

## ***Jirga*: A Mechanism of Dispute Settlement among the Pakhtuns of Peshawar**

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### **Abstract:**

“Democracy is not alien to the Pukhtuns, as they are carrying on their typical and rudimentary form of government on democratic principles since times immemorial. A unique feature of tribal life is the *Jirga* system, a council or assembly of elders, which closely resembles the Athenian democracy of the City States of ancient Greece. The Pukhtuns practiced this participatory sort of democracy long before, Lock, Rousseau, and other eminent philosophers expounded their theories about democracy”.

**Keywords:** *Jirga*, Dispute settlement, Pakhtuns, tribal life, Daudzai, assembly of elders

It is also called ‘*Jarga*’, ‘*Jirgah*’, and ‘*Jargah*’<sup>1</sup>.

*Jirga* is the respected institution in Pukhtun society, and has been kept in esteem by Pukhtuns throughout their history. It is a conflict resolution institution which functions both horizontally and vertically in Pukhtun society.<sup>2</sup>

It is a ‘forum; council; council of elders;’<sup>3</sup>  
a ‘Parliament or National Assembly for Pukhtuns.’<sup>4</sup>

*Jirga* is the combination of two words ‘*jar*’ which means to say something openly and ‘*ga*’ means place.<sup>5</sup>

“It has legislative characteristics, plays diplomatic role, and enjoys many roles that have rarely been articulated”.<sup>6</sup>

*Jirga* is ‘a public assembly of elders’, which is participated by ‘respected persons and informal political leaders’ at micro level. It tries to resolve the issue through binding decision over the parties in a conflict/dispute. Cases are resolved through Islamic law and Pukhtun custom.<sup>7</sup>

Syed Fida Younas Defines *Jirga* as:

“The *Jirga* is an assembly of two or more persons to discuss and decide an issue which may range from a personal loan affair to a bloody inter-tribal feud. The size of a *Jirga* depends on the scope and importance of the issue. Qualifications of its members are social and religious status and proximity to the issue as well as confidence of the parties involved”.<sup>8</sup>

The political culture of Pukhtuns demonstrate three implications, “first, the existence of traditional political institution such as the *Jirga* shows...the institutionalized attempts to provide a legal or rather legitimate alternative as a substitute to written or formal law, respectively”. Second, *Jirga* is a democratic institution. Third,” it demonstrates an ideal of equality and autonomy that give priority to sameness. It reflects the highly valued importance of the ‘free man’ and highlights the *inter pares*, though a *primus* is certainly far from being absent as the heading in a relevant title strikingly implies: a somewhat hierarchical society with an ideal of egalitarianism”.<sup>9</sup>

*Jirga* ‘the council or assembly’ is the gathering of men or ‘group of members of a particular sub-tribe’ to discuss and resolve any issue, which is of ‘common interest’ to the community or any individual, and to produce a joint decision.<sup>10</sup>

All the participants in the *Jirga* process have equal status and right to speak.<sup>11</sup> There is no chairman or ‘presiding officer’ in *Jirga* proceedings. *Jirga* process continues until all the participants arrive at a ‘unanimous’ and ‘unopposed’ decision.<sup>12</sup>

*Jirga* is a forum where basic Pukhtun values of ‘courage’, ‘judgment’, ‘dependability’ and ‘morality’ are negotiated and ‘acted out’.<sup>13</sup>

*Jirga* is an assembly that deals with both public and private affairs of society. It resembles the ‘Athenian democracy’ in its process. It performs ‘judicial’, ‘executive’, and legislative functions at the community level and mostly arbitrates and conciliates between the parties in a conflict.<sup>14</sup>

*Jirga* is ‘the main legislative authority in the men’s public realm’. *Jirga*, which is ‘organized’ by Pukhtuns in a ‘village’ or any other level, is regarded as ‘the legislative authority in *Pukhtunwali*’.<sup>15</sup>

*Jirga* performs three functions in tribal areas i.e. regulation of everyday affairs in society; it provides a channel to communicate tribe’s decision to the government and that of the government to the concerned tribe; and the ‘official *Jirga*’ operating under FCR, to decide criminal and civil cases. It cares little for *Pukhtunwali*. Voting in *Jirga* process is very rare.<sup>16</sup>

From political point of view, a man who participates in *Jirga*, must have the ‘consent’ of the community which he represents. He is expected to present the views of the community *and* to ascertain them before presenting in the *Jirga*. Once *Jirga* reaches to the conclusion and presents a unanimous decision, then it is the responsibility of each member to implement that decision. The aim of the *Jirga* is to resolve the issue peacefully as ‘peace must prevail’ is the aim of any *Jirga*, not the determination of ‘right’ or ‘wrong’.<sup>17</sup>

