

## Jirga as a Mechanism of Dispute Resolution: An Evaluation in the Eyes of Islamic Principles and Legal Challenges in Pakistan

▪ Pages: 1– 11    ▪ Vol. III, No. II (Fall 2024)    ▪ p- ISSN: 3078-3666    ▪ e- ISSN: 3078-3283

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**Abstract:** *The Jirga system in Pakistan has historically served as an informal approach to imparting community-based justice. However, the practical implications of this system raise serious questions regarding its compliance with Islamic jurisprudence and constitutional mandates. This thesis analyses the Jirga system through an Islamic lens, exploring its conceptual foundation in Islamic law and identifying elements contradicting Islamic principles and constitutional provisions. Additionally, it also examines any obstacles, legal or systemic, that are impeding the recognition and legalization of the Jirga system in Pakistan. By juxtaposing the Jirga system with Alternative Dispute Resolution (ADR) mechanisms, the research critically identifies Pakistan's reluctance to institutionalize Jirga while accommodating ADR frameworks. The study concludes by assessing whether the Jirga system can be reformed to operate within the boundaries of Islamic and constitutional law, and it also proposes recommendations to make tradition comply with legal and religious compliance.*

### Keywords:

Jirga, Pashtunwali, CEDAW, Tribal Traditions, ADR, Sawara

## Introduction

### Historical Background of Traditional Disputes Mechanisms in Different Regions:

People have had different opinions based on their life experiences in history and these differences led to disputes and conflicts. In early societies, there was a real need for an unbiased person or group to help resolve these issues. During that era, various traditional mechanisms were established for resolving disputes, with the Jirga serving as a prominent method in specific regions. Within Muslim communities, a diverse array of conflict resolution strategies has been employed throughout history. These methods reflect a deep-rooted cultural heritage, rooted in principles of justice and communal harmony. Notably, even after the regions were conquered by Muslims, these

traditional dispute-resolution practices continued to thrive, maintaining their relevance and importance in addressing conflicts. Below are some illustrative examples of these enduring traditional conflict resolution methods found within Muslim communities.

- **Sulh:** A custom that precedes Islam is sulh, or conciliation and peacemaking. Chieftains (sheikhs), soothsayers, healers (kuhhān), and significant noblemen were crucial mediators in conflicts within or between rival tribes in the framework of tribal Arab society. The power and prominence of those persons served as justification for their verdicts. The ruling of the elders was conclusive but not legally binding. It was an authoritative decision regarding what customary law was or should be, and subsequently of Islamic ideas.<sup>1</sup> Similarly in the Middle East, there are more methods for dispute resolution i.e. Wasataa and Tehkeem which were practised and still it is formally applicable in the Arab region.<sup>2</sup>
- **Xeer:** The Somali customary justice system, xeer, is integral to Somali society, providing an essential mechanism for resolving disputes. Xeer functions alongside formal state-supported courts that use clan elders who rely on precedent, Sharia law, and mutual oral agreements amongst clans to resolve conflicts and determine outcomes. It is especially important in rural regions and locations with low governmental capability, where state courts may be unreachable, offering a cost-efficient and swift alternative.

In contrast, various other societies, particularly those in the ancient civilizations, have established their own traditional methods for resolving disputes. These mechanisms, deeply rooted in cultural practices and legal frameworks, promote dialogue and understanding, often emphasizing negotiation, mediation, and a structured approach to conflict resolution.

- **Hawaiian Islanders:** The Hawaiian islanders of Polynesian descent employ a traditional system for amicably resolving disagreements. Under the guidance of a facilitator, the process, known as Ho'oponopono, involves a family gathering to discuss interpersonal concerns. To "rectify matters" on both a spiritual and interpersonal level is the term's most common interpretation. The person who leads the session is someone that both sides value. The person acts as a mediator and session facilitator. The facilitator opens the meeting with a prayer, asks questions of the group, and sometimes calls for a pause when emotions rise or one side refuses to listen to the other (Boggs and Chun, 1990). The leader tries to promote reconciliation after taking into account both viewpoints and making an effort to comprehend the core of the dispute.
- **The Abkhazian of Caucasus Mountains:** In the Caucasus Mountains of Georgia, formerly part of the Soviet Union, the Abkhazian people have historically employed elder mediation to settle disputes within their community and among neighboring tribes. The mediators are often esteemed elders, predominantly male but occasionally female. The conflicting parties typically seek mediation following a cycle of vengeance that has enabled each side to perceive that it has inflicted equivalent retribution, yet before any reconciliation is attained. A drunken altercation between members of distinct families escalated into bloodshed. The mediators effectively coerced both parties into reconciliation, which was then celebrated with a communal feast.
- **Mediation in China:** China, rooted in Confucian ideals, embraced mediation as an early method

