

## **JIRGA AND DISPUTE RESOLUTION IN KHYBER PAKHTUNKHWA: A CRITICAL ANALYSIS**

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*Disputes are inevitable and take place in all human societies. Hence, the Pushtoon community is not immune from having disputes at all levels among individuals, families, tribes, or even nations. The Pushtoon community has been using the Jirga system which is the oldest and still one of the typical dispute resolution mechanisms in the society. Although the Jirga system has been very crucial in ensuring the administration of justice and harmony in the Pushtoon community in various ways, it has also been subjected to several criticisms due to its application of unwritten rules and informal structures which sometimes may lead to grave injustice to the parties to the disputes. Accordingly, this article aims at exploring the nature of the Jirga system being used in the Pushtoon community from Khyber Pakhtunkhwa; analysing the methods of dispute resolution through the Jirga system; and proposing viable recommendations for the betterment of the Jirga system in administration of justice in the said region.*

### **INTRODUCTION**

Pakistan consists of four provinces, i.e., Khyber Pakhtunkhwa, Punjab, Sindh and Balochistan. Accordingly, it has a multi-racial population. Punjabis mainly live in Punjab; Pushtoons live in Khyber Pakhtunkhwa and also some parts of Balochistan; Sindhis

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and Muhajirs live in Sindh; and Balochi tribes live in Balochistan. Interestingly, each of these ethnics has their own way of settling disputes among the members of the community. Punjabis resolve their disputes in the community through Panchayat;<sup>1</sup> Pushtoons resolve conflicts by Jirga;<sup>2</sup> Sindhis resolve disputes through Faislo; and Balochis resolve conflicts by Balochi Jirga.<sup>3</sup> The following discussions only focus on how various types of disputes are resolved through Jirga in Khyber Pakhtunkhwa.

### **BACKGROUND OF PUSHTOON NATION**

Most of the Pushtoons live now in modern-day Afghanistan and in the province of Khyber Pakhtunkhwa, Pakistan. Some of them are also live in Baluchistan and in Sindh. The population is estimated to be around 50 million. They are the largest population of Afghanistan and also the second largest ethnic in Pakistan.<sup>4</sup>

#### ***Pushtoon Customs***

Basically, they live in tribal system which possesses a specific custom and tradition code called “*Pashtunwali*”. It is an unwritten ethical code and traditional lifestyle for the Pushtoon people. It has existed since prehistoric time and is still practiced in most of the rural tribal areas in eastern Afghanistan and northwest Pakistan.<sup>5</sup> It has the following major pillars:

1. Trust (*Aitbar*): In Pushtoon society, trust has a very important role and most of the transactions and businesses are based on trust as the dealings are verbal in front of elders with few witnesses. The violation of trust is considered as disgraceful act and against the *Pashtunwali*.<sup>6</sup>
2. Revenge (*Badal*): *Badal* means retribution to seek out justice and to take revenge against the enemy. There is no fixed time limit for taking revenge as sometimes it may take hundreds of years and involve generations.<sup>7</sup>
3. Hospitality (*Melmasteia*): Pushtoons are also known as one of the hospitable people in the world. They welcome their guests sincerely with smiling face and feel happy to receive

a guest.<sup>8</sup>

4. Sending marriage proposal (*Nanawati*): The term *Nanawati* means “to go in”. It is a customary rule that sending marriage proposal to the bride family has to be in indirect manner as it is consider insulting to send the marriage proposal directly.<sup>9</sup>
5. Honour (*Nang*): Keeping the honour of the family is the primary duty of every good Pushtoon. No one can accept the insult of family or any member of the family. A Pushtoon must always be on truth in every situation and defend the weak and oppressed around him.<sup>10</sup>
6. Becoming normal again (*Rogha*): *Rogha* means the peaceful situation after the settlement of dispute between family members or friends.<sup>11</sup>
7. Defamation (*Tor*): This is a form of punishment for both men and women who are found guilty in shameful practices. Pushtoos are very sensitive with regard to the honour of women and any small molestation of women is considered as a major and unforgivable offence. Due to this culture, both male and female carefully avoid such type of practices.<sup>12</sup>
8. Loyalty (*Wafa-da-ree*): A Pushtoon shall be loyal to their family, tribe members and friends. Disloyalty is considered a shameful matter not only for the person himself but also for all family members as well as tribe members.<sup>13</sup>
9. Protection (*Naamos*): The protection is especially for women as females must be protected from verbal and physical harm at all cost in the Pushtoon society.<sup>14</sup>
10. Help and Condolences (*Meerata*): When someone dies, it is compulsory for the community to take care of the family and render assistance like arranging foods for the guests and condoling for three days continuously.