“*Jirga* respects those decisions and judgments which are made unanimously, and not those which are based on some ‘transparent law and written theorems’. Equality is the true base of *Jirga*”.<sup>18</sup>

Spain elaborates its functions in the following words;

“In working out a proper settlement, the *Jirga* members take into account the requirements of *Pukhtunwali*, the circumstance in the particular situation, and the character of the individuals concerned. They are also guided by a generally accepted scale of monetary compensation which the injured party can honorably accept, if he so chooses, instead of retaliation in kind”.<sup>19</sup>

*Jirga* is the best example of ‘egalitarianism’ in Pukhtun society. All *Jirga* members have equal status and cases are resolved on unanimous decisions.<sup>20</sup>

In simplistic terms, *Jirga* can be described “as an indigenous institution for dispute resolution in the Pukhtun communities”. *Jirga* is the traditional institution for conflict resolution in *Pakhtospeaking* belt of Afghanistan and Pakistan. It is a model which enables Pukhtun society to function properly and resolve all issues between individuals’ and communities, acceptable to the concerned parties. It is a “strategic exchange between two or more people to address an issue through verbal communication”.<sup>21</sup>

Dr. Suba Chandran argues that;

“*Jirga* in Pukhtun society, culture, tradition and history has been a social institution from the beginning. Comprising elders, the *Jirgas* have been republican in nature and the primary institution of conflict resolution either between the families or tribes. From martial disputes to inter-tribal and intra-tribal problems, *Jirgas* have remained an effective institution to settle differences”.<sup>22</sup>

*Jirga* system 'is not limited to Pukhtuns'. Such traditional institutions have existed in other parts of the world as well. There are many examples of *Jirga* like institutions which performed the same functions. 'Agora' was a place in Greek City States where people used to gather for 'consultation'. Comitia was an 'advisory council' in Rome. The Aryan tribes who came to Afghanistan during 15000-1500 B.C. were practicing *Jirga* system having two councils '*simite* and *sabha*'. *Simite* (the summit) was mostly constituted of tribal elders and chiefs. *Sabha* was a 'rural council'. In Arabic the word '*Shura*' is used for *Jirga*, which was used by Arab tribes for consultation and meetings. *Majlis* is Persian word having the same meaning as *Jirga*, while in Hindi and Punjabi it is called *Panchayat* meaning group of five.<sup>23</sup>

### **Significance of *Jirga***

*Jirga* is an 'integral part of Pukhtun's identity'. It is a 'democratic decision making body' in tribal areas. It adopts a consensus based approach towards the resolution of a conflict. That is the reason, it enjoys 'widespread legitimacy' among Pukhtuns.<sup>24</sup>

Every body, even a *poor* 'considers himself equal' in *Jirga* process in the tribal areas. *Jirga* plays very effective role in the resolution of tribal dispute. It deals with all the social affairs, including war and peace in tribal areas. It performs judicial and executive functions in resolving a dispute. It usually deals with matters such as land distribution, 'blood feuds', 'blood money' and other 'inter-tribal affairs', applying 'conventions, traditions and principles of justice' and faire play. It renders judicial functions when it resolves a dispute and police function when it acts to stop any action which endangers peace and tranquility of a tribe.<sup>25</sup>

The significance of *Jirga* has also been accepted by the Taliban in Afghanistan. They gave importance to *Jirga* over Islamic courts, which they established for the resolution of conflict. In their statute '*Da Mujahideeno Askari Layha*' (Military Rules for Mujahideen) issued in August 2010. It is stated:

"Judicial disputes which are taken to Taliban by the local population for resolution should be addressed, first, to mediation by legal peace making *Jirga*. Only if a *Jirga* cannot come to a solution or if a *Jirga* cannot be held, dispute shall be taken to an Islamic court"<sup>26</sup>

*Jirga* dispenses a fast and cheap justice to the people at their door-step; while the judicial system of the government involves a lengthy, ineffective, costly and cumbersome process. Even people living in the settled areas, recourse to the traditional *Jirga* setup to resolve their disputes, whereas in tribal belt, it is the only method for the dispensation of justice. "The element of transparency is the hallmark of the process of *Jirga*".<sup>27</sup>

*Jirga* was controlling the whole social affairs when there was no state governance, departments and state machinery.<sup>28</sup>

Akbar S. Ahamd discusses the utility of *Jirga* in these words:

