Principles and Interpretations of Local Dispute Resolution body in Sharīʿah perspective

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Abstract:

This is the common practice in society to seek local system of justice other than Conventional court's system. People like to resolve their disputes through most reputes or juries of the society due to various reasons. They believe that conventional system requires more money and time than the previous method. It is experienced and people are aware of the current situation of these courts that some cases approach to fifty years and not yet resolved. Therefore, the wise people engross in local justice system, easy to access, simple to resolve and effortless to execute the decision.

Comprehensively, the process of seeking justice and to resolve the disputes through well-known, repute referees beside the conventional court system is called 'Taḥkīm' in Shariah terminology and refers as Jirga in Pakhtūn Society.

The present paper emphasis on highlighting the detailed comparison of Taḥkīm and Jirga coupled with bringing up the differences and similarities with respect to their modes and principles along with recommendations to bring the local system in full conformity of Shariah Standards.

Key Words: Taḥkīm, Pakhtūn Jirga, Sharīʿah, Dispute.

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Literal meaning of *Taḥkīm*

The meaning of ‘*Taḥkīm’* is written in the well-known Arabic dictionary “*Al Qāmūs al Muḥīṭ*[1]” as follow:

حَكَّمَهُ فِي الأَمْرِ تَحْكيماً: أَمَرَهُ أن يَحْكُمَ فاحْتَكَمَ[2]

It means to make someone decisive in a matter, that someone nominates a person for decision, and he abide by him in this regard. While in “*Mukhtār uṣ Ṣiḥāḥ*[3]” the literal meaning of ‘*Taḥkīm’* is written as “when someone gives authority to a person about his wealth and money[4]”

Conventional meaning of ‘*Taḥkīm*’

Imām ʿAlā al-Dīn Ḥaṣkafī [5] says it means:

تَولِيةالخَصمَينِ حَاكِمَا يَحكُمُ بينهما[6]

to make someone mediator to resolve the dispute occur among the groups and he follows this. The person who plays role to resolve the dispute is called ‘*Ḥakam* or *Muḥkim*’. The groups about whom the decision is taking place are called ‘*Muḥkam*’ and the controversial matter is called ‘*Maḥkūm Bihī*’[7]

Two other terminologies like ‘*Taḥkīm*’ are used as follow:

1.Qadhā

Literal meaning of Qadhā is decision or end as:

والفصل الْقَضَاءُ الْحُكْمُ وَاَصله القطع[8]

while conventional meaning of *Qadhā* is:

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1 *Al Qāmūs al Muḥīṭ* is an Arabic dictionary written by Fairoz Aabādī.it is published 8th time from Beirut, Lebanon in 2005.

2 al-Fayrūzābādī, Muḥammad b. Ya’qūb, *Al Qāmūs al Muḥīṭ*, 7th edition, Beirut, Lebanon, 2005, p.1095

3 *Mukhtār al-Ṣiḥāḥ* is an Arabic dictionary prepared by Zain ud Dīn, Abū ʿAbdullah, al Maktaba al-ʿathriyah al Dār al Namūdhjiya, Beirut, 5th edition,1995.

4 Zain ud Dīn, Abū ʿAbdullah, *Mukhtār al-Ṣiḥāḥ*, al Maktaba al-ʿathriyah al Dār al Namūdhjiya, Beirut, 5th edition, 1995, Vol.1, P.78

5 The real name of ʿAllama Ḥaṣkafī is Muḥammad bin ʿAlī. His title name is ʿAlā al-Dīn and he is well known by al Ḥaṣkafī. He was a great scholar of Ḥanfī jurisprudence. He has passed away at 10th Shawwāl 1088 A.H at the age of 63 years. (Ibn 'Abidin al-Shāmī, Radd al-Muhtār 'ala al-Durr al-Mukhtār, 2nd edition, 1992, Dār ul fikr, Beirut, Vol.1, p.15)

6 al Ḥaṣkafī, ʿAlā al-Dīn, al Durr ul Mukhtār Sharh Tanvīr ul Abṣār, Dar ul fikr, Beirut, 2nd edition, vol.5, p.428

7 Mujallat ul aḥkām al ʿAdliya, Committee made by several scholars and jurist in Othoman caliphate, Nūr Muḥammad Kār Khāna e Tijārat Karachi, p.365

8 al afrīqī, Ibn e Manẓūr, Lithān ul ʿarab, Beirut, Dar Ṣādir 3rd edition, 1414 A.H, Vol.15, p.186

هُوَمَنصَبُ الفَصلِ بَينَ النَاسِ فِی الخصومات[9]

That is, in the event of a dispute, the task of making decisions between the people is called Qadhā.

