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# PAKISTAN

## The tribal justice system

*“The speed with which the jirga system is expanding makes the need for strengthening the justice system all the more pressing”*, The State of Human Rights in 2001, Human Rights Commission of Pakistan, 2002.

### Introduction

On 22 June 2002, a tribal council of elders ‘sentenced’ Mukhtaran Bibi, a 30-year-old woman of the Gujjar tribe in village Meerwala, district Muzaffargarh, Punjab province, to being gang raped in ‘punishment’ for her younger brother’s alleged ‘illicit affair’ with a girl from another tribe, the Mastoi, considered higher in the tribal hierarchy.

Following a public outcry, the Governor of Punjab, Lieutenant General (retrd.) Khalid Maqbool Ahmed, set up an official enquiry which confirmed assertions made earlier by Mukhtaran Bibi: that the story of the ‘illicit affair’ was itself concocted to cover up another earlier sexual abuse. Three men of the Mastoi tribe were found to have sodomized Shakoor, Mukhtaran Bibi’s 12-year-old brother. When Shakoor threatened to tell his family about the rape - which a later medical examination confirmed - the tribesmen handed him over to the local police station where at least some police officers apparently knew about the antecedents but detained the boy. The Mastoi then publicly alleged that Shakoor had had an ‘illicit affair’ with an older woman of the Mastoi tribe and summoned a *jirga*, a council of tribal elders, to deal with the alleged ‘affair’. A medical examination later found that Shakoor would have been physically unable to sexually molest the woman; she insisted that her account was true and Shakoor was examined once more, with the same result.

The ‘trial’ by *jirga* then took place on 22 June 2002 in the presence of several hundred local residents none of whom took any action to prevent the rape. Mukhtaran Bibi later said that she had appealed to all those present for mercy but no one dared object to the council’s ‘verdict’. Given the wide local participation, it must be assumed that local police - some of whom knew the real antecedents - were aware of the event as it unfolded, if not directly present during the incident. However, they did nothing to stop it and to protect the victim.

After the ‘judgment’, the gang-rape was carried out by four men, including one member of the tribal council in an adjacent hut while members of the Mastoi tribe reportedly stood outside and cheered. After the rape, the victim was reportedly made to walk naked through the streets of her village before hundreds of onlookers.

As relatives of the young woman and the boy were too frightened of retribution by the Mastoi tribe to approach the police, no complaint was filed and the abuses would have been ignored if a local cleric had not mentioned the case in Friday prayers and a journalist picked up the news. National and international media then reported the incident and national and international organisations protested. Local police only accepted a complaint by the woman's father seven days after the offence, when a delegation of lawyers met local police authorities and insisted on the registration of the complaint.<sup>1</sup>

On 3 July 2002, the Chief Justice of Pakistan under the Supreme Court's *suo moto* powers to take up issues of public interest, publicly condemned the rape of Mukhtaran Bibi as a 'violation of human rights and human dignity' and issued directions to the Punjab police authorities to regularly report to the court on any action taken by them. At the same time the Punjab Governor ordered an official inquiry into the tribal council's action, the rape and a possible attempt by police to cover up the crime.

The special bench of the Supreme Court set up to monitor the case had occasion to rebuke police on several occasions; on 5 July 2002, it reprimanded police for 'laxity' in pursuing the alleged offenders including those responsible for the rape of Shakoor - none of whom had by then been arrested - and for taking more than a week to register the complaint. Chief Justice Sheikh Riaz Ahmad reportedly said in the hearing that "it is unbelievable that the IG [Inspector General of Police], being the head of police, came to know about the facts of the case so late".<sup>2</sup> He added that police should be more alert and intervene not only after offences had occurred but reach out to stop crimes and help victims in good time.

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<sup>1</sup>Rape and gang-rape are widespread in Pakistan. Police records which were presented to the government inquiry into the Meerwala rape case, showed that in Muzaffargarh district of Punjab province, 22 women were reportedly raped by 53 men in June 2002 alone, including 14 women who had been gang-raped (*AFP*, 18 and 22 July 2002). At least two of the victims were dead within weeks, one shot dead as she was probably able to identify the rapist, another because she committed suicide reportedly because the police took no action against her attackers. The non-governmental Human Rights Commission of Pakistan (HRCP) reported that in 2001, one woman was raped every hour in Pakistan as a whole; this included one woman raped in Punjab province every six hours, and one woman gang-raped in the province every fourth day. Yet the Punjab police filed only 321 complaints of rape in 2001 leading to the arrest of 33 people. The small number of complaints results from the social stigma attached to rape due to which victims do not report the crime, patterns of threats and intimidation by the perpetrators, ignorance of the law, lack of access to justice and women's well-founded fear that victims of rape may be accused of *zina*, fornication, an offence punishable with death by stoning or public lashes, if they cannot prove absence of consent. For details see: *Women in Pakistan: Disadvantaged and denied their rights*, AI Index: ASA 33/23/95.

<sup>2</sup>*Dawn*, 6 July 2002.

There appears to have been some reluctance by police to protect the rights of the victims and to arrest the alleged perpetrators. At least some police officers were apparently aware of the earlier sodomy case; however, not only did they not take any action against the perpetrators but they also allowed the *jirga* and the gang rape to go ahead without taking any steps to protect the victim. Local human rights activists have also pointed out that police, when finally forced to register the complaint, did not mention in it the responsibility of the *jirga* for the commission of the offence nor the presence of 30 to 40 armed members of the Mastoi tribe abetting the *jirga*'s activities nor again that the victim was made to pass a gathering of several hundred people in a state of undress after the rape, which is an offence under section 354A Pakistan Penal Code (PPC). The arrests of the alleged rapists were preceded by the arbitrary arrests of their family members intended to make the perpetrators surrender to police; police took a long time to arrest the locally powerful Mastoi members of the *jirga* and those accused of sodomy. Protection of the victims may not have been adequate at every stage. While the victims' family was given some police protection, they reported that they had been threatened and harassed by Mastoi tribesmen. The Director General of Police, Punjab, later assured the Supreme Court supervising the case that he would look into allegation that the Superintendent of Police of Muzaffargarh had exerted pressure on the victims' family to agree to an out of court settlement and to accept compensation.

After initial delays, all the alleged perpetrators, including the four alleged rapists, the 10 members of the *jirga* and the three men who had allegedly sodomized Shakoor were arrested. A local police officer was reportedly arrested on 12 July for holding Shakoor in police custody although he knew that sodomy had been committed on the boy and for allegedly taking a bribe from Shakoor's family to release him. Other police officers have apparently been transferred or suspended. The trial by an anti-terrorist court in Dera Ghazi Khan began in the third week of July; the Supreme Court had directed the court to conduct and complete the trial within three weeks. The Punjab government deputed a three member team of lawyers to act as free legal counsels to Mukhtaran Bibi. The maximum punishment for gang rape and aiding and abetting gang rape is the death penalty. Amnesty International opposes the death penalty in all cases as it violates the right to life and tends to contribute to a climate of violence.

Meanwhile Pakistani media have reported that Mukhtaran Bibi is planning to set up a mosque and a school for girls with the money, Rs. 500,000, reportedly given to her in compensation for her ordeal by the President of Pakistan.

While official action was taken in this case, it may not extend to addressing the issue of the quasi-judicial body which imposed the judgement. Scepticism was discernible even at the official level. Public Prosecutor in this case, Ramzan Khalid Joiya reportedly said in early August 2002: "This kind of violation of women is very common; every time it is highlighted, the practice stops at least for a while, which is better than nothing."

On 9 July, Amnesty International wrote to the Chief Justice of Pakistan welcoming the interest taken by the Supreme Court of Pakistan in the case but calling his attention to several other similar cases that Amnesty International had earlier brought to the attention of the Government of Pakistan and on which no action is believed to have been taken.<sup>3</sup> The organization also called on the Chief Justice to take all possible measures to ensure that tribal councils do not take the law into their own hands and assume quasi-judicial functions. The organization has not received a reply from the Chief Justice at the time of writing.

Interventions of tribal councils or *jirgas* affecting the rights to life and security of the person of men and women are not rare in Pakistan and the state's acquiescence or connivance in such practices has frequently been reported.

In the context of studying human rights violations perpetrated against girls and women in the name of 'honour', Amnesty International learned about the widely applied tribal justice system<sup>4</sup> in Pakistan. This paper will set out how the system functions mostly in Sindh province of Pakistan, describe its underlying principles and how those administering it and those operating within the official judicial system view its advantages and disadvantages. In doing so, the paper may go beyond the organization's human rights concerns; however, it is believed that the context should be clarified in which issues of concern occur.

This paper should be seen as a companion to the publication *Pakistan: Violence against women in the name of honour*<sup>5</sup> issued in September 1999 which focuses primarily on the victims who lose physical integrity and often their lives in the context of 'honour' crimes rather than the system of tribal justice itself. The current paper describes more extensively murder

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<sup>3</sup>The cases mentioned concerned the handing over of two young girls to 'settle' a tribal dispute in June 2001 (for details, see below) and the case of a 16-year-old mentally disabled girl, Lal Jamilla Mandokhel. She was in March 1999 repeatedly raped by a junior clerk in Parachinar, North West Frontier Province. The girl's uncle filed a complaint about the incident with police, who apprehended the accused but turned over the girl to her tribe, the Mazuzai of Kurram Agency, apparently indifferent to or not appreciating the danger to the girl's life. A *jirga* of Pashtun tribesmen decided that she had brought 'shame' on her tribe and that its 'honour' could only be restored by her death. She was shot dead in front of the tribal gathering. The rapist was reportedly detained 'for his own protection' when tribesmen demanded that he be handed over to them so they could execute him in accordance with tribal traditions. It is not known what happened to him subsequently but it is to be noted that the alleged rapist man was thought worthy of police protection, not the victim of the crime.

<sup>4</sup>The term 'tribe' is here not used in any strict anthropological sense but to apply loosely to a group defined by common descent and shared practices.

<sup>5</sup>AI Index: ASA 33/17/99; for a shorter version of the paper see ASA 33/18/99.

cases 'adjudicated' by tribal courts than murders perpetrated for alleged breaches of 'honour' as these are described in detail in the earlier paper.

The system of tribal justice in Pakistan is rooted in tradition; it has no formal legal recognition in Pakistan except in specifically designated tribal areas which will not be discussed in this paper. Article 8 of the Constitution of Pakistan says: "Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void." The same chapter of the Constitution guarantees the right of everyone to be treated in accordance with law and to equality before the law. Part VII of the Constitution lays down the structure and functions of the judiciary. Article 175(1 and 2) say: "(1) There shall be a Supreme Court of Pakistan, a High Court for each Province and such other courts as may be established by law. No court shall have any jurisdiction save as is or may be conferred on it by the constitution or by or under any law." The Constitution in Article 247(7) specifies that the jurisdiction of the higher judiciary, that is the provincial High Courts and the Supreme Court, does not extend to the designated Federally Administered Tribal Areas and the Provincially Administered Tribal Areas which have their own legal and judicial regime which incorporates some form of tribal adjudication.

The system of justice administered by tribal *sardars*, heads of tribes, is not only ruled out by the Constitution in areas other than the designated tribal areas; the institution of the *sardar* was formally abolished in the System of Sardari (Abolition) Act, 1976 which says in the preamble:

*"The system of Sardari, prevalent in certain parts of Pakistan, is the worst remnant of the oppressive feudal and tribal system which, being derogatory to human dignity and freedom, is repugnant to the spirit of democracy and equality as enunciated by Islam and enshrined in the Constitution of the Islamic Republic of Pakistan and opposed to the economic advancement of the people."*

A quarter century later, the system still exists and operates without legal authority. *Sardars* commenting on the Act of 1976 have told Amnesty International, that "you cannot finish the *jirga* system by decree, it is more effective [than the official system]... it will only dry out if the judiciary works and provides due process of law."