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<sup>1</sup> [https://eprints.lse.ac.uk/24598/1/WPS2008-12\\_Al-Ramahi.pdf](https://eprints.lse.ac.uk/24598/1/WPS2008-12_Al-Ramahi.pdf)

<sup>2</sup> Al-Ramahi, Aseel. "Sulh: A Crucial Part of Islamic Arbitration." *Islamic Law and Law of the Muslim World Research Paper Series at New York Law School*, no. 08-45 (2018).  
<https://mediationblog.kluwerarbitration.com/2018/01/23/history-mediation-middle-east-prospects-future/>.

of dispute resolution. Confucius (551–479 B.C.) asserted that natural harmony must remain undisturbed and that hostile actions are fundamentally opposed to harmony.

- Traditional Mechanism in India: India created a system of arbitration known as Panchayat approximately 2,500 years ago. The arbiter, referred to as a Panch, was accorded such elevated standing that his verdicts were irrevocable. All categories of disputes may be eligible for arbitration, encompassing criminal proceedings. Arbitration was so widely accepted that it continued for the entire eight hundred years while India was ruled by Muslims.<sup>3</sup>

### Introduction of the Jirga Concept

Jirga has been of great importance to the Pashtuns in Pakistan and Afghanistan. It has also been important for neighboring groups like the Azbak, Tarkaman, Baloch, Hazara, and Tajik, dating back around five thousand years. Over time, society has bestowed the Jirga with social and cultural powers, which include functions related to the judiciary and executive branches. Ironically, even policy-making falls within its influence. As a result, small domestic issues and minor financial matters have remained under the jurisdiction of local mechanisms known as Maracca.<sup>4</sup>

Multiple definitions exist regarding the literal meaning of Jirga; some scholars assert that the term originates from the Turkish word 'Jirg,' which translates to “circle”.<sup>5</sup> Similarly, some say it is a Persian word that means circle, the same origin as the Latin circus and the Greek.<sup>6</sup> Moreover, The Aryan tribes are where the Jirga system first emerged. They moved to Afghanistan and later India after leaving Central Asia. Jirga was used by the Aryan race to settle disputes and resolve conflicts. The king occasionally chaired the Jirga and took part in sessions.<sup>7</sup> The Jirga operated as a council for the countryside. The dominant customs made the decision. In Afghanistan and Pakistan, the Jirga tradition is most prevalent among the tribal community, which is primarily composed of Pashtuns. It operates in conformity with the fundamental tenets of Pashtunwali, a code of conduct that regulates every aspect of Pashtun behavior.<sup>8</sup>

Jirga can be classified into various specific types according to the nature of the issues they resolve. Each type fulfills a distinct role within the society, embodying the particular traditions and practices that govern these groups of people.

**Local Jirga:** The local Jirga examines and adjudicates disputes that occur inside the village. The majority of the tribal population often engages in agriculture. The fundamental resources utilized for income are lumber, forests, kindling, channels, passages, inland waterways, springs,

<sup>3</sup> Barrett, Jerome T., and Joseph Barrett. *A History of Alternative Dispute Resolution: The Story of a Political, Social, and Cultural Movement*. Z-Library, 2020. [http://www.mediationhistory.org/wp-content/uploads/2020/10/A-History-of-Alternative-Dispute-Resolution-The-Story-of-a-Political-Social-and-Cultural-Movement-by-Jerome-T.-Barrett-Joseph-Barrett-z-lib.org\\_.pdf](http://www.mediationhistory.org/wp-content/uploads/2020/10/A-History-of-Alternative-Dispute-Resolution-The-Story-of-a-Political-Social-and-Cultural-Movement-by-Jerome-T.-Barrett-Joseph-Barrett-z-lib.org_.pdf)

<sup>4</sup> Saqib, Lutfullah, and Rasheed Ahmad Faizy. "History of Jirga Laws in Khyber Pakhtunkhwa - Do Islamic Law and Jirga Laws Have the Same Historical Jurisprudential Approach?" *Al-Idah* 39, no. 1 (2021). <https://doi.org/10.37556/al-idah.039.01.0592>