The difference between *Qadhā* and *Taḥkīm*:

Islamic jurists state the difference between *Qadhā* and *Taḥkīm* that the *Qadhī* or judge has public guardianship that he can decide about everyone. While the *Ḥakam* does not have this power. Thus, *Qadhā* (judge's decision) can be issued in all matters of *Sharīʿah*, like *Ḥudūd*, *Qiṣāṣ* etc., while the decision of the *Ḥakam* can be issued only in the rights of human beings. It means that the powers of the *Ḥakam* are limited, and the powers of the judge are general. Therefore, it has been written explaining the difference between *Taḥkīm* and *Qadhā*.

الْفَرْقُ بَيْنَهُ وَبَيْنَ الْقَضَاءِ: أَنَّ الْقَضَاءَ مِنَ الْوِلاَيَاتِ الْعَامَّةِ، وَالتَّحْكِيمُ تَوْلِيَةٌ خَاصَّةٌ مِنَ الْخَصْمَيْنِ، فَهُوَ فَرْعٌ من فُرُوعِ القضاء لكنه ادني درجة منه[10]

The difference between *Taḥkīm* and *Qadhā* is that *Qadhā* is from the public guardianship and *Taḥkīm* is a special entrustment from the parties, so it is a branch of *Qadhā* but less than *Qadhā* in rank.

2: *Ṣulaḥ*

Ṣulaḥ or reconciliation is described in the contemporary jurisprudential encyclopedia "Encyclopedia of Kuwait" in the following words:

الصُّلْحُ فِي اللُّغَةِ: اسْمٌ بِمَعْنَى الْمُصَالَحَةِ وَالتَّصَالُحِ، خِلاَفُ الْمُخَاصَمَةِ وَالتَّخَاصُمِ وَفِي الاِصْطِلاَحِ: مُعَاقَدَةٌ يَرْتَفِعُ بِهَا النِّزَاعُ بَيْنَ الْخُصُومِ، وَيُتَوَصَّل بِهَا إِلَى الْمُوَافَقَةِ بَيْنَ الْمُخْتَلِفِينَ وَالْمُصَالِحُ: هُوَ الْمُبَاشِرُ لِعَقْدِ الصُّلْحِ وَالْمُصَالَحُ عَنْهُ:هُوَ الشَّيْءُ الْمُتَنَازَعُ فِيهِ إِذَا قُطِعَ النِّزَاعُ فِيهِ بِالصُّلْحِ وَالْمُصَالَحُ عَلَيْهِ،أَوِالْمُصَالَحُ بِهِ:هُوَ بَدَل الصُّلْح[11]

Reconciliation on the contrary of conflicts applies to reconciliation in disputes and quarrels and the elimination of mischief -while the term of ‘Ṣulaḥ’ applies to eliminate the controversy and hostility between two groups and make them agree on a common point. The person who reconciles is called mediator while the controversial thing is called

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[9] ʿAli ʿAbdul Qādir, Al fiqh al-islāmī, al-qadhā w al-hisba, al-Moasisa al-Arbiya lildirasāt w al-nashr, 1986 A.D, 1ST Edition, vol.1, p.57

[10] Al Mausu'ah Al Fiqhiyah Al Kuwaitiyah, Wazārat ul awqaf w al-sha’ūn al islāmiyya alkwait, 2nd Edition, 1427A.H, Vol.33, P.283

[11] The above mentioned, Vol.27, p.323

‘*Muṣālaḥ ʿanhu*’ and the thing on which the mediation has don is called ‘Badl e Ṣulaḥ’.

The difference between *Ṣulaḥ* and *Taḥkīm*:

The difference between both is that in *Taḥkīm* no one gives up his right while in *Ṣulaḥ* both or one party gives up his right. Thus, *Taḥkīm* results in a decision of a judge, while in ‘*Ṣulaḥ*’, a decision is made with the consent of the disputing parties. Thus, the power to decide in *Taḥkīm* is vested in the arbitrator by the judge or both parties together, while in ‘*Ṣulaḥ*’ a person can reconcile by his own side between the parties. Thus, the following differences are described between *Taḥkīm* and *Ṣulaḥ*.

