

A COMPARATIVE STUDY OF COMMUNITY
MEDIATION IN MALAYSIA AND JIRGA SYSTEM
OF KHYBER PAKHTUNKHWA IN PAKISTAN

BY

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ABSTRACT

Community mediation is a tremendously helpful programme that empowers people to resolve their local disputes within the community, and avoid the lengthy and expensive procedure of courts. In Malaysia, under the federal government, the the Department of National Unity and Integration (DNUI) has introduced a community mediation programme. However, other bodies like Malaysian Mediation Centre (MMC) and Kuala Lumpur Court Mediation Centre (KLCMC) are also providing mediation services to the communities which are economical, time-saving and speedy. The Malaysian government updated the traditional method of dispute resolution to make it contemporary and updated legal framework as well as organisational structure of community mediation. In Pakistan, Khyber Pakhtunkhwa (KP) province, the traditional method Jirga system for dispute resolution is still in practice without a proper legal framework and organised structure. Nevertheless, in different Pakistani statutes, there are some provisions regarding mediation and other mix mode of Alternative Dispute Resolution (ADR) but there is no specific legislation for community mediation. The provincial government of KP and Peshawar High Court has established a mediation centre, but the outcome is not satisfactory. Thus, to modernise the practice of community mediation in KP, a comprehensive legal framework and suitable organisational structure similar to traditional and institutionalised Jirga community mediation programme is needed. The main objective of this dissertation is to study the practice of community mediation programme, the structure of mediation centres, and the appointment of community mediators in Malaysia; and to propose the recommendations for a legal framework and structure of community mediation in KP. The doctrinal method of legal research has been applied in this research. The major part of this research is based on comparative study of laws and practice of community mediation in both jurisdictions.

ملخص البحث

الوساطة المجتمعية برنامج مفيد جداً، ويُمكن الناس من حلّ نزاعات المجتمع المحلي داخلياً؛ لتجنّب الإجراءات المطولة المكلفة للمحكمة، وقد أدخلت وزارة الوحدة الوطنية والتكامل في ماليزيا برنامج الوساطة المجتمعية في ظل إدارة الحكومة الفيدرالية، مع أن هيئات أخرى من مثل: مركز الوساطة الماليزي (MMC)، ومركز الوساطة في محكمة كولالمبور؛ تُقدّم أيضاً خدمات الوساطة المجتمعية بتكلفة زهيدة وفي وقت أقل، ومن ثم؛ حرصت الحكومة الماليزية على تحديث الطريقة القديمة التي كانت تُمارس من قبل؛ بأن أضافت إليها إطاراً قانونياً وهيكلًا تنظيمياً يجمعهما نظام حديث، أما في مقاطعة خيبر باختونخوا في باكستان فما يزال نظام جيرغا التقليدي لحل النزاعات قائماً من دون إطار قانوني وهيكل تنظيمي، وعلى الرغم من أن القوانين الباكستانية لا تخلو من بعض الأحكام المتعلقة بالوساطة وغيرها عن طريقة مزيج ADR؛ تخلو من تشريع محدد للوساطة المجتمعية، وقد أنشأت حكومة المقاطعة والمحكمة العليا في بيشاور مركز وساطة، لكن النتيجة لم تكن مرضية، ومن ثم؛ يلزم إطار قانوني وهيكل تنظيمي مماثل لبرنامج الوساطة المجتمعية التقليدية في جيرغا، وذلك لتحديث ممارسة الوساطة المجتمعية في باكستان، وعليه؛ الهدف الرئيس من البحث دراسة تطبيق برنامج الوساطة المجتمعية، وهيكل مراكز الوساطة، ووسطاء المجتمع؛ في ماليزيا، مع اقتراح إطار قانوني وتنظيم هيكل للوساطة المجتمعية في خيبر باختونخوا، علماً أن الباحث اتبع الطريقة القانونية في هذا البحث الذي اعتمد الجزء الأكبر منه على دراسة مقارنة للقوانين وممارسة الوساطة المجتمعية في الدولتين.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.