Under international human rights law, the state is obligated to ensure the enjoyment of rights to everyone living in its jurisdiction; consequently, if any public function of the state is carried out by bodies such as the tribal *jirgas*, the state has to ensure that they fully protect these rights. As the overview of the functioning of *jirgas* in Sindh given below indicates, *jirgas* not only fail to protect but abuse a range of rights. In so far as the state has failed to exercise due diligence to prevent such abuse, to investigate them and to bring the perpetrators to justice, the state is responsible for such abuses.

Amnesty International believes that the Government of Pakistan in order to fulfil its obligation to exercise due diligence in protecting human rights must ensure that *jirgas*, if they are allowed to continue to function, fully conform to human rights safeguards contained in the Constitution of Pakistan and international human rights treaties which Pakistan has ratified. If this can not be ensured, effective steps should be taken to abolish them in practice. All cases in which *jirgas* have perpetrated abuses should be thoroughly investigated and all those participating in them brought to justice. At the same time, Amnesty International believes that there is an urgent need to reform and strengthen the official judiciary according to internationally respected fair trial standards so that people in search of redress do not feel the need to approach tribal judicial structures.<sup>6</sup>

<sup>6</sup>The tendency to take the law into one's own hands and ignore the role of the official judiciary is widespread in Pakistan and not restricted to the tribal justice system overstepping its legitimate limits. The impunity with which private 'justice' is meted out has no doubt led to the increase of such instances. Police are known to have extrajudicially executed criminal convicts, particularly in Punjab province where police officials are reported to have publicly said that they did not believe the criminal justice system would ensure convictions of criminals and that they believed themselves justified in eliminating criminals. There have been many instances where members of the public have taken the law into their own hands and unlawfully killed people alleged to have blasphemed. Amnesty International believes that such actions are encouraged by the fact that the blasphemy law provides the mandatory death penalty for anyone found to have committed blasphemy. Many men in Pakistan believe themselves entitled to 'punish', i.e. physically attack or kill, women who they consider to have transgressed social norms of behaviour, leading to hundreds of killings of women perceived to have undermined male 'honour' every year.

Islamic non-formal courts have also 'tried' and 'convicted' people. In 2001, some 15 young boys were found 'guilty' by an informal Islamic tribunal in Muridke, Punjab province, of theft and moral waywardness and publicly flogged. The council consisted of the head of a local seminary of Dawatul Irshad and other clerics. The Human Rights Commission of Pakistan noted the spread of religious *jirgas* in the tribal areas, particularly Dir and Malakand, and in the North West Frontier Province (NWFP), in its annual report for the year 2000.

The most recent case of a religious 'decree' to kill was reported within days of the punitive rape imposed on Mukhtaran Bibi by a *jirga*, again police inaction was reported. On 4 July 2002, Zahid Mahmood Akhtar (48), was stoned to death by hundreds of villagers in Chak Jhumra in Punjab province after a Muslim prayer leader, Moulvi Faqir Mohammad, had called for his death using the local mosque's loud hailer. The mentally disturbed man had allegedly claimed to be the "last prophet of Islam". Zahid Mahmood Akhtar's mental disturbance had been recognized earlier by a court which in 1997 granted him bail after his arrest on a blasphemy charge in 1994. He had been living since his release with a brother in another city of Punjab province. However, when he returned to his village in June, a village council, which included the cleric, sought to expel him. Moulvi Faqir Mohammad had filed the original complaint in 1994 alleging that Zahid Akhtar had desecrated the Holy Qur'an and used objectionable language about the Prophet Mohammad. When Zahid Akhtar returned to the village next day, villagers reportedly complained to the cleric who issued the call to kill him. The family of the victim begged for mercy and promised to remove Zahid Akhtar from the village but the cleric reiterated his 'sentence'. Zahid Akhtar was dragged from his house, in the presence of his wife and brother and beaten. When he fell unconscious the mob dragged him to the village square. The cleric reportedly encouraged the rapidly growing mob to stone Zahid Akhtar to death when he regained consciousness. Zahid Akhtar died shortly afterwards in a hail of stones. Police reached the place some four hours after the incident but neither arrested anyone nor sent the body for

## **2. The *jirga* or *faislo* or *panchayat* system**

Tribal *jirgas* [literally: meeting; *faislo*, a Sindhi term for both the meeting and the decision; *panchayat*, council of elders] consisting of elders of the tribe and headed by the *sardar* [head of a tribe] or, if the dispute is of less importance, local heads of the tribe, can either be called on an *ad hoc* basis or take place regularly. They deal with a range of issues, including conflicting claims to land and water, inheritance, alleged breaches of the ‘honour’ code and intra-tribal or inter-tribal killings. Many *sardars* or lower tribal leaders hold regular ‘adjudication’ days which are widely known and attended by people with a variety of complaints. *Sardars* have no formal training in ‘adjudication’; *sardars* have told Amnesty International that they had learned how to conduct *jirgas* from their fathers; one *sardar* said, “It’s all in my head, there is no need to codify it ... I have my own intelligence to tell me what is just”. Others have claimed that while not codified, the principles of tribal justice are well defined.

### *Issues before jirgas: killings*

In tribal society, a perceived injustice is frequently immediately responded to at the family level, without further consultation. If a family member is murdered, the murderer is murdered in turn, causing often long chains of revenge killings. Such blood feuds often span decades and involve dozens of revenge killings; *jirgas* are often called to settle these disputes. *Jirgas* are also approached when issues of ‘honour’ are at stake. Tribal courts only rarely impose the death penalty, to Amnesty International’s knowledge mostly in cases of alleged infringements of ‘honour’.

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autopsy. Relatives buried the body and did not file a complaint as they feared retribution. Only when local media reported the case, did the police register a complaint but there is strong evidence of attempted cover up. Police argued that they had not registered a complaint as the family had failed to lodge a complaint; moreover, the police recorded in their daily diary an incident under section 174 of the Code of Criminal Procedure (CrPC) (unknown cause of death, to be ascertained by police) rather than as a cognizable offence; they also claimed that there were no eye-witnesses to the incident whereas some 14 people subsequently came forward to record their statements. Police were later forced to amend the complaint to include offences under sections 322 (voluntarily causing grievous hurt), 148 (rioting with deadly weapon) and 149 (taking part in such rioting, equal responsibility) PPC. President Musharraf and the governor of Punjab reportedly took note of the incident and directed police to act firmly in the case. Police eventually arrested some 30 people including the cleric.

Only a week before this incident, another Muslim cleric in Jaranwala had called on his followers to kill Afraz Javed, a visiting US citizen of Pakistani origin, who had objected to the cleric’s hate propaganda against the US during Friday prayers; this was construed by the cleric to constitute blasphemy for which Javed should be killed. Afraz Javed got away in time and a case was brought against the attackers on him, several of whom were arrested. The killing of Zahid Akhtar came less than a month after Yousuf Ali, convicted of blasphemy, was shot dead inside Kot Lakhpat Jail, Lahore, by a fellow prisoner with probable connivance of prison staff.

*Jirgas* strive for conciliation and compensation which may take either the form of monetary payments or the handing over of girls or women to the affected party. In July 2001, a *jirga* of the Jatoi tribe in village Jhoke Sharif, district Thatta, Sindh province, decreed that a six-year-old girl, Amina, be handed over in marriage to Khamiso, the middle aged father of Jhuman, a boy whom Amina's minor brother had accidentally killed on a hunting trip, to compensate for his loss. Amina's father agreed to this to save his son. The girl was not asked if she agreed and the handing over was carried out. Other villagers reportedly disagreed with the 'verdict' but were too scared to protest. Several other cases of this nature have been reported. (See under 'objectives of *jirgas*' below).

#### *Issues before jirgas: rape*

In some cases, *jirgas* have 'judicially' dealt with rape cases and imposed cruel and degrading punishments. In May 1994, a village council in Mithankot, Punjab province, sentenced a man it found guilty of rape to having his own wife raped by the husband of his victim. The eight elders then watched the 'sentence' being carried out. Police were reported to be present during the incident but failed to intervene. An inquiry was set up but no action appears to have been taken subsequently.<sup>7</sup> Again, in early August 1996, a young man in Loghnan district of Punjab attempted to rape an eight-year-old girl but let go of her when she screamed. A local village council took up the issue and decided that the young girl's father, Mohammad Ramazan, had the right to punitively rape the assaulter's mother. The older woman was handed over to Mohammad Ramazan for the implementation of the judgment. Subsequently a case was registered against the six council members as well as the alleged rapist but according to reports, the more influential council members were not charged or arrested. It is not known if anyone was convicted later.

**"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."**

#### *Issues before jirgas: breaches of 'honour'*

As repositories of 'honour', women are precious to the social esteem and standing of a man and his family in society. If their 'honour' is breached by alleged sexual misdemeanour of a woman, male relatives, husbands, fathers, brothers and sons, have to take specific socially prescribed steps to restore their 'honour'. This will usually involve direct retaliation, the killing of the woman who is perceived to have breached the code of 'honour' and her alleged lover.

If on the suspicion of an 'illicit relationship' a girl or woman has been killed by her male relatives and her alleged partner has escaped, the matter is then often brought before a *jirga* which is to decide how the aggrieved party, i.e. the woman's family whose honour is seen to have been damaged, can be compensated by the man who escaped his due 'punishment'. This

<sup>7</sup>*Women in Pakistan: Disadvantaged and denied their rights*, AI Idex: ASA 33/23/95.

compensation in many cases involves the handing over of a woman from the side of the man who inflicted 'shame'.<sup>8</sup>

With the expansion of the notion of 'honour' and of what undermines it, not only alleged sexual misconduct of a woman but every act perceived as disobedience of a woman to her male relatives may amount to her 'shaming' her family and calls for a corresponding action to restore 'honour'. In recent years, a woman freely choosing her marriage partners or seeking a divorce have also been perceived to undermine male 'honour' and have led to 'honour' crimes. In some cases, *jirgas* have dealt with such cases. Three recent cases revolving around women freely deciding who they would marry - as is their right under national and Islamic family law in Pakistan -- indicate that state functionaries tend to side with tribal conventions rather than assert the writ of state law and protect women's rights under it.

Faheemuddin, a member of the Mohajir community (people who migrated to Pakistan at the time of the partition of the Indian subcontinent) and Hajira, a member of the Manzai tribe got married in April 1997 against Hajira's father's wishes. The father, Ahmed Khan Pathan, filed a complaint with police alleging that his daughter had been abducted by Faheemuddin. The couple were arrested in Khairpur but when Hajira declared in court that she had consented to the marriage and had not in fact been abducted, she was sent to the state-run woman's shelter, the Darul Aman; Faheemuddin obtained bail before arrest and then through petitioning the Sindh High Court had his wife released from the Darul Aman.

Meanwhile another male member of Hajira's family convened a *jirga* of the Manzai tribe to decide the fate of the couple. It decided that they had shamed the tribe and must die. On 7 September 1997, as the couple along with Faheemuddin's relatives, left the court in Hyderabad where they had gone to have their bail confirmed, they were surrounded by Hajira's male relatives, including her father, brother and uncle. The couple tried to escape in a rickshaw but were hunted down by Hajira's relatives and shot dead at point blank range. Police subsequently registered a complaint of murder but criminal prosecution was subsequently dropped as both families agreed to a compromise under the law of *qisas* and *diyat* (see below).

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<sup>8</sup>For more details on the 'honour' system and underlying concepts as well as specific *jirga* 'judgments' involving the handing over of women in compensation see: *Pakistan: Violence against women in the name of honour*, AI Index: ASA 33/17/99.