وَيَخْتَلِفُ التَّحْكِيمُ عَنِ الصُّلْحِ مِنْ وَجْهَيْنِ:أَحَدِهِمَا: أَنَّ التَّحْكِيمَ يُنْتَجُ عَنْهُ حُكْمٌ قَضَائِيٌّ، بِخِلاَفِ الصُّلْحِ فَإِنَّهُ يُنْتَجُ عَنْهُ عَقْدٌ يَتَرَاضَى عَلَيْهِ الطَّرَفَانِ الْمُتَنَازِعَانِ. وَفَرْقٌ بَيْنَ الْحُكْمِ الْقَضَائِيِّ وَالْعَقْدِ الرِّضَائِيِّ.وَالثَّانِي: أَنَّ الصُّلْحَ يَتَنَزَّل فِيهِ أَحَدُ الطَّرَفَيْنِ أَوْ كِلاَهُمَا عَنْ حَقٍّ، بِخِلاَفِ التَّحْكِيمِ فَلَيْسَ فِيهِ نُزُولٌ عَنْ حَق فَالإِصْلاَحُ وَالتَّحْكِيمُ يُفَضُّ بِهِمَا النِّزَاعُ، غَيْرَ أَنَّ الْحُكْمَ لاَ بُدَّ فِيهِ مِنْ تَوْلِيَةٍ مِنَ الْقَاضِي أَوِ الْخَصْمَيْنِ، وَالإِصْلاَحُ يَكُونُ الاِخْتِيَارُ فِيهِ مِنَ الطَّرَفَيْنِ أَوْ مِنْ مُتَبَرِّعٍ بِهِ[12]

There are two differences between *Taḥkīm* and *Ṣulaḥ*.

1. *Taḥkīm* results in a decision of a judge, while in ‘*Ṣulaḥ*’, a decision is made with the consent of the disputing parties and there is differences lie between the decision of a judge and agreed decision by parties.
2. in *Taḥkīm* no one gives up his right while in *Ṣulaḥ* both or one party gives up his right. Thus, dispute is resolved in both cases but the power to decide in *Taḥkīm* is vested in the arbitrator by the judge or both parties together, while in ‘*Ṣulaḥ*’ a person can reconcile by his own side between the parties.

The introduction of Pakhtūn ‘Jirgah’:

The ‘Jirgah’ is the process of resolving the issues and disputes of the parties by influential peoples through mutual dialogue without the recourse to any law[13]. Contemporary researchers write about the Jirga as follow:

> A Jirga is a group of experts and knowers who have the knowledge and power to make decisions and they are empowered by the parties, as if they make decisions for the nations and gather at the specified time to resolve the issue[14].

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[12] The above mentioned, vol.27, p.324

[13] Muḥammad Dilam Faiz Dad, Jirga: Tārīkh kay ‘Aainay main, Translated by Mūsā Khān, Idāra Istiḥkām e Pakistan, Lahore, p.16

[14] Shah Sawar Khan, Jirga, Danish Printing Press, Peshawar,1st Edition, March 2008, p.18

Comparison of *Taḥkīm* and *Jirga* meaning vise.

The following is a comparative study of the concepts of *Taḥkīm* and *Jirga* by the religious institutions. For this purpose, the concepts of both (*Taḥkīm* and *Jirga*) have been given and the common and miscellaneous issues have been pointed out by comparing them clause by clause.

Taḥkīm: It means to arbitrate a person or group of parties so that they can decide between them[15].

Jirga: It is the process of resolving the issues and disputes of the parties by influential peoples through mutual dialogue[16].

Result: In both the *Taḥkīm* and *Jirga* the decision is taken place by solving the issue among the disputing parties.

Taḥkīm: In *Taḥkīm* the disputing parties vest the decision power by nominating and fixing an arbitrator[17].

Jirga: Both parties vest the decision power by nominating the arbitrators[18].

Result: In both *Taḥkīm* and *Jirga* the parties vest the decision power by nominating the arbitrators.

Taḥkīm: The numbers of arbitrator in *Taḥkīm* may be more than one[19].

Jirga: Normaly the numbers of arbitrators are more than one[20].

Result: In both the numbers of arbitrators may be more than one however in *Jirga* normally the members of *Jirga* may be two or more while in *Taḥkīm* one arbitrator can also decide.

