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Role of Jirga in Pakhtoon Society an Analysis with Special Reference to Justice Dispensation

Abstract

This paper attempts to analyze the role of the institution of Jirga in Pakhtoon society with reference to justice dispensation. This paper also highlights the salient features of unique code of life of Pakhtoons i.e. Pakhtoonwalee and elaborates functions and the practices of Jirgas as a pivotal part of Pakhtoonwalee. It also explores that why Jirga is still popular and preferred institution regarding the access to justice among Pakhtoons. Moreover, this paper tries to give answers to certain questions which are posed by the critiques of Jirga who consider it as a non official judicial institution. So in this regard a comparison of Jirga and the present Pakistani judicial system is also given in order to make a profound understanding regarding the prevalence of Jirga as a strong institution among the Pakhtoon society. Thus, this paper leads to an in-depth understanding of Jirga among Pakhtoons. Furthermore it also gives a brief outlook of the various different types of Jirga and its manifestation among the Pakhtoons.

Key words: Pakhtoon society, types of Jirga, pakhtoonwali, judicial system of Pakistan.

Introduction

Pakhtoons or Pashtoons are the biggest tribal nation in the world. Their population is around forty to fifty million and they are divided into more than sixty tribes which are further divided into sub tribes and clans. Pashto is their mother tongue and it is spoken throughout the Pakhtoon region with little dialectic variations. Pakhtoons inhabit different countries. A large proportion of the Pakhtoons is living in present day Afghanistan and Pakistan. However, they are found in a sizeable number in India as well.

The main urban centers of the Pakhtoons are Kabul, Jalal Abad, Kandahar, Peshawar, Karachi and Quetta. However, regarding the origin of the Pakhtoons it is very hard to answer this question that what is the origin of the Pakhtoons. There are numerous theories about the genesis of Pakhtoons presented by different authors at different times. They have been traced as Jews, Armenians, descendents of Hazrat Ibrahim and the Aryans. Many Pakhtoon scholars are of the opinion that Pakhtoons originated from Israelites and they are one of the lost tribes of Bani Israel. Khwaja Ni'mat Ullah was the first scholar who presented this

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theory. He holds the opinion that the famous Muslim General Khalid Bin Waleed belonged to this tribe of Bani Israel and when he became Muslim he invited his brethren from Afghanistan, who went to Hijaz under the leadership of Kais Abdul Rashid and met Prophet (PBUH). Hence after the long deliberations they became Muslims.¹

Moreover, there is another theory presented by different scholars that the Pakhtoons are the descendents of Aryans. This subject has been discussed in detail by Idrees Asar in his book *Pakhtoonwalee: Code of Love and Peace*. In this book author has presented the ideas of different scholars in favour of this theory as Aryans resemble the habits and living style of present day Pakhtoons.²

Similarly about the origin of Afghans Fraser Tytler presents his mixed race theory. According to him Pakhtoons are Aryans by origin but have intermingled with other nations like Turks, Mangols etc, which at different times infiltrated the Pakhtoon region. Likewise Abdul Ghani Khan also shares the same opinion. He also considers Pakhtoons, a mixture of many races which came through the Central Asia.³

So, it is not an easy task to trace an exact origin of the Pakhtoons however, one thing is very clear that Pakhtoons are living in this region for thousands of years. Although they had influences of different nations but they have always been able to preserve their distinct identity. Thus there are huge number of values always attributed to the Pakhtoon society for instance honor, gallantry, bravery and egalitarianism. In addition, Pakhtoons have their unique code of life called as Pakhtoonwalee which deals with each and every sphere of their lives and transfers from one generation to another generation. So, a true Pakhtoon is the person who acts according to the tenants of Pakhtoonwalee. Pakhtoons also have their distinct justice system which is operated under the institution of Jirga and is indeed an essential part of the Pakhtoonwalee. So this paper leads to a profound understanding of the Pakhtoonwalee and the role of the Jirga in the Pakhtoon society. Moreover, the criticism regarding Jirga as a parallel or non state judicial institution is also discussed in comparison to the official judicial system in Pakistan. This paper also attempts to answer certain critical questions about the role of Jirga.

Pakhtoonwalee as a Code of Life among the Pakhtoons

Pakhtoonwalee is the code of life for Pakhtoons and it regulates all the domains of the Pakhtoon society. It is a mixture of different social traditions, ethics and moral values which transferred from generation to generation and ultimately became the legal code, which is necessary to comply with by all the Pakhtoons.