In a similar case, Riffat Afridi (18) of the Afridi Pashtun community on 2 February 1998 left her home in North Nazimabad in Karachi and seven days later married Kunwar Ahsan (30), a Mohajir. Due to their different ethnic backgrounds, Riffat Afridi's family had not agreed to the marriage. The girl's father brought charges of abduction against Kunwar Ahsan, and charges of *zina*, fornication, against both partners. At the same time, a *jirga* of the Afridis decided that both Riffat and Kunwar Ahsan should be killed as they had defied the will of the girl's father and thereby dishonoured the family. Riffat's father agreed with the verdict; he was reported as saying, "this is a matter of honour. We don't allow our women to be taken away or to go away. Whether she has eloped or was kidnapped, we will kill her." The *jirga* called for a strike on 11 February 1998 in Karachi, saying that 'the recovery of the girl has become a matter of life and death for us' and to denounce the police who had failed to trace Riffat. In its course, two police officers were killed and several people injured. Then Sindh Chief Minister Liaquat Jatoi on 20 February 1998 assured the *jirga* that the government would spare no effort to trace the girl and return her to her family. The Afridis further claimed that Riffat had already been married in accordance with tribal custom; later in the month both spouses were arrested and brought to Karachi where they both declared on 27 February before a magistrate that they were legally married and that there had been no abduction. Riffat was then allowed to leave the court with her husband's relatives but Kunwar Ahsan remained in custody. On 4 March 1998, Kunwar Ahsan was shot and critically wounded as he was brought under police guard and in iron chains before the judicial magistrate when his remand was about to lapse. Human rights activists pointed out that security had been inadequate and that no action had been taken to stop criminal intimidation. The *jirga* said that authorities had been warned of such action but had erred in treating the episode as an ordinary criminal offence rather than seeking a solution to 'restore Pakhtoon honour'. Kunwar Ahsan underwent operations and was eventually released from hospital but continued to have physiotherapy. The couple went into hiding changing their home every few days; they are believed to have eventually left the country.

Eighteen-year-old Bakhtwar, a Pathan woman from Perumal, near Sanghar, Sindh province, on 8 July 2000 married 24-year-old Roshan of the Junejo tribe before a magistrate in Nawabshah. The marriage was contracted against the wishes of Bakhtwar's father, Qamruddin. He had earlier accepted a marriage proposal for Bakhtwar from a kinsman, Akbar Pathan, which reportedly involved the payment of a large bride price including 400,000 rupees and two of Akbar Pathan's five daughters, to be given to Qamruddin. Bakhtwar had refused to marry Akbar Pathan as her prospective husband was elderly, already married and has daughters older than Bakhtwar. Besides Bakhtwar had already decided to marry Roshan Junejo.

Following their marriage the couple went into hiding but were soon caught by Pathan tribesmen. Bakhtwar was taken against her will to relatives; elders of the Pathan tribe reportedly gave written assurances to the Junejos for Bakhtwar's safety and that she would be allowed to appear before a magistrate on 19 July 2000 to state if she wanted to stay with her family or with her husband. They said that they would accept her choice.

Ever since the wedding, several hundred Pathan tribesmen gathered at Sanghar protesting against Bakhtwar's disobedience and twice attacked the house where she was held, apparently with the intention to kill her. The tribesmen denounced the marriage and insisted on protecting the family's honour. To that end, they would not allow the young woman to give a statement before a magistrate as Bakhtwar intended to do. A spokesperson was reported in the English language media as saying: "We will protect our honour. It is our tradition and part of our culture, irrespective of what the people say."

In the night of 18 July, a *jirga* of the Pathan and Junejo tribes gathered - apparently at or near the residence of a former Member of the National Assembly (MNA) - and decided that the young woman should stay with her parents. The Pathan tribe promised the Junejo tribe that she would not be harmed if her husband agreed to divorce her and allowed her to be returned to her parents. Bakhtwar's parents are reported to have sworn on the Qur'an not to harm their daughter. Fearing a long drawn tribal conflict, the Junejo tribe reportedly favoured a quick settlement. They had previously consulted Pir Pagaro, a spiritual and political leader respected and obeyed by many tribes of the area. The Deputy Superintendent of Police was reportedly present during various consultations.

Roshan Junejo who had gone into hiding fearing for his safety, was brought by Pathan tribesmen before the *jirga* and on being given assurances of Bakhtwar's safety, signed the divorce papers, presumably under considerable duress. Newspaper reports on 20 July 2000 said Bakhtwar was being taken to Quetta by her brother. Amnesty International was told later that Bakhtwar was forced to marry a man of her family's choice.

Throughout the 10 days of this episode, the district administration did not intercede in the matter either to ensure the woman's physical safety or to secure her right to have a say in her marriage or divorce. Roshan Junejo appealed to the authorities through the media to place Bakhtwar in a state run women's shelter or in police custody but not into her family's custody. Police did not take any action as no formal complaint was registered. On 14 July, as Pathan tribals began to congregate in Sanghar, police officials were reported as saying, "We have taken security measures and will not allow them to take the law into their own hands." A senior police official was quoted in newspapers after the enforced divorce on 20 July as saying: "They reached an agreement that the marriage was against their tradition and customs".

Commenting on Bakhtwar's fate, the news magazine "Newslines" said that "decisions such as these by tribal jirgas are becoming increasingly common. They draw their strength from the support of powerful landlords and the complicity of the local administration. ... Also disturbing is the role of the ex-MNA as well as the local administration in the perpetration of this human

rights violation. Rather than upholding the law according to which a divorce cannot be obtained by force, let alone the brute force of a jirga, they acquiesced to tribal traditions.”<sup>9</sup>

Women as repositories of ‘honour’ also become unique targets for those who want to tarnish, punish or undermine another man, family or clan. This logic may explain the occurrence of public sexual abuse including punitive rape: “Rape for revenge is a common phenomenon, particularly in southern Punjab and upper Sindh region”<sup>10</sup> from where the punitive rape of Mukhtaran Bibi was reported. The ‘rape for honour’<sup>11</sup> logic may also explain the large number of public stripping of women and parading them naked reported from this area.<sup>12</sup> In the first 10 months of 1998, Lahore newspapers reported 54 cases of women stripped and dragged through the streets in Punjab towns and villages, their intended target of humiliation being mostly the women’s male relatives.

### *The process of the jirga*

A *jirga* can be initiated by a *sardar* who is aware of a feud and calls on the persons involved to submit to a *jirga* or by a complainant who approaches the *sardar*. On some cases the *sardar* alone will decide issues but major conflicts are brought before an assembly of elders. Both the complainant and the accused have to agree to appear before the *jirga* and to submit to their decision. Proponents of the system have described it as democratic: “A democratic system prevails among the tribes. People only come to the *sardar* if both parties agree ... if the *sardar* is a respected person, people will come to him for resolution of conflicts”, a *sardar* told Amnesty International.

Proceedings begin by the complainant presenting his case and the other party then responding. Unlike in the formal judicial system in Pakistan which in some cases allows for trial *in absentia*, in the tribal system, the accused has to be present in person and present their case in person. In some cases, *jirgas* have been postponed when the accused did not present themselves. In December 1998, a *jirga* between the Memon and Phulpoto tribes met in order to settle a murder

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<sup>9</sup>“Divorce at gunpoint”, *Newsline*, August 2000.

<sup>10</sup>*News on Sunday*, 21 July 2002.

<sup>11</sup>*Ibid.*

<sup>12</sup>The Human Rights Commission of Pakistan in its annual report for 1999 reported, “a peculiarity of Punjab was settling scores by public humiliation of the other’s women - the other side of regarding family honour as reposing in the body of a woman”. An example cited in its annual report for 2001 relates to a woman and her three daughters forced to strip naked in public in Okara in April 2001 by men of another family over a minor dispute.

of seven people but then did not proceed because it believed that without the main accused who did not turn up, justice could not be done and no lasting settlement would be achieved.

During the ‘trial’, all the people involved usually stay at the place of ‘trial’ as guests of the presiding person. “We give the hospitality and telephones and food ... but we don’t charge anything for our service”, a tribal *sardar* told Amnesty International, acknowledging, however, that some tribal leaders are now asking for a fee. While generally ‘proceedings’ do not cost the ‘litigants’ anything, *sardars* taking fees are seen by many observers as an indicator of the decline of the system. A former Commissioner of Larkana division, Aslam Sindhrani, pointed out to Amnesty International that *sardars* draw monetary benefit from holding *jirgas* besides benefits to their status.

Should there be reason to doubt any of the statements made before the *jirga*, an *ameen*, a trustworthy and reliable member of the tribe or from another tribe, may be asked to vouch for truthfulness of the statement by taking an oath on the Qur’an.

***“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the***

Among Baloch tribes, the tradition appears to persist to make people walk over fire or hot coals, on the widely shared assumption that only the feet of the guilty will be burned but that innocence protects against injury. In very rare cases this practice is also reported from Sindh. In August 1999, Liaqat Tehlani, a government school teacher in Kot Bugti was accused of theft and summoned to the locally powerful landowner Sardar Saleem Akbar Bugti to his residence. When Tehlani denied the allegation, Sardar Bugti asked him to walk over burning coals to prove his innocence. The burn injuries he sustained supposedly proved his guilt: Tehlani was fined Rs. 50,000 and unable to pay, detained in the house of Sardar Bugti for over one month.

#### *Participants of the jirga*

Participants may nominate members of their tribe to be present and to support their case, or renowned members of other tribes as arbiters. Tribal elders or particularly learned people like school teachers or other local notables may function as *musheer*, advisors or counsels to the *jirga*. Such third party opinion is usually accepted and to be called upon to perform this function is considered a great honour. Proceedings continue till a solution mutually agreeable to both parties is found. This may be very quick but more complicated cases may involve several days. “You have to convince both parties to agree; the decision is oral but I write it down to keep a record”, a *sardar* in Upper Sindh told Amnesty International. There is no appeal from

***“All human beings are born free and equal in dignity and rights ...”***  
**UDHR, Article 1**

a *jirga* decision. As another *sardar* told Amnesty International, “even the Supreme Court cannot overturn our decisions”.

The participants of *jirgas* are exclusively male; women do not appear before tribal courts either as accused, complainants or witnesses or even watch as mere spectators. Some *sardars* have stated that they have taken up women’s cases, for instance when the custody of children is at stake. Women may then approach the *sardar* with the request to plead their cases against their husbands.

### *The objective of the jirga*

Persons involved in *jirgas*, whether as *sardars* or complainant or defendant, have told Amnesty International that the focus of the proceedings is not the truth. “The purpose is to make peace, not to punish, the aim is not truth but reconciliation”, Amnesty International was told repeatedly. In a close knit social setting, participants and observers said, everyone is known and responsibility for a crime cannot be hidden. Moreover, an important claim repeatedly emphasised by participants of *jirgas* was that people do not tell lies before their *sardar* and so the truth is easily established. An Additional Sessions Judge in Sukkur, Parkash Lal, told Amnesty International: “We like the *jirga* system; when people come to court they are afraid that the true facts will come out and they lose out. In the *jirga* system, people are not afraid, they can give the true account ... so a very true and correct picture is brought before the *jirga*.” Similarly, lawyers in the High Court Bar Association in Sukkur, told Amnesty International: “... the *jirga* system is the best ... in court even if people take an oath they lie to the court but they don’t lie in front of the *sardar*”. A *sardar* in Upper Sindh said, “If somebody in my tribe commits a crime, I want it settled here, we want issues settled locally where we can trust each other.” Another tribal leader said, “before a *jirga* the truth is told, nobody will lie to the *sardar* ... that is the traditional authority, our tribes take the *sardar* as a sacred person, whether they are or not. People may lie on the holy Qur’an but not before *sardar* sahib...”

Standards involving the presumption of innocence or access to a lawyer, questions of appeal and review are not considered relevant to tribal judicial proceedings. Amnesty International was told that after a conviction by the official judicial system, the hostility between the offender and his victim or victim’s family persists in tribal society, while a *jirga* decision will end hostility. “Justice is what is accepted as justice by society”, a former senior civil administrator said to Amnesty International.