Taḥkīm: All members should be agreed on the decision in *Taḥkīm*. If any member disagrees the decision should not be considered right[21].

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15 Allama Khaskafi defined the Taḥkīm in al Durrul Mukhtār as: اَلتَحكِيمُ تَولية الخَصمَينِ حَاكِمَا يَحكُمُ بَينهم Taḥkīm means to be appointed a person by the disputing parties for judgement among them. al Durrul Mukhtār, vol.5, P.428

16 Muḥammad Dilam Faiz Dad, Jirga: Tārīkh kay ‘Aainay main, p.16

17 The above-mentioned reference

18 Muhammad Azam Afridi, Adam khai Afridi Tareekh ky aainy main, Hameedia Printing Press Peshawar, 1st Edition, Sep 1999, p.138

19 The two companion of the Holy Prophet PBUH named Abdu Rahman bin Samura and Abdullah bin Amir bin Kuraiz has played role of mediators among Hazrat Hasan and Moaiwia (R.A), Muḥammad ibn Ismā‘īl al-Bukhārī, Ṣaḥīḥ al-Bukharī, Dar Tauq al Nijat, Dimoscus, 1st edition, 1422 A.H,Vol.3, P.186

20 Jirga, p.18

21 It has been mentioned in the well-known book of Usūl e fiqh “Sharhu Majallat al aḥkām” that اذَا تَعَدَدَ المحَكِمُونَ يَلزمُ اِتِفَاقُ رَاءيِ كَلهم وَلَيسَ لِوَاحِدِ مِنهم اَن يَحكُمَ وَحدَه

Jirga: The members of *Jirga* also agree on the decision, if any person disagrees to the expected and planned decision the Jirga would be ended without any decision[22].

Result: In both *Taḥkīm* and *Jirga* all members should be agree on the decision.

Taḥkīm: The selection of members take place by mutual consents of the parties[23].

Jirga: The selection of members takes place by mutual consents of the parties however in *Jirga* sometime the members play the role of arbitrators themselves[24].

Result: In both *Taḥkīm* and *Jirga* the nomination of arbitrators take place by the mutual consents of both parties.

Identification of miscellaneous matters:

The general difference between the concepts of *Taḥkīm* and *Jirga* is that in *Taḥkīm* even one person can become an arbitrator while the number of members of *Jirga* is usually more than one. Thus, in arbitration, the arbitrators are selected after the approval of the parties, while in the jirga, the members of the *Jirga* often proceed to decide on their own, keeping in view the severity of the dispute.

Comparison of principles, terms, and conditions:

The following is a comparative study of the concepts of *Taḥkīm* and *Jirga* their principles, rules, and conditions by religious institution. For this purpose, the concepts of both (*Taḥkīm* and *Jirga*) have been given and the common and miscellaneous issues have been pointed out by comparing them clause by clause.

Taḥkīm: The parties to the dispute allow the arbitrator to resolve the issue. Without their consent, they are not bound to follow the decision of the arbitrators legally and Islamic perspective. This detail has been written by ʿAllama Kāsānī about the reconciliation of *Fadhūlī* as follow:

If the number of arbitrators is numerous, it requires an agreement of opinion among all of them, and it is not allowed for a person to decide alone. (Sharhu majallat al ahkam, Saleem Rustam Baz labnani, sourse 1844, p-1196)

22 Pakhtoon, Rabta, special edition 2012, p.10

23 It is written in the chapter of “Taḥkīm” of Majallat al aḥkām:

التَّحْكِيمُ هُوَ عِبَارَةٌ عَنْ اتِّخَاذِ الْخَصْمَيْنِ آخَرَ حَاكِمًا بِرِضَاهُمَا؛ لِفَصْلِ خُصُومَتِهِمَا وَدَعْوَاهُمَا

Taḥkīm means to make an arbitrator by two opponents parties with their approval; To decide among them in the light of their claims.