After the advent of Islam, Pushtoos embraced Islam wholeheartedly and, thus, Islam has ever since become the major

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religion of the Pushtoon society. Majority of them are *Sunni* Muslim but there is also a small number of *Shi'ah* in some parts of Afghanistan and Pakistan.<sup>15</sup>

### *Nature of Disputes in the Pushtoon Society*

Disputes are inevitable in all human communities and can occur among individuals, families, groups, or even nations.<sup>16</sup> Pushtoon community is not immune from having disputes. The common reasons for disputes among Pushtoos are exchange marriage between two families; rejection from marriage after engagement; theft; robbery; enmity; cousinhood; revenge for any personal matter; honour killing; money; loan; land; property and so on so forth.<sup>17</sup> Volumes of disputes are still settled through the Jirga system among Pushtoos in Khyber Pakhtunkhwa.

### **JIRGA SYSTEM AND ITS ORIGIN**

The origin of Jirga is not traceable in an apparent form and it is believed that it has been practiced in resolving disputes in some part of the world since time immemorial. In ancient time, a kind of Jirga was practised in some Indian villages in the form of councils. In Greece, “the place which the citizens used for assembly was called Agora where the people gather and discuss matters regarding different issues and find the solution to the issues by mutual consent”.<sup>18</sup> In Arabian society, “the word Shura is use for such practice of gathering for dispute resolution”. In Persia, it is called Majlis, and in Hindi as well as Punjabi it is called Panchayat.<sup>19</sup> The Aryan tribes, “which came in (5000-1500BC) from central Asia to existing Afghanistan and then moved into India, practised a kind of Jirga system for dispute resolution”. Sultan Bahlol Khan Lodhi (1451-1489) a renowned Afghan ruler in the subcontinent (India) had established “a Jirga in deciding important issues and whenever the Jirga has assembled, the ruler used to take a seat among the Jirga member in the circle”. Later, “the practice was continued by the Kind Sher Shah Suri and in the Mughal Empire”. In fact, the Jirga system predates the Pushtoon nation and it enriches Pushtoon tradition as well as values. Hence, the Jirga system is universal and it is not limited to Pushtoon nation alone.<sup>20</sup>

### *Definition of Jirga*

The literal meaning of Jirga is “assembly” or “gathering” of the party for the solution of a dispute and it is a type of autonomous body. According to Pashto descriptive dictionary, the term Jirga is an original Pashto word and it is a common traditional word used for a gathering of few or many people. The word Jirga is also used in other languages like Mongolian, Turkish, and Persian that to be interrelated to the word circle. Nevertheless, the word Jirga is “a rich traditional code of Pushtoon nation where the tribal peoples gather for traditional Jirga and sit in a large circle to resolve conflicts and take collective verdicts related to social issues”.<sup>21</sup>

According to Rubin, the institution of Jirga consists of adult males and run by rules and mutual consent. Furthermore, the Jirga can be assembled at any level within the tribal organisation starting from a small family of a tribe to the entire nation. Thus, the Jirga can be held not only at a family level but also, in a larger scale, at tribal level or even at international level among the Pushtoons of Pakistan and Afghanistan, etc.<sup>22</sup>

In Pushtoon society, Jirga is a very unique institution as it works as a council or an assembly or both. Fundamentally, Jirga is a gathering of elders of the tribes, powerful chiefs, and religious leaders who are engaging in resolution of conflicts among the disputants of the community. The institution of Jirga is informal but due to strong tribal tradition, it has formal effects on Pushtoon community. Jirga acts as a judicial institute in which disputes and problems are presented, and in the end, penalty is imposed or reward is given.<sup>23</sup>

### *Proceeding and Size of Jirga*

Normally, the Jirga gathers in Hujra (Hujra is a public place and it is as old as the history of Pushtoon)<sup>24</sup> or in villages, at a mosque or any open ground the community. Generally, the Jirga members sit in a circle together without any discrimination. The assembly of Jirga is usually like a round table conference to show the nature of democracy and equality without any distinction as to the race, colour, wealth or status. In the selection of Jirga members, there

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are no hard rules. The number of members may increase and decrease depending on the nature and important of the problem. There is no fixed qualification and no set of rules for its members, but mostly it comprises of social, religious, and political representatives. The members are generally family heads and religious leaders. All honourable elders or greybeards (*Speen Geeri*) are considered suitable for the membership of Jirga. Nevertheless, for the effective implementation of the verdict by Jirga, the members should have good community status, reputation and financial standing.<sup>25</sup>