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DECLARATION

I hereby declare that this dissertation is the result of my own investigation, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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MALAYSIA AND JIRGA SYSTEM OF KHYBER PAKHTUNKHWA IN
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DEDICATION

I sincerely dedicate this dissertation to my beloved family members

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Federal Constitution 1957 (Malaysia)
Khyber Pakhtunkhwa Police Order (Amendment) Act 2015 (Pakistan)
Mediation Act 2012 (Act 749) (Malaysia)
Peaceful Neighbour Regulation 1975 (PU (A)279/75) (Malaysia)
Rukun Tetangga Act 2012 (Act 751) (Malaysia)
Shariah Nizam-e-Adl Regulation 2009 (NWFP. Reg. No. I OF 2009) (Pakistan)
Small Claims and Minor Offences Courts Ordinance 2002 (Ordinance No. XXVI Of 2002) (Pakistan)
The Family Court Act 1964 (Act No XXXV of 1964) (Pakistan)
The Code of Civil Procedure 1908 (ACT No. V Of 1908) (Pakistan)
West Pakistan Family Courts Act 1964 (Act No. XXXV of 1964) (Pakistan)

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CCI	Council of Common Interest
DRC	Dispute Resolution Council
DNUI	Department of National Unity and Integration
KLCMC	Kuala Lumpur Court Mediation Centre
KP	Khyber Pakhtunkhwa
MMC	Malaysian Mediation Centre
NACM	National Associate for Community Mediation
NACM	National Association for Community Mediation
NCDR	National Centre for Dispute Resolution
PLD	Pakistan Legal Decisions
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
US	United States

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

Mediation is one of the methods of alternative dispute resolution (ADR). It is a process that uses a third party (a neutral party to the conflict), known as the mediator who communicates between the parties on their position.¹ There are many definitions of mediation. For example, according to Liebmann, mediation is “a process by which an impartial third party helps two or more disputants work out on how to resolve a conflict. The disputants, not the mediator, decide the term of any agreement reached. Mediation usually focuses on the future rather than past behaviour”.²

ADR has religious roots as the three main monotheistic religions, i.e., Judaism, Christianity and Islam apply ADR to resolve conflicts among their followers. In Islam, *wasata* is the common term for mediation which means a benevolent and non-binding procedure to end a dispute.³ For centuries, mediation has been the traditional method of settling disputes in the Arab world. In many urban societies in the Middle East, the problems are often resolved by the elders in a community meeting since there is no formal court mechanism designed for that purpose.

Community mediation is a method that applies the mediation process to resolve conflicts between persons within the same community and may be applied to resolve

¹ David A. Hardcastle, *Patricia R. Powers, Stanley Wenocur, Community Practice: Theories and Skills for Social Workers*, (New York: Oxford University Press, 2011), 286.

² Marian Liebmann, *Community and Neighbour Mediation, Great Britain*, (United Kingdom: Cavendish publishing, 1998), 2.

³ Said Bouheraous, *Mediation in Malaysia: the Law and Practice*, (Kuala Lumpur: LexisNexis, 2010), 387.

disputes occurring in the workplace or with a local organisation, such as health practice, and local council authorities.

Community mediation is not a new process in Malaysia for resolving disputes. This process has been practised in Malaysia since a long time ago. The practice was in different shapes, for example, if the dispute arose in a Malay community, it was normally reported before the village administrator or *Imam*. The ethnic minorities of India and China are also familiar with mediation as a dispute resolution in solving within the community. The Indian and Chinese used to resolve their dispute through mediation by the elder of the community before the introduction of the English common law system.⁴ Similar to other countries, the Indian and Chinese are also following it as a customary law.

Moreover, developed countries like Australia and Singapore also establish the community mediation mechanism in their system. Australia has developed community mediation through government financing and non-governmental financing. There are numerous community mediation centres that address both small civil and neighbourhood disputes.⁵ For example, in Australia, the government has to make mechanism, i.e., Australian community legal centres under the territory council to operate the community justice system and its purpose is to provide free legal assistance.

Just like in Singapore where the department of law has established the community mediation centre under the community mediation unit. The purpose is to resolve social and relational conflicts through mediation. In Singapore, the first

⁴ G. Raman, *Probate and Administration in Singapore and Malaysia: Law and Practice*, (Singapore: LexisNexis, 2005), 4.