<sup>5</sup> Marcoux, Guillaume. "A Centuries Old Mechanism to Resolve Conflicts: The Jirga." *Irenees* (February 2010). [https://www.irenees.net/bdf\\_fiche-defis-258\\_en.html](https://www.irenees.net/bdf_fiche-defis-258_en.html)

<sup>6</sup> <https://www.ojs.jdss.org.pk/journal/article/download/400/536#:~:text=According%20to%20Sardar%20Khan%20Baloch.word%20meaning%20the%20tribal%20assembly>

<sup>7</sup> AMahmood, A., Ullah, S., and Ashfaq, S. "The Evolution of Jirga System: A Conflict Resolution Mechanism in FATA." *Liberal Arts and Social Sciences International Journal (LASSIJ)* 2, no. 1 (2018): 21–28. <https://doi.org/10.47264/idea.lassij/2.1.3>.

<sup>8</sup> Shukla, Ashish. "The Pashtun Tribal Identity and Codes: At Odds with Pakistan's Post-9/11 Policies." *n.d.*

and coppices. They are economically and socially structured and firmly established. Members of the local Jirga are drawn from influential elder families within the community. They originate from distinct tribes and khels. The Jirga adjudicates disputes effectively, with members selected from prominent tribes and khel (sub-tribes).

**Qawmi Jirga:** A Jirga composed of esteemed elders and tribal representatives. The jurisdiction of this particular Jirga is significantly broader than that of any other form of Jirga. The Qawmi Jirga can address any matter of national or communal significance. The Qawmi Jirga addresses critical and delicate matters, including murder, bodily harm, personal injury, severe attacks on an individual's goodwill and character, disputes over immovable property, theft, and robbery. Jirga members deliberate on such matters with meticulous attention and thereafter administer punishment under the cultural norms upheld by the tribal community.<sup>9</sup>

The ancient institution of tribe elders has consistently resolved our tribal nation's political, social, economic, and religious issues through decisions grounded in mutuality, consensus, and respect. Other communities in these regions use a comparable custom referred to as shura.<sup>10</sup> A Jirga may take place at local or regional levels of society and may have different objectives. A Jirga may have varied goals and be held at the local or regional level of society. At the communal level, Jirga is frequently utilized to resolve disputes involving a wide range of topics, including theft, murder, and family disputes. After a potentially conflict-causing incident (such as a murder), community elders organize a delegation and meet at the mosque or in hujras (a gathering for male community members) to talk about the matter.

The Jirga members are seated in a circle, which represents the concept of equality. It demonstrates that there is no hierarchy and that everyone is free to voice their thoughts. In other situations, Jirga members use the hospitality principle to visit the parties. The Jirga becomes a visitor when they visit the victim's home, and under Pashtun hospitality customs, guests must be treated with respect and protection. The Jirga, however, engages in individual negotiations with each party during these visits to ascertain their requests and assist them in coming to a consensus. As the Jirga engages with the involved parties and relevant witnesses to determine the facts and reach an equitable resolution acceptable to everyone, consultation among the parties and the community is essential to this process.<sup>11</sup>

Forgiveness and hospitality are key principles in tribal culture, for instance, the 'nanawate' process within the Jirga system, which means seeking forgiveness. When a decision is made by the Jirga, the guilty party's relatives send a delegation to the victim's home. This delegation usually consists of elders, a mullah, and other close family members, and sometimes the offender. They bring sheep and flour, which are slaughtered at the house. Once inside, they ask for forgiveness on behalf of the offender. According to Pashtunwali codes, rejecting nanawate is unacceptable and it leads victims to pardon offenders and agree to reconciliation, known as "rogha".<sup>12</sup>

### **Jirga Concept in the Light of Islamic Perspective**

In alignment with a widely accepted Islamic principle concerning the integration of local customs

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<sup>9</sup> Mahmood, Ullah and Ashfaq (n 7).

<sup>10</sup> "Shukla, Ashish. "The Pashtun Tribal Identity and Codes: At Odds with Pakistan's Post-9/11 Policies." *n.d.*

<sup>11</sup> "Understanding an Islamic Framework for Peacebuilding." *n.d.*, [https://www.islamic-relief.org.uk/wp-content/uploads/2023/01/Understanding-an-Islamic-Framework-for-Peacebuilding\\_IRWP\\_2013-02.pdf](https://www.islamic-relief.org.uk/wp-content/uploads/2023/01/Understanding-an-Islamic-Framework-for-Peacebuilding_IRWP_2013-02.pdf).