"In a society where there is not written or formal law, the importance of an assembly is critical in ordering society and preventing it from collapsing into anarchy. The *Jirga* regulates life through decisions ranging from the location of a mosque to the settling of conflict within sub-sections, to the largest issues such as regulating foreign relations with other tribes and even conveying decisions of the tribes to the government".<sup>29</sup>

*Jirga* plays an important role in conducting the relations of a tribe with other tribe/s or Political Agent. *Jirga (LoyaJirga)* also discusses with the government an issue which is of common interest for the whole Tribal Area. Each tribe sends its representative to *Loya Jirga* to represent that tribe and protect its interests.<sup>30</sup>

In the present era of modernization, *Jirga* is regarded as an ‘informal institution’ because there is no or ‘little documentation’ of its process, which is ‘delicate’, ‘flexible’ and hardly ‘understood by the outside world’.<sup>31</sup>

### **Context of *Jirga***

*Jirga* operates at ‘an inter-personal, inter-family, village and national level’. The most important thing for the operation of *Jirga* is ‘the framework or context’ in which it is constituted and functions, and that context for any *Jirga* is ‘the code of *Pukhtunwali*’ irrespective of its locality and area. It is impossible to understand *Jirga* and its dynamics ‘without understanding the forces that keep the institution alive’. *Pukhtunwali* provides ‘the fields’ for the application of *Jirga*;<sup>32</sup>

as “a common thread for all *Jirgas* is their operation within an environment of common understanding among the concerned community members”.<sup>33</sup>

*Jirga* decides cases according to the tenets of *Pukhtunwali*, the situation and the ‘character of the individual concerned’.<sup>34</sup>

Yousafzai and Ali Gohar argue that the perfect context for any *Jirga* is the code of *Pukhtunwali*:

“The *Jirga* works best within the context of *Pukhtunwali* as *Pukhtunwali* provides the set of rules, regulations, laws, ethos, and moral standards, justifying the theoretical framework of *Pukhtunwali*—a context for an indigenous, independent, traditional, collective, and communal group of people. It is the common culture, in which the meanings of issues related to social justice are located and identified”.<sup>35</sup>

*Jirga* functions in Pukhtun majority areas and is mostly ‘governed by the code of *Pukhtunwali*’. *Pukhtunwali* provides *Jirga* its ‘jurisdiction’ and ‘authority’. ‘*Jirga* is tied intrinsically to *Pukhtunwali*’.<sup>36</sup>

*Jirga* functions ‘within the context of *Pukhtunwali*, outside of which it could not function’. *Jirga* and *Pukhtunwali* are so deeply connected that one cannot even think about *Jirga* outside *Pukhtunwali*, as *Jirga* is ‘inherently influenced by *Pukhtunwali*’.<sup>37</sup>

‘To Pukhtuns, the context in which a specific *Jirga* operates gives a clear and undoubted understanding of the role and responsibilities of that particular *Jirga*’.<sup>38</sup> To Yousafzai and Ali Gohar:

“*Jirga* operates within a context. Outside of that context, *Jirga* would be impossible. The context of *Jirga* is based on shared understanding of history, values, traditions, culture, local environment and above all the Pashto language. These local practices are more popularly known as ‘*Pukhtunwali*’ the code of Pukhtun life”.<sup>39</sup>

### **Types of *Jirga***

The organization and structure of *Jirga* vary from region to region. There is no universal type of *Jirga* in Pukhtunbelt.<sup>40</sup> However, in settled areas where government system is working, ‘the process of *Jirga* and its credibility will vary’. Nonetheless, Pukhtuns are having full confidence in their traditional *Jirga* system.<sup>41</sup>

Ali Gohar and Hassan Yousafzai categorized *Jirga* into the following four types.

***Sarkari Jirga***: *Sarkari Jirga* is sponsored by the government. This *Jirga* functions in FATA and FR (Frontier Regions) under the FCR, where Political Agent or his assistant appoint elders for the arrangement of *Jirga* to trial both civil and criminal cases.<sup>42</sup>

***Ulasi Jirga***: It is comprised of the elders of each family in a particular tribe. It is called to discuss issues of *common* interests for the whole tribe such as property, irrigation water, or any other

‘common concern’. It decides the issue in one session or more as the *Jirga* deems fit. Its jurisdiction is much wider.<sup>43</sup>

It is mostly participated by *spingiri* (white beard), professional *Jirgamaar*, *Masharaan*, *Khans*, and religious leaders. Every participant has equal right to speak in the process.<sup>44</sup>

