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Article:	The Conflict Between Dispute Resolution and Justice Dispensation: A Case Study of Pakhthun Wali and Jirga
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ABSTRACT

Conflicts in society give rise to violence and political and economic instability. Society responds to conflicts through dispensation of justice or dispute resolution. The former focuses on giving involved parties their due usually through a formal legal process whereas the latter involved incentivizing parties to reach an acceptable agreement during a dispute. The dispensation of justice involves formal mechanisms that are complex and time-consuming and requires a hefty amount of litigation cost. Dispute resolution usually takes place informally through social institution, it decreases costs and is a less time-consuming mechanism. However, dispute resolution and the dispensation of justice are in conflict. Dispute resolution through informal social institutions gives rise to miscarriage of justice and aggravates the conflict. This is entirely visible in Pakhtun society which spread across the world's geo strategically most important places, namely, Pakistan and Afghanistan. Pakhtun society is living at the heart of national and international conflicts for centuries. Therefore, understanding conflict between dispute resolution and the dispensation of justice is very important to think about ways to promote peace. The existing literature explains the rising support for dispute resolution but does not critically analyse the conflict between the mechanisms of dispute resolutions and the mechanisms of dispensation of justice. The objective of this paper is to examine this conflict between dispute resolution and justice dispensation. This article uses six case studies of dispute resolution through two social institutions of Pakhtun society, namely, Pakhtunwali and jirga and the method of direct observation to examine the conflict between dispute resolution and dispensation of justice.

INTRODUCTION

Pakhtunwali is a set of un-codified set of rules, which regulates the life of Pakhtuns-people living in north-west parts of Pakistan, Afghanistan, and Karachi. “Tribal customs and traditions form an inseparable part of the Pakhtun society (Quddus, 1990, p.137). Pathan society has the tribal origin. Pakhtuns have preserved their centuries old culture and traditions in the name of Pakhtunwali. Pakhtunwali is strictly observed and quoted with pride, being the Pakhtun’s dearest value; controlling and conducting their routine lives, behaviors and attitudes.

According to Pashto Descriptive Dictionary (1978: 1272), Jirga is an original Pashto word which in its common usage refers to the gatherings of a few or a large number of people; it also means consultations according to this source (Shinwari, 2011, p.36). However, in its operation, Jirga refers to a tribal/local institution of decision-making and dispute settlement that incorporates the prevalent local customary law, institutional rituals and a body of village elders whose collective decision about the resolution of a dispute is binding (socially and morally) on the parties involved (Shinwari, 2011, p.40-45). According to J.W Spain;

A Jirga in its simplest form is merely an assembly.....Practically all community business, both public and private, is subject to its jurisdiction. In its operation, it is probably the closest thing to Athenian Democracy that has existed since original. It exercises executive, judicial and legislative functions, and yet frequently acts as an instrument for arbitration and conciliation (Spain, 1962).

Mumtaz Ali Bangash, describes Jirga in this way;

The Jirga system ensures maximum participation of the people in administering justice and makes sure that justice is manifestly done. It also provides the umbrella of safety and security to the weaker sections of the tribal people from the mighty one.¹

While, describing the traditional/informal or customary justice system Moore (1985) argues that disputes of Pakhtuns are rooted in their culture. When a dispute occurs *The individuals, their families, the community and the histories that led to the discord are on trial. The community participates in an open discussion and the decision, arrived at by a core of the respected leaders, focuses on compromise (Chaudhary, 1999, 1-2).*

Jirga is the most powerful and the most prominent institution of the Pakhtun society in general and tribal society in particular. Its simplest form is only an assembly of few tribal men. It acts as administrative body, judiciary and parliament at the same time. It allows everyone to speak but old persons and the people, whose interests can be affected, are preferred to speak on the occasion. Decisions are made on the basis of consensus and majority; thus solving the problems by ending differences between the petitioner and respondent. At the end of Jirga after reaching a consensual decision, a religious scholar prays for the success and implementation

¹ See Mumtaz A. Bangash. *Speedy Justice of Elders* in Naveed Ahmed Shinwari, *Understanding Jirga: Legality And Legitimacy In Pakistan’s Federally Administered Tribal Areas* (Islamabad: CAMP, 2011), P. 36.

