

The informal justice mechanism in afghan legal system

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Abstract

This paper examines the informal justice and customary law, which play a very significant and essential role in resolving disputes in Afghanistan. The main and well-known form of informal justice in Afghanistan is Jirga. It is discussed that jirga as a traditional Afghan institution is meticulously bound up with the social and economic realities of daily life in Afghanistan and is deeply rooted in the history and culture of Afghan citizens. It is argued that jirga as a long-established institution does not only resolve many national, local and tribal disputes effectively and efficiently and in cost-effective ways but also acts as an influential and impressive channel of communication among the people of Afghanistan. Jirga, therefore, plays a vital part in strengthening social harmony and unity among Afghans and contributes considerably to the maintenance of social order in Afghan society. However, the effectiveness of the Jirga as a mechanism for resolving the disputes among the residents depends on the level of its perception by different parts of the Afghan people. It is believed that there is a persistent need for a Jirga to resolve many contemporary national, local, tribal and social disputes and matters in post-war Afghanistan. Furthermore, Jirga needs to be a more inclusive institution that represents both men and women and to be more sensitive to the universally accepted principles of Human Rights. Both past and current experiences show that there is reason to believe that jirga can bridge tradition with modernity.

Keywords: customary law, custom, informal justice, disputes, Afghanistan

Introduction

Afghan people have been solving their disputes for a long time using the informal justice system (customary Alternative dispute resolution). The informal justice system is very famous and common in rural Afghanistan today ^[1]. Most of the rural residents intend to solve their conflicts through the informal justice mechanism because Afghanistan formal justice system is too costly, and it seems corrupt and unreachable in contrast to the informal justice system or customary ADR methods. Informal justice emphasizes reconciliation over punishment. Furthermore, it saves time and prevents threats related to travel, assisting dispute parties to avoid the long costly and sometimes risky trips to urban centers where formal justice is normally conducted ^[2].

Although the informal justice system has these clear advantages, these mechanisms have also been recognized to subject decisions that disrupt the Afghan constitution, Afghan codes, and statutes, international human rights law, and conventions ^[3]. Most of these violations stem from old traditions, such as revenge murder or trading women as payback for serious crimes. While these infringements cannot be accepted in modern Afghanistan.

Despite the above-mentioned disadvantages that the informal justice mechanism contains, the rural people have a deep cultural connection to settling conflicts through local

informal bodies. These bodies are often led by reliable and trusted community elders who realize rural Afghan lives and perceptions. Rural Afghans will not willingly trade this familiarity and tradition for formal justice ^[4].

What is informal justice?

The Informal justice system has recently taken much attention among rule of law theorists and experts. The concept refers to a variety of institutions that serve to resolve disputes and relate to social practices different from official state policy ^[5]. The Informal justice system may be run by religious or traditional authorities, elders or other distinguished community members. They are “informal” in the sense because they apply non-state approaches to dispute resolution ^[6].

Informal justice in Afghanistan has a long life, as the country's diverse cultural, economic, social and geographical conditions at various stages of its development and reactivation. A vital factor in the almost permanent presence of this justice is the rigid mountainous geographical structure and the viable remote valleys, which sometimes have different customs and practices that impede the realization of one hand and the unity of the whole order ^[7].

In Afghanistan, generally, informal justice refers to a series of mechanisms which are outside of the state's direct

¹ John Dempsey & Noah Coburn, Traditional Dispute Resolution and Stability in Afghanistan, PEACE BRIEF (U.S. Inst. Peace, Wash., D.C.), Feb. 16, 2010, at 2.

² Id. at 3

³ Sheenwary, B. (2017). Institutionalizing Customary Dispute Resolution in Afghanistan: Lessons from the Navajo Approach to Harmonizing Traditional and Formal Justice. *Ohio St. J. on Disp. Resol.*, 32, 245. P 245-246.

⁴ Id. at 246.

⁵ Dr. Tilmann J. Röder, Informal Justice Systems: Challenges and Perspectives, *Max Planck Institute for Comparative Public Law and International Law*, January 28, 2013, at 1.