***Shakhsi Jirga***: This type of *Jirga* is constituted when there is a dispute between two individuals or families. Each party chooses its *Jirga* member or through mutual consent nominates ***neutral*** members. ‘Neutrality and balance’ are the essential elements for the dispensation of justice in *shakhsiJirga*.<sup>45</sup>

If any party refuses to accept the verdict of the *Jirga* then a *badraga* can be mobilized to implement the verdict.<sup>46</sup>

The *waak* (power of attorney) is received from both the parties; if the dispute in hand is complex and require ‘due judgment by the *Jirga*’, the *Jirga* asks both the parties to deposit *zamanat* (security) that would be confiscated if any party refuses to accept *Jirga* verdict. During the process, *Jirga* informs the parties only about the good side of *Jirga* proceedings.<sup>44</sup>

This aims to keep the parties optimistic about the ‘would be verdict’ of *Jirga*. While *Masharaan* try to find a ‘common ground’ to decide the issue acceptable to both the parties, they use various diplomatic tactics to encourage both the parties and create a sense of goodwill towards each other.

***Loya Jirga or Grand Assembly***: This type of *Jirga* functions at the highest level of community. It is functional in FATA and Afghanistan. In Afghanistan it is the ‘constitution making body’ and “supreme manifestation of the power and will of the people of Afghanistan”<sup>45</sup> Its organization includes representative from each administrative unit, major tribes in the country are also represented, women and minorities are given ‘special representation’. It discusses an issue which is of the ‘highest national interest’.<sup>44</sup>

Syed Fida Youas has put forward the need and significance of *Loya Jirga* in Afghanistan in these words:

“Barring a very few exceptions, having some reservations and differences of opinion, the Afghans, in general, are of the firm belief that the panacea for all of the ills of Afghanistan of today or tomorrow, and the resolution of its socio-political conflicts, lay in the convocation and decisions of the *Loya Jirga*, in whatever form or shape, with whatever name, *Jirga*, *Shura* or *Majlis*, and whatever it is held, either inside or outside the country. But that the preference, however, would be that of the age-old traditions of Afghanistan, the name of *Loya Jirga* or *Jirga* preserved and, the venue, as always, kept inside the country, and all the nationalities and regions represented therein”<sup>45</sup>

In FATA, *Loya Jirga* is constituted at agency level in order to discuss an issue with the adjoining ***agency***. Similarly, a *Loya Jirga* of all the agencies is constituted to take up an issue, which is important for the tribes, with the government. Community and mid-level *Jirga* choose their representatives for *loya Jirga* in FATA.<sup>46</sup>

***Maraka***: It is a ‘kind of *Jirga*’ in Afghanistan, where the parties themselves agree to refer the dispute for settlement. ‘*Maraka* is done only with the consent of the parties, initiated by the parties themselves, and only at the preliminary stage of conflict’.<sup>47</sup>

In Daudzai, the term *maraka* is used by the people simultaneously with *Jirga* as ‘*Jirga-maraka*’. *Jirga* system operating in Daudzai resembles the *maraka* system for conflict resolution.<sup>48</sup>

The conflicting parties often make a recourse to *Masharaan* to pacify the tension between them and decide the issue. Its use is very common among Daudzai *Pukhtuns* in murder cases. As in the case of MU K v/sRz K and I K v/s Iz.<sup>49</sup>

In both cases murder was involved. But a year or so, both the parties tried to persuade each other in order to resolve the issue.<sup>50</sup>

In this kind of situation, the professional *Jirgamaar* are very active because they receive a handsome amount of money from one party (who has committed the murder) for persuading the other party to come to terms and try to resolve the dispute.

In both the mentioned cases, the party who has committed the murder is ready to pay 'diyaa' (blood money) to the heirs of the murdered.

### ***Jirga* Leadership (*Masharaan*)**

The success of *Jirga* largely depends on its leadership (*Masharaan*). If leadership is competent and well versed in 'the context' of *Jirga* and having respect and confidence of the community, then *Jirga* can proceed successfully. But if *Jirga* is constituted by 'wrong kind of persons' then its failure is certain.<sup>51</sup>

The word '*Mashar*' in Pukhtun society 'can denote both a person who is older in age and a person whose prestige is based on social position like leadership, experience of life, knowledge etc.'<sup>52</sup>

There is no specific criterion for the selection of *Jirga* members. In some tribes every adult can participate in *Jirga*, while in others there are certain qualities which are necessary for *Jirga* members.<sup>53</sup>

The *Masharaan* are selected according to the issue in hand. The universal practice among Pukhtuns is that *Jirga* is participated by elders, *ulema* (religious scholars), and people of influence. Common people do not participate in *Jirga*.<sup>54</sup>

If *Jirga* is participated by common people then the effectiveness of *Jirga* will be severely affected. Implementing *Jirga*'s decision in many cases is not effective.