⁵ Cheri M Ganeles, "Cybermediation: A New Twist on an Old Concept", *Albany Law Journal of Science & Technology*, vol. 12 (2002): 715.

mediation centre was officially opened in 1998 and the Ministry of Law does the supervision for the promotion of mediation and ADR.⁶

Malaysia also has established community mediation centres under the Department of National Unity and Integration (DNUI), the Malaysian Mediation Centre (MMC) and The Kuala Lumpur Court Mediation Centre (KLCMC) for speedy justice under an organised body. In the province of Khyber Pakhtunkhwa (KP) of Pakistan, the traditional method of Jirga system is still in practice without a comprehensive legal framework. It is the time now to regulate the traditional Jirga system with a comprehensive legal framework to eradicate the human rights violations in the name of custom and tradition.

There are many advantages of mediation such as less expensive, less time consuming and less stressed out compared to going for legal battles before common law adversarial courts of law. The establishment of community mediation centres in KP is, in fact, a revival of its tradition that has been replaced by litigation and adversarial common law courts.⁷

In KP, the establishment of community mediation programme is a very easy process as the system of Jirga⁸ is already available. Hence, the Jirga system needs a legal framework to make a lawful body for community mediation. The research critically analyses the Jirga system as well as existing laws relating to ADR applicable to KP; and comparatively examines the community mediation system in Malaysia with the intention to propose an appropriate structure and a suitable legal framework to govern Jirga community mediation in KP.

⁶ Eugene Tan and Gary Chan, "Mediation", Singapore Law Watch, <http://www.singaporelaw.sg/sglaw/laws-of-singapore/overview/chapter-3> (accessed 30 September, 2018).

⁷ Malik Muhammad Ashraf, "Ensuring Speedy Justice" *The Nation*, 10 February 2017 <<https://nation.com.pk/10-Feb-2017/ensuring-speedy-justice>> (accessed 30 September, 2018).

⁸ Hassan M. Yousufzai and Ali Gohar, *Jirga Towards Understanding Pukhtoon Jirga*, (Pakistan: Just Peace International, 2005), 1.

1.2 STATEMENT OF PROBLEM

Pakistan comprises of different provinces such as Punjab, KP, Sindh and Baluchistan. Thus, the social background of Pakistan is a multi-racial country consists of various ethnic groups. Nevertheless, every ethnic group has a different way of community mediation system for conflict resolution within the community. The practice of traditional methods of dispute resolution in all of these provinces has existed from a very long period of time. The Pushtoons of KP resolve their conflicts by the traditional Jirga system without any government control.

The irony here is that, in KP, the traditional Jirga system for dispute resolution is still in practice without a comprehensive legal framework and organised structure. Albeit some legislations of Pakistan provide some provisions regarding mediation as well as other mix mode of ADR, so far, there is no specific legislation for community mediation. The provincial government of KP and Peshawar High Court has established a community mediation centre, but the outcome is not satisfactory. According to the official reports, there was no progress in the field of mediation except for only one case which was referred in 2017. Furthermore, the traditional Jirga system procedure is unwritten and the practice is without a codified legal framework. Besides, due to no proper control of government, the Jirga system sometimes violates human rights especially against women through honour killing and killings of innocent people during informal traditional procedure of Jirga. Sometimes, the Jirga verdicts are un-Islamic and unlawful. Accordingly, it is very much essential to regulate the practice of Jirga system of KP and thus researcher intends propose a comprehensive legal framework and suitable organisational structure in order to resolve community disputes smoothly and swiftly.

1.3 RESEARCH QUESTIONS

Having stated the above statement of problem, the researcher intends to provide a comprehensive legal framework and a structure to regulate the traditional Jirga system through the following research questions:

1. How are community disputes resolved through mediation in Malaysia?
2. How are conflicts in the community settled by the Jirga system of KP and what are the existing laws relating to mediation in KP?
3. What are the shortcomings of the Jirga system and how can it be improved to provide efficient community disputes resolution in KP?

