

# The Jirga tradition

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of justice is speedy and is more concerned with justice from the victim's standpoint rather than from the standpoint of the community or penalty to the offender. Rewaj or customary law deals, inter alia, with offences like property disputes; criminal breach of trust criminal trespass, rape, false evidence offences relating to religion and places of worship etc.

The simple mechanism of the jirga is that elders well versed in local customary and or religious laws, i.e. ulema, assemble in a public place to settle conflicts and disputes among individuals, groups and tribes. Justice is delivered in major or minor criminal and civil cases while sitting, mostly on the ground, in a circular shape. Every participant in the jirga being theoretically equal has the right to speak and argue, however manners dictate to give due regard to elders in the expression of their views. Proceedings of the jirga are held in open and, therefore, public participation is made sure.

There can be small or large jirgas depending upon the nature, significance and sensitivity of the dispute. The elders, also variously called as masharan, malakan or spingiris, having reputation in the community by virtue of their pedigree, knowledge or charisma, act as judges in the dispute while the participants act as jurors.

The spirit of jirgas held for resolving disputes between the parties remain conciliatory rather than punitive in nature. A jirga will attempt reconciliation between the disputing parties in the first instance, failing which the parties abdicate their authority (waak) in favour of the elders. The elders, after having received authority in the dispute, discuss and judge the case according to the code of Pakhtunwali or Rewaj and then deliver judgement. The disputing parties once having reposed confidence in the judgement of the jirga by giving waak to elders cannot question the decision of the jirga.

The jirga has both formal and informal methods of enforcing its verdicts, however if a jirga delivers judgement in a case between two parties when either party in the dispute does not requisition the jirga, then the aggrieved party can question the judgement of the jirga, and can summon another jirga for re-examination of the case.

ing a teega, literally meaning a stone. Teega is a peace building measure between two families or factions. Its violation by either party is a crime against the whole community. It does not determine guilt or right and wrong in the feud but is only the first step towards effecting a permanent settlement of the dispute through sola (reconciliation).

It restores both the victim and the offenders to normal life by setting the blood feud through various tools like compensation paid to the victims in various shapes rather than insisting on legal procedures to prescribe the criminal from living a normal life. There are various narkh (measure of punishment) depending upon the tribe, for settling murder disputes in the Pakhtun society. Homicide cases are settled through execution of the murder; ex-communication of the offenders from the locality monetary compensation to the victim's relatives etc.

The jirga acts as a vehicle for mediation facilitation and conflict resolution between the parties rather than deferring the matter entirely to state criminal processes and sitting as a non-personal judge. There have been no systematic studies but generally there is a high client satisfaction, victim participation restitution completion, and low crime rates, where disputes are settled through jirgas as compared to state justice system.

Whereas the state judicial system is based on the negation of guilt by the accused, in restorative justice through the jirga, the first act the offender is expected to perform is nanawaty; which is an open admission of guilt by the offenders. The offenders along with some members of the jirga, goes to the home of the victim or his relative to request for the settlement of the dispute on the terms of the victim. The offenders must be members of the community on whom nanawaty is made.

After nanawaty the jirga decides the case according to set procedures and customs of the community. Minor criminal cases like inflicting injuries in a fight are pardoned by offering nanawaty and uzar by the offenders. Similarly in cases of theft or robberies, the jirga places more importance on the restoration of property may be double of its original value, to the wronged party. Besides, the offender has to admit guilt and tender apologies to rectify emotional and relational harm done to the victim.

This is with reference to an article on restorative justice authored by Mr. Malik Naveed Khan, PSP Director FIA Peshawar Zone and chief coordinator of the international seminar on restorative justice to be held in Gandahara University Peshawar in December 2003. Our traditional justice system is clearly based on the concepts of restorative justice. The origin of the jirga, like the origin of Pakhtuns, is shrouded in historical miasma; nevertheless, this ancient institution of a tribal society egalitarian and democratic in spirit, work as the backbone of Pakhtunwali -- the Pakhtun social code even today. The jirga is an informal institution, mostly composed of male elders, held at family clan, tribal or national levels to settle community issues, either personal or communal, in most of the Pakhtun inhabited land in Pakistan and Afghanistan.

The jirga in Afghanistan as a customary institution was integrated in the state system and was even further developed as the highest consultative political structure in the monarchic system of Afghanistan where the king's role was that of the first among equals in the loya jirga or grand assembly of tribal leaders of Afghanistan. But the jirga in Afghanistan is beyond the scope of this article. Our main focus remains the Pakhtun inhabited land in Pakistan with respect to the role of the jirga in the life of Pakhtun people.

