to the ministry together with its own reports of the same nature.<sup>67</sup>

#### **4.2. Jirga community mediators**

In fact, a competent mediator essentially needs to have mediation training, experience in mediation, mediation skills, cultural understanding of the parties and other qualities as necessary.<sup>68</sup> Thus, the Jirga Community Mediation Centre at the provincial level shall establish a Jirga community mediation training institute in order to train people from respective areas in the province to become Jirga community mediators. Any interested person who possesses high moral standards and reputation in the community - such as a retired judge, a lawyer, a government official, an elder, a tribal chief, a technocrat, among others - can be enrolled to be trained as the Jirga community mediator. The training shall include modules on the theoretical understanding of the benefits and challenges of the application of mediation process to the neighbourhood disputes; the practical development of essential skills required to constructively engage in community mediation and direct participants toward the amicable resolution; and the applicable national and provincial law - including human rights laws, professional, ethical and cultural guidelines associated with the practice of community mediation. After the successful completion of the prescribed Jirga community mediation training, the provincial Jirga Community Mediation Board shall certify and accredit them as the Jirga community mediators. Apart from that

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<sup>67</sup> See also Mohammad Naqib Ishan Jan, Mahyuddin Daud and Muhamad Hassan Ahmad, "Mediation Institutions", in Adnan Yaakob, Ashgar Ali Ali Mohamed, Arun Kasi, Mohammad Naqib Ishan Jan and Muhamad Hassan Ahmad (eds.) *Alternative Dispute Resolution: Law & Practice* (CLJ Publication: 2020), pp. 369-380.

<sup>68</sup> Model Standards of Conduct for Mediators 2005: Standard IV (A)(1); Muhamad Hassan Ahmad, Mohammad Naqib Ishan Jan and Seeni Mohamed Nafees, "Mediation: Standards of Conduct for Mediators", in Adnan Yaakob, Ashgar Ali Ali Mohamed, Arun Kasi, Mohammad Naqib Ishan Jan and Muhamad Hassan Ahmad (eds.) *Alternative Dispute Resolution: Law & Practice* (CLJ Publication: 2020), p. 186.

a mediator should also continue to enhance knowledge and skills related to mediation by attending educational programs and related activities.<sup>69</sup>

Each and every Jirga Community Mediation Board of the branches of the Jirga Community Mediation Centre shall submit a list of available certified and accredited Jirga community mediators to the provincial Jirga Community Mediation Board that shall further submit to the ministry for the approval. If it is satisfactory, the ministry shall appoint them as the Jirga community mediators of the respective Jirga community mediation centre for the particular area of the province. A Jirga community mediator can be dismissed on the ground of any misconduct that may be prescribed under the Jirga Community Mediation Act.<sup>70</sup> In this way, each and every branch of the Jirga Community Mediation Centre maintains a list of Jirga community mediators, certified and accredited by the provincial Jirga Community Mediation Board and further appointed by the ministry, readily available to conduct Jirga community mediation among the disputants in any particular area of KP.

### **4.3. Standards of conduct for the jirga community mediation**

Any disputing party or a court may refer a neighborhood dispute to the respective Jirga Community Mediation Centre available in a particular area. Once the case is referred, the Director of the respective centre shall call upon both parties to conclude the “mediation agreement” with their voluntary consent and also to appoint the mediator of their choice with the mutual agreement from the list of available Jirga community mediators maintained by the centre. The number of mediator can be one or more depending on the request made by the parties. If the parties could not agree on the appointment of the mediator within 10 working days from the date of referral, the Director shall appoint, as he thinks fit, one mediator from the said list.

A mediator shall conduct the mediation only when he has the ability to mediate the dispute and the required qualifications as well as skills to meet the reasonable expectations of the

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<sup>69</sup> Model Standards of Conduct for Mediators 2005: Standard IV (A)(2); Muhamad Hassan Ahmad, n. 68, at p. 186.