<sup>12</sup> Wardak, Ali. "Building a Post-War Justice System in Afghanistan." *Crime, Law and Social Change* 41, no. 4 (2004): 319–341. <https://doi.org/10.1023/b:cris.0000025765.73021.fa>.

and norms that do not contradict the fundamental doctrines of Islam, various traditional mechanisms have successfully aligned with the practices of the Prophet (PBUH) and have been sanctioned by the Qur'an, thereby being adopted as tools for application.

### Quranic Verses

“If ye fear a breach between them twain, appoint (two) arbiters, one from his family, and the other from hers; if they wish for peace, Allah will cause their reconciliation: For Allah hath full knowledge, and is acquainted with all things. (Al-Nisaa 4:35)”

Islamic mediation is a recognized method for settling disputes, wherein an impartial mediator assists individuals in reaching an agreement. The aforementioned passage from the Qur'an addresses the procedure of mediation in familial disputes.<sup>13</sup>

“In most of their secrets talks there is no good; but if one exhorts to a deed of charity or justice or conciliation between men, (secrecy is permissible): to him who does this, seeking the pleasure of Allah, We shall soon give a reward of the highest (value)” (Al-Nissa: 114).

“And if two parties among the Believers fall into a quarrel, make ye peace between them: but if one of them transgresses beyond bounds against the other, then fight ye (all) against the one that transgresses until it complies with the Command of Allah; but if it complies, then make peace between them with justice, and be fair: for Allah loves those who are fair (and just)”. (Al-Hujurat: 9)<sup>14</sup>

In the verses of the Quran mentioned above, Allah Almighty has endorsed the practice of mediation and conciliation as a good deed for resolving disputes among people. In this context, the concept of a Jirga can serve as a useful tool for establishing a system to resolve conflicts.

### Sunnah Practices

In addition to these verses, the Hadith of Prophet Muhammad PBUH strongly supports peaceful settlement. The Prophet states:

“Conciliation between Muslims is permissible, except for a conciliation that makes lawful unlawful and unlawful lawful”.<sup>15</sup>

Masoud, Abu al Harith's brother, mediated the reconciliation between the Prophet (PBUH) and the tribe of Fadk after the Battle of Khaibar (7 A.H.); Badil ibn Waqaa mediated the reconciliation of Hudaybiah between the Prophet Muhammad (PBUH) and the Meccan monotheists in the sixth A.H.<sup>16</sup>

Mediation is important to Islamic conflict resolution, as Hazrat Muhammad (PBUH) demonstrated. Muhammad (PBUH) directly mediated and arbitrated disputes. He was called “the Faithful One” (al-Amin) for his honesty, which helped the Prophet mediate conflicts in Mecca. Every community in Yathrib (Medina) chose him as the mediator between the tribes. The Constitution of Medina recognized his role as a mediator-arbitrator<sup>17</sup>. One of his notable

<sup>13</sup> “[https://www.rahmaa.org/Domestic-Violence/Islamic-Mediation/.](https://www.rahmaa.org/Domestic-Violence/Islamic-Mediation/)” n.d.

<sup>14</sup> Bouheraoua, Said. "Foundation of Mediation in Islamic Law and Its Contemporary Application." n.d. [http://www.asiapacificmediationforum.org/resources/2008/11-\\_Said.pdf](http://www.asiapacificmediationforum.org/resources/2008/11-_Said.pdf).

<sup>15</sup> Ibid

<sup>16</sup> Ibid

<sup>17</sup> Yildirim, Y. "Peace and Conflict Resolution in the Medina Charter." *Peace Review* 18, no. 1 (2006): 109–117. <https://doi.org/10.1080/10402650500510750>.

interventions pertained to the relocation of the Black Stone from the Kaaba, during which he was the sole individual trusted by the three principal Meccan tribes to arbitrate their contention regarding who would bear the honor of moving the Black Stone. His mediation and problem-solving abilities motivated him to propose that they jointly move the stone by laying it onto his cloak<sup>18</sup>. The Prophet Muhammad (PBUH) is commonly cited as the inspiration for several mediation activities that are carried out all across the Muslim world. These initiatives are founded on Islamic principles and goals that are derived from the Qur'an and hadith.