of the decision (Khan, 2000, p.34-35). The main function of Jirga is to peacefully settle disputes by establishing “Theega.”²

Jirga is one of the values or factors of Pakhtunwali without which the code of Pakhtunwali is incomplete. It is one of the major commandments or codes of Pakhtunwali without which Pakhtunwali is not only incomplete but it cannot be regulated without it. Thus, there is inter-relation between Pakhtunwali and Jirga (which will be discussed in the latter part of the paper). Here, the major point of concern is that, Pakhtunwali and traditional Jirga being inter-related; must have a relation with respect to social change as well.

Jirga cannot be explained alone without referring to the context of pakhtunwali which holds the institution of Jirga from generation to generation. Thus Jirga and Pakhtunwali are entwined with each other in a way that both the codes are incomplete without each other. According to Quddus (1990); “The life of the tribal Pakhtuns is governed by Pakhtunwali or an unwritten code of life, held sacrosanct by them for ages. As a matter of fact this code of honour contains values of life and embraces all the activities from the cradle to grave.” (Quddus, 1990, p.137).

In the settled areas, the tribal structure has broken down and its functions have been absorbed by the state; thus many of the traditions have been altered. As such there are noticeable variations between the social forms of the tribal and the settled areas. At the same time, the tribal and settled Pathans still share a set of explicit values and ideal forms, which serves as common reference point for both groups.

Syed A. Quddus states that the

No doubt, various developments in shape of economic and social mobility have brought changes to the societies across the globe. So same is the case with that of tribal customs. If we think it the least i.e. just to the addition of luster; still this is a social change in itself.

they were not hesitant to argue that those areas have experienced many changes in their social fabrics.³ (Ahmed, 1976, p. 132-35). Akber S. Ahmed concludes in his study that there are three main factors responsible for the socio-political change in the tribal areas i.e. shift of leadership from elder to younger, new economic opportunities, education, new roads and Mullahs experiencing social mobility and also having urban background.

If the life styles and standards of tribal Pakhtuns have changed or is changing then it is clear to argue that there is a social change in the society. If this is the case then the discourse of Pakhtunwali as a stagnant and fixed code is not right. Thus this argument indicates that Pakhtunwali is not stagnant but it is being fixed by the discourse created through writings and research scholarship. The tribal structure is largely conventional; therefore, the traditional forms of Pathan social life continue to operate within their own context of customs. The settled Pathan is aware that his own real social form diverges in many ways from the ideal which he

² Theega is a Pashto word which means a big stone; by placing or establishing theega refers to the first step of Jirga to stop violence from spreading over. After theega is established, none of the disputants dare to further the dispute.

³ For more details see Ahmed, A.S. (1976). Millennium and Charisma among Pathans.

associates with tribal life. Deferring to tribal traditions, he frequently feels obliged to explain what these divergences are and how they came about (Quddus, 1990, p.147).

He applies his model of divergence for the settled Pathans i.e. urban based Pathans but he may not be right to project tribal Pathans as non-divergent. Settled Pathans have their own kind of divergences from the ideal type; while the tribal pathans have experienced gradual but continuous changes in their tribal structure of which they have no control or they are helpless somewhat to resist such changes. As Barth quotes "Tribal or 'hill' Pathans organize their socio-political life along egalitarian lines and more in accordance with the Ideal concept of 'Pakhtunwali' than their cousins in the 'plains' (Barth, 1969, 13 quoted in Ahmed, 1976, p.74).

Similarly, like Quddus (1990), Syed I. Hussain continues that the true Pakhtuns jealously uphold their traditional code of life denominated as Pakhtunwali inherited from their ancestors and elders. In this regard they are more orthodox and conservative than other (settled) Pakhtun. Thus Pakhtunwali is the tribal constitution which is traditional and conventional. Its injunctions and sanctions have not been affected by the passage of time. It is so rigid that making any departure from them entails grim consequences. Unlike others, S. Iftikhar Hussain is of the view that Pakhtunwali and Pakhtu in the sense of a code of life, cannot be the same thing but they determine the pattern of life of Pakhtuns. According to him Pakhtu means modesty and propriety. (Hussain, 2000, p.20).