Justice is understood not in terms of punishment of the guilty leading to a process of remorse and eventual rehabilitation but strictly in terms of conciliation brought about by restoring a

***“Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary***

balance disturbed by an offence. Sardar Jatoi explained that in cases of robbery or other property crimes, the guilty are made to repay the stolen property and to pay a fine; in cases of murder, compensation is to be paid to the family of the victim for the loss of a relative; compensation can also be in the form of a woman or girl; in the case of a loss of 'honour', compensation can be in the form of monetary compensation or the handing over of a woman or a girl. Hence the tribal council after deciding about an alleged offence immediately negotiates about the appropriate level of compensation to be paid to the aggrieved party.

Compensation is awarded in accordance with standards of widely accepted worth for different victims. Compensation payments have become standardized over time, with some local variations: For the murder of a man, Rs. 200,000; for the murder of a woman, Rs. 400,000;<sup>13</sup> for injuries between 25,000 and 75,000 depending on seriousness and Rs. 1.6 million for the murder of a family member of a tribal leader. However, according to a former Commissioner of Larkana Division, most *jirgas* take also the economic status of the perpetrator into account and may impose lower rates if the tribe of the perpetrator is poor.

Compensation can be of different kinds; in land or water disputes it will be in kind or money. In the case of 'honour' crimes, compensation can be either in the form of money or a woman given in compensation for damage to 'honour'. In the 12 years of conflict between two groups of the Aghani tribe in Larkana district, both sides killed four men of their opponent tribe and injured one person. Despite some efforts by tribal leaders to end the clashes, the revenge killings continued until tribal leaders encouraged both sides to attend a *jirga* in December 1998. It found in two days of hearings that no compensation needed to be paid as the killings were equal on both sides but one group was made to pay Rs. 50,000 for injuring a man belonging to the other group. Both sides pledged to cease hostilities and accepted the *sardar's* ruling.

In another case, in August 1999 a month-old feud over the theft of a buffalo between the Mahesar and Bullo tribes in which four people were killed and eight injured, was settled in a *jirga* in Sukkur which ordered that a fine of Rs. 400,000 be paid to the families of each of the murdered men and Rs 75,000 for each of the critically injured, Rs. 25,000 for the lightly injured. The warring groups then embraced and promised to pay the compensation and end their quarrels.

The handing over of women to 'settle' a conflict continues to be reported. In such cases, a woman from the family of the person deemed guilty is handed over to the aggrieved family; the women concerned are not consulted as to whether they consent to be handed over to a potentially hostile family or not. The big inter-tribal *jirgas*, Amnesty International was told, exclusively take recourse to financial compensation. The use of women as part of a

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<sup>13</sup>The justification for a higher compensation to be paid for the murder of a woman is according to Senator Jatoi that women are not involved in a tribal dispute and hence murdered while innocent.

compensation agreement is based in the notion of women as not independent persons with rights of their own but as objects owned by men, whether they be fathers, husbands or sons.<sup>14</sup>

In late June 2001, a *jirga* of the Jatoi tribe in Thatta district, Sindh province, ‘settled’ a nine-month old feud between different members of the Jatoi tribe over the murder of Mohammad Juman Jatoi by the brothers Hanif Jatoi and Noor Mohammad Jatoi. The murder had reportedly been triggered by the two brothers getting annoyed about the barking of a pet dog belonging to Mohammad Juman Jatoi. The *jirga* decided that two young girls from the side of the murderer be handed over to the side of the victim: the 11-year-old daughter of accused Hanif Jatoi was made to marry the 46-year-old father of the murder victim and the six-year-old daughter of Noor Mohammad Jatoi was married to the eight-year-old brother of the victim. The ‘compensation’ agreement was accepted by all sides, the girls were not asked their opinion and no criminal prosecution was initiated relating to the murder. Though the arrangement was reported in the English language press in Pakistan, no action by the authorities is known to have been taken to prevent such abuse, to rescue the girls or to bring the perpetrators of the abuse to justice.

**“No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”  
UDHR, Article 4.**

Many tribal *sardars* believe that the giving of a woman is, as Sardar Khadim Hussain Jatoi put it, “the best way to cool tempers, to heal the conflict and to bring families together through the link of marriage”. This view may be unduly sanguine: women handed over in this manner live in hostile environments without their consent and continue often to be ignobly treated.

Compensation is reportedly imposed collectively on the perpetrator’s family, not on the guilty individual. The money handed over to the family of the victim hence does not directly benefit the widow and children of the murdered man nor again does the perpetrator have to pay compensation which hence does not have a punitive or deterrent effect on the perpetrator.

*Perceived advantages of the jirga system: quick, reliable and restorative*

Proponents of the tribal justice system stated that tribal courts reach decisions very quickly, with even complicated cases being decided in days. Nawab Aslam Raisani told Amnesty International that he had settled a case going back 96 years that started with a dispute over a piece of land and involved five killings. The *jirga* lasted nine days and concluded, according to Raisani, ‘to everyone’s satisfaction’.

<sup>14</sup>For details see *Pakistan: Violence against women in the name of honour*, AI Index ASA 33/17/99.

*Sardars* whom Amnesty International interviewed emphasised that *jirgas* provide a lasting dispute settlement in a way no official court could. “The feudal lord brings about reconciliation between the affected parties. The custom of monetary or matrimonial compensation adjudicated by the sardar ends the feud”, according to Sardar Wali Khan Mazari. “His basic interest is to bring about reconciliation between the disputants, based on the evidence and arguments presented by both parties and after consultation with members of the *jirga* comprising respected elders recommended by the disputing parties. This unofficial judicial system is democratic and places emphasis on conflict resolution and reconciliation as opposed to punishment.”<sup>15</sup> Senator Jatoi and others have pointed to the fact that despite the establishments of more and more courts, including speedy trial courts, the crime rate has not come down: “Chain of murders can only be stopped in *jirgas*. Justice and peace are our main aims.”

Proponents of the tribal justice system claim that the authority of the *sardar* and the *jirga* he conducts ensures that peace is permanently restored in the process. While this appears to be so in the majority of cases, *jirgas* do not always permanently resolve an enmity, the ‘*sardari* peace’ is not always lasting. During the *jirga* itself, hostilities between the parties are supposed to be held in abeyance but sometimes clashes are reported to break out as opponents present their cases. In May 1999, during *jirga* negotiations over a land dispute between different branches of the Bugti tribe in a village near Kashmore, participants opened fire on each other, killing one and injuring another. A *jirga* held in 2001 in Dadu, Sindh province, to settle a land dispute between two groups of the Leghari tribe, ended in violence when the two sides attacked each other with guns, axes and clubs. One side to the dispute was represented by a former Member of the Provincial Assembly and the other by the district leader of the Pakistan People’s Party and a provincial leader of the Millat Party; it was presided over by a *sardar* who was a former Member of the Legislative Assembly.

In some instances, *sardars* are reported to have imposed fines on those breaking the peace during the period between announcing the date of the *jirga* and its actual occurrence. A *jirga* held on 28 December 1998 in the Khairpur Circuit House attended by the *sardars* and other elders of the Bhutto and Jamali tribes as well as the Deputy Commissioner of Khairpur to resolve a conflict that had resulted in four murders within five months, imposed a ‘*sardari* fine’ of Rs. 200,000 on the Jamali tribe for having committed a murder after the date of the *jirga* was announced. The same *jirga* also announced that a fine of Rs. 2 million would be payable by anyone breaching the peace between the two tribes in future.

Sometimes series of *jirgas* take place when the peace is broken again and again. In July 1999, a *jirga* was held in the Circuit House in Sukkur to settle an 11-year-old dispute between the Maher and Jatoi tribes. This was the fourth consecutive *jirga* as the earlier ones in 1993, 1996 and 1998 had not provided lasting peace. By 1999, more than 100 people were said to have been

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<sup>15</sup>*Newsline*, June 1998.

killed between the two tribes. The original clash was over a piece of land near Sukkur but then spread to other parts of Sindh where people belonging to the two tribes live. The immediate focus of the *jirga* was a recent killing of 19 people and the injury of 23 others, including five women, over a cattle theft. The beginning of the *jirga* was delayed as hostilities again flared up, but respected *sardars* present at the *jirga* pacified the assembled men and the issue was settled on that very day, involving the payment of over Rs. five million and the threat of heavy fines to anyone disturbing the hard won peace. Amnesty International does not know if peace was subsequently maintained.

Tribal *jirgas* have no institutionalized enforcement mechanism, a weakness in the opinion of some tribal leaders whom Amnesty International interviewed. “Verdicts are carried out through social pressure but sometimes people run away to escape their obligations”, Nawab Aslam Raisani admitted. While the authority of the *sardar* and the presence of the tribal community is usually enough to ensure that the agreed settlement is honoured, in view of possible and actually reported breaches of such agreements, many *jirgas*, in addition to extracting promises from participants to honour the agreement, have announced that a fine will be imposed on anyone breaching the decision.

### 3. Tribal justice and the state

The attitude of the state towards the tribal justice system has been by and large supportive of the *jirga* system. The state does not as a rule take action when *jirga* decisions lead to the killing of women for an alleged breach of the ‘honour’ code or the handing over of women and children to ‘settle’ disputes.<sup>16</sup> Decisions of *sardars* which lead to the infliction of severe physical harm are not usually criminally prosecuted by the state. Despite strikes by the Government Secondary Teachers Union no action was taken by police against the *sardar* who caused a teacher to walk over fire (see case above).

The state in Pakistan has in fact sometimes sought to make use of the system. Many tribal leaders in Pakistan are themselves parliamentarians, members of the civil administration or have

***“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights***

<sup>16</sup>For details on the acquiescence or connivance in abuses by private actors by the Pakistan state or its failure to exercise due diligence to prevent, prosecute and punish such abuses, see the second part of *Pakistan: Violence against women in the name of honour*, AI Index: 33/17/99.

family links with the administration.<sup>17</sup> In their official capacities, they speak the language of good governance, of the separation of powers which entails the respect for the independence of the judiciary and of human rights but in their constituencies they preside over tribal courts. For instance, Mir Nadir Magsi, *sardar* of his tribe and Member of the Provincial Assembly (MPA) in December 1998 headed a *jirga* which settled by a payment of Rs. 735,00 a five-year-old dispute between the Magsi and Khoso tribes in Shadatkot which had claimed four lives.

Several parliamentarians and state officials were also present at a *jirga* in December 1998 involving a conflict between the Bhayo, Marfani and Brohi tribes which met in the district council hall in Shikarpur; the conflict had involved 46 murders over 30 years. Those present included the Pakistan People's Party Members of the National Assembly (MNAs) Aftab Shahban Mirani and Ghaus Bux Khan Mahar and the MPA Maqbool Ahmed Sheikh as well as the District Magistrate and Senior Superintendent of Police (SSP) of Shikarpur. Paramilitary Rangers and police were deployed for the protection of the *jirga* which settled the issue in five hours and imposed various compensation payments totalling over Rs. 12 millions.

State officials have also sought the assistance of tribal leaders to solve criminal cases pending in court stating that this was in the interest of restoring law and order among the tribes of Sindh. Following a rising wave of tribal clashes<sup>18</sup> which contributed to a general climate of insecurity particularly in Upper Sindh, then Commissioner of Larkana division, Sabhago Khan Jatoi in late 1998 contacted tribal *sardars* to resolve long-standing disputes - rather than involving the official law enforcement apparatus.

At the end of 1998, the Commissioner announced the holding of a Grand *Jirga* in Larkana to which all the tribes of Upper Sindh would be invited to hammer out a uniform code of conduct for *jirgas* to settle intra- and inter-tribal disputes. The Commissioner next appointed, Aftab Ahmed Qureshi, followed the same policy; he claimed that the approach initiated by his predecessor had laid the foundation for lasting peace in the region and that more *jirgas* would be held to resolve the remaining disputes. He said before the press that the *jirgas* were held in the presence of the district administration and that the Commissioner and Deputy Commissioner signed the agreement between the disputants and "such attestation of the decision automatically gets legal cover". He said that *jirgas* had the status of 'judicial councils' but should get explicit legal cover through legislation.<sup>19</sup>

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<sup>17</sup>In the last National Assembly before its dissolution in October 1999, out of a total of 207 seats, 126 were reportedly held by feudal landlords or tribal leaders.