⁶ Id. at 1.

⁷ Mohammad Akbar Zameen, An in-depth look at formal and informal justice in Afghanistan, <http://www.hoqooq.eu/akbarzamin081115.pdf>. P 6.

control^[8]. The informal justice system is used to solve conflicts and disputes among the residents through local communities^[9]. The Informal justice system is known by various names, For instance, the “customary law,” the “traditional justice system,” *jirga*, *shura*, and other names. These terms may be used interchangeably^[10]. These mechanisms comprise ad hoc or standing local councils (both *jirgas* in Pashtun^[11] areas and the more established *shuras* in Pashtun and non-Pashtun areas), as well as opportunities for appeal to religious leaders, Ulema councils (councils of religious scholars), respected elders, or informal mediators who may act with disputants’ agreement to facilitate a resolution^[12].

The trail or Jirga

The *jirga* is an original Pashto word, which refers to the gathering of a few, or many people; According to this source, it also means consultation^[13]. In other words, the word *Jirga* is derived from *jirga*, which means a 'wrestling ring', or 'circle', but is commonly used to refer to the gathering of people^[14].

In Afghanistan, the informal legal system or customary often called *jirga* has a long and ancient history^[15]. Ancient Aryans have been solving most of their disputes via *Jirgas*, which is also known as a *peace mission*^[16]. The importance of *jirga* among the Pashtuns could also be traced back to the eighteenth century when the issues of the Abdali Empire were handled by a council of elders or *Jirga*. Abdalis, who were later known as the Durrani in Afghanistan, conquered the Ghazali Empire in 1747. Then, a Grand *Jirga* (Loya Jirga) was established and after its ninth day of debate, it announced Ahmad Shah Abdali as a new king of Afghanistan^[17].

Jirga is a traditional institution that is more deeply tied up with the tribal economy and society of the Pashtuns. The *jirga* is the product of Pashtun tribal society and conducts according to the principles of the Pashtunwali^[18]. Thus, in

the tribal Pashtun areas, local *jirga* settles (nearly) all issues, unless assistance is requested from another tribe or the government^[19]. In today's Afghanistan, *Jirga* plays a significant role in rural conflict resolution, and Afghans accept *Jirga* decisions as law and enforce judgments against those who refuse to abide by a *Jirga's* decision. The Pashtun *Jirga* has its specific principles and regulations. The Pashtun *Jirga* was formed by the Pashtun people. Pashtuns are known as Pathans and Pukhtuns and speak Pashto (or Pukhtu) language^[20].

Most Afghan citizens are Pashtuns who live in different parts of Afghanistan. Pashtuns typically solve their internal matters via Pashtun *jirgas*. In Pashtun *Jirgas*, only men are permitted to be the members of the *jirga*. If a woman is a part of a dispute, she cannot bring her own matter to the *jirga*. Usually, a male family member-father, uncle, brother, or husband-would bring a woman's dispute to the elders "white beards," "Jirga Mar ", or Marakcheen^[21]. If she is a widow, or if there is no male to proceed on the behalf of her, the elders and white-beards may allow her to proceed on her own; though, young, unmarried women are not authorized to do so^[22].

People who are living in remote areas intend to take their matters to the elders because elders are capable and experienced to resolve conflicts among the parties and come with proper and appropriate decisions. Notably, the members of a *jirga* are not allowed to take wage and the are volunteers, so serving a *jirga* is a community service^[23].

Composition, Jurisdiction, and Authority of Informal mechanism or Jirga

When a dispute arises between two sides, both parties work together to choose *Jirga* members. Normally, the members of a *jirga* are influential and trusted enough to make an unbiased decision. Furthermore, the *Jirga* members resolve matters from marital disputes to murder and even other sever issues. Moreover, the elders oversee those arguments which are more consistent in society. For instant, land and water-use cases. All the decisions are taken based on social values and community contribution^[24]. Usually, the disputant parties select elders who are experienced and have a background with the subject matter of the conflict. For an instant, if a case has a religious aspect, it is essential to choose religious elders to resolve the dispute^[25].

by Afghans throughout the country and Pakistanis who live in the Pashtun regions or close to the Pashtuns, who have gradually become Pashtunized over time.