<sup>70</sup> See also Mohammad Naqib Ishan Jan and Muhamad Hassan Ahmad, “Negotiation: Types and Ethical Issues”, in Adnan Yaakob, Ashgar Ali Ali Mohamed, Arun Kasi, Mohammad Naqib Ishan Jan and Muhamad Hassan Ahmad (eds.) *Alternative Dispute Resolution: Law & Practice* (CLJ Publication: 2020), pp. 106-110.

parties.<sup>71</sup> Besides, he shall take up the case only when he is ready to commit and give the full attention to the process.<sup>72</sup> He has to promote “diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants”.<sup>73</sup> If it is necessary, the mediator may request police to be present during the mediation sessions for safety. The centre shall make necessary arrangement for a mediation session. The parties to the dispute shall collaborate with the mediator in all processes and provide full support in resolving the dispute within the stipulated time.

After the appointment, the mediator shall commence the mediation session at the respective centre with the adoption of the facilitative method within a period of fifteen working days from the date of referral. Nevertheless, the court may extend the time in extraordinary circumstances. A mediator shall conduct the mediation professionally in consistent with the principle of self-determination, confidentiality and impartiality.<sup>74</sup> A mediator shall understand that the mediation is based on the fundamental principle of self-determination by the parties and thus he has to rely upon the ability of the parties to reach a voluntary agreement without any form of coercion.<sup>75</sup> He has to make it clear from the beginning that mediation is consensual in nature and that the mediator is just an impartial facilitator. Therefore, any party has the right to withdraw from mediation at any time and the mediator may not impose or force any settlement on the parties.<sup>76</sup> The mediator shall ensure that all information available to him in the mediation proceedings are strictly confidential and will not be

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<sup>71</sup> Model Standards of Conduct for Mediators 2005: Standard IV (A); Standards of Conduct for Mediators in Court-Connected Programs 2000: Standard IV; Muhamad Hassan Ahmad, n. 68, at p. 185.

<sup>72</sup> The standards of conduct for mediators prepared by The American Arbitration Association (AAA); the American Bar Association’s Section of Dispute Resolution (ABA); and the Association for Conflict Resolution (ACR), i.e., the Model Standards of Conduct for Mediators 2005: Standard VI (A)(1).

<sup>73</sup> Model Standards of Conduct for Mediators 2005: Standard VI (A); the standards of conduct for mediators adopted by the New Jersey Supreme Court, i.e., Standards of Conduct for Mediators in Court-Connected Programs 2000: Standard VI (A); Muhamad Hassan Ahmad, n. 68, at p. 192.

<sup>74</sup> Muhamad Hassan Ahmad, n. 68, at p. 192.

<sup>75</sup> Standards of Conduct for Mediators in Court-Connected Programs 2000: Standard I.

<sup>76</sup> Standards of Conduct for Mediators in Court-Connected Programs 2000: Standard I (A); Muhamad Hassan Ahmad, n. 68, at p. 184.

disclosed for any reason unless the parties expressly consent to any disclosure or it is required by the applicable law to do so.<sup>77</sup>

Impartiality can be defined as the “freedom from favouritism, bias or prejudice”.<sup>78</sup> A mediator shall always conduct mediation sessions in an utmost impartial manner.<sup>79</sup> He has to inform the parties if there is any circumstance that might create any possible bias, prejudice, or lack of impartiality<sup>80</sup> and, in such a case, decline to mediate as he cannot conduct the mediation in an impartial manner.<sup>81</sup> Even during the mediation, he always has to be careful against “prejudice or lack of impartiality due to the personal characteristics, background, values and beliefs, or behaviour of any party, or any other reason”.<sup>82</sup> He should also withdraw from the process, at any time, if he is unable to conduct the mediation in an impartial manner.<sup>83</sup> Furthermore, a mediator shall avoid mediating a dispute if there is a conflict of interest either “in the subject matter of the dispute or in any relationship, regardless of whether it is past or present, personal or professional, between a mediator and any party to the dispute”.<sup>84</sup> The mediator may also terminate the mediation session at any time if the mediator deems that the mediation will not be fruitful.