### **Un-Islamic Elements in Jirga**

From the perspective of Sharia and jurisprudence, Jirga serves the role of consolidation and reconciliation. However, there are several flaws within our current Jirga system from a Sharia point of view, which affects its effectiveness and introduces issues similar to those found in the judicial system as discussed in the analysis. Following are some of these defects:

1. The decision is primarily influenced by established cultural norms and societal traditions, which play a significant role in guiding the process. In this context, the principles and teachings of Sharia law are notably overlooked and not factored into the decision-making framework, emphasizing a preference for local customs over religious guidelines.<sup>19</sup>
2. A significant concern arises from these resolutions: the decisions made through Jirga have been deemed unaligned with Islamic teachings and principles. The Federal Shariat Court declared the “**Sawara**” custom as unIslamic<sup>20</sup>, a solution while resolving the disputes among the parties. This custom is against Islam so this is prohibited. It can be said that the custom of sawara is prohibited because it results in injustice and zulm and is against Sharia. This calls into question the legitimacy of such conclusions and highlights the tension between traditional dispute resolution methods and adherence to religious law.
3. It is frequently inevitable that various unethical practices occur both during the appointment of Members of the Jirga and at the critical stage of making decisions. These misdeeds can undermine the integrity of the process, affecting both the selection of representatives and the outcomes of important deliberations.<sup>21</sup>
4. It is observed that in the event of a decision, it is not Sharia valid to take a reward after the settlement of disputes, on this destiny, it is also one of those acts of worship for which the reward is not valid, and where it is a matter of peace, it is also correct to take a reward for it. Yes, on this destiny, its nature is also the same as all other legitimate matters, on which it is right to have a wage for their performances, and there is no harm in It either, while the wage is to be decided by mutual agreement in advance.<sup>22</sup>

### **The domestic and international Legal aspects of Jirga**

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<sup>18</sup> "Understanding an Islamic Framework for Peacebuilding." *n.d.*. [https://www.islamic-relief.org.uk/wp-content/uploads/2023/01/Understanding-an-Islamic-Framework-for-Peacebuilding\\_IRWP\\_2013-02.pdf](https://www.islamic-relief.org.uk/wp-content/uploads/2023/01/Understanding-an-Islamic-Framework-for-Peacebuilding_IRWP_2013-02.pdf).

<sup>19</sup> "Mufti Ubaid Ur Rahman. "Free Download, Borrow, and Streaming: Internet Archive." *Internet Archive*, 2023. [https://archive.org/details/mufti-ubaid-ur-rahman/TAHKEEM\\_AUR\\_JARGA/page/2/mode/1up](https://archive.org/details/mufti-ubaid-ur-rahman/TAHKEEM_AUR_JARGA/page/2/mode/1up).

<sup>20</sup> [https://www.federalshariatcourt.gov.pk/Judgments/Judgment%20on%20Swara%20\(Shariat%20Petition%2025.10.2021\).pdf](https://www.federalshariatcourt.gov.pk/Judgments/Judgment%20on%20Swara%20(Shariat%20Petition%2025.10.2021).pdf)

<sup>21</sup> Mufti Ubaid Ur Rahman. "Free Download, Borrow, and Streaming: Internet Archive." *Internet Archive*, 2023. [https://archive.org/details/mufti-ubaid-ur-rahman/TAHKEEM\\_AUR\\_JARGA/page/2/mode/1up](https://archive.org/details/mufti-ubaid-ur-rahman/TAHKEEM_AUR_JARGA/page/2/mode/1up).

<sup>22</sup> Ibid Page 3

The Jirga system rooted in Pashtunwali has some obstacles to its legalization in Pakistan. However, the Jirga system has significant potential to solve disputes and social order. To legalize the Jirga system in Pakistan, the following obstacles need to be addressed:

### Key Obstacles

Jirga consists of highly influential people in the locality such as landlords, Maliks, and Khans. It is natural and obvious that these influential people will help their friends and relatives when setting up disputes.<sup>23</sup>

### The Jirga System and its Conflict with Constitutional Provisions

When influential people give justice to like-minded people and deprive the poor of it too, it is a clear violation of the constitution of Pakistan which guarantees fair trial to all its citizens. Article 10A of the constitution of Pakistan gives a right to a fair trial which states: "For the determination of his civil rights and obligation or in any criminal charge against him a person shall be entitled to a fair trial and due process."<sup>24</sup>The state protects the rights of all its citizens regardless of color, creed, and race. The state is not only specified to a particular area or group of people. Giving justice according to due process is the responsibility of the state which in the case of the Jirga system fails to do so.

