



History of Jirga Laws in Khyber Pakhtunkhwa - Do Islamic Law and Jirga Laws had the same Historical Jurisprudential Approach? (A Historical Analysis of Shari'ah & Jirga Law)

Author(s): 1. Dr. Lutfullah Saqib

Associate Professor, Department of Law and Shariah
University of Swat, Email: lutsaqib@gmail.com

2. Dr. Rasheed Ahmad Faizy

Naib Tehsildar District Kohistan, Email:
rasheedahmadfaizy@gmail.com

Issue:

<http://al-idah.szc.pk/index.php/al-idah/issue/view/34>

URL:

<http://al-idah.szc.pk/index.php/al-idah/article/view/592>.

Citation: Lutfullah Saqib and Rasheed Ahmad Faizy 2021. History of Jirga Laws in Khyber Pakhtunkhwa - Do Islamic Law and Jirga Laws had the same Historical Jurisprudential Approach?. Al-Idah . 39, - 1 (Jun. 2021), 51- 70.

Publisher: Shaykh Zayed Islamic Centre, University of Peshawar, Al-Idah – Vol: 39 Issue: 1 / Jan– June 2021/ P. 51 – 70.

Article DOI:

<https://doi.org/10.37556/al-idah.039.01.0592>.

Received on: 13 – Jan - 2021

Accepted on: 23 – May - 2021

Published on: 30 – June - 2021



Abstract:

Jirga, a historical legal antique, was an informal adjudication of *Pakhtūns*, that had been flourishing and evolving through-out ages, solving issue of indigenous people tremendously. In the present research endeavor, conventional *Jirga* and its various facets had been critically examined from *Sharī'ah* perspective; meaning thereby whether such *Jirga* and its procedure was based on Islamic law or not. During investigation, it was revealed that *Jirga* had a very close resemblance, in terms of structure and procedure, with *Qaḍā* and *Taḥkīm*. The present work aims to pinpoint compliance and non-compliance of *Jirga* to *Qaḍā*. While looking for these findings, the qualitative research technique had been adopted in the present research endeavor; wherein the contents from authentic and trustworthy sources were critically analyzed.

Keywords:

Fuqahā, Jirga, Jirga-Mār, Sharī'ah, Dispute, Taḥkīm, Law, Qaḍā

Introduction:

Human, since the beginning of time born, differences in opinion, regardless of the fact that difference of opinion is by nature or due to living experiences; sometimes it had led to the disputes and conflicts amongst them. Then, apparently, there was a dire need of unbiased person; persons or an institute who would mediate among the concerned parties. Legal history deemed that no such institution had found at the early stage of a state, hence, their primary and sole source of dispute resolution was *Jirga*¹. *Jirga*, therefore, had remained a crucial institution, historically, for not only Pukhtoons of Pakistan and Afghanistan but also other nations in their vicinity; these included, though not exhaustively, Azbak, Tarkaman, Baloch, Hazara and Tajik.² Such institutions are replaced with modern judiciary. On the same way, *Jirga* or a system similar to this had been witnessed by the history of developed or even semi developed nations. For instance, Panchayath in Punjab, across Pakistan and India, *Taḥkīm* in Arab countries, town meeting in United States, regional assembly in England,³ the Mediation of Chinese, Nigeria's Yoruba, Central Liberia's 'The Kpelle', Hawaiian Islanders, Kalahari's Bushmen, Sindh's *Faislo* and Pukhtoon's *Jirga* could be the best exemplification. Numerous studies showed that beside advanced countries, developing states, like Pakistan Bangladesh and other economically unstable countries, too, had chosen the informal Justice system to seek justice.⁴ This informal legal mechanism had gained popularity and, thus, prevailed among the aggrieved masses around the world.

Of course, with the passage of time, formal courts were established, owned by state. The rules, procedure and all other necessary laws were laid down by colonial state for the smooth work of these establishments. Courts took, then, the maximum responsibility of dispensing justice – technically called administration of justice. These formal institutions had kept the formality its prime priority than justice dispensation, and owing to this fact majority of people, primarily, in developing and under developing countries preferred to avoid formal adjudication. In Pakistan, particularly, in Khyber Pakhtunkhwa the situation was not different. These circumstances had favored the environment again for the informal system of justice like *Jirga*. The common people were attracted once more. This situation was realized at international level, too, and, therefore, developed countries and International community, in recent years, had emphasized, through different ways, for justice dispensation outside of the court. In this connection; a report had issued by United Nations in the third quarter of 2012, *Informal Justice systems – Charting a course for Human Rights based engagement*. This report, while realizing the importance of informal system, stated, “for prevailing the respect of Human Rights, the informal system of justice may be more beneficial.” Other reports, too, had come to the spot, identifying how such system could be helpful in improving the access of public to justice.⁵

Historically, *Jirga*’s roots could be found in the tribal structure of *Pukhtoons*, some five thousand years back. Since then, *Jirga* was incurred with vast social and cultural powers by society, such as, it had enjoyed power of Judicature, Executive and, ironically, policy making, too, felt in its ambit.⁶ Thus, small domestic matters and immaterial monetary issues had remained the jurisdiction of local mechanisms called *Maracca*.⁷ The *Jirga*’s procedure, by then, had the similarity with that of Athens’s democracy.⁸ With the due course of time, this gathering of elders (*Jirga*) had obtained fame and, thus, inviolability; brought strong execution of the declaration given by it. From the Medieval ages to the recent past, the *Jirgah* had become an International Institution; an institution towards which James William Spain, a renowned scholar, had pointed a finger some half century ago. In his view, some renowned figures like Mughal Attaches; Generals of Sikh, British and Pakistani Administration and Politicians had also faced the *Jirgah*⁹ - by one way or another. Recently, Pukhtuns were subjected to two different Constitutions, for example, Pukhtūns of Pakistan and of Afghanistan; hence, *Loya Jirga* is not possible for bringing consensus on a particular matter, among entire Pukhtun Race.¹⁰

The present work tends, firstly, to show history, structure, methodology and mechanism of *Jirga* in Khyber Pakhtunkhwa; a typical Pukhtūn belt in Pakistan, formerly known as North West Frontier Province (NWFP) of Pakistan and British India. This nomenclature is in use for the area since 18th amendment in Constitution of Pakistan in 2010. The work also aims, at the second phase, to critically analyze these various aspects of *Jirga* from the perspective of *Shari’ah*. Thirdly, to investigate the existing mechanism of *Jirga* is viable for the dispute resolution or not. Fourthly, to put forward

various suggestions, in the light of findings, indispensable for the dynamic improvement of this informal adjudication.

Methodology:

The typical methodology of qualitative research i.e. content analysis, technique has been used throughout the present work for the investigation of the issue. The contents, in terms of secondary data, have been carefully and exhaustively analyzed. Moreover, logic and reasons are being exploited in case of non-availability of such data. Before application of such technique, the previous works *Jirga's* history, mechanism, structure and development found in numerous languages¹¹ are profoundly observed to avoid the material errors and bad citations – if any. A significant use of secondary data has been made from online books, printed books, magazine, relevant journals and appropriate websites. While doing *Shari'ah* appraisal of any aspect of *Jirga*, the research endeavors of Muslim jurists, both classical and contemporary, have been resorted. However, work of the classical Muslim jurists is preferred more comparatively to that of contemporary Muslim juris; owing to the fact that the previous is more authentic than the latter. As the work focuses on various facets of *Jirga* from *Shari'ah* compliance perspective, due diligence has been exerted to the possible extent to avoid biasness and partiality in argumentation.

Jurisprudential Sources for Jirga Laws in Khyber Pakhtunkhwa - A Historical Perspective:

Several thousand years ago, differences, being a natural phenomenon, had been occurred in *Pukhtoons'* societies. Instead of trivial nature, such conflicts even then needed to be resolved by *Manžgaray* (منڅگرې) or *Šālis*,¹² (an impartial individual). Later on, dispute resolution through *Sālis* had got a new shape in the form of *Jirga*. . The *Pukhtoon* race, like other ethnic groups, tended to establish an assembly for themselves for resolving the local disputes. Sultan Mohammad Sabir had the same opinion by stating as, “One of the interesting fact about Five thousand years old Afghans’ convention is they decided their matters in their way (*Jirga*).”¹³ *Pukhtoon*, since that age, tried numerous systems to bring new changes to such informal way of dispute resolution. The princely states, for example, in *Pukhtūn* belt had established hierarchy of *Mashir*; *Hākim*; and *Munsif* as alternatives to *Jirga*. A regional renowned historian Sultan-i-Rome opines that in Swat (a district in Khyber Pakhtunkhwa), a judicial system was introduced by the then king.¹⁴ This situation paved a way for the modern formal judicial system, primarily, in such areas. Nevertheless, people’s still had faith in it; following its un-scripted rules sternly and wanted it, too, for their minor dispute resolution.