The proceeding of Jirga is held in Hujra, mosque, guest house or even under the shadow of a big tree. In minor cases, the Jirga takes two or three days and, in major cases, it may take a long time. In the beginning of a Jirga, both disputant parties are given a specific time to present the problem. During the proceeding of Jirga, the members of Jirga will try to understand the nature of the problem and provide the mainly mediation services between disputant parties with their best capacity. No party is given any preferential treatment and all are treated equally. Albeit the Jirga always holds in public place, the crowd is not permissible to take part or hinder the Jirga during the proceedings. In the proceedings, the Jirga members give time to both parties and witnesses to present their stance regarding the issue. After hearing and investigating, the Jirga members give a neutral and acceptable solution to the dispute.

Commonly, the verdict bases on *shari'ah* and local Pushtoon traditions. In serious matters, sometimes the Jirga asks a party to swear in the Qur'an as Islamic values have a very strong influence on the Pushtoon community. The Jirga members will then announce the decision after reaching on a consensual point for solving the dispute. However, before announcing the verdict in public, the Jirga members take the consent from both parties. This practice is known as power of attorney (*Waak* or *Ikhtiar*) and, through this practice, the Jirga obligates both parties to adhere to the verdict.<sup>26</sup>

The Jirga system allows any party to appeal against the judgment and the unsatisfied party may even request for another Jirga. This may often occur when different tribes have dissimilar custom on a similar issue.<sup>27</sup> If any disputant party fails to obey the decision of Jirga (called turning the face from the Jirga verdict - *Makh Arawal*), then Jirga body has the right to enforce its ruling in anyway. The Jirga can impose sanctions on the disobedient party which may be a huge fine and other punitive forms.<sup>28</sup> The Jirga provides safety to the oppressed and weak people. It plays a very important role in ensuring the preservation of justice and harmony in the community.<sup>29</sup>

#### **PRINCIPLES OF JIRGA**

For a successful Jirga, there are some basic principles to be followed in a proceeding such as transparency, freedom of expression, accountability of Jirga members, and message of harmony.

##### ***Transparency***

Transparency is one of the essential elements of a Jirga. In the Jirga process, matters are not debated in isolation but argued openly in public. When the people related to the matter are clear about the proceeding of the Jirga, then they properly accept the efforts and Jirga moves smoothly. It is important for Jirga members to keep it entirely transparent to the society so that this process creates the support for the enforcement of the judgment of the Jirga.<sup>30</sup>

##### ***Freedom of Expression***

In Jirga proceedings, each member, party and witness has complete freedom of expression. In freedom of speech, there are two important aspects. Firstly, anyone can highlight any issue regarding the procedure or structure of Jirga and declare the grievances. Secondly, anyone can comment on the content of Jirga. Both disputant parties to the Jirga have right to discuss openly in proceedings as well as suggestions. The Jirga members give attention to both parties. The leaders and elders of the community ensure the safety of the place, the assembly, the dignity, and the discipline of proceedings.<sup>31</sup>

*Accountability of Jirga Members*

Jirga members work together as a team and they appreciate the hard work of every person in peace building. The senior in Jirga always alert others about the trouble maker in the community. If someone is alleged of abusing the process of Jirga or his power as a Jirga member, the seniors must decide to expose such person and openly announce the separation of that person from the Jirga. When a Jirga member is found to be abusive by the community, then there will be a perpetual injunction on his services to lead community furthermore. The community also exercises a structure of internal control over the individual who wants leadership in an informal means. The number of the Jirga members depends upon the nature of dispute. For a minor dispute, it comprises of two to five members and, for a major dispute, it may go up to ten to fifteen.<sup>32</sup>

*Message of Harmony*

A Jirga can highlight religious principles, the risk of life as well as property, the importance of the future of the children, and education to influence the disputing party to go away from violence. Jirga can give “awe-inspiring belief based on non-violence philosophy to the community in a violent situation”. The message of harmony has always been “a remainder and attractive instrument within Jirga to pledge a solid negotiation during the settlement of the dispute”.<sup>33</sup>

**TYPES OF JIRGA**

The Jirga can be held at any level of the society for various purposes. Mostly, commentators have divided Jirga into the following types.