On the contrary, Akber S. Ahmed explains the brilliant works done by Firth, Mayer and Barth in their respective fields and time frame. In his critical approach, Ahmed explains that the above mentioned authors were able to draw respective conclusions and theories from their field researches in specific times and areas. But when they themselves visited the same areas, He gave reasons why the tribal areas resisted the socio-political change. According to him, the maliks or elders do not represent the whole tribes; one malik represents approximately 100 persons. For example, why a malik opposes the formation of new roads is just because road will bring new economic opportunities, education, social mobility etc which is a direct threat to his authority. Through awareness, people will not listen to him thus he won't be able to play his role as a mediator between the government and the tribal people (Ahmed, 1977).

This paper provide narrative analysis of six case studies to explain the standings of traditional Jirga decisions. The first three case studies are older than the last three cases. These case studies revolve around two basic concepts i.e. *ghairat*(honour) which is violated when a girl becomes a *Toora*. The literal meaning of *Toora* is blacked. The social understanding of *Toora* is the lady accused of adultery and Swara; which refers to the settlement of the dispute erupted after an honor violation or honor killing by exchange of girls in marriage to the enemies either to one or both the parties.

Inter-relating Pakhtunwali and Traditional Jirga

James W. Spain writes in such a way that;

The Pathan is above all an individualist, despite the rigid behavior standards prescribed by clan membership. Nonetheless, there are important traditional and social factors which guide community life and in many cases influence or even determine the action of

individuals. These mores vary considerably in different parts of the area, and codification of them is virtually impossible. However, certain of them are almost universal, and some knowledge of these is essential to an understanding of what the Pathan is and how he got that way (Spain, 1963, p.63).

This which guides the Pakhtun way of life, is known as “Pakhtunwali.” Jirga is one of the most prominent codes of Pakhtunwali which can only be explained and understood in context of Pakhtunwali.

Case Studies Analysis

All the cases selected are the prominent cases in F.R Peshawar with reference to honor killing, Swara and women right of inheritance. The first three cases will present the jirga decisions about 20 to 50 years ago. The other cases are contemporary and they portray the changing role of jirga in making decisions regarding the above mentioned issues. The division of these case studies is made in such a way that they remain convenient while understanding and differentiating the old case from the contemporary ones. Therefore, the old cases come under category A while the new cases come under category B. Thus the narrative analysis of the case studies in focus is explained below.

While playing a cricket match, two persons started quarrelling in the cricket ground abusing and beating each others with bats and wickets. People gathered and mediated which led to the end of the fight. After a week or two, one of the persons was crossing the village of another for the sake of some piece of work. The other person blocked the way for him, caught him and shot him dead. The murderer approached his elders that he has the murder of a person belonging to another tribe. He was advised by his elder tribesmen to kill his own wife (who was sick for more than a year). He did the same by killing his wife by calling her as *Toora* means that she has become black (in sexual relation with the murdered). Jirga stepped in and accepted the murderer’s reason for committing the murder as valid because this murder was committed in response to an honor violation. This gave rise to a long lasting enmity between both the tribes. It was jirgah which justified the honor killing without finding the reality that whether it was honor killing or killing due to personal jealousy and curse etc. Both the parties led by elders were more tilted towards honor/ghairat. Thus they decided to win the honor while crushing the compromise; a true essence of traditional jirga.