History indicates that conflicts were either brought directly to the *Jirga* or it had taken, by itself, cognizance of all these. In case of conflict(s) between two individuals or tribes, the *Jirga* had to perform its function on two ways. The parties to the conflict, for instance, had to approach *Jirga* by themselves. In this case, it had to resolve the dispute; provided certain conditions were needed to be fulfilled by the conflicting parties. In the second situation, the *Jirga* itself went for intervention; bringing them for the resolution of dispute. The situation had more similarity with the *Suo Motto*¹⁵ action where the competent court

could take cognizance of an issue.¹⁶ Moreover, in both situations the *wāk* (power of attorney) should be given to such members (of *Jirga*) before commencing the process of *Jirga*.¹⁷ Additionally, the parties also had to avoid any sort of allegation of biasness on *Jirga-Mār* (the one or more people who administer the *Jirga*).

Unlike the formal court, once the cognizance was taken by *Jirga*, it did not use to institute or file that issue in the form of documents. Usually, this traditional Justice system was not in habit to follow any enacted or written law for deciding the matters, however, in view of some historians, it used to follow a *Narkh* (*Pushtun's* Customary¹⁸ Law or Constitution), *Riwaj* (Custom) and *Sharī'ah* (Islamic Law), too.¹⁹ Being Muslims, the latter was followed more. *Narkh* was an un-written stringent customary law built-in in the minds of people. The *Narkh* could further be understood from known *Pushtu* proverb, «کلي اوڅه د نرخه مه اوڅه» “*Da kali uza da Narkha ma Uza*”²⁰ meaning thereby, “better to leave the village but not *Narkh*”. This implies that violation of *Narkh* was always remained very hard like any enacted statute of a country.

The *Jirga* law had to vary from region to region due to variation in local needs and relevancy to the situation of a specific area.²¹ It happened, though some time, that a particular district had used to adopt the *Narkh* of another area, state, agency and province; for some prominent reasons or due to government recommendations. On other hand, both civil and penal matters, as stated earlier, they used to follow *Sharī'ah*; as *Pushtūn's* Society was more harmonious to Islam and its teachings.²² Owing to these facts, it can be said that their main source of justice dispensation had included Custom and Islamic Law, together. The decision pronounced by *Jirga* was always considered as sacred to break. However, as per view of the Naveed and Neha, only twenty percent (20%) people believed in its finality. The aggrieved, either had to request to form a new *Jirga* or go to the formal Justice system against it.²³

Main sources of *Jirga*, as described earlier, were *Narkh* and *Sharī'ah*. A matter, therefore, had to be brought after the fulfilment of two steps of essence. This was followed by the matter of execution. Usually, it is being thought that in the absence of law enforcing body, the rule of law becomes a dream and merely a bookish theory. However, the case of *Jirga* was entirely different. According to majority of scholars, particularly, those familiar with structure and mechanism of *Jirga*, it had a special force, known as tribal *lakhkar*, for enforcing its decision. Yousufzai and Gouhar offered another opinion in this regard by stating that *Jirga* did not use special force for implementation like Police rather its primary source was people's excommunication with one who did not abide by the decision. They further add that penal measures, in fact, had to vary from tribes to tribe and place to place.²⁴ In addition to other powerful sanctions, *Jirga* could confiscate the assets, for example, weapons etc. as *Gravey* (mortgage). If the non-compliance still continued then men had been sent to burn down their material assets like, house²⁵ and movable property. Moreover, such person was considered as *Kabarjan* (arrogant²⁶; meaning thereby that he had broken the trust of *Mashrān* (Elders) and violated

the tribal code and, as a consequence, the *Spin Giri* (white bearded) of *Jirga* would not take cognizance of his killing, if he had attacked in the course of enmity in future.

Historical Evolution of *Jirga* Composition and its Laws in Khyber Pakhtunkhwa:

Everything in this universe, of course, is always frail at the earliest stage of its birth. On the same token, the *Jirga* had come into being with the beginning of *Pukhtoons* as a race, usually marked as 1st millennium B.C.²⁷ It can be assumed that how simple the structure of *Jirga* would be at that time; since lifestyle, dealing and matters of *Pukhtoons* had remained very simple. In addition, population of *Pukhtoon*, at that time, had shaped in a joint family with a sufficient number of heads with them.²⁸ It indicates that all these small units had a simple local mechanism for dispute resolution, administered by the men.²⁹ Besides, *Jirga* also comprised, at that time, of family elders, their representative, ‘Ulamā (Religious elders); depending on the nature of issue in front. Additionally, there was no strict criterion for selection of members, notwithstanding, they should have sufficient *Nafar* (man-power), social status and sound economic position.³⁰ With the passage of time, this small family of *Pukhtoons* had jumped from 350 to 400 tribes to 40 to 45 Million.³¹ With the passage of time new issues had come to the horizon of *Pukhtoons*’s society, turning simple structure and mechanism of *Jirga* into more completed one.

The first ever official *Jirga*, according to historian, marked in the middle of 18th century, when almost all tribes had gathered to select Ahmad Shah Durrani (1722-72) as their first head of Modern Afghanistan.³² It was composed, at that very time, of entire headmen and chieftains of all *Pushtūn* tribes and clans of Afghanistan and, thus, had named as *Loya Jirga* (Grand assembly). This gathering could be possibly considered a doorway for the composition of *Jirga* from the simplest to the complex one. In view of some scholars, a long time elapsed for the evaluation of *Jirga* when some tribes had migrated to Pakistan (Mardan).³³ At the end of 19th and beginning of 20th Century, the *Jirga* got flourished in almost every urban and rural areas of *Pukhtoons*. In view of some historians, notwithstanding, composition of *Jirga* was still a mystery, hence, unknown to mankind.³⁴

The structure of *Jirga*, more or less, was found similar in the province of Khyber Pakhtunkhwa as that Federally Administered Tribal Areas. Some minor differences, however, were observed; arising out of the distance, culture and language of the concerned people. Structure of *Jirga* in Dir (situated in the north of Pakistan at a distance of 220 km from Capital of Khyber Pakhtunkhwa), for instance was very simple; comprising of four to five people. Similar was the case of *Jirga* in Swat (Situated in the north of Khyber Pakhtunkhwa, with 157 Km distance from Capital of Province, Peshawar). It was further noted, on the same way, that the number of *Marakachian* (Administrators of *Jirga*) has fluctuate, too, with the needs of people.³⁵ In some areas, the composition had relied on local *Pukhtoon* Code of conduct, known as, *Pukhtunwali*, also known as *Pukhtu*.³⁶

The composition of *Jirga* was profoundly discussed by Danish and Anwaar. In their view, if the dispute occurred between / among the parties from the same tribe, intra-tribal *Jirga*, namely, *Malakan* and *Spin Giri* had to be constituted. However, if it occurred between / among the parties from different tribes, then, inter-tribal *Jirga* was used to hold; comprising of persons from the same or from different tribes – whatever the case may be. The *Jirga* was deciding, in addition to the above, the religious matter between two sects i.e. a mishap or a conflict arises between *Shī'ah* and *Sunnī Qaum* (tribe), it worked effectively.³⁷ Sherzaman Taizi, Hassan M. Yousufzai and Ali Gouhar had devoted their work on the selection criteria of *Jirga-Mārān* (members of *Jirga*). The substantial part of these conditions, primarily, revolved around the social activities, public interactions, age, experience, and alike. To exemplify the above, the regular presence of *Jirga* member in social events, namely: reaching farther villages for marriage ceremonies, child birth ceremonies and condolences. Additionally, the conspicuous attendance was considered utmost important, especially to elders in *Hujra* (Pukhtuns' community centre) for obtaining the remarkable understanding of history and *Pukhtunwali*. This clearly displays that one should know, at that time, the value of numerous aspects of *Pukhtunwali*. The first instance was Social aspect that included *Melmastiyā* (hospitality), *Ghayrat* (braveness), *Namus* (self honour and dignity); Legal aspect, comprising that included arbitration, mediation, negotiation. Additionally, he should be soft spoken, humble, sympathetic, honorable, upright, honest, well off, energetic and generous in spending for people.