There is no procedural mechanism in the Jirga system. While in a court, there is a proper procedure for setting the law in motion, also known as Procedural Law (e.g. Cr.P.C), in the case of the Jirga System Elders from both parties sit down to discuss the matter while hearing both sides without the need for a substantial amount of evidence and within a few days give the final verdict.

### Gender Inequality in the Jirga System

Article 25 of the constitution of Pakistan states: "All citizens are equal before the law and are entitled to equal protection of the law". The Jirga system, however, is quite patriarchal, since it comprises only the male and female are not allowed to take part in it. Unlike the Legal Formal System, in the Jirga System, the women must select a male to represent them and advocate for them. The participation of women is not allowed under any condition in the Jirga mostly due to the reluctance of the male members. The Jirga does not allow a woman to be a member, nor a complainant or a witness. This exclusion not only reinforces gender biases but also results in decisions that infringe upon women's rights, including matters involving honor killings and forced marriages. If a woman has a complaint against a male relative, there is no relief for her as no recourse is available.

Another extremist perspective of the Jirga System is the concept of Swara, Vanni, and sung chatti. All of these are similar in the end as women are given away as compensation for the disrespect committed by the accused. The nearest virgin girl related to the accused is handed over to the other family as punishment.<sup>25</sup> All of this is aided by the jirga, whereas in the Legal Formal System, clause 1 of subsection 1 of Section 310 of the PPC states: "Provided that a female shall not be given in marriage or otherwise in Badal-i-Sulh." In addition to this, Section 310A provides

<sup>23</sup> Abbas, Zaheer. "Dawn News." *Dawn News*, March 29, 2013.

<sup>24</sup> Article 10A, *Constitution of Pakistan* 1973.

<sup>25</sup> Khurshid, Momina. "Jirga System in Pakistan: A Transgression of Human Rights." *Research Society of International Law / RSIL*, April 11, 2022. <https://rsilpak.org/2022/jirga-system-in-pakistan-a-transgression-of-human-rights/>.

the punishment for anyone who compels a female into marriage or gives her away in Swara, Vanni, or sung chatti.

### **Human Rights Violations**

Jirgas have been linked to several human rights violations. Sometimes, Jirgas makes unfair decisions that can harm people. These decisions are based on old traditions instead of formal laws. There have been reports of Jirgas approving violence against women or punishing people without a fair trial. This is against international standards since Pakistan is a member of the Universal Declaration of Human Rights (“UDHR”), and the International Covenant on Civil and Political Rights.

(“ICCPR”), and has also ratified the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”). In the UDHR<sup>26</sup> and ICCPR<sup>27</sup>, the state is required to provide equal protection to everyone irrespective of gender. Article 15 of CEDAW requires the state to provide women with the same capacity to enjoy access to the courts and tribunals<sup>28</sup>.

### **Public Perception and Credibility**

During a conversation with a Tribal man, Khanzeb Khan, he shared insights about the Jirga system. He belongs to South Waziristan and has spent over 30 years in Karachi running a business. Khanzeb has played a crucial role in resolving many disputes, particularly financial issues among tribal businessmen. He noted that in regions where the Jirga system is practiced, locals often view it as a more effective way of achieving justice than the formal judicial system. The Jirga is a traditional assembly of influential elders and respected community members, reflecting these societies' cultural values and social structures. This makes it a familiar and trusted alternative for conflict resolution.

However, this preference for the Jirga system poses challenges to accepting and legalizing formal judicial processes in these regions. The widespread belief that formal courts are slower and lack knowledge of their cultural norms creates a hesitance to accept alternative legal systems. As a result, individuals continue to incline toward the Jirga as their primary means of seeking justice.<sup>29</sup>

### **The Difference between ADR and Jirga System:**

Delving into the fascinating contrast between ADR and the Jirga system, both are used for resolving the conflicts outside the Formal justice system. There are some differences in implementation and structure. Below are some differences between the two Justice systems:

1. Jirga is a council of elders constituted under Pashtunwali - the Pashtun code of conduct to resolve a dispute between two disputants or warring factions. Jirga, basically, aims at restoring peace and social order. It has no legal authority to adjudicate but seeks the consent of the respective parties to mediate. Once the disputants agree to hold Jirga and the Jirga is constituted following the Jirga procedure of ‘Wak’ (absolute consent) and baramta (surety bond), the decision of Jirga is mandatory to be accepted and is implemented accordingly until the disputing party objects over a member of Jirga or decision of Jirga recording justifiable

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<sup>26</sup> Article 7&8 of UDHR

<sup>27</sup> Article 26 of ICCPR

<sup>28</sup> Article 15 of CEDAW

<sup>29</sup> Khan, Khanzeb. Jirga Expert, Tehsil Serwekai, South Waziristan.