1.4 OBJECTIVES OF THE RESEARCH

The main purpose of the study is to analyse the efficacy of Malaysian community mediation system and compare it with Jirga system of KP as well as to recommend a legal framework to govern the Jirga system. The followings are predominant objectives of the research:

1. To examine the community mediation system in Malaysia together with its legal framework;
2. To evaluate the resolution of community conflicts under the Jirga system of KP and the existing laws relating to mediation in KP;
3. To analyse critically the shortcomings of the Jirga system and to propose a comprehensive legal framework to govern the Jirga system with the intention to provide efficient community disputes resolution services in KP.

1.5 HYPOTHESIS

The practice of Jirga system and existing laws on mediation in KP are inadequate to resolve the community disputes. Based on Malaysian experience, there is a need for a legal and organisational structure to govern the traditional Jirga system, community mediation centres and trained community mediators in KP.

1.6 LITERATURE REVIEW

Modern or formal community mediation is a developing concept in Pakistan. However, this expanding concept has a lacking that needs to be filled, i.e., the legal framework and organisational structure of Pakistani community mediation. Unfortunately, there is the dearth of legal material on community mediation literature in Pakistan unlike countries such as the United States (US), the United Kingdom (UK), Malaysia, Australia and Singapore where this concept is well-developed. The literature is closely analysed in order to shed light on the reality of community mediation and relationship to current research as well as any lacking that needs to be filled up. Some literatures are compilation works which cover the areas of negotiation, conciliation, mediation, arbitration, legal issues and few aspects of dispute resolution. However, most of the literatures focus on mediation and its process, the mediators and relevant issues in both.

The uniqueness of Malaysia is that it is multi-racial and multi-cultural. The history of multi-cultural Malaysia had begun even before the period of Melaka Sultanate and developed after that when trades from other countries such as Arab, India and China came and settled in the country. These people later formed small communities such as the Baba and Nyonya communities. These communities later expanded with the emergence of the Portuguese who inter-married with the locals and

brought their own unique culture. This particular community was a lasting legacy of the Portuguese as a result of their conquest of Melaka, and their policy of encouraging intermarriages.⁹

The available literatures regarding traditional mediation in Malaysia shows that it had been practiced by the Malays, Chinese or Indians many years ago. The disputant parties generally are referred to an elder person or a community mediator to resolve their dispute in the village where it was reported to the village administrator (*Ketua Kampung*) or to the religious mosque leader (*Imam*)¹⁰. However, modern mediation lets disputant parties decide how to resolve their conflicts or disputes with the assistance of a mediator as a neutral party. This is different from traditional mediation whereby the mediator, who is an elder or respected person in the community prioritises the goal to maintain peace in a small community.¹¹

The government of Malaysia has initiated community mediation in Malaysia by conducting some trainings to community leaders through a pilot programme called *Rukun Tetangga* (Peaceful Neighbourhood) community mediation. The main purpose of this programme is to promote unity among multi-racial and multi-ethnic citizens.¹²

A mediator is one of the elements that ensures the success of a mediation centre. The importance of this literature is a guide or reference on the issue of mediators.¹³ However, some of the literatures mainly concentrate on the history of the community mediation centre or community justice centre, and the success of the pilot project done by the government of the US. The history and the development of

⁹ Timothy P. Daniels, *Building Cultural Nationalism in Malaysia: Identity, Representation, and Citizenship*, (New York: Routledge, 2005), 19-55.

¹⁰ James A. Wall Jr, "Ronda Roberts Callister, Malaysian Community Mediation", *Sage Journals*, vol. 1, no.8 (1999): 343-365.

¹¹ Joyce Lau, "Promoting Ethical Practice in the Mediation Community", Paper Presenting in 2nd AMA Conference Rediscovering Mediation in 21st Century Kuala Lumpur, 24-25 February (2011): 1-8.

¹² Nora Abdul Hak, Hanna Ambaras Khan, "Community Mediation in Malaysia: A Step Forward", *Malayan Law Journal*, vol. 1 (2014): 3-4.

¹³ Laurence Boulle, *Mediation: Principles, Process, Practice*, (Sydney: Butterworths, 1996), 167-169.

community mediation programme, the mechanism in structuring community mediation, the funding, the mediators and the matter covered by the community mediation were among the topics covered.¹⁴

Loukas A. Mistelis (2001)¹⁵ discusses the three most widely practices of community mediation which included neighbourhood mediation, school peer mediation and victim-offender mediation in the UK.