The entire structure of *Jirga*, sometimes, would be different than usual, particularly, when a man of wisdom would preside. In a heinous offence, for example, a *Malak* would act as an arbitrator or mediator while settling the dispute may impose *Pesa* (fine) on the violators of interim orders.³⁸ The composition of *Jirga* also differed with the variation of culture. In some Pakistani agencies area and some Afghani regions the composition of *Jirga* varied from tribe to tribe³⁹ and towns to villages.

***Sharī'ah* Appraisal of Historical *Jirga* Composition in Khyber Pakhtunkhwa:**

The *Jirga* structure, of ancient time, can be possibly found in the legal spectrum of *Sharī'ah*. Study shows that institution of *Jirga* has the closest resemblance with *Qadā* and *Tahkīm*. An attempt has been made in the following lines to point out their similarities – to the last possible extent.

Sharī'ah, indeed, recognized the basic criteria of *Jirga* composition in its few dominant legal concepts i.e. *Tahkīm* and *Qadā*. The concept of *Tahkīm*, thus, could be predominantly while the analogy of *Qadā* could be partly extended to *Jirga-Mārān* (the composition of *Jirga*). The first similarity had arosed at the level of persons who led these three concepts, technically called *Qādī*, *Hākim* and *Jirga-Mār*. *Spin Giri* (white bearded or gray haired elders), for instance, were the basic criterion for the selection of *Marakachian* (members of *Jirga*). *Sharī'ah*, on the other hand, marked the reputation of a man vital for becoming

Qāḍī or *Hakam* (the administrator of *Tahkīm*).⁴⁰ Moreover, the pre-requisite of *Jirga-Mār* was his adequate knowledge of *Sharī'ah*; referred as '*Spin Patki*' in different local literature of *Jirga* and other social values known as '*Narkh*'. In other words, knowledge always remained a dominant factor for the chief of *Jirga* – in terms of appointment. The *Fuqahā* of four schools, on the same way, had offered a great emphasis on *Ilm* (understanding of Islamic Law) for the selection of *Qāḍī* and *Hākim*.⁴¹ In addition, a *Qāḍī* and *Hākim* could consult *Ahli-Ilm* (the people of knowledge) for the clarification of any matter in *Sharī'ah* – raised at different levels of a case. In the view of *Māwardī*, a renowned jurist, *Muftī* (religious scholars, primarily, those had the capacity to issue verdict) could be consulted.⁴² The similarity, herein, comes to the spot as the *Markachiān*, too, could consult *Spin Patki* (elder people having knowledge mostly based on experience) in any matter in front them. The view that *Mufti*, to the least, could be consulted is in line with common sense, and, at the same time, in line with the old principles of *Jirga*.

Social life of *Jirga-Mār*; meaning thereby how he was spending his social life, always considered a matter of great importance.⁴³ *Sharī'ah*, on the other hand, proposed principles for *Hakam*, *Qāḍī* and *Shāhid* (witness). In this connection, Islamic law had exhaustively asserted, for example; that he must not be insane, idiot, unsound mind, slave, *Fāsiq* (habitual violator of major Islamic Laws), deaf or dumb and not penalized in *Hadd-e-Qazaf*.⁴⁴ Some of these factors, of course, insured his moral standing in a society. Like *Tahkīm*, free consent or *Tarāḍī* (typically called *Wāk* in *Jirga's* terminology) was always considered prerequisite for the parties to *Tahkīm* (*Jirga*).⁴⁵ On the same way, the *Jirga-Mār* should not be a party in his own case, and has to be entirely impartial.⁴⁶ The same principles were elaborated by *Sharī'ah* for *Qāḍī*. In this regard, *Ibni Nujaim* stated, "There should be no *Qarābah*; a relationship between *Qāḍī* and a party that stops a person from becoming a witness, like, being siblings, spouses, father, son and vice versa".⁴⁷ Following the same principle, neutral people could be selected/appointed for *Jirga*, such as, *Spin Giri*. In addition, as per principles of Islamic law, *Qāḍī* must be appointed by the state - so a forceful implementation of his decision could be made. Here at this point, the difference between a *Qāḍī* and *Muftī* could be comprehended. Following the same, *Chār-Wāk* (authoritative and influential elders) were there to implement a decision of *Jirga*.

Procedure in *Jirga* and its *Sharī'ah* Appraisal – Historical Perspective:

A well-groomed Society, at any age of time, keeps everything in order. In *Pukhtūn* society, too, the institution of *Jirga* had an organized but simple process; functioning in almost all hamlets of the *Pashtūn* indigenous population. A matter of dispute was, first of all, used to place before a *Jirga* by two ways. Firstly, such body of *Jirga*, on matters of grave concerns or public nuisance, use to take action on their own, technically called *Suo Moto*⁴⁸ in the modern common law. Some specific terms were used in *Jirga* for the same i.e. "*Jirga manz ta ratlal*" (intervention of *Jirga*) or "*Pa Jargi tlat*"⁴⁹ (interposing as *Jirga*). Secondly, the parties themselves would approach and request themselves (like filing a suit in the common law);⁵⁰ precisely pronounced,

“*Jargi ta khabara warkawal.*” Hence, the *Jirga* might take cognizance of civil suits, for instance, disputes on lands, collective forests or other natural resources within and without *Khel* (community), criminal cases, such as, theft, *Marg* and *Jūbla* (murder and injuries),⁵¹ family matters, for example, *Koranay Nāchāqi* (domestic altercations or violence) in which cognizance was taken by a smaller gathering called *Koranay Jirga* (family *Jirga*).⁵² On the similar token, *Sharī’ah* accredited the initiation of an issue to a body termed as *Tahkīm*.⁵³ The concept of *Suo Moto* had broadly expounded by *Imām Māwardī* in his known book *Aḥkām ul Sultāniyyah*.⁵⁴

Once the cognizance was being taken by *Jirgamārān*, summonses in its ordinary typical mode, had to be communicated orally through a process server called, ‘*Nāi*’ (a barber). Besides his traditional duties, he had to carry confidential messages including summons. At some area of Khyber Pakhtunkhwa, he was also named ‘*Dum*’⁵⁵ (a ballad singer). In case where a party was absent due to denial of attendance, or some other reason; the *Jirga* holders used to order the beating of a drum - a substituted form for serving a summon. The common law in Pakistan had quite a similar process for summoning the litigants; called ordinary and substituted mode of serving.⁵⁶ The above process, followed by *Jirga* for calling the disputing parties, having resemblance with that of *Sharī’ah*, primarily, the one adopted in Umayyad dynasty’s judicial system.⁵⁷

Like contemporary courts, the division on the basis of jurisdiction could be found in *Jirga*. As a general principle, inhabitants, living in ambit of a particular *Jirga*, were the subjects of personal jurisdiction of that very *Jirga*. The territorial jurisdiction, indeed, was the most prevalent amongst others, such as, *Ulasī Jirgah* (tribal *Jirga*); where representation from each house called upon. It had jurisdiction in intra-tribal or inter-tribal issues, affecting the collective interest of a village in a tribe (within a defined territorial area). For instance, joint ownership of lands, forests, irrigation water and springs, being civil matters, fell in the ambit of *Ulasī Jirga*.⁵⁸ The criminal cases were dealt on the same way. Moreover, the territorial jurisdiction of *Loya Jirga* (grand *Jirga*) was always across the *Pukhtūn* belt of South Asia, especially, current Khyber Pakhtunkhwa, the north western side of Pakistan.⁵⁹ Similar was the case of south eastern provinces⁶⁰ of Afghanistan. This great and grand *Jirga* was called, primarily, when there had a common threat to the whole race.⁶¹ The ‘subject matter jurisdiction’ could also be found in the mechanism of *Jirga*, typically called ‘*Shakhsi Jirga*’ (Personal *Jirga*). This type of *Jirga* had to be summoned when there was a family dispute – both of civil and criminal nature.⁶² It would hear matters of smaller scale within the domain of a village.⁶³ This approach was adopted for saving the invaluable time of court.