<sup>18</sup>In the four years up to end-1998, some 136 tribal murders were reported in Larkana division. In 1990, around 50 people were murdered between the Jatois and the Mahars.

<sup>19</sup>Dr. M.B. Kalhor, "Why not regularize jirgas?" in: *Dawn*, 2 July 1999.

In many of these *jirgas*, members of the civil administration were present. A long-standing dispute between the Kehar and Jeha tribes, which claimed 16 lives and caused numerous injuries and destruction of property over five years, was settled in December 1998 when the local administration persuaded the heads of both tribes as well as other important *sardars* to attend a *jirga* held at the official District Council Hall in Shikarpur. Police provided security to the *sardars* as well as to those accused of murders and raids, escorting them to the meeting place. Police were also deployed around the hall during the holding of the *jirga*. In addition to senior members of the tribes, representatives of the state present during proceedings included the Divisional Commissioner, the Deputy Inspector General of Police, Larkana, the District Commissioner and the Senior Superintendent of Police (SSP) of Shikarpur. Several of these have a tribal affiliation themselves. They were according to reports not actively involved in the proceedings which after several hours resulted in a settlement with respect to all those murders where the guilty could be identified. It involved compensation payments of Rs. 2.125 millions payable by the Jeha for murdering four Kehar men and injuring three others. The compensation was higher than usual at Rs. 400,000 for each murder as the Jeha had defied an earlier *jirga* decision in 1997 and continued their attacks. Kehars were ordered to pay total compensation of Rs. 400,000 for two murders of Jeha men. The *jirga* also announced that compensation for each murder would be raised to Rs. one million if the killings continued in future. Both sides accepted the ruling and pledged to cease hostilities. The SSP then asked the gathering to surrender all illegal arms. It is not known if this appeal had any effect.

In some instances, *jirgas* take place on the premises of the official criminal justice system. Sardar Khadim Hussain Jatoi was in August 1998 invited by the Sindh Home Department to conduct a *jirga* inside Sukkur Central Jail to resolve an eight-year-old dispute between warring factions of the Dhareja tribe which had cost six lives. Within four hours, the *jirga* held in the courtroom of the jail directed that Rs. 200,000 be paid for each murder and Rs. 75,000 to each severely injured person, Rs 10,000 for less injured persons. The former enemies agreed to the settlement and withdrew the murder charges under which several of the accused had been arrested.

Sardar Khadim Hussain Jatoi said to an Amnesty International delegation that state officials often came to him for advice on how to solve complicated cases though they did not formally recognize tribal justice as equal to the official justice system. Other *sardars* have confirmed similar practices. Nawab Aslam Raisani noted that members of the judiciary had approached *sardars* for advice in cases impacting on the tribes: "We decide the issue, refer it back to the court and they implement it."

In some cases, tribal *jirgas* have not only operated within the space of the official system but have held perpetrators belonging to the official system to account for violations of human rights. In November 1998, a *jirga* held at Khairpur Circuit House found the Station House Officer (SHO) of police station Babarloi guilty of the murder of a local landlord of Piryaloi town, Karim

Bux Odho. Police had initially claimed that Odho was a robber and had been killed on 18 February 1998 in an 'encounter' with police. Two of Odho's relatives were arrested as his 'accomplices' and a gun was claimed to have been recovered from Odho. Local people protested against what they believed was a fake encounter killing and demanded an impartial investigation. When police failed to act accordingly, a *jirga* attended by Odho tribal elders and senior police officials was instituted to 'adjudicate' the case. It found the SHO guilty of murder and 'sentenced' him to payment of Rs. 400,000 to the Odho family. Similarly in July 1999, a *jirga* directed the former SHO of Pir Jo Goth police station to pay Rs. 300,000 for torturing a detainee, Ashraf Jatoi, to death. Again in 2001, several police officers, including a Deputy Superintendent of Police and a Station House Officer of a police station were reportedly 'tried' by a *jirga* in Rohri, Sindh province, after they had allegedly unlawfully killed a woman and injured five villagers three months earlier during a raid of a village where they had searched for some bandits. After local protests, a criminal complaint was filed against the DSP and others. Before the case came to court, the *jirga* found them guilty of the killing and ordered that they pay Rs. 1,200,000 in compensation to the families of the victims. It is not known if any other action was taken against the accused.

The Government of President Musharraf has been more outspoken than previous administrations in condemning 'honour' crimes and the assumption of a judicial role by *jirgas*. In the inaugural address to the Convention on Human Rights and Human Dignity on 21 April 2000 in Islamabad, General Musharraf said: "It shall be the endeavour of my government to facilitate the creation of an environment in which every Pakistani can find an opportunity to lead his life with dignity and freedom. .... The Government of Pakistan vigorously condemns the practice of so-called 'honour killings'. Such actions do not find any place in our religion or law." He also said that killing in the name of 'honour' "is murder and will be treated as such."

According to a government statement of July 2000, there is nothing 'honourable' in such killings: "The practice is carried over from ancient tribal customs which are anti-Islamic. ... The government is committed to combatting this practice with all the resources at its disposal. The present leadership in Pakistan had launched a national human rights campaign, singling out honour killings for special denunciation. Administrative instructions have been issued to ensure that due process of law takes its course un-hindered and there is no manipulation in either the registration or proceedings of such cases." In September 2000, Interior Minister General (retrd.) Moinuddin Haider said he had directed police to register First Information Reports (FIRs, complaints registered with police which start the inquiry process) in 'honour' crimes cases even if the killers tried to take shelter behind verdicts of *jirgas* as these were not recognized by law. He also said, "the law is going to be amended to end this un-Islamic practice. And those who commit murders in the name of honour should be hanged."

Most media responses to the government announcement called it 'a long overdue step considering the fact that there has been an alarming increase in the numbers of this heinous

crime in the past few years. ... At present such incidents are usually ignored by government officials, especially in rural or tribal areas, where some culprits are either powerful and well-connected or simply manage to bribe their way out of trouble. The real test of the government's intent to root out this savage practice would thus lie in elimination of all possible escape routes for the offenders."<sup>20</sup>

Despite clear indications at the highest level that sanction of abuses of women's rights at the hand of *jirgas* would not be tolerated, state officials, local body leaders and members of political parties were reported to have supported or condoned them or to have participated in them. A persisting ambivalence even in official circles is evident. In February 2001, the Sindh Governor on a visit to Larkana reportedly commented that *jirgas* were not a bad thing. Federal Law Minister Khalid Ranjha similarly told an Amnesty International delegation in July 2002 that while there was an 'inhuman aspect of females being made a victim' when handed over by a *jirga* to a tribe to 'settle' a long standing dispute, this was a cultural tradition which had its merits; at the cost of a single life, more killings could be prevented. Moreover while such women might suffer in their first year of a forced marriage into an antagonistic tribe, the birth of the first child would end all discrimination. He reiterated what Amnesty International had been told frequently, 'You can't beat the mind-set through legislation'. However, the state's responsibility also includes providing education to all which will gradually contribute to an awareness of equality.

While the media coverage of a particular phenomenon is not necessarily an indication of its significance, the annual reporting by the non-governmental Human Rights Commission of Pakistan (HRCP) is noteworthy: in the 1999 annual report, there is no special mention of tribal

***“Marriage shall be entered into only with the free and full consent of the***

*jirgas*; in 2000 half a page; but in 2001, three full pages were devoted to 'jirga rule'. Following the most recent case in which a tribal council of elders had imposed a 'punishment' of gang rape on a young woman for a supposed misdeed of her younger brother, the chairman of the HRCP said: "We are concerned at the growing tendency of informal tribunals ... taking the law into their own hands and delivering justice in a mediaeval way."

Official steps to halt *jirgas* taking on quasi-judicial roles have been very few and linked to individual officials taking an interest in the issue rather than being based on official policy consistently implemented. In a surprise move, the then new Commissioner of Larkana division, Nazar Hussain Mehar, on 30 December 1999 instructed members of the civil administration in Larkana division to no longer participate in *jirgas* and not to refer disputes to *jirgas*. He directed that all proceedings relating to any offence, including land disputes, murder and assault be registered with police in accordance with the law, to be tried by properly constituted courts. The Deputy Commissioner (DC) of Shikarpur is reported to have then issued a letter to his staff

<sup>20</sup>*Dawn*, 14 March 2000.

to abide by this direction, arguing *inter alia* that the writ of the government was being eroded by the persistence of the *jirga* system, that *jirga* decisions were not impartial and neutral nor adequately implemented. The DC of Larkana is also believed to have issued similar instructions.

*Sardars* of Larkana Division reportedly interpreted this directive as a ban on *jirgas* in general and in a meeting in early 2000, unilaterally and by consensus rejected this decision. Subsequently several *jirgas* were held in Upper Sindh by people from Larkana Division but according to reports, outside the area. These included a *jirga* on 28 February 2000 on a dispute between the Soomro and Mastoi tribes of Shahdatkot in which former MPA, Nadir Magsi, acted as *ameen* and 'sentenced' the Mastoi to pay Rs. 675,000 to the Soomros for the kidnapping of a woman and injury to some other men; he 'sentenced' the Soomros to pay Rs. 595,000 to the Mastoi for the murder of a Mastoi man and causing injuries to several others. Another *jirga* was held in Khairpur over a land dispute between members of the Mangla tribe. While the incidence of *jirgas* declined for a time after the Commissioner's directive, they increased again after his transfer to another post and the withdrawal of the directive by his successor. For instance, a *jirga* in Ratodero, near Larkana in Sindh province in mid-2001 and presided over by the chief of the Jalbani tribe reportedly resolved a long-standing dispute between the Khokhars and the Syeds in the course of which 11 people had been killed. The *jirga* found the Khokhars guilty of the murder of a Syed advocate and directed that they pay Rs. 1.2 million to the Syeds in compensation. This fine was later reduced to Rs. 200,000. Other instances of *jirgas* with apparent official sanction or participation included:

-- In Sukkur, Sindh province, a *jirga* in 2001 resolved a dispute between two factions of the Rind tribe which had cost 15 lives, including that of two women. Animosity had spanned 16 years after an 'honour' crime in 1985. The *jirga* was attended by a former federal secretary and a new DCO (District Coordination Officer). It found one side guilty of five murders and fined it Rs. 600,000 and the other guilty of three murders and fined it to Rs. 500,000.

-- In early July 2001, the DCO of Khairpur district 'settled' a double sectarian murder case through a *jirga* held at Gambat. The *jirga* reportedly decided that each of the parties should pay Rs. 200,000 to the other for its murder; the sub-divisional magistrate reportedly read out the decision.

-- In a few cases, tribal *jirgas* resorted to the method of ascertaining innocence or guilt by making 'defendants' walk over burning coal. A *jirga* of Marhab and Kakhriani tribes in Bakhshapur, northern Sindh Province, heard a case in 2001 relating to a double murder case. Two of the 'accused' confessed their guilt and were ordered to pay Rs. 600,000 to the family of the victims; a third 'accused' claimed that he was innocent and was made to prove his innocence by walking over burning coal. When his feet were not burned, he was let off.

#### **4. Tribal justice and the official judiciary**

The widespread recourse to tribal justice even by state officials must be seen against the background of the official justice system of Pakistan which over time has become inefficient,

slow, expensive, is remote from people's understanding and, as currently operated, not always capable of delivering justice. Afrasiab Khattak, chairperson of the HRCP said in July 2002 after the punitive gang rape of Mukhtaran, "the vacuum created by the judicial system and the weakness of governance is filled by jirgas and the panchayats... We have to address the main issue, that is the need to strengthen our institutions."