Roman Tomasic and Malcom M. Feeley (1982) compile previous research on the establishment of the community mediation centres. It covered a wide range of relevant issues on the establishment of community mediation. Among the issues dealt with in the book were how the root of the problem in a community could be explored and how its effectiveness of the settlement could be reached.¹⁶

In a book written by Mohammad Naqib Ihsan Jan and Ashgar Ali Ali Mohamed (2010), the views of many renowned scholars regarding alternative dispute resolutions are discussed in every detail. The laws governing mediation in Malaysia, merits of mediation, cross-cultural mediation, community mediation, mediation in labour dispute, mediation in a family dispute, mediation in criminal cases, mediation in Islamic law and mediation in *Shari'ah* law. This book is a very comprehensive combination of different aspects of mediation in Malaysia.¹⁷

A PhD thesis submitted by Hanna Binti Ambaras Khan (2017) discusses in detail regarding the current practice of community mediation in Malaysia and its legal framework. This dissertation also proposed a new legal framework for the DNUI. The

¹⁴ Daniel McGilli, *Community Mediation Programs: Developments and Challenges*, (United States: Diane publishing, 1997), 77.

¹⁵ Julian D. M. Lew and Loukas A. Mistelis, *Comparative International Commercial Arbitration*, (Hague: Kluwer Law International, 2003), 521-551.

¹⁶ Roman Tomasic and Malcom M. Feeley, *Neighborhood Justice Assessment of an Emerging Idea*, (New York: Longman, 1982), 286.

¹⁷ Mohammad Naqib Ihsan Jan and Ashgar Ali Ali Mohamed, *Mediation in Malaysia: The Law and Practice*, (Malaysia: LexisNexis sdn Bhd, 2010), 5-429.

framework was based on the comparative study with other jurisdictions for getting new and better ideas for Malaysia.¹⁸

Another PhD thesis submitted by Nurah Sabahiah Mohamed (2013) also discusses how mediation works in Malaysia. She emphasises that a fruitful mediation with full efforts of a mediator can resolve the disputes and reduce the volume of cases.¹⁹

Nora Abdul Hak, Saodah Ahmad and Umar A. Oseni (2011), in their book on ADR in Islamic law, express that Islam is a way of life and also provides means of dispute resolution, among others, based on faith and Islamic principles. There are clear concepts in Islamic law such as *sulh*, *tahkim*, *muhtasib* and *ibra*. This book discusses the concept, principles, forms and practices of ADR in Islam.²⁰

The latest publication of “Community Mediation in Malaysia” in 2018 is the new literature and a very comprehensive book on the current practice of community mediation in Malaysia. However, the book mainly concentrates on the history of the community mediation centre and the success of the pilot project done by the government. The discussion on traditional dispute resolution method like the Jirga system is also featured in the book.²¹

The proceeding of an international conference on ADR in 2017 held at Ahmad Ibrahim Kulliyah of Laws (AIKOL), International Islamic University Malaysia (IIUM) with the theme “Modern Trends and Effective Dispute Resolution” contains many articles related to community mediation in Malaysia and comparative study with

¹⁸ Hanna Binti Ambaras Khan, “Legal Framework and Structure of Community Mediation in Malaysia: A Proposal,” (Ph.D. thesis, International Islamic University Malaysia, 2017), 30-257.

¹⁹ Nurah Sabahiah, “Mediation in the New Dispute Resolution Landscape: A Case for the Enhancement of Its Application in Malaysia,” (Ph.D. thesis, Faculty of Law University of Malay, 2013), 47-78-146.

²⁰ Nora Abdul Hak, Saodah Ahmad and Umar A. Oseni, *Alternative Dispute Resolution ADR in Islamic Law*, (Kuala Lumpur: IIUM Press, 2011), 1-20.

²¹ Hanna Aambaras Khan and Nora Abdul Hak, *Community Mediation in Malaysia*, (Kuala Lumpur: Dewan Bahasa dan Pustaka Press, 2018), 1-50.

various jurisdictions. This book covers the issues and challenges faced by the DUNI, and many scholars contributed ideas of a new legal framework for community mediation.²² These scholarly works and presentations of different scholars in the field of mediation help to understand the concept of community mediation and the structure of the DNUI in Malaysia.