¹⁹ Wardak, A. (2003). *Jirga—A traditional mechanism of conflict resolution in Afghanistan*. Pontypridd, UK: The University of Glamorgan, Centre for Criminology. P 4.

²⁰ Sheenwary, B. (2017). Institutionalizing Customary Dispute Resolution in Afghanistan: Lessons from the Navajo Approach to Harmonizing Traditional and Formal Justice. *Ohio St. J. on Disp. Resol.*, 32, 245.P 249

²¹ Yousufzai, H. M., & Gohar, A. (2005). *Towards Understanding Pukhtoon Jirga: An Indigenous Way of Peacebuilding and More... Just Peace International*, p 17.

²² Smith, D. J. (2009). Community-based dispute resolution processes in Nangarhar province. Kabul, Afghanistan: Afghanistan Research and Evaluation Unit. P 39.

²³ Customary laws, supra note 16, p 8.

²⁴ Noah Cobum, *Informal Justice and The International Community In Afghanistan*, United States Institute Of Peace, Peace works No. 84. First Published 2013, p 16.

²⁵ Sheenwary, B. (2017). Institutionalizing Customary Dispute Resolution in Afghanistan: Lessons from the Navajo Approach to Harmonizing Traditional and Formal Justice. *Ohio St. J. on Disp. Resol.*, 32, 245.P 253-255.

⁸ Dr. Ali Wardak, *A Decade and a Half of Rebuilding Afghanistan's Justice System An Overview*, Von Vollenhoven Institute, 2016, at 13.

⁹ Noah Cobum, *Informal Justice and The International Community In Afghanistan*, United States Institute Of Peace, Peace works No. 84. First Published 2013, at 9.

¹⁰ Sheenwary, B. (2017). Institutionalizing Customary Dispute Resolution in Afghanistan: Lessons from the Navajo Approach to Harmonizing Traditional and Formal Justice. *Ohio St. J. on Disp. Resol.*, 32, 245., p 248.

¹¹ Is someone who belongs to the Pashto-speaking people of Afghanistan and NW Pakistan.
<https://www.collinsdictionary.com/dictionary/english/pashtun>, 05.03.2020, 7:30 pm

¹² Dr. Ali Wardak, *A Decade and a Half of Rebuilding Afghanistan's Justice System An Overview*, Von Vollenhoven Institute, 2016, at 13.

¹³ *Pashto Descriptive Dictionary* (1978: 1272).

¹⁴ Ghyathul-Lughat (1871:119).

¹⁵ Sheenwary, B. (2017). Institutionalizing Customary Dispute Resolution in Afghanistan: Lessons from the Navajo Approach to Harmonizing Traditional and Formal Justice. *Ohio St. J. on Disp. Resol.*, 32, 245. P 249.

¹⁶ THE INTERNATIONAL LEGAL FOUNDATION, THE CUSTOMARY LAWS OF AFGHANISTAN 7 (2004), http://www.usip.org/sites/default/files/file/ilfcustomary_law_afghanistan.pdf [hereinafter CUSTOMARY LAWS].

¹⁷ Ahmed, Z. S., & Yousaf, F. (2018). Pashtun Jirgas, their potential in Pak-Afghan reconciliation and national reconstruction. *South Asia Research*, 38(1), p 57-74.

¹⁸ Pashtunwali means "the way of the Pashtuns" or "the code of life". Banting, Erinn (2003). *Afghanistan the People*. Crabtree Publishing Company. p. 14. ISBN 0-7787-9335-4. Retrieved 29 October 2010. Pashtunwali is widely practiced among Pashtuns,^[3] especially among the non-urbanized Pashtuns in the countryside. In addition to being practiced by members of the Pashtun diaspora, it has been adopted

While a dispute arises and taken it by the parties to resolve it, Jirga members go to a specific room, or a local Masjid (mosque). Traditionally, before addressing and discussing the issue, every member commences with a short story, proverb or an example related to the issue or case. After that, every member of the Jirga is authorized to express his expression and explain a specific point of view and make suggestions regarding a possible solution ^[26]. Furthermore, Jirga members are expected to be impartial. If it is found that one of the Jirga members is bribed or paid, the parties can replace that member ^[27]. It is worth mentioning that the duration of jirga proceedings depends highly on the nature of a case. Some cases take days and weeks of discussion to come up with a reasonable decision ^[28].

