



# REVIVING THE JIRGA SYSTEM AS AN ALTERNATIVE DISPUTE RESOLUTION (ADR) IN PAKISTAN'S TRIBAL AREAS

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The political architecture of Pakistan is inherently characterised by its tripartite structure, with the judiciary, legislature, and executive constituting the three branches of government. The role of the judiciary in shaping and interpreting Pakistan's political and constitutional order has been dynamic and complex, often punctuated by dramatic shifts and defining moments. The Constitution of Pakistan mandates an independent judiciary to ensure expeditious and inexpensive justice to its citizens. However, with a backlog of 2.4 million cases in courts across the country, whose fate has yet to be decided—as noted by Justice Mansoor Ali Shah at the recent 5th Asma Jahangir Conference—and Pakistan's ranking at 130th out of 142 countries worldwide in the Rule of Law Index according to the World Justice Project Report 2023, the need for alternative dispute resolution (ADR) has become more pressing than ever.

According to Alternative Dispute Resolution Act (ADR) of 2017, passed by the National Assembly, ADR encompasses a set of processes that allow conflicting parties to resolve disputes outside of traditional courtroom settings without formal litigation. This includes methods such as arbitration, mediation, conciliation, and neutral evaluation. In light of this definition, it can safely be said that prior to the introduction, formalisation, and adoption of the ADR, the Jirga system had already been functioning as a traditional form of alternative dispute resolution (ADR).

The Jirga system, both historically and in modern settings, has been used to mediate, conciliate, and resolve conflicts. Anchored in the wisdom of community elders and deeply rooted in local customs, whilst also accommodating the cultural and religious sentiments of the respective communities, the Jirga system remains an important mechanism for peacebuilding and conflict resolution, especially in the tribal areas of Pakistan.

Originating from the Aryan tribes of contemporary Afghanistan and India, the Jirga system is one of the oldest methods of conflict resolution. This centuries-old Jirga system holds significant historical and cultural importance, especially among the Pakhtun community and in the tribal belt. The word 'Jirga' in Pashto means a gathering or consultation aimed at reaching a mutually agreed-upon solution to a problem. It is a tenet of the Jirga system that the Jirga must be comprised of elders selected for their integrity, wisdom, and knowledge of Pakhtunwali and Islamic law. The Jirga has been used to resolve disputes between groups and tribes, especially in matters related to land distribution, property, blood feuds, and inter-tribal affairs. According to Goodhand and Meehan (2018), the Jirga functions horizontally as a dispute resolution mechanism, acting like a jury to adjudicate wrongdoings and violations of customary laws. Vertically, it serves as a mediator between local communities and the government to foster

connections with other tribes and facilitate jurisdictive, peacebuilding, progressive, and arbitration processes.

Recognised as an august forum for resolving disputes and promoting unity among warring tribes, the Jirga system aims to facilitate hearings and devise objective solutions based on Shariah law and local customs. Jirga proceedings take place in various settings, such as mosques, hujras (guest houses), and beneath large trees. In the tribal areas of Pakistan, the Jirga carries out both judicial and executive functions, closely aligned with local traditions and customs. For tribal communities, the Jirga system is a cost-effective alternative to the formal justice system. Its relative success stems from the community's deep respect for and attachment to this traditional method. Compared to the formal court system, which is expensive both financially and in terms of time, the Jirga is more accessible. It draws its legitimacy and authority from the community it represents, compelling all involved parties to honour its rulings.

Although the Jirga system has been practiced in tribal areas for centuries, its role has occasionally been the subject of debate and criticism, particularly when its mechanisms and methods of justice delivery are compared to the formal justice system in other parts of the country. Despite these concerns, the Jirga system continues to be the most reliable platform for resolving conflicts within tribal communities. The effectiveness of the Jirga system in conflict resolution can be assessed through its resolution of high-stakes disputes. For instance, the resolution proposed by the Tori Bangash Jirga in Kurram Agency showcases this effectively. In this case, a long-standing land dispute between the Tindawal and Ali-Sherzai tribes, which spanned 30 years and resulted in significant loss of life, was successfully resolved. The Jirga played a role in facilitating negotiations and reaching a unanimous verdict accepted by both sides, with essential support from district administration.