In *Sharī’ah*, on the other hand, the concept of jurisdiction minutely discussed by the jurists in classical work. *Imām Rūyānī*, the prominent *Shāfi’ī*, jurist said in this connection, “لو قلده النظر الخاص يصح، وهو أن يقلده النظر في المدينت دون المناكح،... أو في نصابٍ

⁶⁴ مقدر من المال فيجوز ويختص بما خص

Meaning thereby; “It is all right to assign a special jurisdiction to *Qāḍī*, that is, jurisdiction in civil matters and not family matters....or giving him monetary jurisdiction to a specified amount.” He elucidated further that conferring a particular jurisdiction to a *Qāḍī* was acceptable in Islamic law. The accusation or ‘alleged claim’ of a *Pariq* (party) was not given worth until the *Mukhālīp* (adverse party) had been given ample time to defend.⁶⁵ This rule was, however, not followed in *stricto sensu*. Most of the issues had to be resolved on the spot; giving defendant a shorter period to ponder. In some critical matters or in heinous crimes, contrary to this, defendants were given enough opportunity for arguing the issue - varying from a day to a week but not more than a fortnight. Giving opportunity to the defendant, on the other hand, was also recognized by *Sharī’ah*. In this regard a familiar statement could be found in the literature of Islamic law i.e., “إِنَّ الْمُدَّعِيَّ يَدَّعِي عَلَيْكَ بِهَذَا الْوَجْهِ فَمَاذَا تَقُولُ”,⁶⁶ meaning thereby, ‘the plaintiff has claimed against you what do you say in this connection?’ The word ‘*Taqūlu*’ is ‘*Fe’li Mudāri*’ (a tense in Arabic language, used both for present and future); had a reflection of the same. Owing to this fact, a *Qāḍī*, under Islamic law, was not allowed to decide a case until he had listened to the defendant properly.

After giving due opportunity to both *Pariq* (parties), primarily, to the defendant for defense, he was either proven guilty or he used to confess. Such confession was used as evidence by the *Jirga* against him. Eventually, the penalty was inflicted upon him by *Jirgamārān* due to such confession.⁶⁷ Retraction from admission, or confession, however, was exceptionally rare occurrence due to number of reasons. Firstly, the resoluteness of *Pukhtūns* on truthfulness was embedded in their society. A famous *Matal* (proverb) offered the same idea, i.e. د دار په سر هم رښتيا وايه meaning thereby, “even on gallows speak the truth”.⁶⁸ Secondly, their social life was very much dependent on each other as they lived in closely knitted society under the norms of *Pukhtunwali*.⁶⁹ Retraction from confession, on the other hand, had minutely discussed by the Muslim jurists, predominantly, by the *Hanafīs*. A prevalent legal maxim, in this school, i.e. “المرء مؤاخذ بإقراره”⁷⁰, explained the same.⁷¹ Conventional law, too, had the same maxim i.e., “*habemus optimum-testem, confidante reum*”. Retraction in *Fiqh*, in contrast to *Jirga*, had a very elaborative nature. In this regard *Imām Qārāfi*, the eminent *Māliki* jurist, stated, “Resiling from *Iqrār* (confession or admission) is against Islamic legal system”.⁷² *Shams-ul-Ai’immah*, *Imām Sarakhsi*, had the same opinion.⁷³ The only exception to this rule was *Jārimul Hudūd* (fixed punishment cases), where retraction would help accused in mitigating the punishment from *Hudūd* penalties to *Ta’zīr*—crimes for which Islamic law does not provide fixed penalties.

Yousufzai and Gohar elaborated, while writing about the standard procedure followed by the *Jirga*, that burden of proof was always on a person who alleged the fact. He had to produce the witnesses who was supposed to swear, or took an oath on his wife⁷⁴ (of dissolution of marriage) to tell the truth before *Jirga*. If the plaintiff failed in presenting any kind of evidence, the defendant would swear by the Holy *Qurān* to clear himself.⁷⁵ This process, astonishingly, of hearing was, predominantly, identical to that of *Sharī’ah*,

plainly explicated by *Ibni Qudāma* in a *Hadīth*-cum-legal maxim, *الْبَيِّنَةُ عَلَى الْمُدَّعِي، وَالْيَمِينُ عَلَى مَنْ أَنْكَرَ* "وَالْيَمِينُ عَلَى مَنْ أَنْكَرَ", meaning thereby, "Evidence is upon claimant and denier is to swear".⁷⁶

There were other procedural similarities, apart from the above mentioned, between *Jirga* and *Sharīah*. *Spin Giri (Jirgamārān)*, being local, could witness the offences and infringements on daily basis in their locality. They, however, could not decide on the basis of their own knowledge.⁷⁷ Conversely, in *Sharī'ah*, *Qādī* could decide on the basis of his knowledge – though with some exceptions.⁷⁸ Moreover, the time for disposal of a case was premeditated in *Jirga* system; nevertheless, offences of civil nature should be disposed off in shortest possible extent. Moreover, family suit and crimes were supposed to be swiftly reported to the concerned authority.⁷⁹

Sharī'ah, of course, had an accommodation for the concept of *Taqādum* (limitation) in its legal spectrum, primarily, in civil cases; starting from two years to thirty six years. Family matters, however, were not hit by *Taqādum* (limitation); owing to their peculiar and special nature. In *Qisās* (a heinous crime), fifteen years were recommended. Nonetheless, such period could be varied at the discretion of *Sultān* (head of state).⁸⁰ In case of *Jirga*, contrary to this, the limitation period was not that much considered and, therefore, an issue could be raised before it at any time. The enforcement of *Jirga* would take place through special tribal *Lakhkar* (forces), called *Arbakyān*⁸¹ but later on, in Colonial structure, it was known as 'Khāsādār' in this belt (this area now consists of FATA and Baluchistan belt).⁸² In Islamic law, comparatively to *Jirga*, offered an effective implementation mechanism through *Qadā*.⁸³

Implications of the Current Research:

This study highlights, with solid reason, the possible alternate of the formal judicial system of Pakistan in the form of indigenous *Jirga*. The tremendous history, in terms of its fructuousness for the people, this institution can still have an exceptional positive impact for the resolution of disputes at local level. However, such informal mechanism can also be introduced at institutional level – though through substantive legislation.

Social Implications:

The back-bone for the stability in a society is, indeed, reliance and trust of people on their Justice system. It may be a blessing in disguise when the judicial system is under a heavy burden of pending cases, and an alternate comes to rescue it in the shape of *Jirga*. According to latest report of Law and Justice Commission of Pakistan, published in 2019, almost 1.8 million (1,761,339) cases of diverse nature are *pendente lite* (pending) in numerous courts of country.⁸⁴ *Jirga*, being an indigenous mechanism of dispute resolution, can play a vital role in such circumstances. Minor disputes, for instance, can be easily placed before *Shakhsi Jirgas* for resolution. Heinous crimes, contrary to this, can be resolved through *Loya Jirga*.

This indigenous institution, as a matter of fact, is advantageous in nature by a number of ways. For example, it is cheaper and accessible comparatively to the formal judicature. Similarly, such institution does not believe in

ceremonious technicalities of procedure; saving time of litigants and eventually of courts, too. Hence, it is a pragmatic solution that emerges as a speedy and expeditious Justice dispensing institution in the country like Pakistan. Above all, the protocols of *Jirga* are derived from *Rewāj* (Custom) and owing to this fact, comparatively, more acceptable and convenient for Pukhtūns. In order to guarantee the effectual practice of *Jirga*, the *Jirgamārān* should not only be the *Spin-Girī* or ‘*Ulemas*’ (those who understand *Sharī’ah*) of the society, but should also be acquainted with contemporary principles of justice and statutes. Having all these benefits, the importance of *Jirga* cannot be denied at any level – both academic and institutional.