Mujallat ul aḥkām al ʿAdliya, Committee made by several scholars and jurist in Othoman caliphate, Nūr Muḥammad Kār Khāna e Tijārat Karachi, Vol.1, P.138

24 Muhammad Azam Afridi, Adam khai Afridi Tareekh ky aainy main, p.138

وأَمَّا الْفُضُولِيُّ فَإِنْ نَفَذَ صُلْحُهُ فَالْبَدَلُ عَلَيْهِ، وَلَا يَرْجِعُ بِهِ عَلَى الْمُدَّعَى عَلَيْهِ؛ لِأَنَّهُ مُتَبَرِّعٌ، وَإِنْ وَقَفَ صُلْحُهُ فَإِنْ رَدَّهُ الْمُدَّعَى عَلَيْهِ بَطَلَ، وَلَا شَيْءَ عَلَى وَاحِدٍ مِنْهُمَا، وَإِنْ أَجَازَهُ جَازَ، وَالْبَدَلُ عَلَيْهِ دُونَ الْفُضُولِيِّ[25]

That is, if the conciliation of the *Fadhūlī* is implemented, then it is also his responsibility to change it, and he will not return to the defendant because he is a benefactor and if his conciliation is suspended, then it will be seen that if the defendant rejects it, then the conciliation will be considered null and void and nothing is obligatory on him. And if the defendant justifies it, then it will be valid, and the substitute will be obligatory on the defendant not *Fadhūlī*.

Jirga: The selection of *Jirga* members is taken place by the consent of disputing parties, without their consent *Jirga* cannot conciliate among them[26].

Result: Members of the *Jirga* are elected by the parties to the dispute. Without their permission, the *Jirga* cannot decide between them.

Taḥkīm: According to *Sharīʿah*, the arbitrator must have the ability and power to decide[27].

Jirga: In the eyes of the parties, the members of the *Jirga* are considered opinion and vision experts[28].

Result: Generally, the members of the *Jirga* and the *Taḥkīm* are those who can make decisions.

Taḥkīm: The mediator's intent must be pure to resolve the issue[29].

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[25] 'Ala' al-Din al-Kasānī, Badā’iʿ al-Ṣanā’iʿ, Dar ul Kutub al-ilmiya, Beirut, 2nd edition, 1986A.D, Vol.6, p.54

[26] The above mentioned

[27] It is written in the well-known text of Ḥanafī jurisprudence al-Hidāya about the Hakam (Mediator) "لِأَنهُ بِمَنزِلَةِ القَاضِي فِيمَا بَينَهُمَا فَيَشتَرِطُ أَهلِيَةُ القَضَاء" That is, the arbitrator is the judge for the parties to the dispute, so it is necessary to have the ability of Qadhā. However, it is worth mentioning here this interesting jurisprudential debate: Imam Shafi'i, one of the four jurists, believes that if all the conditions for the position of Qadhā cannot be fulfilled in any of them, then it is also possible to get rid of them. While other three imam are on the view that, it is necessary to find the conditions of the judge in the arbitrator. (for detail: see Al Mausu'ah Al Fiqhiyah,Baḥath al Taḥkīm, p.237) (al-Hidāya fī sharh e Bidayat al-Mubtadī, ʿAlī bin Abī bakr al-Marghanānī, Abu al-Ḥasan, Burhān ud Dīn, Dar e ihya al-turath al-arab, Beirut, vol.3, P.108)

[28] Jirga,p 18

[29] Imām Rāḍī has explained under the verse:
وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِنْ أَهْلِهِ وَحَكَمًا مِنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا إِنَّ اللَّهَ كَانَ عَلِيمًا خَبِيرًا(النساء) وَالْمَعْنَى أَنَّهُ إِنْ كَانَتْ نِيَّةُ الْحَكَمَيْنِ إِصْلَاحَ ذَاتِ الْبَيْنِ يُوَفِّقِ اللَّهُ بَيْنَ الزَّوْجَيْنِ.

Jirga: The members of the Jirga also usually try to reconcile the parties with sincerity.

Result: In both the *Taḥkīm* and the *Jirga*, the members work with the intention of serving the people, which includes the concept of worship, so their intentions must be pure.

Taḥkīm: It is not necessary for mediators to have a white beard, but even young people can become judges if there is no other obstacle[30].

Jirga: The Members of *Jirgas* are usually honorable peoples of the society, who known in Pakhtūn society as ‘Meshrān’ (Akbarin) and ‘Spin Gari’ (white beard)[31].

Result: There is no age limit for decision making while the members of the jirga are usually older men. This, practice shows and is a proof that people don’t give value to the youngsters’ decision.

Taḥkīm: It is necessary to be wise, mature, sighted, and eloquent to decide[32].