There are various elements of the Pakhtoonwalee however here are presented some of them in order to give a brief orientation of the Pakhtoon society and its social system. An important traditional institution of the Pakhtoonwalee is *hujra* (public guest house). *Hujra* is a common sitting place for all the members of the society living in the surrounding area. Mostly elders of the society sit in the *hujra* and discuss and debate different matters regarding their society, other institutions include mosque and godar i.e. water point for fetching water etc.

However, *hujra* and mosques are mostly administered by Malik or the head of the dominant family of the precincts. In addition, some other significant traditional practices and the institutions of the Pakhtoonwalee include *Jirga*, *Waak* (delegation of power), *Nagha* (fine), *Melmastia* (hospitality), *Chega* (communal turn out for defence), *Balandra* (voluntary participation in social work activities), *Badal* (revenge), *Swara* (girl married to enemy in order to end up a feud), *Walwar* (bride price), *Khoon-Baha* (blood money), *Matiza* (a woman who elopes with her lover she is liable to be killed), *Nanawati* (individual act of asking for forgiveness), *Baramta* (recovery of claimed money), *Bonga* (abduction) and *Zhagh* (when a male is failed to marry a girl he fires rifle shots at the front of her house to warn the community that he has claim on that girl)⁴

Thus all these above mentioned traditions and practices constitute the salient features of the Pakhtoonwalee and whole of the Pakhtoon society revolves around these institutions of the Pakhtoonwalee. Moreover, hierarchy is almost invisible while egalitarian practices are always promoted among the Pakhtoon tribes. There does not exist any concept of superiority or inferiority and no tribe is considered better or worse in comparison to the other tribes. Anyhow, Jirga is the main pillar of the Pakhtoonwalee as all the disputes whether related to land or money or regarding women are decided and solved in Jirga. Hence Jirga plays a pivotal role in the dispensation of justice in the society.

Jirga and Its Functions in Pakhtoon Society

Jirga is the main meeting place for consulting and discussing different disputes in Pakhtoon society. Such meetings are called as *jirga-marakah* in Pashto. To elaborate, "Jirga" is the board of elders who act as a member of Jirga while "Marakah" means talk and consultation. The Jirga system is not only limited to the Pakhtoon society rather it is also visible in different shapes in different societies. For example, the old Panchayat system of Punjab is quite similar to Jirga while in Sind and Baluchistan people have their Jirga system as well. However, an account of the Pakhtoon Jirga has been given in this paper because the Jirga of the Pakhtoons has some distinct features which are not found in other types of Jirgas. So, as far as Pakhtoon Jirga is concerned the most important feature of it is the democratic and participatory nature of Pakhtoon Jirga the reason being it promotes equality and everyone gets the opportunity to sit in the Jirga. Jirga is an important judicial institution of Pakhtoonwalee. It comprises of two or more persons who are mainly the family elders while the religious elders also attend Jirga. Jirga exercises both the executive and the judicial powers within a specific area. However, various issues for instance, intertribal affairs, land disputes, money disputes, blood feuds and all other different types of conflicts and disputes among the Pakhtoon society are dealt by the Jirga.

Moreover, most of the times Jirgas are assembled in *hujra* or mosque or in an open field outside the village. People sit in a circle without any presiding authority. People choose one of them to preside the session which maintains equality and shows the love of Pakhtoon people for the democratic values.⁵ Mainly there have been mentioned four important types of Jirga by the scholars. These four types of Jirgas encompass **Sarkari Jirga**, **Ulusi Jirga**, **Shakhsi Jirga** and

Loya Jirga.

Sarkari Jirga means the Jirga sponsored by the government. British introduced Frontier Crimes Regulation Act (FCR) in 1901 in the former NWFP. It allowed the representatives of the government to regulate the formation of Jirga in tribal areas. They appointed political agents in different tribal zones as well. So these political agents designate the group of elders as Jirga for the trial of the criminal and civil cases. However, there is also appellate tribunal of government to hear the appeals against the decision of the Jirga, this type of Jirga i.e. *Sarkari Jirga* can recommend the punishments up to the fourteen years imprisonment.

On the other hand, the *Ulusi Jirga* consists of the elders from each household of a village. *Ulusic* basically means “community”. This Jirga is organized to discuss the matters regarding collective property rights, distribution of irrigated water or the matters of common interests like deciding the place of construction of schools etc. Initially however, few elders from the society consulted this Jirga but later it is announced through band beat. It is an open assembly in which all people are allowed to sit and speak during the proceeding of this Jirga. Moreover, after one or more sessions decision is taken unanimously. This Jirga enjoys wider jurisdiction because it contains representation from all the households of the village. *Ulusic Jirga* can take up any issue of the community interest and it can also make new laws for the tribe. For example, grazing rights and water rights etc.