The jirga, in pre-colonial period, was free and pure in form and content; however, the British occupation of Pakhtun lands in the late 19th century deformed this ancient institution to meet colonial interests. The formation of a separate province of Pakhtuns - the North-West Frontier Province in 1901 - was prompted by colonial interests to design special laws, the Frontier Crimes Regulations (FCR), for controlling the lives of the so-called unruly Pakhtuns through un-justice and inhuman laws unlike the rest of British India where criminal and civil justice met the minimum requirements of a civilised world.

The Frontier Crimes Regulations were tempered with the institution of the jirga by nominating British loyal elders to settle disputes among opposite parties. With the passage of time, this institution degenerated and people lost trust in the capacity of officially nominated jirgas to deliver justice in civil and criminal disputes or other communal issues.

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Despite the trauma of degeneration of the jirga in colonial and post-colonial period in the Pakhtun land of Pakistan, it still forms the basis of alternative dispute resolution methodology in majority of civil and criminal cases, particularly in view of the fact that Pakistan's judicial system, like her many other institutions, has undergone institutional melt-down, failing to provide speedy and fair justice to the litigants. Therefore, the role of the jirga, as an alternative justice system, has re-emerged although it still remains under-developed both in form and content due to non-patronage by the state and non-state actors.

The role of the jirga, as an alternative dispute resolution mechanism, can become even more pronounced in the evolving perspective of criminal justice system where more emphasis is laid on restoration of the victim rather than punishing the offender. The role of the jirga as an institution of restorative justice existed in pre-colonial period and even today it serves this function although in a crude form, at the non-official level.

The customary laws of Pakhtuns, variously called as Rewaj, Turezoona, Afridwala, (the name depending upon the tribe which practices it), provide a code of laws for the trial of civil and criminal cases, which may be found deficient to meet civilised judicial standards in certain disputes, nevertheless, the administration

the jirga has both formal and informal methods of enforcing its verdicts, however if a jirga delivers judgement in a case between two parties when either party in the dispute does not requisition the jirga, then the aggrieved party can question the judgement of the jirga, and can summon another jirga for re-examination of the case.

In case of violations of the judgement of the jirga, it determines punishment for the violator on the basis of narkh (measure of punishment) in Pakhtunwali. It can impose fine (nagha) ex-communicate or confiscate property of the non-compliant party. Besides, the non-compliant party loses the support of the tribe or community and is subjected to social vis-a-vis the opposite party. Therefore, comparing it with retributive justice system administered by a state where the main focus remain on the punishment of the offender the system of restorative justice as practiced in the jirga institution is more focused on reconciliation and restitution of the victim. This is in accordance with Black's Law Dictionary (1968) definition of restitution, which is an "act of restoration of anything to its rightful owner" the act of making good or giving equivalent for any loss, damages or injury and indemnification.

Restorative justice is a systematic response to wrongdoing that emphasises healing the wounds of victims, offenders and communities caused or revealed by the criminal behaviour. This systematic response is best articulated in the institution of the jirga in many ways. Whenever, there is bloodshed between two parties in a certain dispute, the first act of a jirga, taking suo motto notice or requisitioned by an interested aggrieved party, is to effect a truce between the warring factions by plac-

ing the community. Minor criminal cases like inflicting injuries in a fight are pardoned by offering nanawaty and uzar by the offenders. Similarly in cases of theft or robberies, the jirga places more importance on the restoration of property may be double of its original value, to the wronged party. Besides, the offender has to admit guilt and tender apologies to rectify emotional and relational harm done to the victim. There are many other instances of settling disputes through the jirga, which satisfies needs of the victim and the offenders than the state.

The present retributive criminal justice system lays more emphasis on penalising the offender than taking cognisance of the victim's interests or understanding of the situation, which leads to crimes. It satisfies the state's needs and may, sometimes compromise the interests of the victim as the prosecution acts both on behalf of the state and the victim.

Contrary to the state retributive justice system, the institution of jirga has great potential as a vehicle for restorative justice. However, a lot needs to be done to modernise both the structure and the principles of customary laws of justice to meet modern standards of justice from the standpoint of all the stakeholders, i.e. the community the victim and the offender. The jirga can be e-structured, as a system of restorative justice to reduce crime rates and satisfy needs of all the stakeholders in a dispute. This cannot be possible without civil society's involvement both at the local and international levels; therefore, civil society organisations working on the concept of restorative justice worldwide have to re-integrate the jirga institution as an alternative dispute resolution mechanism in evolving a more just and crime reduced society.