- grounds. In the instant case, another Jirga can be constituted for mediation.
2. The Alternative Dispute Resolution (ADR) Act of 2017 defines ADR as a process where parties use methods other than court adjudication to settle a disagreement. These methods include, but are not limited to, arbitration, mediation, conciliation, and impartial evaluation.<sup>30</sup>
  3. ADR uses a variety of techniques like Negotiation, Mediation, and Arbitration to solve disputes out of court. ADR Act 2017 gives proper structure and legal framework to ADR. Negotiation is an informal and non-binding solving of a dispute that only involves the parties to the dispute (no third party to assist in resolution). Mediation / Conciliation is a non-adversarial and non-binding method involving a mediator to resolve the parties' disputes. Arbitration is adversarial and binding Based on an arbitration agreement between the parties.
  4. In the Jirga system, the decision is made by the consensus of the elder of the tribe who does not have any proper training in dispute resolution. The Jirga system is an informal process that does not have proper checks and balances. Every tribe has different customs and traditions therefore the decision may also vary.<sup>31</sup>
    - a. ADR on the other hand has a legal framework according to the ADR Act 2017. ADR has competent arbitrators and mediators who know how to solve disputes between conflicting parties. These arbitrators make sure that justice is served justly.<sup>32</sup>
  5. The primary focus of the Jirga system is to solve the dispute and maintain peace and prosperity in the area. Jirga system most of the time gives preference to the interests of the locality over individual rights. This violates the basic fundamental rights of an individual.<sup>33</sup> Contrary to the Jirga system ADR is a very friendly mechanism that aims at the dissolution of disputes without infringement of rights of the parties. The decisions made can also be documented and enforced, which further protects the rights of the parties.<sup>34</sup>
  6. As the Jirga system has no structure or legal framework, it deals with all types of matters whether it be Civil, Criminal, or Family disputes among the parties. There are no boundaries for the Jirga operators. ADR on the other hand deals only with civil matters and the arbitrators are trained for this role. No criminal matters are resolved in the ADR centers. Criminal matters are to be solved in the Formal judicial system.
  7. The Jirga system is male dominated justice system where women are not included in decision-making. This exclusion from decision-making creates gender discrimination. This elimination of women from the jirga system often leads to decisions where women's rights are violated.
    - a. In ADR women can also participate in dispute resolution so that they can freely fight for their rights. Furthermore, it also believes in gender equality and can make certain standards that can give equal dispute-resolving opportunities with gender discrimination.
  8. If we compare Pakistan's Jirga system with another dispute-solving mechanism around the world, it is found that the Jirga system is a strict way of solving disputes and often gives harsh punishment to both victims and accused. Their goal is to stop such crimes in the future, but it makes the situation even worse.

<sup>30</sup> "Alternative Dispute Resolution Act, 2017." *n.d.* Pakistancode.gov.pk.

<sup>31</sup> "DISCOURSE 2024." *n.d.* Accessed June 9, 2024.

<sup>32</sup> Akhtar, Zia. "And Reconciliation Commission and Peace on the Pakistan-Afghanistan Frontier." ADR (Grand Jirga). *n.d.* <https://www.qmul.ac.uk/law/humanrights/media/humanrights/docs/adr-grand-jirga.pdf>.

<sup>33</sup> Akhtar, Zia. "ADR (Grand Jirga), Truth, Justice and Reconciliation Commission and Peace on the Pakistan-Afghanistan Frontier." *n.d.* <https://issrapapers.ndu.edu.pk/site/article/download/163/101/131>.