The Jirga community mediation process shall be concluded when the parties reach to an agreed settlement or any party applies to end the session. The parties shall sign a “settlement agreement” at the end of a successful mediation session. With regard to the services offered by the Jirga community mediators, the provincial Jirga Community Mediation Board can fix an appropriate amount of remuneration for them to be paid by each

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<sup>77</sup> Model Standards of Conduct for Mediators 2005: Standard V (A); Muhamad Hassan Ahmad, n. 68, at pp. 187-189; Abdul Haseeb Ansari, Assaduzzaman Khan and Muhamad Hassan Ahmad, “Confidentiality and Public Policy in Alternative Dispute Resolution”, in Adnan Yaakob, Ashgar Ali Ali Mohamed, Arun Kasi, Mohammad Naqib Ishan Jan and Muhamad Hassan Ahmad (eds.) *Alternative Dispute Resolution: Law & Practice* (CLJ Publication: 2020), pp. 79-100.

<sup>78</sup> Model Standards of Conduct for Mediators 2005: Standard II (A).

<sup>79</sup> Section 9(3), the Malaysian Mediation Act 2012.

<sup>80</sup> Standards of Conduct for Mediators in Court-Connected Programs 2000: Standard II (B).

<sup>81</sup> Model Standards of Conduct for Mediators 2005: Standard II (A).

<sup>82</sup> Model Standards of Conduct for Mediators 2005: Standard II (B)(1).

<sup>83</sup> Model Standards of Conduct for Mediators 2005: Standard II (C); Muhamad Hassan Ahmad, n. 68, at pp. 189-190.

<sup>84</sup> Model Standards of Conduct for Mediators 2005: Standard III (A); Muhamad Hassan Ahmad, n. 68, at pp. 190-192.

party by considering actual expenses incurred. The mediators may waive the fee if they would like to do so. The record of all listed cases in all centres shall not be kept for more than 3 years after the accomplishment of the mediation session.

It can be observed in the proposed structure that the practice of traditional Jirga system is still well maintained while improving its composition, training and appointment of Jirga community mediators, and above all the proper standards of conducts for the Jirga community mediation. After the establishment of the Jirga Community Mediation Centre under the proposed Jirga Community Mediation Act, the disputants have the well established, enforced and accountable forum to resolve their disputes in the community. Therefore, they do need to participate in the unstructured Jirga resolution anymore as they may now settle their disagreement at the Jirga Community Mediation Centre or a court of law. The ministry also needs to prohibit any other form of Jirga dispute resolution by law for the purpose of eliminating social injustices in the society in the future.

## 5. Conclusion

In fact, the Jirga system would be more fruitful in resolving neighbourhood disputes if it is formalised and regulated, to the extent it is possible, under a comprehensive legal framework with the intention to offer proper structures and procedures in handling disputes in accordance with all the existing laws applicable to KP. Other jurisdictions such as Australia, Malaysia, Singapore, and the US have devolved legal frameworks to this effect and introduced the community mediation into their formal legal system. Of course, the law governing the Jirga system should be carefully crafted by giving importance to the traditional dispute resolution methods in place and also learning experiences from other suitable jurisdictions.<sup>85</sup> Accordingly, authors propose a structure that the practice of traditional Jirga system is still well maintained while improving its composition, training and appointment of Jirga community mediators, and above all the standards of conducts for the Jirga community mediation. Authors humbly present that it is better to allow the government bodies to handle the administration of justice in accordance with the existing laws in KP rather than allowing some individuals with no proper knowledge on justice to settle the dispute by making use of the traditional Jirga system within their limited

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<sup>85</sup> See also Muhamad Hassan Ahmad, n. 6, at pp. 253-254.

intellectual capacity which at times lead to grave human rights violations and injustices.<sup>86</sup>

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<sup>86</sup> See also Abdul Haseeb Ansari, Muhamad Hassan Ahmad and Adnan Yaakob, “Alternative Dispute Resolution: Definition and Its Development”, in Adnan Yaakob, Ashgar Ali Ali Mohamed, Arun Kasi, Mohammad Naqib Ishan Jan and Muhamad Hassan Ahmad (eds.) *Alternative Dispute Resolution: Law & Practice* (CLJ Publication: 2020), pp. 28-48.