Yousafzai and Ali Gohar mention two categories of *Jirga* leadership; one consisting of 'the professional people', who are considered as the self imposed community leaders e.g. *maliks*, *khans*. The other consisting of the people, who have 'influence in the community'.<sup>55</sup>

Akbar Ahmad has presented three categories of leadership in Pukhtun society; one 'traditional leaders (usually elders), second, 'official representatives of the established state authority' and the third category consists of 'religious functionaries'.<sup>56</sup>

Lutz Rzehak has divided *masharaan* into two categories; one is consisted of *Khans* and *Maliks* and the other is of *Spingiri* (grey bearded). The status of *Khan* and *Malik* is hereditary. Their status and influence is determined by the land and property which they hold and economic strength they have. The *Khan* or *Malik* should also have personal traits of leadership. The *Spingiri*, also called wise men have all the skills and knowledge necessary for leadership. *Spingiri* are well versed in *Pukhtunwali* due to their life long experience. They are also called *narkhi*.<sup>57</sup>

*Masharaan*, who participate in *Jirga*, must follow the tenets of *Pukhtunwali* according to the ideals. In the settled areas (*qalang*) *masharan* 'belong to the landowning elite' and are having influence and honour in society for implementing *Jirga*'s decisions.<sup>58</sup>

Leadership is not an easy task. It should have certain qualities of personal character and knowledge of the Pukhtun culture. A *Jirga* leader should have deep knowledge of *Pukhtunwali* and its different elements. A '*Jirgamaar*' should be loyal to, and abide by the code of *Pukhtunwali*. *Jirgamaar* should also be able to manage and control the situation, can use his

‘rhetoric’ and other personal qualities; such as his understanding of Pukhtun culture, idioms and stories. A *Jirgamar* should also have the ability to analyze and understand the conflict ‘within the context of *Pukhtunwali*’. He should have a ‘strong belief in peace’. A *Jirga* member should have the required ‘aptitude’ to analyze the conflict in a particular situation and present feasible strategy for solution.<sup>59</sup>

‘The peace building characteristics of *Jirga* are frequently associated with religion’. Masharaan, mostly aalimaan (religious scholars) use religious teachings for making peace between the parties,<sup>60</sup>

as they are well versed both in religious teachings and culture.<sup>61</sup>

In *Jirga* a good and competent leader (*mashar*) is one who has the ability to resolve the conflict between the parties through his intellectual skills, and do not let the situation to get worsened.<sup>62</sup>

In Daudzai a good *mashar* is one who has the respect and honour of the community. Ulema (religious scholars) are considered more capable *Masharan* for conducting *Jirga*, because they are considered as respected figures in society and their decisions carry great weight. Even people, who dislike ulema or having political differences with them, often ask them to conduct *Jirga* for them to resolve their disputes.<sup>63</sup>

Now, some other categories of leadership have emerged in Daudzai. One category is of political activists such as *Nazims* or other potential candidates who are playing to contest elections. This category involves itself in *Jirga* process in order to attract voters and present themselves as good leaders and well-wishers of the community. The other category consists of professional *Jirgamaar* (one who conducts *Jirga*). This category uses their status for earning money. They often mediate between the conflicting parties to resolve their dispute applying the code of *Pukhtunwali*. Yet another category consists of traditional elders. They have respect in society and are mostly *Khans*. They conduct *Jirga* and implement *Jirga*’s decisions through their material status and non-material qualities.

Most of the *Jirgas* organized in Daudzai so far had one, two or all of these categories of leadership, representing one party or the other to resolve the dispute. It has been observed that whenever a *Jirga* is conducted without the inclusion of traditional *Mashaaran* and ulema, it can not proceed successfully. ‘Being a Muslim-Being a Pukhtun’ is applied in *Jirgas*, conducted in Daudzai. Pukhtuns living in Daudzai have a soft corner and inclination towards religion and its traditions. *Jirga* conducted by ulema and traditional leaders has been mostly a success story because of arriving at unanimous decisions within a short span of time as compared to the *Jirga* conducted by other categories.