*Community Representative Jirga (Ulusi or Qaumi Jirga)*

The term *Ulas* means people and *Qaum* means community. The community representative Jirga basically is a gathering of leaders of the community and village. In this type of Jirga, they assemble to discuss the issues such as common properties, the discussion on irrigation water for agricultural lands, or giving a common



property of village for projects like school or any other developmental project. The location and time for such assembly are duly announced and the gathering is open for all members of the community to speak and participate and everyone's opinion is valuable for Jirga. Sometimes, it may take two to three sessions if the matter needs private discussion with the various shareholders. Then later announces the decision publicly after the initial discussion of community leaders.<sup>34</sup> The dominion of community representative Jirga is much broader than any other types of Jirga. It can "arrange as many meetings as needed; highlight any matter of interest or important for the community; announce any temporary verdict; make new code for the community; invite others for best ideas; call for volunteers to serve the community; increase duties for community work; work as the peace delegation or send a delegation to disputant parties, establish a commission for mediation in intertribal matters; and form a tribal army for a specific task".<sup>35</sup>

The community representative Jirga consists of many elders; well experienced professional mediators; the notable landlords (*Khan*) to look for hospitality; and religious leaders as advisers on family laws".<sup>36</sup> In this type of Jirga, all members have the right to express their opinion, but mostly people prefer to observe the proceedings. Everyone has the opportunity to start the conversation without any formal organiser. During the proceeding, several issues are deliberated by addressing the concern of everyone from the community. Nevertheless, the leaders pay attention only to the important points, simplify the talk and announce the fairly consensual agreement. Any party, who is not satisfied with verdict of the Jirga, has right to present the case before the court of law. Generally, the community representative Jirga solves the disagreement in amicable way and the verdict is usually acceptable to all.

### *5.2 Third Party Jirga (Shakhsi Jirga)*

This type of Jirga is formed in resolving a conflict between either two persons or families. In this Jirga, the mediators are selected

from both sides and the parties have to consent for the nomination. The selected members have to be impartial in the process. Normally, the Jirga will announce a verdict. If any party fail to accept the verdict, it will then try to convince the respective party to agree to accept the decision willingly.<sup>37</sup> However, the Jirga also has the power to organise a *Badraga* (a volunteer security force raised to secure and protect the proceedings of a specific Jirga) for the awareness of the whole community about the process and the decision. Generally, the following steps are involved in the third-party Jirga.

After occurring a dispute, one of the parties approaches a specific member of the community known as mediators (*Jirgamar*) to explain the dispute and request for his involvement. Sometimes, both the disputant parties decide to settle their conflict through the third party. Then, the mediator moves forward and starts initial hearing from both sides. The mediators may sometimes advise the parties to include other suitable persons to the case too. Jirga mediator creates a channel of communication between the parties. If the issue is minor, then the Jirga settles down the matter easily. When the issue is a major one, then the mediator may ask the party to give their power of attorney and, normally, the parties give unconditional power of attorney to the mediator in order to decide the dispute. In serious matters, the parties may even be asked to deposit security bond. The Jirga hears the parties face to face or sometimes one after the other depending on the situation. In the process, the mediators try to express openly in front of both parties, but sometimes the parties are only told the good side of the story with the intention to search for common grounds for a settlement. After discussing and clarifying the issues presented by both parties, examining all available evidences, and applying the traditional Pushtoon code; the Jirga passes a judgment that has to be accepted by both parties. If a party views that the judgment of Jirga is injustice, then that party can convene a more suitable Jirga to meditate and review the matter.<sup>38</sup>

Third party Jirga is mainly used for the resolution of dispute between two individuals or families. Thus, this Jirga aims to resolve

the disputes among the parties without having to go to court, and generally the Jirga members can give the amicable solution. However, every party to the dispute has the right to go to court to claim their legal rights as the Jirga members should not stop any party to look for a legal redress from a court of law.

#### ***Grand Jirga (Loya Jirga)***

The term *Loya Jirga* is a combination of two Pushto words: *Loya* which means “grand” and *Jirga* which means “assembly” or “gathering”. In fact, the practice of grand Jirga came from Afghanistan and it is one of the constitutional bodies there. Grand Jirga is the assembly where leaders and representatives of different tribes gather to discuss and vote on matters at the national level. In grand Jirga, the status of representatives is very important and sensitive. If these members mishandled even slightly, the nation can lose a lot. For representation of the community, each member must have absolute confidence and best qualities to represent the respective community in Jirga.