This Jirga also sends delegations to the concerned party or to the other tribes in case of inter tribal conflicts. This Jirga also forms tribal *lashkar*; this is tribal army which is responsible for the execution of the decisions of the Jirga. This Jirga also has the right to declare war or peace with the other tribes. Although, women cannot attend Jirga proceedings but in some cases they can attend the Jirga. However, in this case Jirga is led by the elders and white beard men of the society. The *Shakhsi* or third party Jirga is formulated in case of a dispute between two individuals or two families. Jirga members are chosen from both parties and both parties should also choose a third party as a neutral member so that they can reach to a decision equally acceptable for both the parties. Hence it is the responsibility of the third party in this kind of Jirga to give just and fair verdict in other words it is a form of arbitration. Further *Loya or grand Jirga* is a grand assembly of many tribes at one place in which representatives of different tribes discuss and vote for national issues. This grand assembly of tribes has become constitution making body in Afghanistan and Afghan parliament is also called *Loya Jirga*. Moreover, there can also be allowed the special representation for women and for the minority groups.

These are various methods adopted to take representatives in this Jirga but the main purpose behind is to give equal opportunities to all the tribes and areas for their representation in the *Loya Jirga*. The concept of *Loya Jirga* is not only observed in Afghanistan but it is also practiced in tribal agencies of Pakistan. So all the above mentioned types depict the different forms of Jirga.⁶

Jirga Proceedings and Its Decision Making Process

This very section elaborates the proceedings of Jirga and its decision making process in detail. Jirga conducts its proceedings in a simple manner. Both parties are heard patiently and are given adequate time to present their case. Different witnesses are also interviewed in Jirga in order to determine the facts of the case. So, after a detailed and patient hearing Jirga tries to decide the matter in an impartial manner and an acceptable solution of the problem. The decisions are however, based on Shariah and local practices. In serious cases parties are requested by the Jirga to take oath on Quran in favour of their claim, as religion is an extremely strong force among Pakhtoons. The decision of Jirga is announced in the light of the agreement of the majority opinion. Mostly Jirga members take the consent of both the parties before making their decision public. This practice however, is known as *Waak* or power of attorney. *Waak* gives the binding force and legal cover to the decision of the Jirga. In addition, if anybody violates the jirga's decision he receives severe kind of punishment in the form of heavy fines or burning of house. While in severe cases if the peace of the area is threatened by the violated party Jirga constitutes tribal lashkar against that party. Usually Jirga gives its verdict after the deliberations of one or two days but in some cases it may also take time for one week.⁷ Jirga decisions include in case of violation, burning of house, heavy fines, confiscating weapons and live stocks etc. In this way it also operates as an executive authority as there is no institution of police. So, Jirga is not only responsible to make decisions regarding disputes and their solutions but it is also responsible for the implementation of its decisions.⁸

Thus under the prism of above mentioned observations it can be said that Jirga is a true representative of social democracy because it provides an equal chance to all the members of the society to speak up for their rights. It also fulfils the notion of free and quick justice for all without any discrimination as prescribed in the teachings of Islam. Moreover, Jirga is the cheapest way to get justice. Due to Jirga people do not need to hire lawyers or to pay heavy court fee for pursuing their cases. Further people are also not bound to wait for years to get justice under the system of Jirga. All these beneficial and prominent features of Jirga have made it popular among the people at grass root level. Similarly, Jirga system is according to the genius of the people who are having a better understanding of their system. In addition, people do not face any language barrier to pursue their case because most of the times Jirga's proceedings are held in local languages. This is the reason that Jirga system is quite popular among Pakhtoon masses and even today they are strongly attached to the institution of Jirga. People among Pakhtoons consider Jirga as an ultimate institution which provides them free, fair and quick justice at their door steps.