### **Decision Making in *Jirga***

There are two types of decisions in *Jirga*: one is *Haq* or right and other is *Waak* or authority. In the *Haq* cases, the parties involved in the dispute have the right to challenge the decision of *Jirga*, if they feel that the decision is unjust. They argue with the elders of *Jirga* and present other custom/*narkh/dastur* to plead their case. To address the objections of the party/s another *Jirga* is called to re-examine the issue. In this case, the decision of the *Jirga* would be final and binding on the party/s.<sup>64</sup>

In case of *waak*, the concerned parties give full authority to the *Jirga*. They have to abide by its decision and cannot challenge the decision. However, in most of the cases *Jirga* “seeks to receive approval of the parties” before announcing its decision.<sup>65</sup>

In Daudzai, most of the *Jirga* decisions are based on *waak* or authority, *haq* is rarely applied. In case of *haq*, it only delays the process of *Jirga*. *Masharaan* re-consult the parties in order to bring conciliation and finalize the verdict. Yousafzai and Ali Gohar observe:

“One ingrained technique that *Jirga* members use, is to pay special attention to the narratives that parties give during proceedings/hearings. The narratives explain their position and assumption regarding the issues and help the *Jirga* understand the context of the conflict”.<sup>66</sup>

*Jirga* is a ‘peace making institution’ in Pukhtun society. Unlike the Judicial Courts; it decides cases on the basis of compromise between the conflicting parties. The main objective of *Jirga* is to ‘re-establish’ the relations between the conflicting parties in conflict as they were before the conflict whereas the court decisions may punish the culprits but do not put an end to the enmity.<sup>67</sup>

### ***Jirga* Operation**

*Jirga* is usually conducted in a *hujra* or any other place selected by *Masharaan*. *Jirga* is mostly participated by male members of the society, because women do not intervene in the domain of men, as *Jirga* is considered as an exclusive masculine affair.<sup>68</sup>

Due to the male dominated society, Pukhtun women do not participate in *Jirga*. But Bushra Goahar (a well known social worker and politician) claims that in the past women participated in *Jirga* process.<sup>69</sup>

Usually, the *Jirga* is comprised of *masharaan* or *spingiri*.<sup>70</sup>

In Daudzai *Jirga* is comprised of those *masharaan*, who are nominated by the parties to the dispute. There is usually a third party as well facilitating the *Jirga* process. The facilitator is an influential person, usually a Khan, Nazim, a respected personality or a political figure.

There is no presiding officer or president in the hierarchy of *Jirga*.<sup>71</sup>

as all are equal members and enjoy equal rights to speak in the *Jirga* but a person is designated as spokesman. Elders are given some respect and are regarded as ‘*primus inter pares*’ (due to their age). *Masharaan*, due to their status, have to ensure that all parties are given proper representation in *Jirga* process. *Masharan* ponder over the issue from various angles. The process of deliberation and consultation continues till the issue is resolved and all the parties are made to agree to the verdict of *Jirga*. All the parties involved are heard and the issue is thoroughly investigated before the final verdict.<sup>72</sup>

Decisions are made unanimously and in accordance with ‘the sense of the meeting’,<sup>73</sup> not like western democracy on majority basis.<sup>74</sup>

There is no voting in deciding a case by the *Jirga*.<sup>75</sup>

Spain puts it thus:

“The *Jirga* hears and examines the parties to discover the facts of the dispute. Following a thorough discussion with the parties, the *Jirga* members analyze the dispute, keeping in mind the traditional, religious, socio-economic, and geo-political circumstances. After probing the matter thoroughly, the *Jirga* makes every feasible effort to find an unbiased and adequate solution of the problem. The *Jirga*’s pronouncement is usually based on local traditions and/or *shariat*”.<sup>85</sup>

When a dispute is resolved by the *Jirga*; *masharaan* and all parties (involved in the dispute) agree to the *Jirga*’s verdict. Then its verdict is transformed into a written shape on a stamped paper which bears the signatures of the disputants as well as the *masharan*. It is also called ‘*Razinama*’ in Pakhtolanguage. If a dispute involves any legal process e.g. if there is any

FIR registered with the police, then to legalize Jirga's verdict, masharaan hand over the concern parties to the police to fulfill the legal requirements. The parties, along with the masharaan are presented before judicial courts along with the written agreement (Razinama) to facilitate the court to finalize the case.