Institutional Implications:

The factual fruits of *Jirga*, of course, can only be obtained if its decisions are given binding nature by the legislature as formal adjudication. The police, on local level, should discourage the lodging of First Information Report (FIR) or complaint; advising the parties for opting *Jirga*. Civil Judges, of all levels, should persuade the claimants not to file suits and refer their matters to *Jirga*. The decision of *Jirga*, later on, may be endorsed by respective court. Moreover, the *Jirga’s decision* may be implemented as a sub form of Alternate Dispute Resolution and Arbitration – by one way or another. It, nonetheless, can also be implemented in the form of ‘Negotiation’, ‘Mediation’ or ‘conciliation’. While enforcing its decision, the concepts of *Sharī’ah*, for instance, *Ṭahkīm*, *Ṣulāḥ* and *Qādā* should also be taken into account. It would help in rebuilding the trust of people. Additionally, it would minimize and cut down the long pending suits. Moreover, this would shave out hatred, burst out from filing frivolous and vexatious suits against each-other.

Conclusion:

Jirga is an ancient, prominent and non-formal judicial institution in Pukhtūns; resolving disputes of all nature - from ordinary civil trifles to state level crimes, amicably. This research endeavor has to investigate, at the first instance, the structure, procedure and development of *Jirga* from historical perspective, in comparison to *Sharī’ah’s* typical concept of *Ṭahkīm* and *Qādā*. History elaborates that when a smaller group of Pukhtūns has grown larger, immense need of such institution has been felt. The main purpose of *Jirga* is, therefore, to systematically institute the matter in dispute; select visionary *Spin-Girī*, having knowledge of *Narkh* or *Pakhtunwali*. Moreover, *Spin-Patki* are also selected, having knowledge of *Sharī’ah*- a divine legal mechanism for solving the disputes. The prior consent of the parties is always deemed an indispensable factor before putting an issue to *Jirga* for resolution. The *Prīkra* (can be rightly called here award) is then executed, primarily, through *Arbakyān*; otherwise, through excommunication (social boycott). The party refuses to accept *Jirga’s* decision, is sometimes banished through militia (*Arbakyān*) and is declared as *Kabarjan* (the arrogant).⁸⁵ The *Jirga*, historically, is very brief and simple in terms of its mechanism and structure, particularly, at its earlier stage i; comprising of two persons. Later on, it has gained power in many respects at 18th century. The number of members, for instance, has been increased and named as *Loya Jirga* then. According to

historian, Ahmad Shah Durrani has been selected as head of all *Jirgas* in the typical regime *Pukhtūns*. At 20th century some drastic changes have appeared in its structure, however, the composition of *Jirgamārān* remained odd in number at all the time. The criterion for the *Jirgamārān*'s selection is settled; revolving around their social status. Social status indicates his prominence in *Hujra*, *Melmastiya*, his *Nāmus*, observance of Pukhtunwali and comprehending capacity to understand the nature of dispute. A profound study shows that *Jirga* has much resemblance with various typical concepts of *Sharī'ah*. The qualification of *Shāhid Qāḍī* and *Hākim* prescribed by Islamic law, for instance, have a resemblance with that of *Jirga-Mār*. Because of this reason, a *Jirga-Mārān* should not to be insane, *Fāsiq*, slave (or under someone's undue influence), *Maqzūf* (one who has been penalized in *Hadd-e-Qazf*), incapable person and etc. Moreover, *Sharī'ah* encourages consultation with *Ahli-ilm* (people of knowledge). The same pattern is followed in *Jirga* where *Spin Patki* are consulted in complex matters. On the same way, in *Tahkīm* the *Tarāḍi* of parties is utmost important. Additionally, *Qāḍī* or *Hākim* must not have *Qarābah* with the disputant parties. All these standards are followed in *Jirga*. The *Jirga* members, therefore, should neither be a *fariq* (party) to the dispute nor should have any relation with the parties. Being typical Muslims, such rules may be directly derived from Islamic law. The procedure followed by a *Jirga* is, too, very much identical to that of *Sharī'ah*. At the initial stage of a dispute, a part launches a complaint against another party; technically called, "*Jargi ta khabara warkawal*". In Islamic law this process is called "*Raf' al Da'WA*". *Jirga* can also take *Suo moto* action, called locally, "*Da Jirgi menz ta ratlal*". The similar concept is described, minutely, by Imām *Māwardī*. After receiving a complaint from an individual, the other party is informed through *Nai*. Summoning a party is very much familiar procedure in Islamic law, primarily, at the era of In *Khilāfat al-'Umayyiyah* (the Umayyad dynasty). In addition to all these similar approaches of Islamic law and *Jirga*, other resemblance can be found in various aspects including, though not exhaustively, territorial jurisdiction, appointment of individual/ individuals for the resolution of dispute, enforcement of decision, dealing techniques with simple and heinous crimes, distribution of cases into civil and criminal and etc. Having all these peculiar characteristics, the *Jirga* mechanism can be effectively used for the dispute resolution, primarily, in various parts of Khyber Pakhtunkhwa.



This work is licensed under a Creative Commons Attribution 4.0 International Licence.

References:

1. The word *Jirga* can be spelled in numerous ways, like, '*Jargah*', '*Jarga*', '*Jirgah*'. However, the most common in the literature is '*Jirga*'. *Jirga* is a terminology of social sciences, defined by many, as per their own style.

According to Ali Wardak, *Jirga* is a Pushtu word which, in fact, means, “gathering of few or large number of people for Consultation”. (Wardak, Ali. *Jirga—A Traditional Mechanism of Conflict Resolution in Afghanistan*. Pontypridd, UK: University of Glamorgan, Centre for Criminology, 2003..3). The definition carries sufficient meaning, though with inadequate wording. Ali Wardak, quoting *Ghāyatul-Lughat* in another research endeavor states “word ‘jirga’ is also used in *Dari/Persian* language, originated from ‘*Jirg*’ that means ‘wrestling ring’”. (Wardak, Ali. "Building a post-war justice system in Afghanistan." *Crime, Law and Social Change* 41, no. 4 (2004): 326.). While referring to *Faiz-uz Zād*, some other Scholars say, “it carries the same meaning in Turkish Language” Hussain, Syed Irshad, Pervez Iqbal Cheema, and Maqsudul Hasan Nauri. "Conflict Management at the Grassroots in FATA." *Tigah: A Journal of Peace and Development, FATA Research Centre* 1, no. 1 (2012): 134. In view of some other scholars, “It is the board of elders who act as the members of *Jirga*”. (Taizi, Sherzaman. "Jirga system in tribal life." *Central* (2007): 5). James W. Spain, Notwithstanding, in simplest form calls it as assembly whose jurisdiction practically prevails on, public and Private, community interest and business. Abdul Qadir Mushtaq, Umer Yaqoob and Muhammad Usman Javaid, “Role of Jirga in Pakhtoon Society an Analysis with Special Reference to Justice Dispensation”, *JPUHS*, Vol.29, No.2, July - December, 2016: 14. This definition exceeds the authority of certain kinds of *Jirga*; for instance, *Marakah* and local *Jirga*, which only decide the confined matters in contention and does not intervene in business matters of people. A.Wardak defines it as, “*Jirga*, being local institution, decides and settles disputes that incorporates the customary law and rituals, having *Mashrān* (elders) who decide the issue altogether, having binding effect on its parties”. Wardak, Ali. "Building a post-war justice system in Afghanistan." *Crime, Law and Social Change* 41, no. 4 (2004): 326.). This definition is the most useful definition which pervades the vital parts of this concept.

2. Sultan Mohammad Sabir, *Loya Jirga*, (Lahore, Frontier Post Publications, 1994), 9
3. Asim Raza, “Why I believe the Jirga system should stay,” The Express Tribune, February 27, 2013... please visit for further details...<https://blogs.tribune.com.pk/story/16150/why-i-believe-that-the-jirga-system-should-stay> (accessed 19th Januray, 2019)
4. Wojkowska, Ewa. "Doing Justice: How informal justice systems can contribute." (2007). 12.
5. See for example: “United Kingdom, Policy division, Department for International development briefing, Non-state Justice and Security Systems, May 2004 ... <http://www.gsdr.org/docs/open/ssaj101.pdf>(accessed on Aug 28th, 2019). Similarly, OECD, DAC. "Handbook on Security System Reform: Supporting Security and Justice, Draft Edition." (2007). “Rule-of-Law Tools for Post-conflict states: mapping the justice sector”; “World Justice Project Website (2012)”, “Informal Justice”, Please visit for further details ...<http://worldjusticeproject.org/factors/informal-justice> . (accessed 20th January, 2019)
6. Sherzaman Taizi, *Jirga System in Tribal Life*, (Area study Centre, Russia; China; and Central Asia, 2007), 5.