<sup>34</sup> <https://www.qmul.ac.uk/law/humanrights/media/humanrights/docs/adr-grand-jirga.pdf>

The ADR mechanisms which are operated in countries like the USA, India, and South Africa focus on fair and clear conflict resolution with systematic and lawful mechanisms. This system vanishes the bridge of anger and hate between victims and offenders by promoting mutual conversation.<sup>35</sup>

### **Why Pakistan is Reluctant to Adopt the Jirga System in Pakistan while Giving Space to ADR?**

All claims that are right or wrong are negotiable. It is common practice among the tribesmen that if anyone in the locality claims over to his property or anything he must sit with him in the jirga. This practice of tribesmen hurts the legal system (Jirga system) of the tribal areas. It gives birth to so many disputes. In this case, the elders try to solve the dispute in a way that the amount or commodity between the disputants is divided in such a manner that is acceptable to both of them.<sup>36</sup>

The one who claims the property of other tribesmen has no loss even if he loses. The loss is of that person whose property had been claimed. This mentality prevailed everywhere in the tribal areas of Pakistan. There is one distinctive quality in tribesmen that they never forget good or bad done to them. They will remember good deeds for the rest of their life. Similarly, they remember the wrong and recall when the wrongdoer is caught in an identical position to take revenge on him. In a nutshell, this type of tradition or custom of every claim, right or wrong, has a negative impact on the legal system of tribal areas. That's why Pakistan is reluctant to adopt the Jirga system because it has some negative customs and traditions that violate the fundamental rights of an individual guaranteed by the constitution of Pakistan and international law.

The second reason for not implementing the Jirga system in Pakistan is that it has certain rules and regulations that are not present in codified form. Pakistan has a written constitution, and other relevant laws are also in statutory form, therefore, to implement the Jirga system, codification of rules and regulations used in the Jirga system is required. Another reason could be that the decisions made by the Jirga system operating in tribal areas are against the Pakistani constitution and international law. For instance, the practice of Swara, a decision made by the Jirga system in tribal areas has no place in Pakistan's constitution or international law. Pakistan can never adopt such unjust and inhuman customs of the Jirga system.

Additionally, Pakistan accepted the United Nations' 1981 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). "Any distinction, exclusion, or restriction made based on sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field," states Article 1 of the convention. The Jirga system frequently makes decisions that violate the CEDAW convention. Pakistan cannot, therefore, embrace such Jirga system customs.

### **Recommendation**

It is obvious that this system has immemorial relation with the people for resolving disputes and it cannot be neglected. Still, the people are used to and even believe in Jirga rather than judicial justice. Introducing ADR is quite a good step for resolving disputes as the courts in Pakistan have

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<sup>35</sup> "Unveiling the Dynamics of the Jirga System in Pakistan: An In-Depth Analysis." *Annals of Human and Social Sciences* 5, no. II (2024). [https://doi.org/10.35484/ahss.2024\(5-ii\)11](https://doi.org/10.35484/ahss.2024(5-ii)11).

<sup>36</sup> *Riwaj: The Way of Life in Tribal Areas* by Sharif Ullah Dawar.

a burden of cases. Even the judiciary itself working on ADR to be added and regularized. Jirga and other similar dispute mechanisms have deep roots in the different regions of Pakistan, the best possible way to consider these mechanisms is while adopting some new systems.

- The Jirga system should be reformed, legalized, and then regularised to ensure its alignment with Islamic principles and constitutional values. This process involves identifying and eliminating any practices or elements that are deemed un-Islamic or unconstitutional, thereby promoting a more just and equitable framework for conflict resolution within the community.
- The individuals responsible for conducting the Jirga should undergo training similar to that of mediators and arbitrators. This training would equip them with the necessary skills and techniques to effectively facilitate discussions, resolve conflicts, and make informed decisions that reflect the needs and concerns of all parties involved.
- The court is responsible for reviewing and validating the findings of the Jirga report to ensure that the matter has been resolved by the law. This verification process is crucial to maintain legal integrity and uphold the principles of justice.

### Conclusion

The Jirga system which is strongly established in Pakistan culture and tribal traditions, has long been used as an informal dispute resolution tool. It provides attainable and community-based justice, but it frequently violates constitutional laws, Islamic beliefs, and human rights standards. These issues can be resolved by reforming the Jirga system, codifying its process, assuring gender inclusion, and merging it with modern legal frameworks and techniques. Training and organizing the Jirga members and implementing supervision measures would improve transparency and accountability. Merging the Jirga system with Pakistan's legal and constitutional framework can become a legitimate alternative dispute resolution tool. This assures justice while conserving the character of an established cultural institution.