In the second case study, about two years ago, one night a twenty seven years old boy was called upon by his friends for an emergency. The boy was a taxi driver and a friend of them. It was about 2 o’clock at mid-night but still the boy got into his taxi and went to their *Hujra* (male dwelling place). His friends asked him to wait in the *Hujra*. In the meanwhile, a 38 years old lady appeared in the *Hujra* and sat with him. The boy resisted her presence with him but failed to get rid of her. Her brothers came in and caught them both. They beat the boy and took off his clothes and send him (without clothes) early in the morning. They let the boy go because, they wanted to bargain not to establish blood feud. I was told that the girl was 38 years old, single and sick for years. Although their brothers were not well off and they wanted to get rid of their sister (as she was known for dishonor/*Toor* already). Negotiations started through Jirgah, as an evidence, the boy was found guilty because some people saw him naked

(doesn't matter if it all was planned but such a planning also needs a heart made of stone). Jirga gave its decision that the boy shall marry the girl and will give two girls in Swara. It was accepted by both the parties. Later on a Malik stepped in and criticized the decision of the Jirga was unjust. He explained that the settlement has already been taken place because marriage is going to be made while the demand of *Swara* is not required. Thus Jirga reconsider its decision; abolished the *Swara* with a fine of rupees 2.5 lacs.

Tribal customs and traditions are known to be undaunted and unceasing but still they had received many social changes with the passage of time. A social change in the Pakhtun tribal society means the changing role of Pakhtunwali denoting the change experienced by all the factors of it. Traditional Jirga is also a very strong and prominent code of Pakhtunwali that's why its role has also been changed with the passage of time. Thus, changing role of Pakhtunwali to run the contemporary tribal society has a very deep relation with the contemporary role of traditional jirga. For example, awareness (through education and religious teachings) has led to the decrease in honor killings, practice of swara and deprivation of women from their right of inheritance. Thus social change in shape of awareness has deep impacts on the society and jirga simultaneously.

(A) Older Case Studies

(1) 40 Years Of Enmity On Honor Killing

Since my childhood, I knew that there was an enmity going on from very old times. With the passage of time, I came to know the basic reasons which led to this enmity. For the sake of this study, I asked an old man who lives between the villages of those having enmity. That person was neutral because he sided none of them. He told me that about forty years ago, there came a quarrel between two persons while playing cricket. A week after the quarrel, when one person was going across the village of the other, the latter shot him with the gun and he died on the spot. When the elders came to know that a murder has been committed, they forced the murderer to kill his wife (who was already sick for more than a year). In order to avoid further blood feud and settle the score, the murderer then killed his own wife by calling her as "toora" means black or accused of adultery.

After that, Jirga came in to force and established theega/stone means cease fire. The elder told me that initially, Jirga was able to settle the dispute by justifying the honor killing of both the male and female. But, in the meanwhile, there was a malik advocating from the side of the male victim, stressed his own side and the Jirga that we will not initiate peace with their enemies unless and until they provide us with the particular body part they cut off the dead body. On the other hand, the murderer side refused to do so because they were saying that they had not cut any organ instead, the powerful party wants enmity to prevail and demolish us all (they were very small in number). As a result of the enmity, eighteen persons died half from each side. Recently, they came up with an end to the enmity because of two major reasons; one, the malik who insisted on carrying on the enmity was killed by his enemies in an ambush, second, Taliban as a major force stepped in and forced the jirga and the parties to reach a compromise.

(2) Khandad and his sons (Jirga, Swara and Honor)

The wife of Khandad is now very old. She was married to Khandad as per the decision of Jirga about more than 50 years. She told me that their family was not good in dealings with others. Her family violated the honor of Khandad's family; on retaliation blood feud arose and killing of a person (her family) took place. After jirga was summoned, it was proved that her family was guilty. Thus the Jirga, in order to settle the dispute, ended up the feud by exchanging swara. She got married to Khandad who was already married. She expressed that we both women given in swara lived our lives and bore children normally because we felt proud because we were the major source which provided the end to the curse.

Many years after this, Khandad's son, who is still alive, killed a person while playing cards (my uncle was also injured during that shooting while mediating). As a matter of fact, Khandad was a powerful man having influence in government as well, started taunting the other party of whom they killed a person. Jirga was not given space here because Khandad was not willing to set in Jirga while the other party was not in a mode to settle the dispute. Khandad kept on provoking the honor of the other party to the extent that he threw a dead donkey near the village of the killed person. In the meanwhile, the brother of the murdered person got his rifle and fired on Khandad and his two sons. They were dead on the spot. Now the ratio of killings is still 1:3 and yet to be settled. Jirga stepped in on various occasions but both the parties were unwilling to have a compromise. The enmity continues till today with the same ratio of killings.