Jirga Verses Judicial System of Pakistan

Usually Jirga receives great criticism from different spheres of life and particularly human's rights, women's rights activists. Moreover some scholars also target Jirga as an informal or anti state judicial system. Often they build up their argument around the notion of gender discrimination that there is no participation of females and all the decisions are taken by the male counterparts in Jirga system. While these decisions, taken by the males are later implemented and imposed on

the women folk. Moreover, they also consider some practices like *Swara* which is practiced through *Jirga*, as an act of gender discrimination. In this particular practice of *Jirga* a girl is married to the member of enemy's family in order to settle a blood feud. These scholars and human and women's rights activists are of the opinion that it is not fair and legitimate to marry someone against her consent just for the purpose of ending a feud. However, all these allegations regarding *Jirga* need in-depth study of Pakistani judicial system in its present manifestation. Only then we can grasp up the real idea that how far Pakistani judicial system is fulfilling its obligations and comes up to the expectations of the people for delivering free and fair justice for all.

It is a well revealed fact that we have an extensive judicial system in Pakistan. At district level we have session and civil courts which hear the cases of civil and criminal nature while at provincial and capital level we have High courts which also dispense justice. Above all we have Supreme Court of Pakistan which holds the status of the final authority in the judicial system of Pakistan. Along with this judicial structure we have special courts as well. For example Federal Shariat Court hears the cases about the religious matters. Moreover, military and anti terrorism courts are also constituted in Pakistan for the dispensation of the justice. However, it is a hard reality that this huge judicial set up in Pakistan is still not able to give justice to the common man of Pakistan and thousands of cases are still pending in this large number of courts. Here, I have produced some statistics from the Judicial Statistics of Pakistan 2010 Report by National Judicial Policy Making Committee, which give the detail of pending cases in different courts of Pakistan. According to this report there were approximately four million cases pending in different courts of Pakistan as of January 1, 2010.⁹ Despite the fact that most of the crimes particularly the minor ones are not reported and police does not even register FIR (First Information Report). So according to this report only 30% crimes are registered in urban areas whereas in rural areas this ratio is about 10%.¹⁰ On the contrary, if we take a look of the composition of the Supreme Court, we come across the fact that there is no single female judge present among the judges of the Supreme Court. Here the list of Supreme Court judges is mentioned which is as follows.

1. Mr. Justice Anwar Zaheer Jamaali (Chief Justice of Pakistan)
2. Mr. Justice Mian Saqib Nisar
3. Mr. Justice Asif Saeed Khan Khosa
4. Mr. Justice Amir Hani Muslim
5. Mr. Justice Aijaz Afzal Khan
6. Mr. Justice Gulzar Ahmad
7. Mr. Justice S.H. Azmat Saeed
8. Mr. Justice Mushir Alam
9. Mr. Justice Dost Muhammad Khan
10. Mr. Justice Umar Ata Bandial
11. Mr. Justice Qazi Faez Isa
12. Mr. Justice Maqbool Baqar
13. Mr. Justice Manzoor Ahmad Malik
14. Mr. Justice Sardar Tariq Masood
15. Mr. Justice Faisal Arab.¹¹

Moreover, in the World Governance Survey 2003 by United Nations University, Pakistan was in the low scoring countries with reference to the access to justice and judicial autonomy. “Respondents insisted that the judiciary is corrupt to the core and therefore there are no such things, as justice in Pakistan. In addition to corruption, respondents identified the cost of going to court and the time involved as key issues reducing success to justice”.¹²

So all this information as stated above presents a very gloomy picture of the Pakistani judicial system which is not only accepted in the official reports and publications but is also reflected in the reports of international surveys about access to justice in Pakistan. Corruption, delay in decision making, expensive court fee, accessibility barriers and ineffective police system, which constitute the main hurdle in the way of execution of judicial decisions are the prime issues of Pakistan’s present day judicial system. Hence all these findings reveal the fact that the institution of Jirga is still far better in the dispensation of justice for masses. As Jirga provides quick and free justice to all the people it can be accessed by anyone at any time. Moreover, as Jirgas are grass root level councils so these are not over burdened by the cases and through their quick and simple mechanism Jirgas are able to solve cases in a short period of time as compared to the courts in Pakistan. However, as far as the question of gender discrimination is concerned women are lagging behind in their representation and participation in the official judicial system of Pakistan as well. The prominent example of this is that there is no single woman sitting as a judge at present in the Supreme Court of Pakistan.