The grand Jirga has no fixed size as each tribe can bring forward a representative. It may also allow special representatives for women, minorities, etc. The procedure of selection of members is unique and there are various methods in the selection of representatives. Generally, the Jirga consists of notable leaders from all tribes which are selected by the respective tribe.<sup>39</sup> This Jirga addresses only on specific issues of national important. All members in Grand Jirga must be heard and issues raised by each of them must be considered whenever collective decisions are made. All the decisions are made on common grounds.<sup>40</sup>

#### **MAJOR ISSUES AND CHALLENGES IN THE JIRGA SYSTEM**

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

*Unwritten Nature of the Jirga System*

The main criticism of Jirga is that its rules are unwritten and it processes in informal manner. In resolving disputes, Jirga normally uses the religious and traditional rules which may vary from one scholar to another or from one tribe to another. Furthermore, applicable rules are not as clear as a written code for criminal and civil matters for the Jirga members to apply them to the disputes. Besides, there is no specific record of the disputes that have been settled by the Jirga.<sup>41</sup> Hence, the inconsistencies of the application of both substantive laws and procedural rules are widespread in all types of Jirga. In contrary, the common law system offers a court of law that is performed according to the written statutes; constructed on legal evidences; and applied the judicial precedent, i.e., *stare decisis*, for the judicial consistency. In fact, the Jirga system has been consistently practiced even by the common people those who do not have a formal legal education and it serves well in resolving disputes in the community. Of course, it could be more fruitful if the Jirga system can be formalised, to the extent it is possible, under a legal framework with the intention to offer proper structures and procedures for the purpose of rendering justice.<sup>42</sup>

*Human Rights Issues in the Jirga System*

Another major criticism on Jirga system is with regard to the violation of human rights in some cases. Some commentators criticise that the accused person could not enjoy enough rights and sufficient time to defend oneself because the Jirga proceedings are not in line with the national legal system. Sometimes, Jirga forces one party or the other to accept and implement its decision and the parties needed to comply with it due to the social pressure from the community. There is also lack of check and balance on what the Jirga does and decides as in the mainstream State organs such as executive, legislative and judiciary. The Pakistan Supreme Court even once made a remark pertaining to Jirga and Panchayat by saying that it is the violation of the Universal Declaration of Human Rights (UDHR).<sup>43</sup>

The Jirga system is also under severe criticisms for the violence of human rights especially against women in some cases. Some examples of these human rights violations are noteworthy of discussing in brief in this part. In 2011, “a Jirga agreement between different political parties prohibited 18,000 registered women from voting in by-elections” in Kohistan, Khyber Pakhtunkhwa District.<sup>44</sup> In 2013, Rubina - a 12 years old girl - was being forced by a Jirga to marry an older man in Doong Darra, Upper Dir District. She appealed to the Chief Justice of the Supreme Court of Pakistan to provide her with safety from such a forced marriage.<sup>45</sup> Similarly, in 2014, Amna - 11 years old girl - was forced to marry to a man elder three times her age as compensation for her uncle having raped a girl in Grilagan, Northwest Pakistan. She was one of the two girls given to the aggrieved family through a Jirga decision and finally she needed to marry the brother of the girl who had been raped by her uncle.<sup>46</sup> In 2015, a Jirga declared that women should not be allowed to vote in elections and this resulted disenfranchising over 12,000 women voters in the constituency in Darel Valley, Diamer District. The Jirga members comprised of religious leaders and candidates of political parties from the said region.<sup>47</sup>

Apart from the above mentioned incidents of human rights violation, the honour killing practices through the Jirga system is also very much alarming. According to the reports prepared by Aurat Foundation, the total number of 475 women in 2008; 604 women in 2009; and 557 women in 2010 were killed in the name of honour and mostly the decision was made by Jirga or Panchayat system.<sup>48</sup> In 2016, it is reported that more than 70 cases of honour killings were ordered through the Jirga system. These incidents happen mainly in the rural areas where rigid traditional rules are in practice. The Jirga members in those areas are not really aware of existing human rights and domestic laws.<sup>49</sup> Of course, there are volumes of cases that can be discussed in this part as many more cases happened in different areas of Pakistan where the Jirga system is being used to resolve disputes. These kinds of human rights violation incidents happen due to the fact that the government of

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the country does not have proper control over the conducts Jirga system through a proper legal framework. The Jirga system is ongoing solely with the acceptance of the society therein.

## CONCLUSION

The Jirga system is the oldest and still one of the typical dispute resolution mechanisms in the Pushtoon society. It is the only institution that works for dispute resolution and bringing harmony in all parts of life. It provides simple, easy and cheap services to the community in resolving their disputes. Albeit its structures and functions are not well codified, yet it is the fundamental part of the Pushtoon society. It also works as a social institute, a court of justice, and a diplomatic mission for bringing peace. Of course, it does not mean that there is no shortcoming in the system as a whole. The administration of justice through the services of Jirga system would be more fruitful with the support of the government if it can be formalised, to the extent it is possible, under a comprehensive legal framework with the intention to offer proper structures and procedures in handling disputes in accordance with all the existing laws applicable to Khyber Pakhtunkhwa.

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