Findings

Swara was the only source to settle the dispute and save human lives says the wife of Khandad. On the other hand, the other party who were poor and victimized by the powerful Khandad, retaliated so hardly just because the powerful violated their honor twice. Thus they have to pay heavily for their actions of taunting the poor.

(3) Jirga, woman's authority, honor and exchange marriage

This case belongs to the relatives of my Grandmother for whom she feels sorry and enraged even today. My grandmother narrated me with the whole context of this case. According to her, this case started about twenty years ago when that family visited Peshawar for treatment in a hospital. When they were coming back, a little girl (about years of age) jumped into their Suzuki and wept with helplessness and poverty. When asked her, she told that she is an orphan and she will go with you at any cost. After a great insistence by the little girl they took her back home. This was the background of the case.

The woman who took her was authoritarian by nature; she had three sons and a husband of less authority in domestic issues. With the passage of time, that woman succeeded in making an exchange marriage for her eldest son with his cousin and gave her daughter in exchange. The girl she brought from Peshawar was Afghani migrant, she was now a grown woman ready to be married. The villagers often talked about the disposal of this girl from the village to be married elsewhere. They thought that she was very beautiful by face but ugly with the

character. The powerful woman refused to do so and stopped people not to interfere in this issue. As a matter of fact, her elder married son fall in affair/love with her and managed to flee the village carrying along the Afghani girl. He left behind his whole family including his wife and two children.

As this was an exchange marriage, therefore, it brought up a massive disgrace to the whole village including his sister's in laws. Both the families tried to negotiate personally and secretly but didn't reach to any settlement. The main problem was that the powerful woman was favoring his elder son's act and refused to take action against the Afghani girl. Jirga was called in to negotiate the matter because the whole village was divided into two factions leading to the deterioration of the situation. Jirga gave its decision that the afghan girl be banished and send her away to an unknown place and the boy must come on *nanawati*/pardon to his father-in law and continue life with his old wife in order to save his sister's life. However, jirga decision was not implemented because of the continuous refusal from the side of the powerful woman.

After a year, the same boy died in a tragic accident in a company where he used to work. His family brought his dead body and his second wife (he married the afghan girl at Karachi) to the village. His second wife started living in the same house where his first wife used to live. The powerful woman, while making it a matter of his honor and ego, arranged to marry the same afghan girl to her second son. The end result was that the village is still disunited and the exchange marriage broke away.

Findings

Powerful position of a single woman managed to disobey the Jirga decision. Due to her egoistic and antagonistic behavior, she not only lost her son but also her daughter's home ruined. There came honor in to different kinds; one, the owner of the boy's in laws was at stake because their daughter's life was in danger while secondly, the powerful misleading and misjudged honor gave rise to destruction only.

(B) Contemporary Case Studies

(1) Said Khan Case (A planned attempt of honor violation)

Said Khan is about twenty eighth years old, who became a prey for a planned attempt of honor violation. This is very hard to say things like that but it is a bitter reality of the society we live in. My father disclosed the details because he was the part of the Jirgas in the latter part of the Jirga process. Khan Said was a shopkeeper and a part time taxi driver. One night round about at 2.00 am, he was called by his friends that we had an emergency; therefore, we need your taxi. He reached their *Hujra* at that time. They said wait here! We will be back. In the meanwhile, the sister of his friends appeared in *Hujra* and approached the boy. Her brothers came in and caught them as an evidence for dishonor they were involved in. They sent the boy naked to his family early in the morning as a symbol for their evidence of *Toor*.

(2) Malik Case (Honor of a Malik and Jirga decision)

This is a very prominent case occurred about a year ago. The daughter of a malik managed to flee with her lover. The Malik utilized all his resources and searched the fled couple. During the search, Jirga came into force; Malik was also the part of it. Jirga ordered the recovery of the fled couple on emergency basis. The jirga also assured that the only solution to this problem is to give this girl marriage to her lover formally.