This is very true in Pashtun regions, where Jirgas often require a sum of money called *Machalga*, which is to be collected after both sides have formally granted Waak (Authorization) to the jirga to resolve the matter. *Machalga* is taken from both parties to make sure that both parties adhere to the decision of the Jirga because it is forfeited if any of the parties does not show respect to the jirga decision or breaches it at a future date ^[29].

Takhm or Appeal

A person dissatisfied with the decision of a Jirga may ask the revision of the case through another jirga. If a party is not satisfied with the ruling of the second Jirga, a member of the Jirga may ask for a third and final review known as Takhm ^[30]. Parties must accept the final decision of the Takhm. If one refuses to comply with jirga's order, the tribe will choose a suitable punishment, which ranges from cash fines to burning down the house of the guilty party. Generally, Pashtuns accept and greatly show respect to Jirga's decisions as trustworthy under Pashtunwali that is the code of honor which most Pashtun tribes use to resolve their matters ^[31].

The advantages of informal justice

The informal justice of our country, which resolves more than 65% of disputes among the people advantages that have attracted the attention of citizens:

- Informal justice is favored because its nature and form are fully compatible with the traditions of the rural tribes and are familiar to the people.
- Resolving the dispute with the Jirga is not time-consuming. The disputes are resolved in a speedy way.
- The decision making is based on reconciliation, peace, and social unity. In informal justice, the dispute is considered as a general social problem ^[32].
- Attempted are made to obtain enough agreement and consent from the parties to the decision so that the decision can be easily enforced.
- Increasing satisfaction and compliance with settlements when the parties are directly involved in the preparation

of the agreements ^[33].

- The perception that informal justice procedures and substantive rules, compared to those of formal justice systems, are more in accordance with the local cultures and the social relations of people.
- The informal justice might be based on the individual or community perception that a decision-maker, such as a religious and traditional leader, has the legitimate authority to make an appropriate and impartial decision ^[34].

Conclusion

What is discussed in this article shows that unofficial justice or customary law, mainly built by the Jirga, has its roots in the history and culture of Afghanistan. This is closely linked to the social and economic realities of Afghan society and closely tied to the social order of the village, tribe and the whole community. The *jirga*, its techniques, norms, and processes distinguish the local ways Afghans resolve their national, local and tribal matters; therefore, it is a very significant and essential aspect of Afghan national identity. Jirga is an Afghan social institution that deeply exists in the minds of the Afghan people. Unlike those who reject the importance of the Jirga as a substance for peace in Afghanistan. It is a traditional institution that has a proven track record of resolving conflicts at different levels in Afghan society.

Moreover, successful *jirgas* in the history of Afghanistan have shown that the institution is an influential and strong mechanism of communication of Afghan nation among the various, tribes, ethnicities, and religions of the nation – it is a source of national unity and social solidarity. The extent to which *jirgas* have been successful in resolving local, tribal and national conflicts has always depended on the extent to which the people of Afghanistan perceived them as legitimate.

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²⁶ Customary laws, supra note 16, p 8.

²⁷ Id. at 8.

²⁸ Id.

²⁹ Id. at 8.

³⁰ Sheenwary, B. (2017). Institutionalizing Customary Dispute Resolution in Afghanistan: Lessons from the Navajo Approach to Harmonizing Traditional and Formal Justice. *Ohio St. J. on Disp. Resol.*, 32, 245.P 251.

³¹ Id. at 252.

³² Mohammad Akbar Zameen, An in-depth look at formal and informal justice in Afghanistan, <http://www.hoqooq.eu/akbarzamin081115.pdf>. P 14.

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