Conclusion

This paper examined the role of Jirga as an institution of dispensation of justice in the Pakhtoon society and also explored that how Jirga is closely attached to the values and traditions of the Pakhtoons. It also highlighted the salient features of unique Pakhtoon code of life i.e. Pakhtoonwalee and threw light on Jirga as its central pillar. So, the whole Pakhtoon society revolves around the institution of Jirga as it is not only a judicial institution rather it works as an executive authority as well. This paper also attempts to answer the certain questions which always make Jirga a controversial body. Therefore, when we compare Jirga with the present Pakistani judicial system Jirga proves to be far better placed in the dispensation of justice and it is also deep rooted in the Pakhtoon society. Thus to conclude, it can be said that Jirga acts more effectively as a judicial institution at grass root level because it is according to the genius of the people at that locale and through its decision making process it facilitates people with immediate justice. Moreover, Jirga is less expensive and easily accessible for the locals. Due to the role of Jirga the locals do not need to go to the courts and waste plenty of their time for the solution of their minor problems. Hence institution of Jirga should also be included into the official judicial system of Pakistan because by doing so, it can be proved very fruitful as present judicial system of Pakistan is not capable enough to deal with a large number of cases, as a consequence of which million of cases are still pending and rest also take years to resolve. In the nutshell, an amalgamation of Jirga and the judiciary can prove to be a source of free, fair and quick justice for all the people of Pakistan which ultimately will lead to the prosperity of the country with a fair and noble judicial system.

A Selected Bibliography

Akhtar, Justice Saleem.2002. *Study of Informal Justice System in Pakistan*. Karachi: Sind Judicial Academy.

Asar, Idrees.2005. *Pakhtoonwalee: Code of Love and Peace*. Peshawar: Danish Book Store Qissa Khwani Bazar.

Court, Julius and Goran Hyden.2003. *The Judiciary and Governance in 16 Developing Countries (Report)*. United Nations: United Nations University. Available at: www.unu.edu, accessed on 1.12.2013.

National Judicial (Policy Making) Committee.2011. *Judicial Statistics of Pakistan 2010 (Report)*. Islamabad: Secretariat of Law and Justice Commission of Pakistan Supreme Court Building.

Shah, Syed Wiqar Ali.2007. *North West Frontier Province: History and Politics*. Islamabad: National Institute of Historical and Cultural Research.

Spain, James W.1972. *The Way of Pathans*. Karachi: Oxford University Press.

Supreme Court of Pakistan, Available at: www.supremecourt.gov.pk accessed on: 15.10.2016.

Taizi, Dr. Sherzaman.2007. *Jirga System in Tribal Life*. Peshawar: Area Study Centre University of Peshawar.

Yousafzai, Hassan M and Ali Gohar.2005. *Towards Understanding Pakhtoon Jirga*. Peshawar: Just Peace International.

Notes & References

¹ Syed Wiqar Ali Shah, *North West Frontier Province: History and Politics* (Islamabad: National Institute of Historical and Cultural Research,2007),p.1-2.

² Idrees Asar, *Pakhtoonwalee : Code of Love and Peace* (Peshawar: Danish Book Store Qissa Khwani Bazar, 2005),p.27.

³ Syed Wiqar Ali Shah, *North West Frontier Province: History and Politics* (Islamabad: National Institute of Historical and Cultural Research,2007),p.6.

⁴ Dr. Sherzaman Taizi, *Jirga System in Tribal Life* (Peshawar: Area Study Centre University of Peshawar,2007), p.1.

⁵ Dr. Sherzaman Taizi, *Jirga System in Tribal Life* (Peshawar: Area Study Centre University of Peshawar,2007), p.3.

⁶ Hassan M.Yousafzai and Ali Gohar, *Towards Understanding Pukhtoon Jirga* (Peshawar: Just Peace International,2005),pp.45-51.

⁷ Dr. Sherzaman Taizi, *Jirga System in Tribal Life* (Peshawar: Area Study Centre University of Peshawar,2007), p.7.

⁸ James W.Spain, *The Way of Pathans* (Karachi: Oxford University Press,1972),pp.50-51.

⁹ National Judicial (Policy Making) Committee, *Judicial Statistics of Pakistan 2010(Report)* (Islamabad: Secretariat of Law and Justice Commission of Pakistan Supreme Court Building,2011),p.1.

¹⁰ Justice Saleem Akhtar, *Study of Informal Justice System in Pakistan* (Karachi: Sind Judicial Academy,2002),p.17.

¹¹ Supreme Court of Pakistan, Available at: www.supremecourt.gov.pk accessed on: 15.10.2016.

¹² Julius Court and Goran Hyden, *The Judiciary and Governance in 16 Developing Countries(Report)* (United Nations: United Nations University,2003),Available at:www.unu.edu. accessed on 1.12.2013.