In Daudzai, most of the Jirga decisions are based on waak or authority. Haq is rarely applied. In case of haq, the process of Jirga is only delayed, the masharaan re-consult the parties in order to bring conciliation and finalize the verdict. Before announcing the final verdict in public, masharaan take waak from the parties when they think that both parties have been reconciled and agreed to the decision arrived in Jirga. When the Jirga announce its verdict then no party can challenge it. It must be obeyed; otherwise they will have to face harsh consequences in case of non compliance. Decisions are usually made when Okayed by all the parties involved. The masharsan make proper arrangement to announce Jirga's verdict. People from different villages are gathered in a hujra or mosque for the occasion, as decided by masharsan. One of the mashars, usually an aalim (religious scholar) before the announcement of the final verdict, gives a short khtuba (sermon) in order to persuade the conflicting parties and create a sense of goodwill among them. A few verses are recited from the Holy Quraan, which fit the context and the occasion. After khtuba (sermon/speech) the verdict is announced. This is usually written on the stamped paper and bears the signatures of both the parties and masharaan of Jirga. Both the parties are made to embrace each other and are advised to refrain from indulging in conflict in future. Tea or cooked rice is served to the people gathered, as nanawati, usually by one of the conflicting parties.

### ***Jirga Process***

*Jirga* starts its process as soon as masharaan are nominated by the concerned parties. *Jirga* is constituted when;

One of the parties approaches the *Jirga*;

The *Jirga* intervenes between the parties or,

The *Jirga* is convened on the mutual consent of the disputants;

The *Jirga* process is very simple. 'It interviews' and investigates the disputant parties. Witnesses are called and investigated to collect all relevant information regarding the dispute. After thorough and exhaustive deliberations, the *Jirga* members try to decide the issue in an impartial manner and present the kind of solution acceptable to all the parties. The *Jirga* interferes in family disputes only when any one of the parties requests *Jirga* to resolve the dispute. But when there is a 'grave issue then *Jirga* intervenes on its own to stop the 'would be' bloodshed and try to resolve the issue between the parties.<sup>86</sup>

*Jirga* process (in FATA) continues for a few days. If the conflict is serious, and then the process may extend depending upon the parties involved and "complexity of the conflict"<sup>78</sup>. *Jirga* tries to resolve the issue in the minimum possible time.<sup>87</sup> All the parties in *Jirga* are at liberty to present their viewpoints regarding the issue freely and give suggestion to resolve the issue. This has been endorsed by 'The Official Report on the Administration on the Border of NWFP for the year 1938-39'. The report says that *Jirga*'s decisions are based on unanimity of all the stakeholders as is evident from the following excerpt of the report:

"...each tribe has a tribal '*Jirga*', or representative body of persons with an acknowledged position in the tribe... where everyman considers himself a member of the tribal *Jirgah* and where the political officer's task is not completed until he has convinced the last man of *Jirgah* numbering anything up to three thousand... in Waziristan.... Almost every head of a household

considers himself a member of the tribal *Jirgah* and has no intention of obeying the *Jirgah's* decision unless he happens to agree with it".<sup>88</sup>

*Jirga* process in Daudzai region does not finish in one sitting. It may continue for weeks and months, until the *masharaan* bring unanimous decision and parties involved are satisfied with the solution proposed. The sitting/meeting of *Jirga* is called by the concerned *masharaan* as they deem fit, the place and time for *Jirga* process. The parties are consulted and enquired when necessary. All developments of the *Jirga* process and the possible decisions and outcomes are conveyed to the concerned parties by the *masharaan* in order to facilitate *Jirga* process. If parties disagree to the solution, *masharaan* look to other alternatives. This process of consultation and re-consultation continues until the issue is resolved and *masharaan* reach to a final conclusion.

### **Implementation of *Jirga* Decisions**

'Implementation of a decision is crucial to the credibility of *Jirga*.'<sup>89</sup> Implementation of *Jirga* decision is based on the custom and tradition of each tribe which varies from region to region. If a party does not accept or abide by *Jirga* decision, then the concerned *Jirga* decides the punishment to be applied.<sup>90</sup> In FATA, each region and tribe has a specific method for implementing *Jirga's* decision. In Waziristan, the 'Salwekhtee 40', in Khyber Agency 'The Lakhkar' and 'Rapakian' in Kurram Agency, are the tools for implementing *Jirga* decision and giving punishment to the party which refuses to accept *Jirga* decision. The popular punishments which are given include: 'ex-communication of the non-compliance party', 'heavy fine', and 'confiscation of the rifles', kept as security (*zamanat*) and the most severe is the burning of the house/s' by *Jirga*.<sup>91</sup> 'Acceptance of a *Jirga* decision is a question of honour' for Pukhtuns.<sup>92</sup>

Implementing the decisions of *Jirga* involves its 'credibility'. Any party which refuses to accept the decision and thus 'rejects the collective wisdom, takes a grave risk'. *Jirga* can impose its decision through various means according to the 'narkh' which differs from area to area. The implementation of *Jirga* decision is exclusive and contextual in nature. Its practice is different in different regions.