7. The concept of Maraka has been discussed by numerous researchers. Ali Wardak, however, has investigated minutely, differentiating it with its other counterpart (Jirga) and shedding light thoroughly on numerous trajectories. See for more details: Wardak, Ali. *Jirga—A Traditional Mechanism of Conflict Resolution in Afghanistan*. Pontypridd, UK: University of Glamorgan, Centre for Criminology, 2003: 6
8. Anwer Roman, *Pushtunu ki Tarikh*, (Quetta, Goshai Adab, 1988), 138 (Translation of Pathan Borderland by James William Spain).
9. Spain, James W. "The Pathan Borderlands." *The Middle East Journal* (1961): 165-177.
10. Anwer Roman, *Pushtunu ki Tarikh*, 139-140.
11. The History of Jirga is normally written in Pushto books, however, a good collection can also be found in both English and Urdu languages, contributed by foreign and national writers respectively.
12. *Şālis* is Pushto version of Arabic word '*Thālith*' which is borrowed from Islamic Law and with the passage of time embedded in Pushto language.
13. Sultan Mohammad Sabir, *Loya Jirga*, p 9.
14. Rome, Sultan-I. "Administrative system of the Princely State of Swat." *Journal of the research society of Pakistan* 43, no. 2 (2006): 2-13.
15. Some Scholars have the opinion that *Jirga* used to take cognizance of crime by itself *but* civil and family matters were brought to it by the parties themselves.
16. Naveed Ahmad Shinwari, *Understanding Jirga: Legality and Legitimacy in Pakistan's Federally Administered Tribal Areas*, P.40... Please see for further details...
<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwjszaKu9-PbAhXMa1AKHYyfADMQFggwMAE&url=http%3A%2F%2Fcrossasia-repository.ub.uni-heidelberg.de%2F3124%2F1%2FUnderstanding-Jirga-07-2011.pdf&usg=AOvVaw2JwjP0OuOkpTKQSjif5Hsc>. (accessed on 24th Feb, 019)
17. Faqir, Khan, and Malik Amer Atta. "Jirga: A Conflict Resolution Institution in Pukhtoon Society." *Gomal University Journal of Research*, 29, no. 1 (2013).
18. Sherzaman Taizi, *Jirga System in Tribal Life*, (Area study Centre, Russia; China; and Central Asia, 2007), 5.
19. Hassan M. Yousufzai and Ali Gouhar, *Towards understanding Pukhton Jirga*, (Peshawar, Just Peace International, 2005), 20
20. Mohammad Anwer Lashkari, *Ulası Mataluna*, (Peshawar, Zeb Art Publisher, 2001), 55.
21. Guillaume Marcoux, A Centuries old Mechanism to resolve Conflict: Jirga, (Article Published on: February 2010)... http://www.irenees.net/bdf_fiche-defis-258_en.html (accessed on 21st June, 2018)
22. Niaz Mohammad and Javed Khan, Jirga in the Pakhtoon Society: Religious Foundations and Reasons of Acceptance, *PUTAJ Oriental Studies* 20, (2013), 2
23. Shinwari, Naveed Ahmad. "Understanding Jirga: Legality and Legitimacy in Pakistan's Federally Administered Tribal Areas." *CAMP*, 2011, 40
24. Yousufzai, Hassan M., and Ali Gohar. *Towards Understanding Pukhtoon Jirga: An Indigenous Way of Peacebuilding and More...* Just Peace International, 2005. , 21-22

25. Rome, S. I. "Pukhtu: The Pukhtun code of life." Swat, 2007. <https://www.valleyswat.net/literature/papers/Pukhto.pdf> (accessed on June 11th, 2007)
26. Bangash, Mumtaz A. "Jirga: Speedy Justice of Elders. What is Not Decided in the Jirga Will Never be decided by Bloodshed." *Khyber Gateway*. <http://www.khyber.org/culture/jirga/jirgas.shtml> (accessed June 11, 2007)
27. Asif Khan, *Pukhtoon*, [Internet]; available from ...<http://the-pukhtoon.blogspot.com/2011/08/history-of-pukhtoon.html> (accessed on August 6th, 2018)
28. It has been written by various historians that Pushtuns are descendants, grandsons of king Saul of Israel. They are also referred as the 'lost tribe' of Jews which lived from 7th to 20th Century in some parts of Afghanistan and Pakistan. As they were less in numbers, therefore, their problems were, too, simple unlike their present situation. The Editors of Encyclopedia of Britannica, Pashtun People. Please visit for further minute details... <https://www.britannica.com/topic/Pashtun>. (accessed on August 5th, 2018)
29. Mohammad Ashraf, "*The Virtual Jirga: The 2009 Education Policy and the Medium of Instruction Debate in Pakistan— Who is Participating and What Are the Implications for Baluchistan?*" Ph.D. dissertation, School of Education, College of Social Sciences, University of Glasgow, 2014. Please visit for further details <http://theses.gla.ac.uk/5769/1/2014AshrafPhD.pdf>. (accessed on August 7th, 2018).
30. Sherzaman Taizi, "Jirga System in Tribal life", *Area study Center (Russia, China and Central Asia)*, University of Peshawar, (April 2007), 5.
31. The details are traced back from ...https://www.cs.mcgill.ca/~rwest/wikispeedia/wpcd/wp/p/Pashtun_people.htm. (accessed on August 6th, 2018).
32. Wardak, Ali. *Jirga—A Traditional Mechanism of Conflict Resolution in Afghanistan*. (Pontypridd, UK: University of Glamorgan, Centre for Criminology, 2003), 3
33. Samandri, *History of Pashtun tribal settlement in Khyber Pakhtunkhwa Province*, [Internet]; available from ...<https://defence.pk/pdf/threads/history-of-pashtun-tribal-settlements-in-khyber-pakhtunkhwa-province.400009/> (accessed on August 5th, 2018)
34. Yousufzai, Hassan M., and Ali Gohar. *Towards Understanding Pukhtoon Jirga: An Indigenous Way of Peacebuilding and More...* Just Peace International, 2005, 01
35. Abid Suleri; Babar Shahbaz; Steve Commins and Irina Mosel, 9-10
36. Brig. Said Nazir, *The Dynamics of Conflict Resolution in FATA*, [Internet]; available from ...<http://frc.org.pk/wp-content/uploads/2013/07/3.pdf> (accessed on August 13th, 2018)
37. Danish Ahmad and Anwaar Mohyuddin, "Role of Malik in Pukhtoon Tribal Areas," *Journal of Studies in Social Sciences*, 5 (2013): 2, 248.
38. *Ibid*, 249-250
39. For example, Yousufzais had their own composition of Jirga, while Afridis, Marwats, Waziris, Mohmands, and Khattaks, on the other hand, had their own set-up.