Six months after this, they managed to recover them and bring them back home. The malik killed his daughter later on. When asked about this act of disobeying the Jirga decision he explained that it was Jirga's decision to marry them on the condition that they must come back to resume the suspended honor. But they failed to come back willingly; I have brought my daughter. She failed to keep my honor and grace but I am having the power to at least honor our culture, traditions and Jirga. They violated and disgraced Jirga that's why I must punish the culprits (why that not be my daughter). He killed her because she was recovered alone, her lover managed to escape but they are trying to trace him to settle the honor.

(3) No place for *Toor* girls within the Tribe

There are two cases recently happened which are explained as following;

In one case, a stranger was found wandering near a village. The stranger belonged to the *Kochi/nomadic* people who used to sell various things in our areas. The stranger was spotted and caught on the basis of doubt. He was beaten and he exposed his aim of wandering near the village. He said that I am in contact with an unknown girl from this village for more than a year. The phone number was recovered and the girl was traced. The girl has called upon the boy to see him but failed to meet due to the restricted norms for young girls particularly. This matter was ignored to avoid the honor being violated. One day the same girl made a failed attempt to run with her lover. They were caught and Jirga was called upon to decide the fate. Jirga came to know that the girl expressed her feelings that she will only marry this nomadic guy and no one else.

Jirga gave its verdict favoring her desire to marry the same guy she chose. But along with favoring the girl's desire, Jirga has also made an obligation on the couple. According to this obligation, the couple was banned once for all to revisit this area. They were prevented from entering the area otherwise they will be killed. Similarly, another girl was caught in disgraceful conditions but they were unable to catch the boy. This led to the *Toor*. Thus the girl lost her credibility within the tribe. Jirga was called by the boy who was suspected to be the same who had affair with the girl. Jirga was called to allow the boy to marry her but her father was not willing. Thus Jirga gave its decision that this girl is banned within this tribe and she shall be married away from this area. This was done finally.

Conclusion

In the light of all the discussions above and the cases analyzed we can conclude that there are gradual but continuous socio-economic changes occurring in the Pakhtuns tribal society. Thus social change in tribal society means social change in Pakhtunwali because the tribal society is governed by Pakhtunwali. As Pakhtunwali is governed by Jirga as an institution

which has the qualities to cover up all that Pakhtunwali; therefore, Jirga has direct relation with Pakhtunwali. This means that there is a chain which links the tribal society, Pakhtunwali and Jirga. The dynamics of social change in tribal society leads to the social change in Pakhtunwali which further leads to the social change in jirga decisions. As we have seen in the above case studies, there is a major shift in the decisions of jirga regarding various issues discussed earlier. In the first category, it is obvious that how jirga justified the honor killing, how woman was used to avoid enmity. In the first case, woman was killed to justify the murderer of a person by transforming it to an honor killing. In the second case, women were exchanged in *Swara* to settle the dispute. In the third case, excessive powers to woman aggravated the situation further led to the disobeying of the Jirga decision.

In the category B, the jirga decisions are noticed to be shifted from directly validating the killing to a sort of settlement in the shape of money exchange, marriage of the fled couple or giving in marriage outside the tribe and banning from re-entering the society. In first case, it was noticed that Jirga was influenced by the influential but for the positive means i.e. *Swara* were replaced with money as a fine. In short, there is a continuous flow of various factors like money, education, awareness, modernity, religious teaching, roads, development etc. which are responsible for the social changes in the tribal society and Pakhtunwali as well. This has either changed the meaning of honor for example for the people or has led to the ceasing and daunting of the tribal customs in shape of contemporary Pakhtunwali.

Thus there is a major shift in the contemporary Pakhtunwali as a result Jirga decisions have been changed alternatively. With the emergence of various socio-economic developments, Pakhtunwali has been exposed to certain gradual but continuous social changes. These social changes have replaced the some of the customs with more welcoming alternatives. For example, honor killing comes under the umbrella of Pakhtunwali but it is criticized all over the world. So, there is a reasonable decrease in honor killings and *Swara* in contemporary time which is a positive sign for progress and development. Similarly, Jirga has favored the women right of inheritance on many occasions as prescribe by Islam.

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