Jirga: The members of the *Jirga* must have intellect, maturity, strength of sight and strength of speech[33].

Result. The above-mentioned features are agreed upon for *Taḥkīm* and the member of the *Jirga* that all these and especially the two features (speaking and seeing) have been declared necessary, because they are directly related to the solution of the problem.

If the intention of the arbitrators is pure and correct, then Allah Almighty will create harmony in the spouses as well. (al-Tafsīr ul Kabīr, Al Rāḍī, Dar e ihya al-turath al-Arab, Beirut, 3rd edition,1420, Vol.10, p.73)

30 For this reason, this incident of Islamic history narrated by Imām Sarakhsī can be presented as a testimony which he has mentioned in his famous book al-Mabsūṭ. Ḥadhrat ʿUmar (may Allah be pleased with him) called the judge of Syria who was young and asked him: What do you decide on? He said: On the Book of Allah. He said: If it is not found in the Book of Allah, he said: I will judge according to the decision of the Messenger of Allah (Peace and Blessings of Allah be upon him). This incident showed that a young man can be made a judge if he is a jurist. And when he can become a judge, he can become a mediator as well. (al-Sarakhsī, al-Mabsūṭ, Dār ul Maʿrifa, Beirut, 1993, vol.16, P.67)

31 Retrieved on 22.10.2015 at www.jirga.com Towards Understanding Jirga, Naveed Ahmad Shinwari, p.22

32 It is necessary for the arbitrator to have the conditions of a judge and for a judge, ʿAllāma Kasānī has stated the following conditions:

الصَّلَاحِيَّةُ لِلْقَضَاءِ لَهَا شَرَائِطُ مِنْهَاالْعَقْلُ وَمِنْهَا الْبُلُوغُ وَمِنْهَا الْإِسْلَامُ وَمِنْهَا الْحُرِّيَّةُ وَمِنْهَا الْبَصَرُ وَمِنْهَا النُّطْقُ وَمِنْهَا السَّلَامَةُ عَنْ حَدِّ الْقَذْفِ-

Wisdom, puberty, freedom, the power of vision, the power of eloquence, security from the limit of slander. (Badāʾiʿ al-Ṣanāʾiʿ, Kasānī, Vol.7, P.3)

33 Jirga, p.18-20

Taḥkīm: *Ḥukam* (arbitrator) neither of the parties can be a relative in whose favor his testimony is not accepted, such as father, son, spouse, etc.[34].

Jirga: The members of the jirga are usually not close relatives of the parties (such as father, son, etc.) but they are neutral.

Result: Ḥukam and members of the jirga have in common the attribute that they are not close relatives of the parties but are usually just arbitrators.

Taḥkīm: It is necessary for *Ḥukam* to be trustworthy, not penalized to slander (convicted of slandering anyone)[35].

Jirga: It is mandatory for the members of the jirga to have a respectable and unblemished character and not to be convicted by any court[36].

Result: It is necessary for both the *Ḥukam* and the member of the *Jirga* to be respectful and trustworthy.

Taḥkīm: *Sharīʿa* has allowed the representation of women in the *Taḥkīm*[37].

Jirga: Women are not given a chance to be representative generally in *Jirgas*[38].

Result: The difference between *Taḥkīm* and a *Jirga* is that according to sharīʿah, it is permissible for women to be *Ḥakam* and according to *Pakhtūn* traditions, women are not included in jirgas.

Taḥkīm: It is the responsibility of the arbitrator to treat the parties equally and to avoid leaning to one side so that the other party does not have any suspicion[39].

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[34] In the famous book of Ḥanafī jurisprudence, al-Hidāya, it is written that the '*Ḥakam*' decides in favour of his relatives:حُكمُ الحَاكِمِ لِاَبَويه وَزَوجَته وَوَلَدِه بَاطِلٌ وَالمولىٰ وَالحَكَمُ فِيه سَوَاءٌ the decision of the judge is invalid in favour of his parents, his wife and his children. The same will be applied for the owner and the arbitrator.

[35] Kasānī, Badāʾiʿ al-Ṣanāʾiʿ, vol.7, P.3

[36] Aadam Khail Afridi, Tareekh ky Aainy main, p.138

[37] The conditions of a judge are mandatory for an arbitrator. ʿAllama Kasānī writes in al-Badāʾiʿ al-Ṣanāʾiʿ about women's ability for judgement.