40. ‘Ali bin Abu Bakr bin ‘Abdul Jalil Al-Farghāni al-Murghīnāni, Abul Hassan Burhan ud Din, *Al-Hidāya Fī Sharh Bidāyatul Muḥtadī Ma’a Sharḥ al-‘allāma ‘abd-al-ḥai al-Kanwi*, (Pakistan, ‘Idāra al-Qurān wa-al ‘Ulūm al-‘Islāmiyya, 1996), vol.5, 385. (Added year of publication)
Original text flows as under: "وهذا إذا كان المحكم بصفة الحاكم لأنه بمنزلة القاضي فيما بينهما فيشترط أهلية القضاء،"
القضاء،"
41. See for details Shams ud Din Mohammad bin ‘Abdullah al-Zarkashi al-Miṣri al Hanbali, *Sharḥ al Zarkashi*, (Saudi Arabia, Dārul ‘Abikān Riyād, ١٩٩٣), Vol. 7, 236.;
Abu bakr bin Mohammad bin ‘Abdul Momin bin Hariz bin Mo’allā al-Hussaini al-Hasni, Taqī ud din al-Shāfi’I, *Kifāyatul Akhyār Fī Halli Ghāyatil Ikhtisār*, 1st Edition. (Damascus, Dārul Khair, 1994), Vol. 1: 550.;
Abu al Walīd Mohammad bin Aḥmad bin Mohammad bin Ahmad bin Rush al-Qurtabi al-Undulusi al-Shahīr, *Bidāyat ul Muḥtadī wa Nihāyat ul Muqtasid*, 1st Edition (Lebanon, Dār Ibnī Hazam, 1999) ١:768. ; Mohammad bin Aḥmad bin Abi Sahl Shamsul Aīmā al-Sarakhsi, *Al-Mabsūt Lil Sarakhsi*, (Beirut, Dārul Ma’rifā, 1993), 15:71.
42. Abu al Hassan ‘Ali bin Mohammad bin Mohammad bin Habīb al Biṣri al Baghdādī (also known as Al-Māwardī), *Al-Ḥāwī al Kabīr Fī Fiqḥil Mazhab Imām Shāfi’I* which is *Sharḥ Mukhtasar ul Mazni*, 1st Edition., (Lebanon, Dārul Kutub al Ilmiyyah Beirut, 1999), 16:50.
- 43 Yousufzai, Hassan M., and Ali Gohar. *Towards Understanding Pukhtoon Jirga: An Indigenous Way of Peacebuilding and More...* Just Peace International, 2005., 54;
- 44 According to Imām Shaf’ī if a person in *Tahkīm* does not fulfil the criteria of becoming a *Qadī*, still he can administer the *Tahkeem*. See for the minute discussion of the issue...
Mohammad Bin ‘Abdullah bin Abi Bakr al Hasisi al-Šardafī al-Raimi, Jamal ud Din, *Al-Ma’āni al Badī’ah Fī Ma’rifati Ikhtilāfi Ahli-Sharī’ati*, (Lebanon, Dārul Kutub al-Ilmiyyah Beirut, 1999),. 2:454. The original text flows as under:
“عَنْدَ الشَّافِعِيِّ وَأَحْمَدُ وَمَالِكٌ يُجُوزُ وَمُحَمَّدُ بْنُ الْحَسَنِ يَشْتَرُطُ أَنْ يَكُونَ الْقَاضِي عَالِمًا، وَلَا يُجُوزُ أَنْ يَكُونَ عَامِيًّا، بِهِ قَالَ مِنَ الرَّيْدِيِّ الْقَاسِمِ.”
45. *Al-Mousū’atul Fiqhiyyatul Kuwaitiyyah*, 2nd Ed., (Kuwait, Dār ul Salāsīl, 2004), ١٠:241.
46. Aezaz ur Rehman and Neha gauhar, *Reforming The Jirga System: Sensitsaton on Fundamental Human Rights*, CAMP (Community Appraisal and Motivation Programme), 2013. Further details can be obtained from ...<http://www.camp.org.pk/wp-content/uploads/2016/03/Jirga-manual-final-Eng.pdf>. (accessed on August 24th , 2018).
47. Zain ud Din bin Ibrahim bin Mohammad alias Ibn Nujaim al-Misri, *Al-Bahr ur Rā-iq Sharḥ Kanz ud Daqā-iq*, 2nd Ed., (Lebanon, Dārul Kitāb al Islami Beirut), 7:24. The original text flows as: “...صَلَّاحِيَّتُهُ لِلْقَضَاءِ بِكَوْنِهِ أَهْلًا لِلشَّهَادَةِ...”
48. Jirga – the Pushtun Judicial System; For more detail ...<http://pashtunarchives.blogspot.com/2012/05/jirga-pashtun-judicial-system.html> (accessed on June 4th, 2018)
49. Yousufzai and Gouhar, *Towards understanding Pukhton Jirga*, 45

50. Fakhr-ul-Islam, Khan Faqir & Malik Amer Atta, "Jirga: a Conflict Resolution Institution in Pukhtoon Society", *Gomal University Journal of Research* 29 (June 2013) : 2
51. Abdul Qadir Mushtaq, Umer Yaqoob and Muhammad Usman Javaid, "Role of Jirga in Pakhtoon Society an Analysis with Special Reference to Justice Dispensation", *Journal of Punjab University Historical Society (JPUHS)*, Vol. 29, (July-December 2016): 13
52. It included elders from houses of both spouses or they would mutually declare a neutral *Sālis* (third person) who settle the dispute. This approach is recognized by the Holy Qurān.
53. It literally means to appoint or empower someone to decide. Technically it means the consensual reference of a dispute by disputants to a neutral for resolution. See for further details; Attaullah, Qazi, and Lutfullah Saqib. "Tracing the Concept of ADR In Shariah and Law." *Hamdard Islamicus*,. XXXIX, 2016, (3)7-51.
54. Māwardi, *Aḥkām ul Sultāniyyah*, (Dārul-Ḥadīs, Cairo) 1:119 ... The original text is as under;

”وَلَا تُخْلُو وَلَايَةُ الْقَاضِي مِنْ عُمُومٍ أَوْ خُصُوصٍ، فَإِنْ كَانَتْ وَلَايَتُهُ عَامَّةً مُطْلَقَةً التَّصَرُّفُ فِي جَمِيعِ مَا تَضَمَّنَتْهُ فَتُظَرِّفُ مُشْتَمِلَةً عَلَى عَشْرَةِ أَحْكَامٍ: أَخَذَهَا: فَصَّلَ فِي الْمُنَازَعَاتِ، وَقَطَعَ التَّشَاجُرَ وَالْخُصُومَاتِ، إِذَا صَلُحَا عَنْ تَرَاضٍ، وَبَرَأَى فِيهِ الْجَوَازُ، أَوْ إِجْبَارًا بِحُكْمٍ بَاتٍ يُعْتَبَرُ فِيهِ الْوُجُوبُ ..
55. *Gazetteer of the Peshawar District 1897-8*, Punjab Government, P168, Second Ed.
56. *The Civil Procedure Code, 1908*, Order V Rule 10, 10-A to 20.
57. Sālim bin ‘Abdullah al-Khalf, *Nazam Hukm-ul-Umawiyyīn wa Rusūmahum fil-Undulus*, 1st Edition. (Madina Munawwara, ‘Imādatul Bahath-ul-‘Ilmī Bil Jāmi’atul Islāmiyyah, 2003), 2:667. The original text goes as

"وقد كانت هناك رسوم متبعة في استدعاء الخصم إذا كان غير موجود، وتحديثنا المصادر عن أن قاضي الجماعة محمد بن بشير هو الذي ابتكر هذا الرسم في الأندلس، إذ أنه عندما تولى قضاء الجماعة، قام بنظم عشرة رقايع بخاتمه، وكل رقة من هذه الرقايع تعرف باسم "طابع" فإذا جاء أحد يريد من القاضي طابعاً ليستدعي به خصمه، فالقاضي يسأل عن هذا الخصم، فإن كان قريباً بقرطبة، أعطى المدعي الطابع، وأمر كاتبه أن يثبت في السجل لديه اسمه ومسكنه، وفي من أخذ الطابع، ومن ثم يخبره القاضي بأن عليه إعادة الطابع بمجرد حضور الخصم."
58. Mushtaq, Yaqoob and Javaid, "Role of Jirga in Pakhtoon Society an Analysis with Special Reference to Justice Dispensation" *JPUHS*, Vol.29, No.2, July - December, 2016
59. A Loya Jarga was held in Khyber Pakhtunkhwa, Bannu, where Bacha Khan, tribal chieftains and many other participated to make Pakhtunistan in 1947. Full article can be accessed on ... <https://cdn1.byjus.com/wp-content/uploads/2020/02/Khan-Abdul-Ghaffar-Khan.pdf> (accessed on: 05 April 5, 2021). The reference is also given in another article with same inference but there word 'Loya Jarga' is not used. Sufi, Juma Khan, "The Challenge of FATA and Security of Pakistan", *THE INSTITUTE OF STRATEGIC STUDIES ISLAMABAD, PAKISTAN*, No.1 2015.
60. These provinces include Badakhshān, Nuristān, Kunāf, Nangarhār, Paktiyā, Khost, Paktikā, Zābul, Kandahār, Helmand and Numroz.