In Pakistan, the traditional Jirga system is still in practice in most of the rural areas. The Jirga system is a traditional method of dispute resolution applied by the Pashtoon. The literature for understanding the basic concept of the Jirga system is available. The Jirga is a council of elder in Pashtoon community that deals with local problems through its unwitting traditional code of life.²³

Ali Gohar (2014), in his research work regarding Jirga system and peaceful society, draws an organisational structure of Jirga system in Pashtoon areas of Pakistan. The Pashtoons are divided into many tribes and sub-tribes which are socially organised and led by a *Khan, Malik* or tribal chief.²⁴

Hassan M. Yousfazai and Ali Gohar (2003) describes Jirga system in Pashtoon community as: “[F]rozen in the history as the Pushtoon nation froze, Jirga is an old custom with unmatched potentials for conflict resolution in the Pukhtoon belt of Pakistan. It is a name given to the model, in which position society operates, to undertake issues between individual and between communities, to address the concern and look for a solution acceptable to all stakeholders”.²⁵

²² Nora Abdul Hak and Ashgar Ali Ali, *Alternative Dispute Resolution 2017 Modern Trends and Effective Dispute Resolution*, (Malaysia: Ahmad Ibrahim Kulliyah of Laws, IIUM, 2017), 9-435.

²³ Ali Gohar, “International Jirga,” Just Peace International, [http: www.justpeaceint.org/internationalJirga.php](http://www.justpeaceint.org/internationalJirga.php) (accessed 25 October 2018).

²⁴ Ali Gohar, “Identity and Conflict Transformation: Identity in the Pushtoon Community,” Just Peace International, www.justpeaceint.org/IvsU.pho (accessed 25 October 2018).

²⁵ Ali Gohar and Hassan Yousfazai, “Restorative Justice, Jirga and Local Government Institutions in Pakistan”, University of Peshawar, www.justpeaceint.org/RJJirga&Lgovt.php (accessed 26 October 2018).

According to Ghani Khan (1994), in his book “The Pathans,”²⁶ the Jirga is a prominent institute of Pashtoon and an elected assembly of elder men. Most decisions of disputes in Pashtoon community are made by members of the Jirga. Jirga is the main body of authority which is acknowledged by a large number of Pushtoons as good for instant justice.

The booklet of Dr. Sherzaman Taizi (2007) titled “Jirga system in Tribale life”²⁷ mentions that Pashtoons are organised into more than 50 tribes, each divided into sub-tribes, clans and sub-clans. The leaders of tribes, known as Khans, have limited power. Important matters are usually settled by sub-tribes and clan chiefs, or by a tribal council. Pashtoons have always resisted efforts to impose government control on their society. Traditionally, a social code known as *Pashtunwali* regulates the behaviour of Pashtoons. The Jirga assembles in a *Hujra* or a village mosque or in an open field outside the village. The Jirga members usually sit in a circle without any presiding figure. The meeting is like the round-table conference without a chairman to reflect their love and principle of equality. This research work is based on the historical perspective of Jirga in Pushtoon community.

Idrees Asar (2005), in his book “Pakhtoonwalee Code of Love and Peace”, widely discusses the practice of Jirga system in Pushtoon community. This book also covers the historical perspective of dispute resolution in Pushtoon community. In this book, the author presents the views of different scholars regarding the lifestyles of Pushtoons in present days.²⁸

“Reforming the Jirga system: Sensitisation on Fundamental Human Rights” is a project work of Appraisal Motivation Programme (CAMP) in which they work

²⁶ Ghani Khan, *The Pathans*, (Peshawar: Frontier Post Publications, 1994), 1-58.

²⁷ Sherzaman Taizi, *Jirga System in Tribal Life*, (Peshawar: Area Study Centre University of Peshawar, 2007), 1-8

²⁸ Idrees Asar, *Pakhtoonwalee, Code of Love and Peace*, (Peshawar: Danish Book Store, 2005), 1-224.