وَأَمَّا الذُّكُورَةُ فَلَيْسَتْ مِنْ شَرْطِ جَوَازِ التَّقْلِيدِ فِي الْجُمْلَةِ؛ لِأَنَّ الْمَرْأَةَ مِنْ أَهْلِ الشَّهَادَاتِ فِي الْجُمْلَةِ، إلَّا أَنَّهَا لَا تَقْضِي بِالْحُدُودِ وَالْقِصَاصِ؛ لِأَنَّهُ لَا شَهَادَةَ لَهَا فِي ذَلِكَ، وَأَهْلِيَّةُ الْقَضَاءِ تَدُورُ مَعَ أَهْلِيَّةِ الشَّهَادَةِ-

Being a man is not a condition for becoming a judge, because the ability for becoming a judge depends on the ability to testify and the woman can testify. However, due to their inability to testify in Ḥudūd and Qiṣāṣ, they cannot give a verdict in this field. (al-Badāʾiʿ al-Ṣanāʾiʿ, Vol.7, p.3

[38] Pakhtoon Rabita, p.21

Jirga: It is also considered important for the members of the jirga to treat the disputing parties equally so that justice is not lost.

Result: The parties are treated equally in both the *Taḥkīm* and the Jirga.

Taḥkīm: It is not rightful act in shariah perspective for *Ḥakam* to give advice to any one party, to show haste, to raise his voice more without any reason during the arbitration and to treat the parties with bitterness[40].

Jirga: It is mandatory for the members of the jirga not to explain arguments to any one party, nor to support or refute any one party while listening to the statements but they should listen to the parties with a smile and seriousness.

Result: In both the *Taḥkīm* and the Jirga, it is necessary to show good manners and seriousness with the parties and not to support any party in expressing their views.

Taḥkīm: There is no mention of having anything as a guarantee from the parties in the Shari'ah.

Jirga: The members of the jirga take the authority of decision from the parties as well as guarantee that the parties will not deviate from the decision[41].

Result: Bail is guaranteed by the parties in the jirga while no guarantee is given in *Taḥkīm*.

Taḥkīm: Making decisions by taking bribes for Hakam is considered the worst sin and even disbelief[42].

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[39] For justice between the parties, Haḍrat ʿUmar (RA) wrote in a letter to Haḍrat Abū Mūsā al-Ashʿarī (RA)

سَوِّ بَيْنَ النَّاسِ فِي مَجْلِسِكَ، وَوَجْهِكَ وَعَدْلِكَ، حَتَّى لَا يَطْمَعَ شَرِيفٌ فِي حَيْفِكَ، وَلَا يَيْأَسَ ضَعِيفٌ مِنْ عَدْلِكَ-

Use justice and equality among the people to get them sitting, to pay attention them and to do justice them, until the noble man does not expect injustice from you and the weak do not despair of your justice. (al-Jurjānī, Yaḥyā bin al Ḥusain, Tartīb ul ʿamalī al-khamīsa, 1st edition, 2001, Dar ul Kutub al-ilmiya, Beirut, vol.2, No.2628, p.326)

[40] Imām Sarakhsī (may Allah have mercy on him) has written in his book al-Mabsūṭ describing the etiquette of the one who decides:

لَا يَنْبَغِي لِلْقَاضِي فِي مَجْلِسِ الْقَضَاءِ أَنْ يَشْتَغِلَ بِالْمَشُورَةِ----لَا يُشَارُ أَحَدُ الْخَصْمَيْنِ؛ لِأَنَّ ذَلِكَ يَكْسِرُ قَلْبَ الْخَصْمِ الْآخَرِ وَيُلْحِقُ بِهِ تُهْمَةَ الْمَيْلِ مِنْ حَيْثُ إنَّ خَصْمَهُ يَظُنُّ أَنَّهُ فِيمَا يُشَارُ بِصَابِعِهِ عَلَى رِشْوَةٍ وَلِذَلِكَ لَا يُشَارُ غَيْرُ الْخَصْمَيْنِ فِي مَجْلِسِ الْقَضَاءِ-

It is not appropriate for a judge to consult a single party in the judiciary. Nor will he say anything to either of the parties in gestures- It breaks the heart of the other and can lead to accusations of bias on the part of the decision maker- Because the other party thinks that this act is a bribe, he should not say anything to anyone in the Judiciary except the parties. (al-Mabsūṭ, vol.16, p.66)

[41] Jirga p.21-22

Jirga: Taking bribe is an unforgivable crime for the members of the jirga. Such people are looked down upon and no one in the society respects them cordially and wholeheartedly.