61. Faqir, Khan, and Malik Amer Atta. "Jirga: A Conflict Resolution Institution in Pukhtoon Society." *Gomal University Journal of Research*, 29, no. 1 (2013). 5.
62. *Ibid*, 2.
63. Marcoux, "A Centuries Old Mechanism to resolve Conflict: Jirga." Please see for further details... http://www.irenees.net/bdf_fiche-defis-258_en.html (Accessed on: 21-June-2018)
64. Abū al-Mahāsīn ‘abdul-Wāhid bin Ismā’el al Rūyānī, *Bahr ul Mazhab (Fi Furū’i Mazhab al Shāfi’i)*, 1st Edition, (Beirut, Dār-ul-Kutub ul ‘Ilmiyyah, ۲۰۰۹), 11:66.
65. Muhammad Nawaz Khan, Kaleem Ullah Bariach and Faizullah Khan Panezai, "The Role of Jirga in Conflict Resolution," *Takatoo* 14, 6, (July-December 2014): 12.
66. Lujnatu Mukawwanatin Min ‘Iddati ‘Ulamā’in wa Fuqahā’in Fil Khilāfatil ‘Uthmāniyyah, *Majallatul Ahkām-el-‘Adliyyah*, (Beirut, Matba’a al-adabiyya, 1981), 264
67. Aftab Nabi and Dost Ali Baloch, "Early British efforts to curb *Karo Kāri* in colonial Sindh", *Pakistan Journal of Criminology*, Special Issue; Women’s Rights and Violence against Women, 2 (2010); 2.
68. Lashkari, *Ulasī Mataluna*, (Peshawar, Zeb Art Publisher, 2001), 66.... This book has further discussed other relevant proverbs on page 24. The gist can be pictured as, ‘*Pakhtūn* prefers to die over retracting from his word, since, staying on his word is considered as ‘*Pukhtū*’ (an unwritten code) for him’; the proverbs are worth citing hereinafter, "پښتون په پښتو مري او په حيا پائي", means, "*Pakhtūn dies for his Pukhtū*’..." Likewise, another proverb says, "if a *Pakhtūn* does not do *Pukhtū* he better be buried under the soil", "پښتون چه پښتو نه کړي نو زمکه دي پري ډکه شي".
69. Another proverb, being *Narkh* (uncodified custom), asserts, پښتون ځان بائيلى خو قام "نه بائيلى", meaning thereby, "A *Pakhtūn* Does not prioritize his life at the cost of his caste"
70. This legal maxim means that confession of the accused shall be used against him.
71. *Al-Mousū’atul Fiqhiyyatul Kuwaitiyyah*, 2nd Ed., (Kuwait, Dār ul Salāsīl, 2004), ۵:۵۸.
72. Shahāb ud din bin Ahmad bin Idrīs bin ‘Abdur Rahmān al-Mālīki alias Imām al-Qarāfi, *Al-Zakhīra*, 1st Ed. (Beirut, Dārul Gharb-ul-Islāmi, 1994), 9:275 (Corrected as Generality ----- Volume and page was written as 9:275)
73. Imām Abū Bakar Muhammad ibn Abī Sahal Sarakhsī, *Al-Mabsūt*, (Beirut, Dārul-Ma’rifā, 1993) 18:1۰۴,
74. The Pashto terminology in used at that time was, ‘*Talāq Achawal*’, which means, "If he lies his wife will be divorced of him". This concept has evolved, because the sanctity of wife and family is very high.
75. See for further details regarding the procedure of Jirga... Yousufzai and Gouhar, *Towards understanding Pukhtoon Jirga*, 20-21
76. Abdullah Ahmad bin Mohammad bin Qudāma, *Al-Mughni*, (Cairo, Maktabatul Qāhira, 1968), 10:133
- 77 Evidence and inquiry have primary value in *Jirga* procedure and, therefore, it does not give importance to other less important means of proving.

- 78 Further minute details can be traced from... 'Alāudin abu bakr bin Mas'ūd bin Aḥmad al-Kāsāni, *Badāi' ul-Sanāi' Fi Tartībi-Sharāi'*, (Beirut, Dārul Kutub-ul- 'ilmiyyah, 1986), 2nd Edition, vol.7, 6-7
79. [Jawad ur Rehman, The role of Jirga in conflict resolution, P.11-12; ...https://www.academia.edu/26454452/The_role_of_Jirga_in_conflict_resolution?auto=download](https://www.academia.edu/26454452/The_role_of_Jirga_in_conflict_resolution) (accessed on 26-4-2019)
80. 'Ali Ḥaidar Khwājām Amīn Afandī, *Durar-ul-Hukkām Fi Sharḥ Majallatil Ahkām*, 1st ed., (Beirut, Dārul Jail, 1991), 4:٢٩٨. The original text flows as under:
 "لَا تُسْمَعُ الدَّعَاوَى غَيْرُ الْعَائِدَةِ لِأَصْلِ الْوَقْفِ أَوْ لِلْعُمُومِ كَالَّذِينَ الْوَدِيعَةُ وَالْعَقَارُ الْمِلْكُ وَالْمِيرَاثُ وَالْمُقَاطَعَةُ فِي الْعَقَارَاتِ الْمَوْقُوفَةِ أَوْ التَّصَرُّفِ بِالْإِجَارَتَيْنِ وَالتَّوَلِيَةِ الْمَشْرُوطَةِ وَالْعَلَقَةِ بَعْدَ تَرْكِهَا خَمْسَ عَشْرَةَ سَنَةً... أَمَّا مُدَّةُ مُرُورِ الزَّمَنِ فِي الدَّعَاوَى الْآخَرَى كَالطَّلَاقِ وَالتَّكَاحِ... أَلَيْسَ لَمْ يُتَمَّعْ اسْتِمَاعُ الدَّعَاوَى فِيهَا بِمُرُورِ الزَّمَنِ... مُرُورِ زَمَنِ السَّنَتَيْنِ، فَحَسَبَ دَلِيلِ قَانُونِ الْأَرْضِ لَا تُسْمَعُ دَعْوَى التَّصَرُّفِ فِي الْأَرْضِ الْحَالِيَةِ وَالْمَحْلُولَةِ أَلَيْسَ فُوضَتْ مِنْ طَرَفِ الْحُكُومَةِ لِلْمُهَاجِرِينَ"
81. Loya Jirga da Tārikh, Haqūq, Qānūn auw Tolan-pohani pa Ranrā ki. Please see for further details ... <http://mobta.gov.af/ps/page/11030> (accessed on 28th February, 2019) Original text flows as under;
 اړبکیان هغه قومي سپایان دي، چې د جرگې په وخت کې د جرگې امنیت ساتي او د پرېکړو څارنه یې کوي. اړبکیان په هر قوم کې یو میرلري او هغه له قوم څخه تکره ځوانان له ځان سره منظموي او کله، چې اضطراري حالت پېښېږي او یا جرگه جوړېږي میرخل اړبکیان را غوري، وسله وال کوي یې او خپلې، خپلې دندې ورته ټاکي، دوی په قام کې ځانگړی مصونیت لري او څوک نه شي کولای، چې هغه ته زیان ورسوي. کوم وخت، چې اړبکیان په کار گومارل کېږي، د دوی اجراتو ته ټول قوم غاړه ږدي او مني یې
82. In the beginning it was called Qabāili *Lakh'kar*, however, after the early eighties of 19th century, the word *Khāsa-dār* has been constantly used.
83. Sa'ūd bin 'Abdul 'Āli, *Al-Mosu'atul Jinā'ieyyah al-Islāmiyyah al-Muqāranah*, 2nd ed., (Riyadh, 2006), 1:378.
84. Law and Justice Commission of Pakistan, *Consolidate statement showing pendency, institution and disposal of cases during the period 1-30th June, 2019 in the Supreme Court of Pakistan, Federal Shariat Court, High Courts and District Judiciary*; See for minute details ... ljcp.gov.pk › nljcp › assets › dist › news_pdf › courts (accessed on Aug 30th, 2019).
85. Declaring defiant of *Jirga* as *Kabarjan* means he is deprived of social security pledged by *Jirga*, eventually one might be killed in absence of his security.