A high percentage of the population of Pakistan is illiterate or with little schooling or learning, making them ill-equipped to approach the official judicial system in case of any injustice experienced. Many do not understand the law, its procedures and the system that administers it, nor are they aware of the ways to access legal aid. Complaints need to be filed with police who, after investigating the complaint, submit their reports to magistrates who then decide if there is enough evidence to commence criminal prosecution. Long years of abuse of power by police - who are under-paid, under-equipped and under-trained - as well as political interference in the working of the police by successive governments have undermined popular trust in this institution: ordinary people fear the police. Corruption and nepotism add another layer to the popular distrust of the police. With the access to the criminal justice system being a major hurdle, many people forgo criminal prosecution through the official system.

The shortcomings of the law enforcement apparatus have direct implications for the working of the judiciary. Police lack of motivation and skills lead to poor investigative reports and this, along with the possibility of buying witnesses and securing false evidence, makes it often impossible for courts to determine the truth. Police officers were in 1998 reported in the Pakistan media to have said that due to the ease with which criminal suspects could get released, they have taken to killing rather than arresting criminal suspects in order to curb crime.

The judicial system itself has come under considerable criticism. With a severe backlog of cases which goes into the hundred thousands,<sup>21</sup> the courts take years to complete criminal prosecution making litigation expensive and difficult for complainants. Moreover justice is by no means assured as a result.

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<sup>21</sup>For example, the Lahore High Court, one of the four provincial high courts of Pakistan, and its subordinate courts in the Punjab in the years 2000 and 2001 disposed of 953,670 cases leaving a backlog of 1,067,526 cases. Many of them go back several years as the following break up demonstrates: The Lahore High Court at its principal seat in Lahore and its provincial benches in the years 2000 and 2001 disposed of 112,485 cases; these included 3,930 old cases pertaining to the period before 1991 which were disposed of by 31 December 2000 and another 5,249 old cases which were disposed of during 2001 under a project to accelerate the disposal of cases launched by the Lahore High Court in September 2000. The Lahore High Court in the year 2001 disposed of 3,730 cases dating back to before 1996 out of a total of 11,481 cases of the pre-1996 period. The situation in the other provinces is similar.

The Constitution of Pakistan of 1973 provides for the separation of powers and an independent judiciary whose duty it is to maintain the rule of law, interpret the constitution, protect fundamental rights and administer civil and criminal justice impartially without interference from other institutions. However, government attempts over the past years to influence the higher judiciary by withholding security of tenure, by appointing, promoting and dismissing judges on political grounds rather than considerations of merit, punitive transfers and personal threats, under staffing courts leading to long delays and not ensuring adequate and continuous training of judicial staff have seriously undermined the independence of the judiciary<sup>22</sup>. At the same time judges of the highest judiciary have not always maintained their political neutrality and have thereby undermined the standing of the institution. Local observers also assert that corruption, so prevalent in Pakistan at every level, has also crept into the judiciary and affected its independence.<sup>23</sup> “The independence of the judiciary figured prominently in public debate and not always to the august institution’s credit”, HRCP commented in its *State of Human Rights in 2001* report.

The need for judicial reform has been much debated and acknowledged by the legal profession, the judiciary and the public but efforts in that direction have not taken off yet.<sup>24</sup> Faced with a seriously impaired criminal justice system, an aggrieved person who does not trust the official judiciary,<sup>25</sup> has few alternatives: to take the law into their own hands -- which happens

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<sup>22</sup>For an analysis of problems faced by the judiciary see: *The rule of law and human rights in the legal system of Pakistan*, International Bar Association, 1999 and *Strengthening of institutional capacity and judicial and legal reform*, Asia Foundation, 2001.

<sup>23</sup>For instance the Lahore High Court in December 2001 was reported to have dismissed 14 members of the lower judiciary for corrupt practices and unprofessional conduct in the discharge of their duties.

<sup>24</sup>The federal Law Minister in December 2001 said that within the Access to Justice Programme funded with US\$ 350 million by the Asian Development Bank (ADB), an enabling environment for access to justice was sought to be created and the administration of justice and the effectiveness of courts to be improved. The latter would involve increasing the pace and reducing the cost of court proceedings by setting up separate civil and criminal courts at the lowest level and introduction of modern management and information technology in the court system. The ADB project was in mid-July 2002 reported to be on hold as 23 conditions set by it to be implemented by June 2002 in the first phase did not appear to have been met; they included the approval of programmes for the reduction of delays, the implementation of an action plan to professionalize management of higher courts, enactment of new police laws etc.

<sup>25</sup>According to a Gallup Pakistan survey in July 2000, 67% of respondents said that society did not operate according to the rules of justice and 75% said that law-breakers usually got away unpunished.

frequently and contributes to an already staggering crime rate -- or to approach the tribal justice system which promises quick, inexpensive and easily understood solutions.

This opinion appears to be widely shared by people in Sindh. A petitioner in a tribal *jirga* was quoted as saying: "In the regular courts we have to pay for a wakeel [lawyer], the policemen, chaprassis [watchmen], clerks and others. Then cases are delayed for years and we get squeezed financially in the process. That is why I have come to Sardar sahib who will announce a decision in my case within a day and that too without any payments."<sup>26</sup>

Nawab Aslam Raisani similarly said, "when they approach us they feel at home, they know that they can trust us". Sardar Wali Khan Mazari, a strong proponent of the *jirga* system similarly claimed for it: "The alternative recourse to the state judicial system, in most cases, means more suffering where the rule of law falls victim to the highest bidder."<sup>27</sup> Mumtaz Bhutto, former member of the Sindh Assembly, reportedly said: "People have lost faith in the police, the judiciary and the parliament ... we are doing the job that the administration should be doing. Because the government machinery is not working, this is the only alternative that provides solutions."<sup>28</sup>

A former chief justice of Pakistan told Amnesty International in February 1999 that many people had 'lost faith in the [official] system' due to a general disregard toward institutions in general and for the judiciary in particular. Acknowledging the long drawn nature of some tribal disputes, he added that compromises, including the setting up of new blood bonds through marriages between warring tribes 'work wonders' in ending disputes. Considering the differences in urban and rural communities, he thought that on the touchstone of 'workability', the tribal justice system was appropriate until such time as rural and urban areas enjoy the same socio-economic standard. A sitting judge in the Sindh High Court disagreed with this argument, saying, "is it fair to let people live in a society in which fundamental rights are not known? Should we say, you are backward so you should live in a backward system?"

## 5. Principles of tribal justice and official criminal law

Lawyers in Pakistan with whom an Amnesty International delegation discussed the tribal justice system have pointed to a significant convergence of tribal and statutory law in Pakistan. Offences involving land, water or property disputes would be tried as civil cases leading to compensation or fines. 'Honour' crimes, including the killing of women and sometimes men on

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<sup>26</sup>Nisar Khokhar: "Blind justice" in: *Newsline*, November 1998.

<sup>27</sup>*Newsline*, June 1998.

<sup>28</sup>*Far Eastern Economic Review*, 20 May 1999.

the allegation of illicit sexual acts, and revenge murders are murder triable in regular courts under the *Qisas* and *Diyat* law which is a part of the Pakistan Penal Code. The *Qisas* and *Diyat* law does not necessarily provide for punishment of the offender in the form of the imprisonment or the death penalty but may -- like tribal justice -- involve compensation in its stead.

The *Qisas* and *Diyat* law, first introduced as an ordinance in September 1990, was repeatedly repromulgated<sup>29</sup> until it was passed almost unaltered by parliament in 1997 without significant public or parliamentary debate. The *Qisas* and *Diyat* law redefines the offences of physical injury, manslaughter and murder previously shaped by British colonial criminal law<sup>30</sup> in terms of Islamic law as interpreted in Pakistan; it also introduces new punishments for these offences.<sup>31</sup> The *Qisas* and *Diyat* law regards the offences of physical injury, manslaughter and murder not as directed against the order of the state but against the person of the victim. With respect to offences against the person, a judge in Pakistan observed: "In Islam, the individual victim or his heirs retain from the beginning to the end entire control over the matter including the crime and the criminal. They may not report it, they may not prosecute the offender. They may abandon prosecution of their free will. They may pardon the criminal at any stage before the execution of the sentence. They may accept monetary or other compensation to purge the crime and the criminal. They may compromise. They may accept *qisas* [punishment equal to the offence] from the criminal. The state cannot impede but must do its best to assist them in achieving their object ... in appropriately exercising their rights."<sup>32</sup>

Under the *Qisas* and *Diyat* law, the punishment for murder may be either in the form of *qisas* i.e. a punishment equal to the offence committed, or in the form of *tazir*, i.e. discretionary punishment. The concept of *qisas* is defined as "punishment by causing similar hurt at the same part of the body of the convict as he has caused to the victim or by causing his death if he has committed *qatl-i-amd* (intentional killing), in exercise of the right of the victim or a *wali* (heir of the victim, or the provincial government if there is no heir)." In the case of murder this means that if the relevant rules of evidence are fulfilled, the heirs of the victim have the right to have

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<sup>29</sup>Ordinances promulgated by the President lapse after four months unless passed by parliament; to avoid this lapse, many ordinances have been repeatedly repromulgated despite Supreme Court reprimands that this practice effectively circumvents the legislature.

<sup>30</sup>The Pakistan Penal Code dates from 1860.

<sup>31</sup>For discussions of this law as it affects the death penalty, see: *Pakistan: Legal changes affecting the application of the death penalty*, AI Index: ASA 33/03/91 and *Pakistan: The death penalty*, AI Index: ASA 33/10/96. Its effect on impunity for honour crimes is dealt with in *Pakistan: Violence against women in the name of honour*, AI Index: ASA 33/17/99.

<sup>32</sup>Federation of Pakistan through Sec. Min.of Law vs. S. Gul Hassan Khan, PLD 1989 SC 633.

*qisas* inflicted on the offender. The heirs may waive this right, however, at any stage, in which case the death penalty cannot be imposed as a *qisas* punishment. The evidentiary requirements for the imposition of the death penalty as a *qisas* punishment are the confession of the accused before a competent court or the fulfilment of rules of evidence laid down in the *Qanun-e-Shahadat* [law of evidence] of 1984. If these standards are not fulfilled, the court can impose punishments, including the death penalty, as *tazir* punishments, i.e. discretionary punishment, if it finds the offender guilty of murder.

In *qisas* cases, the law changes the role of the court in the prosecution of murder from the role played by a court before the Law of *Qisas* and *Diyat* was introduced: its role is merely to ensure fair passage of the case but the victim's heirs have the right to decide whether or not prosecution is to continue and the punishment be inflicted. Death sentences can only be carried out once confirmed by the appropriate High Court but even once so confirmed, the heirs of the victim can still pardon the convict and accept compensation, *badal-i-sulh*. The amount of compensation is negotiable; the law stipulates that the giving of a woman in compensation is not a valid form of *badal-i-sulh* but does not explicitly prohibit the practice. In practice, courts reportedly continue to accept women being handed over as part of a compensation settlement for murder. An execution can be halted by the heirs "even at the last moment before the execution of the sentence". The execution must be carried out in the presence of the heirs and courts have debated whether the mode of carrying it out as *qisas* may or must involve the heirs actually carrying it out.

***“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are***

In November 2000, the Peshawar High Court held that in cases where the right to *qisas* in murder cases was compounded, i.e. where compensation was accepted by the family of the victim in lieu of punishment, the handing over of a woman shall not be valid form of compensation and lower courts shall not accept such agreements. It described the practice of *swara*, the handing over of girls and women as settlement of a dispute, as 'tyrannical', illegal and against Islamic law it also suggested that a penalty be imposed on anyone upholding this custom. It held that a marriage contract was void if made in the context of *swara*. This judgement has been ignored as the practice is

reported to persist.