In a study conducted by Nawaz & Aman (2022) titled 'Dispute Resolution Councils in Khyber Pakhtunkhwa: The Personification of Jirgas,' the preferences of respondents regarding forums for resolving criminal and civil disputes were investigated. The study revealed that 47.6% of respondents preferred Jirgas, 37.7% opted for civil and police administration, while a mere 8% mentioned formal courts for criminal disputes. In civil disputes, 59.1% of respondents chose Jirgas, 16.9% preferred civil and police administration, and only 14% proposed formal courts. However, in complex cases, a majority of respondents (44.5%) favoured formal courts over Jirgas (5.8%). These findings provide valuable insights into the level of

confidence Pakhtuns have in the Jirga system compared to the formal justice system.

Although the Jirga system has played an important role in conflict resolution in tribal areas, it is equally important to acknowledge the concerns raised by critics and human rights activists. Criticisms leveled against the Jirga system include the absence of codified written rules, all-male council compositions (creating gender biases), its fundamentally patriarchal nature, and the potential for the misuse of power and authority. The Jirga system has faced immense criticism for discriminating against women and violating the sanctity of women's rights during the decision-making process and the implementation of those decisions. Most importantly, women are excluded from participating in Jirgas, even when they are the victims, accused, or witnesses. In 2011, a Jirga agreement in Kohistan, Khyber Pakhtunkhwa District prohibited 18,000 registered women from voting in by-elections. Furthermore, women's rights violations occur through practices like honour killing, swara, vanni, or sung chatti, which involve the exchange of women as settlement. In 2013, a Jirga of around 200 people from 25 surrounding villages in Upper Dir convened and decided to give 12-year-old Rubina in swara as a form of compensation for her uncle's alleged mistake. Additionally, reports by Aurat Foundation indicate that 475 women were killed in the name of honour in 2008, 604 in 2009, and 557 in 2010, with many of these decisions being made via Jirgas.

In response to these violations, the Supreme Court of Pakistan, in line with the principles of Universal Declaration of Human Rights (UDHR), declared Jirgas unlawful in 2019. Chief Justice Saqib Nisar emphasised that Jirgas lacked precedents, predictability, and certainty in their decisions. Personal knowledge and hearsay were used to determine civil rights violations and criminal charges. Such practices were deemed contradictory to Article 4, IOA, 25, and 8 of the Constitution, which prohibit customs that infringe upon fundamental rights. However, the court also recognised that certain customary and traditional sentiments could still be addressed by gatherings of village elders, provided these disputes were resolved within legal boundaries and without functioning as parallel courts.

Considering the inherent limitations of the Jirga system, coupled with the challenges confronting Pakistan's formal justice system, including the backlog of millions of cases and draconian laws requiring structural reforms, it is reasonable to say that with the revival of Jirga system, it can continue to serve as a

form of Alternative Dispute Resolution (ADR) within legal boundaries and in compliance with the law. This is important, given that despite the Supreme Court's ban, people in tribal settings continue to rely on the Jirga system. Therefore, to revive and integrate the Jirga system as ADR within the formal legal framework and make justice accessible to all, the following measures are proposed.

First, institutionalising and formalising the Jirga system within Pakistan's judicial system as a recognised form of ADR can lead to more efficient and cost-effective justice and reduce the burden on courts. Second, it is important to provide conflict resolution training to influential societal figures, such as religious clerics and tribal leaders to ensure that Jirgas operate within the bounds of justice and inclusivity.

These training programs must include mandatory instruction regarding fundamental teachings on Islamic law and jurisprudence. This will also help clarify that practices like honour killings, vanni, and swara are not in accordance with Islamic teachings. Third, the inclusion of a learned judge, lawyer, and an accredited mediator and arbitrator in every Jirga committee is crucial to ensure the legality of the decisions being made. Fourth, mandatory female participation in Jirgas should be enforced at all levels. Inspiration can be taken from the Sister's council, an all-female Jirga based in Khyber Pakhtunkhwa (KPK). Fifth, a comprehensive monitoring and evaluation framework should be formulated to regularly assess the performance and impact of Jirgas. Lastly, all Jirga proceedings must be recorded and documented using modern technology.

These measures, if taken, have the potential to revive the Jirga system as an efficient and compliant mechanism of Alternative Dispute Resolution (ADR) in the tribal areas of Pakistan.

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