Result: It is considered illegal to take bribes in both Takhim and Jirga.

Taḥkīm: The parties have chosen the Hakam to decide, so it is obligatory for them to accept the decision of the arbitrators[43].

Jirga: After giving authority, the decision of the jirga must be obeyed by both the parties and in case of refusal, such a person falls in the eyes of the people[44].

Result: In both cases, the parties are bound to accept the decision.

Taḥkīm: It is permissible for a Ḥakam to decide based on witnesses. If there is no witness, he can also decide based on oath. Thus, in response to a claim of one party, the party may decide based on mere confession of the opposing party[45].

Jirga: In the jirga, the person who denies the claim is sworn in. The members of the jirga give some time to think and consult before swearing such a denier. This happens when the complainant does not have witnesses or witnesses, but the other party accuses them of lying[46].

Result: Decisions are made based on confession, witnesses, and oath in both the *Taḥkīm* and Jirga.

Identification of different issues:

The following are different things in *Taḥkīm* and *Jirga*.

1. In *Taḥkīm*, young people can also become arbitrator, while the members of the jirga are usually older men.

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[42] Imam Tabarani writes quoting the words of Hazrat Abdullah bin Masood. الرِّشْوَةُ فِي الْحُكْمِ كُفْرٌ، وَهِيَ بَيْنَ النَّاسِ سُحْت. That is, taking a bribe in a decision is kufr, while taking a bribe for people under normal circumstances is a grave sin.

Al mujam ul kabeer abul qasim al tabrani,Maktaba ibn-e- taimiya,Alqahira,2nd edition,vol 9, p 226

[43] Imam Marghinānī has written about the decision of the Ḥakam

اِذَاحَكَّمَ لَزِمهما لِصُدُورِ حُكمهم عَن وِلَايَة عَلَيهما

The decision of the arbitrator is necessary for the parties to accept that it was authorized by the parties. (al-Hidāya, vol.3, P.108)

[44] Pakhtūn Rabita, p.11

[45] Imam Marghinānī writes about the decision of the arbitrator

وَيَجُوزُ اَن يَسمَعَ البَيِنة وَيَقضِى بِالنَكُولِ وَكَذَا بِالاِقرَارِ لِاَنه حُكمُ مُوَافِقٌ لِلشَرعِ.

It is permissible for the arbitrator to decide in all three cases: witnesses, denial of oath and confession. (Al-hidāya, vol.3, P.108)

[46] Jirga, p.36

2. In *Taḥkīm*, it is permissible for women to be *Ḥakam* according to sharīʿah while according to Pakhtūn traditions, women are not included in Jirgas.
3. Bail is guaranteed by the parties in the jirga while there is no concept of guarantee in the consolidation.

Results of the discussion:

The following results could be derived from the above comparison:

1. Pakhtun ‘jirga’ is a practical application of the religious term ‘Taḥkīm’.
2. In the meanings of both Pakhtūn ‘Jirga’ and the religious term ‘Taḥkīm’, two distinctive issues have been pointed out.
3. Pakhtūn ‘jirga’ and the religious term ‘Taḥkīm’ both agree except two issues.
4. In the principle of both Pakhtūn ‘jirga’ and religious term ‘Taḥkīm’, three distinctions have been pointed out.
5. In the principle of both Pakhtūn ‘Jirga’ and religious term ‘Taḥkīm’ agree except three issues.

Recommendations:

1. Although the religious term ‘*Taḥkīm*’ is practiced in Pakhtūn society, but unfamiliarity is also found in its principles and concepts. So Taḥkīm should be introduce by various means of education in Pakhtūn society.
2. The Pakhtūn Jirga should be refined and the rules and regulations of Taḥkīm should be applied on it.
3. The scholars (ʿUlamā) and educated people of the society should play role in this field and present easy and immediate means of justice in (Jirga) in effective manner.
4. Pakhtūn society should abide by shariah by eliminating discrimination between Taḥkīm and Jirga and chance should be given to women in solving some domestic problems.
5. Special care should be taken of the Shariah commandments in the bail held in the Jirga.