The case in which the Peshawar High Court commented on *swara* involved a 26-year-old woman, Bakht Mana, who had been handed over as an infant in compensation for a murder committed by her father's sister-in-law. She was contracted to marry Hamaish Gul, the son of the complainant. As a result of this compromise agreement, the woman responsible for the murder was not prosecuted. However, Hamaish Gul did not make arrangements for Bakht Mana to leave her family home to live with him; instead, in 1996, Hamaish Gul took another wife while

Bakht Mana stayed at her family home. Hamaish Gul refused to divorce Bakht Gul or to take her to his home on the ground that she was given to him in *swara* and he could therefore decide her life circumstances. Bakht Mana filed a suit for dissolution of marriage and maintenance for the preceding 25 years before a family court which granted her the dissolution of marriage but dismissed her claim to maintenance. Hamaish Gul then challenged the family court decision in the Peshawar High Court claiming that his right to *swara* had been violated.

Similarities to tribal justice are evident: the conception of killing as an appropriate punishment for a murder and as a right of the heirs is implicit in tribal logic that no compensation is due if both sides have killed an equal number of people; it is also the basis of the *Qisas* and *Diyat* law's understanding of the death penalty for murder. In both systems, compensation is acceptable instead of any other punishment for murder; in both systems, the offence is considered between individuals or families and not against the order of the state. In both systems, the judge or the *sardar* merely facilitate the negotiations between the parties, the punishments are prescribed and in neither system is the motivation of the offender taken into account in deciding the punishment. The handing over of women in compensation is practised in the tribal system and condoned in the official system.

It is due to the nature of the *Qisas* and *Diyat* law that heirs of a murder victim whose case is settled in a *jirga* can lawfully withdraw a criminal charge which they may have brought in the official criminal justice system.

The proximity of the two systems became apparent in a recent case of compensation involving the forced marriage of several girls to ensure pardon for four men belonging to different branches of the same extended family, who had been convicted of murder and sentenced to death. The 'deal' between the victims' family and the perpetrators was negotiated by a village council and intended to be presented to the official court which is obliged to accept the compromise and free the convicts. The sharp disparity between the ages of the girls and the intended husbands aroused media attention as a consequence of which state officials stopped the 'deal'.

A family feud in Abbakhel, Mianwali district, Punjab province, going back to a murder in 1954 when a man shot dead one of his brothers lead to several revenge murders, including murders in 1988 of which four men were convicted and sentenced to death. After exhausting their appeals and request for pardon they were to be executed on 27 July 2002. However, on 23 July 2002, a local council of elders brokered a compromise according to which the four convicted men's immediate family were to pay 8 million Rs. (133,000 US\$) and hand over eight girls to the relatives of the murder victims. The council comprised local landlords, including the Nawab of Kalabagh, clerics and former legislators, including two former legislators. More than 4,000 villagers reportedly watched the negotiations and cheered its conclusion, which was celebrated with the distribution of sweets.

On 25 July, police intervened to cancel the forced marriage of 18-year-old Wazeeran Khatoon, and 14-year-old Tasleem Khatoon, daughters of two of the convicted men, to 77-year-old and 55-year-old relatives of the murder victims. Police enforced a divorce in both cases before the girls could be handed over to their husbands and the marriage consummated. Wazeeran Khatoon was reported to have volunteered marrying the old man as she wanted to save her father's life and to end hostilities between the family branches. Correspondents of local newspapers reported that villagers were bewildered and perturbed by the police and media intervention; they considered the deal to be in agreement with local traditions and unobjectionable.

After the police intervention, the family of the victims formally withdrew their demands for eight girls to be handed over to them and informed the administration and the district and sessions court that they would be ready to accept mere monetary compensation and forgive the convicts. The family of the convicts had reportedly sold their land to raise the required amount.

The HRCP said that "such decisions violate the law of the land, the laws of all religions including Islam and indeed the norms of civilized behaviour anywhere in the world. When local papers reported the 'deal', the Supreme Court ordered an inquiry: Chief Justice Sheikh Riaz Ahmed said: "The compromise deal appears to have been reached in violation of the law of the land, and against the norms of the civilized world."<sup>33</sup> Human rights lawyers in Pakistan have, however, pointed out that the handing over of women and children is often part of the settlement and that courts usually turn a blind eye to such deals which amount to slavery.

In response to public outcry around the 'deal' in Mianwali, Punjab Minister for Law Rana Ijaz Ahmed Khan, on 25 July is reported to have said that the military government had decided that 'marriage for reconciliation' would be made a cognizable offence by amending section 310 PPC. It is not known if concrete steps are being taken to bring about the required legal change.

*"All are equal before the law and are entitled to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."*  
UDHR, Article 7.

## 6. Tribal justice and gender inequality

<sup>33</sup>The Guardian, 26 July 2002.

Women do not as a rule have access to the tribal justice system.<sup>34</sup> If issues including inheritance or custody of children affecting women arise they are usually settled in the family with women's interests represented -- or misrepresented -- by male relatives. Senator Jatoi summarized the situation: "In our system, we cannot call a woman to the jirga." Only in rare cases will *jirgas* deal with civil issues affecting women, for instance property disputes or inheritance or custody matters; in such forums, it has so far been inevitably men who represent women's interests there. Amnesty International was told that women's testimony would not be accepted in murder cases.

Women also do not have direct access to *jirgas* even if they fear becoming the victims of 'honour' crimes; they cannot defend themselves or clear their reputation of slurs and slander. It is the rumour about a woman's inappropriate behaviour that damages the 'honour' of her family or community and the truth of such allegation is not sought to be established. Hence a woman's testimony on her own behalf is not heard at *ajirga*. Women, however, do seek refuge in the house of the *sardar* from violence against them when they are aware of rumours circulating about their behaviour which may trigger 'honour' crimes. In such cases, the *sardar* will shelter the girl or woman and subsequently negotiate a settlement with her male relatives, once again not in the affected woman's presence.

Women are not consulted when important decisions affecting their lives are made; even when they are handed over as part of a compensation agreement to settle a revenge killing or an 'honour' crime. The treatment they can expect in the family to which they are given cannot be thought to be sympathetic. Tribal leaders and others supporting this practice betray a high level of disregard for women's rights when they argue that the handing over of women to settle a dispute produces blood bonds which make for lasting peace and are therefore desirable.

## **7. Reforming or replacing tribal justice?**

While tribal *sardars* have sought to co-ordinate and institutionalize the dispensation of tribal justice, many observers in the interior of Sindh have pleaded for its abolition urging at the same time that the official judiciary be strengthened and reformed.

Amnesty International has been told that *sardars* in Sindh and Balochistan meet to discuss the dispensation of tribal justice. For instance Nawab Aslam Raisani said that *sardars* of the Baloch

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<sup>34</sup>Amnesty International was told in Upper Sindh that a woman in a particular tribe functioned for several years as a *sardar* holding *jirgas* though not exposing herself to public eyes when her father, a *sardar*, died and left no adult son. Others have strongly denied this as a legend without basis in fact. Readers are invited to report to Amnesty International any insight they may have into women's participation in tribal justice in Pakistan.

tribes meet to discuss the administration of justice every two years to compare for instance levels of compensation in order to harmonize their approaches. More experienced *sardars* are also consulted by *sardars* of other tribes. Many now maintain a record of major decisions and take signatures of participants and witnesses to the proceedings to counter possible misinterpretations of the decision. Thus a body of case law appears to be building up and questions of a more uniform tribal law are occasionally discussed. There are evident differences in administration of tribal justice as some *sardars* for instance do not approve of the handing over of women to settle disputes while others believe this to be an effective way to settle inter-tribal disputes. In a very few cases, *sardars* have used their standing to introduce positive change. On 18 March 2002, the *sardar* of the Leghari tribe, Sardar Nadir Akmal Leghari, announced that there would be a complete ban on 'honour' killings in his tribe and that anyone found committing it would be handed over to police. At the same time he announced the abolition of the '*sardari* fine' to ensure implementation of a *jirga* decision. He also instructed members of the Leghari tribe to ensure their daughters were educated in order that the old custom of 'honour' crimes would come to an end; other tribal chiefs were asked to join hands in the effort to ameliorate the lives of women.

Criticism of the tribal justice system often focuses on the institution of the *sardar* itself; several local observers have told Amnesty International that the system itself has lost its legitimacy as *sardars* have become corrupt, use *jirgas* to strengthen their political and social status and their hold over their tribe and have begun to accept a fee, a 'donation', for holding a *jirga* or retain part of the compensation paid to the victim. Some have also pointed out that, given the *sardars'* political roles in the official political system and its emphasis on political alliances, *sardars* are no longer neutral and in fact the more powerful tribes are favoured during *jirgas* with the weaker ones being intimidated. It is also alleged that many *sardars* do not take action to prevent tribal clashes but arrange *jirgas* only when many killings have taken place with often devastating consequences for the security of vast areas. Political parties in Sindh have not taken any position on the return to the traditional justice system as most party leaders from Sindh themselves come from a tribal background. Consequently parties with deep roots in Sindh like the Pakistan People's Party (PPP) have done nothing to ensure that disputes are settled in accordance with statutory law. Many observers believe that the *sardari* system began to decline when *sardars* became absentee landlords, moved to cities and 'used' their tribes mainly as sources of income and vote banks. As education and an awareness of rights have grown, more people aspire to a more egalitarian system rather than *sardar*-dominated hierarchies. Recent government initiatives to use *jirgas* to settle local disputes may have given new life to a system judged by some to have been in natural decline.

Some critics have pointed out that several of the supposed advantages of tribal justice -- that it is cheap and quick, familiar to tribal people and capable of solving conflict in a lasting way -- are simply not true; these advantages appear to have declined perhaps in tandem with the decline of the *sardari* system itself. Some observers hence plead for a reform and renewal of the

*sardari* system on which the *jirga* system is based. Others argue that if the *sardari* system which is seen to be in decline can be reformed, an effort could and should be made to revive the official system.

Journalists and academics who have covered tribal developments in the interior of Sindh for years have raised the important concern that tribal justice -- though it grew in response to a failure of the official justice system -- in turn undermines and weakens the official system and respect for the rule of statutory law. Aziz Malik asked: "The Sardari system which provides the foundation for the jirga system has already been abolished. Then why have the federal and Sindh governments not taken cognizance of the perverted practice? The Constitution of Pakistan and the Objectives Resolution<sup>35</sup> are quite clear on the subject ... So it can safely be said that the State itself is guilty of subverting the constitution by taking no action against the perpetrators of the jirga system."<sup>36</sup>

Similarly Dr M.B. Kalhoro questioned: "...will these efforts [to settle tribal murders through *jirgas*] not erode the writ of law and the government's authority? ... will it have any legal cover ... will this not give encouragement to the feudal system?"<sup>37</sup> He reported that he raised these issues with civil servants posted in the region of Upper Sindh. The Commissioner Larkana Division who had initiated several of the *jirgas* himself, reportedly said that the civil administration used the services of the tribal *sardars* to ensure a restoration of peace after tribal clashes but always retained control over the processes, Government authority would therefore not be jeopardized. Many question this assessment.

## **8. Amnesty International's concerns and recommendations**

Under international human rights standards, states have an obligation to promote and protect the human rights of everyone within their jurisdiction. For instance, the Universal Declaration of Human Rights (UDHR) in its preamble states that UN member states "have pledged themselves to achieve ... the promotion of universal respect for and observance of human rights and fundamental freedoms". Human rights treaties require state parties to 'ensure' that human rights are effectively implemented by taking positive measures to that end.

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<sup>35</sup>The Objectives Resolution, which was made a substantive part of the Constitution in 1985, speaks of the Constitution as a framework for the State of Pakistan "wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and the Sunnah .... [and] wherein the independence of the Judiciary shall be fully secured."

<sup>36</sup>*Dawn*, Karachi, 28 December 1998.

<sup>37</sup>*Dawn*, Karachi, 7 January 1999.

The obligation to ‘ensure’ the enjoyment of rights also means that the state, in allowing some public functions to be performed by specific bodies like the *jirgas*, has to ensure that the *jirgas* ensure the full enjoyment of rights as well. Amnesty International believes that *jirgas* have not only failed to safeguard rights but have in fact abused a range of rights. In systematically failing to prevent such abuses, to investigate them and to punish those who perpetrated them, the Government of Pakistan has failed to exercise due diligence.

The concept of due diligence describes the threshold of effort which a state must undertake to fulfil its responsibility to protect individuals from abuses of their rights by anyone, including non-state actors -- people and organizations acting outside the state and its organs. The Special Rapporteur on violence against women has held that “... a State can be held complicit where it fails systematically to provide protection from private actors who deprive any person of his/her human rights.”<sup>38</sup> Due diligence includes taking effective steps to prevent abuses, to investigate them when they occur, to prosecute the alleged perpetrators and bring them to justice in fair proceedings, and to ensure adequate reparation, including rehabilitation and redress. It also means ensuring that justice is dispensed without discrimination of any kind.

The standard of due diligence was articulated and applied by a regional human rights court, the Inter-American Court of Human Rights. The Court stated: “An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention [American Convention on Human Rights].”<sup>39</sup> The Court stated in the same judgment: “The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”<sup>40</sup> The court pointed out that a single violation of human rights or one ineffective investigation does not establish a state’s lack of due diligence.

State inaction can be seen in a range of different areas. These include inadequate preventive measures; police indifference to abuses; failure to define abuses as criminal offences; discrimination in the court system; and legal procedures which hamper criminal prosecution. Beside state inaction, the state may also be in more direct ways responsible for human rights abuses committed by non-state actors as when state officials participate in the abuse or are

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<sup>38</sup>UN Doc. E/CN.4/1996/53, para.32.

<sup>39</sup>Velásquez Rodríguez v. Honduras, (ser.C.) No. 4, Judgment of 29 July 1988, para.172.

<sup>40</sup>Ibid., para 174.

aware of and acquiesce in the abuses. Complicity, consent, acquiescence and failure to exercise due diligence constitute a spectrum of different forms of state failure to protect individuals from human rights abuse.

Focussing on when the state fails to protect people from abuse by others, and how it can be held to share responsibility for the abuse, does not ignore the original abuser's responsibility. In every case, the direct perpetrator must be fairly tried and punished for their crimes.

*Jirgas* in Pakistan have been allowed to operate virtually unimpeded; in many of the cases described in this report, state officials have called for *jirgas*, been present during their proceedings and consented in their decisions. The state is in many cases complicit in the abuses perpetrated by *jirgas* and there is strong evidence that the state has failed to exercise due diligence when it failed to stop, investigate and punish abuses perpetrated by *jirgas*. The state has taken action only in very rare cases following a public outcry at the national and international level whereas in the vast majority of cases it has ignored abuses inflicted by *jirgas*.

Article 3 of the Universal Declaration of Human Rights states: "*Everyone has the right to life, liberty and security of the person.*" *Jirgas* violate the right to life, liberty and physical integrity when they order or encourage, connive or acquiesce in revenge or 'honour' killings or if they direct that women be handed over to anyone in compensation for acts done by others. **Amnesty International urges the Government of Pakistan to ensure that *jirgas* do not abuse the right to life, liberty and security of the person.**

Many of the punishments imposed by *jirgas* -- walking over fire or punitive rape -- amount to torture or cruel, inhuman or degrading treatment or punishment. By failing to take any action to prevent or punish their imposition the state shares responsibility for these abuses. These include all abuses and punitive and marital rape forced on women who were handed over in forced marriage as compensation for offences committed by someone else. Torture and ill-treatment are prohibited under Pakistan law and a host of international human rights standards. The Universal Declaration of Human Rights says in Article 5: "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*" Amnesty International considers that acts of violence by non-state actors constitute torture for which the state is accountable when they are of the nature and severity envisaged by the concept of torture in international standards and the state has failed in its obligation to provide effective protection. **Amnesty International calls upon the Government of Pakistan to ensure that *jirgas* do not abuse the right to be free from torture and ill-treatment.**

In cases where women are handed over to settle a dispute, either by a tribal *jirga* or under the state law as part as a compensation for murder, the women are traded as virtual slaves who have no say in their own lives. Slavery is prohibited in the constitution of Pakistan in article 11: "*Slavery is non-existent and forbidden and no law shall permit or facilitate its introduction*

into Pakistan in any form.” Similarly the Universal Declaration of Human Rights says in Article 4: “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.” Slavery is also prohibited under the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery which Pakistan ratified in 1958. Article 1 of the Supplementary Convention states: “Each of the State Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in Article 1 of the Slavery Convention signed in Geneva on 25 September 1926: ... (c) Any institution or practice whereby: (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardians, family, or any other person or group; (ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise ... .” **Amnesty International urges the Government of Pakistan to make the handing over of women to settle disputes or as compensation in murder cases a criminal offence in line with such prohibitions and to ensure that *jirgas* do not abuse the right to be free from slavery and related practices.**

The handing over of women in compensation also violates the right of women to freely decide their marriage partner which is laid down in Pakistan law and its constitution and which Pakistan is obligated to honour as part of its obligations under the UN Convention on the Elimination of All Forms of Discrimination. The Convention states in Article 16: “State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of man and women: (a) the same right to enter into marriage; (b) the same right to freely choose a spouse and to enter into marriage only with their free and full consent; (c) the same rights and responsibilities during marriage and its dissolution ...” **Amnesty International urges the Government of Pakistan to ensure that *jirgas* do not abuse the right to choose one’s marriage partner.**

The handing over of girls below the age of 18 into situations of forced marriage where they may be subjected to marital rape also violates Pakistan’s obligations under the Convention on the Rights of the Child which Pakistan ratified in 1990. The Convention says in its Preamble: “Childhood is entitled to special care and assistance” and Article 3(1) states: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.” Article 34 of the Convention states: “State parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. ...” and article 35 says: “State parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic of children for any

*purpose or in any form.” Amnesty International urges the Government of Pakistan to ensure that jirgas do not abuse the rights of children in contravention of Pakistan’s obligations under the Convention on the Rights of the Child.*

*Jirgas* also violate the right to be free from discrimination; they discriminate against women and children as well as against poorer sections of society. Afrasiab Khattak, chairman of the HRCP, in July 2002 commenting on the functioning of tribal councils said that *jirgas* and *panchayats* tilted in favour of dominant segments in society to the detriment of vulnerable groups, including women.<sup>41</sup> The right to non-discrimination is enshrined in the Constitution of Pakistan and a range of international standards. The Universal Declaration of Human Rights says in Article 1: “All human beings are born free and equal in dignity and rights ....”. Article 2 states: Everyone is entitled without distinction to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language ...” The UN Women’s Convention spells this out in greater detail; for instance Article 5 states: “State Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles of men and women.” **Amnesty International calls on the Government of Pakistan to ensure that *jirgas* do not abuse the right to non-discrimination.**

International human rights standards also lay down a range of rights relating to equal protection of law, equality before law, fair trial and to effective remedy in a national tribunal. Article 7 of the UDHR states: “All are equal before the law and are entitled to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” Article 8 further states: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” Article 10 says: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” Article 11(1) of the UDHR states: “Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”

The Government of Pakistan has failed to exercise due diligence in protecting these rights when *jirgas* conduct trials that violate a range of rights inherent in the right to a fair trial. *Jirgas* dispense with the presumption of innocence, do not recognize the right of a defendant to assistance by a legal counsel and to a tribunal composed of competent, independent and impartial jurists. They do not base their work on a legal code with clearly defined offences and

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<sup>41</sup>*Dawn*, 29 July 2002.

punishments and do not provide the scope for appeal against a decision. **Amnesty International urges the Government of Pakistan to ensure that *jirgas* do not abuse the right to fair trial.**

An important right listed in all major standards relating to the independence of the judiciary is the right to not be tried by an *ad hoc* and arbitrary tribunal but by a regular court of law which is legally constituted. Principle 5 of the Basic Principles on the Independence of the Judiciary<sup>42</sup> says: “Everyone has the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunal.” This is echoed in the Universal Declaration on the Independence of Justice<sup>43</sup> in Article 2.06: “(a) no *ad hoc* tribunals shall be established; (b) everyone shall have the right to be tried expeditiously by the established ordinary courts or judicial tribunals under law subject to review by the courts.”

**Amnesty International believes that the Government of Pakistan in order to fulfil its obligation to exercise due diligence in protecting human rights must ensure that *jirgas*, if they are allowed to continue to function, fully conform to international human rights standards in protecting all the rights contained in such standards. If this can not be ensured, they should be abolished. All cases in which *jirgas* have perpetrated abuses should be thoroughly investigated and all those participating in them brought to justice.**

When addressing issues relating to the formal criminal justice system, Amnesty International has on a number of occasions pointed to the human rights implications of the law of *qisas* and *diyat*. In so far as it makes criminal prosecution of murderers in cases of murder for the sake of ‘honour’ dependent on family members’ desire for prosecution, the law has contributed to the impunity enjoyed by such offenders and the persistence of the practice.<sup>44</sup> The law also facilitates impunity for police officers who obtain pardon from the families of victims of torture, custodial killings or extrajudicial executions to whom they pay compensation and so legally escape criminal prosecution. The law also discriminates against poorer sections of society when it makes the granting of pardon in cases where the death penalty is imposed dependent on the ability to pay

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<sup>42</sup>The Basic Principles on the Independence of the Judiciary were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in September 1985 and approved by the 40<sup>th</sup> session of the United Nations General Assembly in November 1985.

<sup>43</sup>Adopted at a 1983 non-governmental conference of legal experts from five continents and over 20 international organizations and professional bodies.

<sup>44</sup>See: *Pakistan: Violence against women in the name of honour*, AI Index: 33/17/99.

compensation.<sup>45</sup> **Amnesty International urges the Government of Pakistan to review the law of *qisas* and *diyat* as the right to seek pardon following the imposition of the death penalty when linked to the requirement to pay compensation is inherently discriminatory as it favours those enjoying a higher economic status who can afford to pay compensation.**

In a recent report, the Human Rights Committee, the expert body to monitor implementation of obligations arising from the ratification of the International Covenant on Civil and Political Rights - which Pakistan has not ratified - observed when considering the report of Yemen: "The Committee notes with concern that the offences liable to the death penalty under Yemeni law are not consistent with the requirements of the Covenant and that the right to seek a pardon is not guaranteed for all on an equal footing. The preponderant role of the victim's family in whether or not the penalty is carried out on the basis of financial compensation is also contrary to articles 6 [the right to life], 14 [the right to fair trial] and 26 [right to equality before the law] of the Covenant."<sup>46</sup>

Amnesty International wishes to remind the Government of Pakistan of the close link between an independent judicial system and the protection of human rights and to point out that unauthorized quasi-judicial bodies - which far from protecting rights in fact abuse a range of rights - have no place in such a system.

The UN Special Rapporteur on the independence of judges and lawyers has pointed out the link between the independence of the judiciary and the protection of human rights. "An independent judicial system is the constitutional guarantee of all human rights. The right to such a system is the right that protects all other human rights. Realization of this right is the sine qua non for the realization of all other rights."<sup>47</sup> The Commission on Human Rights has in resolution 1994/41 similarly noted the link between the weakening of safeguards for the functioning of judges and lawyers and the gravity and frequency of human rights violations.

**Amnesty International calls on the Government of Pakistan to urgently consider a review and reform of the formal judicial system of Pakistan to make it more effective, independent and fully in consonance with relevant international standards to ensure that the state can respect, protect and fulfil the human rights of all people equally.** Then perhaps people in search of justice would be less likely to turn to *ad hoc* structures like the

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<sup>45</sup>See: *Pakistan: The death penalty*, AI Index: 33/10/96.

<sup>46</sup>Unedited concluding observations, UN Doc. CCPR/CO/75/YEM, para. 15.

<sup>47</sup>UN Doc. E/CN.4/1997/32, at para 195.

*jirgas* - and thereby placing themselves and others at risk of further human rights abuses - or take the law into their own hands.