There are three categories of *Jirga* leadership in Daudzai. One category includes Aalimaan (religious scholars) and spingirimasharaan (grey beard elders). Second, Nazims, Khans and other influential people. Third category includes professional *Jirgamaar* (who take money from one or both parties for arranging and conducting *Jirga*). The criterion for implementing *Jirga* decisions is identical in all these categories. Waak (power of attorney) and *zamanat* (security, which includes six to eight kalashnikov (AK-47), cash money or both) is taken from both the parties. In category one and two of the mentioned *Jirga* leadership, if the concerned parties do not agree to *Jirga's* decision or *Jirga's* decision is not acceptable to any of the parties before the final announcement; then *zamanat* is returned to both the parties (*Jirga* *wapas kedal* or *zamanatona* *wapas kedal*). In the third category, *masharaan* withhold some part of *zamanat* as *bejabi* (renounce one's promise). *Zamanat* is taken by *Jirgamasharaan* (*zamanat* *zabat kedal*) when *Jirga* announces its decision and any of the parties refuses to accept the decision (*da jargi faisala*).

Functions of *Jirga* performs various functions at different levels of Pukhtun society to fulfill different purposes and objectives. This dynamism might create certain complexities for other people, but Pukhtuns are well aware of these complexities and having 'a common understanding' about these.<sup>93</sup> The basic aim for which *Jirga* is constituted is: 'To conciliate the opposing and inimical parties, to cool down tempers, to strive for amity, to effect settlement, to mediate between parties, to bring normalcy in cases of tension and disputes'.<sup>94</sup>

Besides performing ‘judicial’ and ‘police’ functions, Jirga aims not only to ‘determine guilt or inflict punishment’, but to resolve the issue between the parties and restore normal relations between them. Both the parties are treated as equal by the *Jirga*.<sup>95</sup>

**Local terms used for *Jirga*<sup>96</sup>**

| Terms used for <i>Jirga</i>       | Meaning   |
|-----------------------------------|---|
| <i>Jirga Kawal</i>                | Doing a <i>Jirga</i> or let’s sit to talk   |
| <i>Pa Jirga tlal</i>              | Going by the <i>Jirga</i> , or doing an intervention  |
| <i>Jirgay ta Khabara Warkawal</i> | Referring a case to <i>Jirga</i> by parties or one of the parties                               |
| <i>The Jirgay Khabara</i>         | The word of <i>Jirga</i> , opinion of <i>Jirga</i>  |
| <i>Jirga manz ta Ratlal</i>       | Intervention by a <i>Jirga</i> , i.e., ceasefire or <i>Jirga</i> ’s interruption in the matter. |

*Jirga*  
decides  
cases  
according  
to  
local  
traditions

itions<sup>97</sup>, *Shariat*, and the principles of justice and fairplay’. *Masharaan* take oath from the parties in serious cases and ‘ask a party to clear itself from the charge’ leveled by the other party. This decides the case once and for all as ‘religion is an extremely strong force’ among Pukhtuns.<sup>98</sup>

**Modern and Traditional Institutions: How to reconcile them?**

In modern era of globalization, many traditional institutions have been challenged. “How we should treat these old traditional institutions is an issue of great concern. What would happen if the forces of modernization try to “change the traditional pattern of society”. Ali Gohar asserts that there must be a way for the modern scientific and better ‘codified system to “benefit from and collaborate with the traditional systems to bring forward the synergies of two different sets of understandings”.<sup>99</sup>

Forces of globalization and democracy have brought new changes in the social structure which have transformed the ‘traditional pattern of society’ into a modern democratic system, and many people have left their old culture and adopted the modern practices of better life. But nobody ponders over that how the ancient traditions and practices can be transform into the modern systems.<sup>100</sup>

*Jirga*, the traditional institution of Pukhtuns has lost its significance according to the present ‘standards of governance’. But, many people still keep it in high esteem.

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54. *Jirga* system is mostly based on 'waak maraka' system of Afghanistan, in which *Masharan* 'investigate, discuss, and decide the case in the absence of disputant parties'. (Wardak, *Jirga – A Traditional Mechanism for Conflict Resolution in Afghanistan*, p. 9)
55. See chapter 5 for details
56. Cases resolved through *Jirga* are discussed in the next chapter
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67. This is the occasion where *Ulema* dominate the *Jirga* process, because of their understanding of both religious teachings and traditional norms of *Pukhtun* (being insides).
68. Yousafzai & Ali Gohar (2004), p.61
69. Oberson (2002), p. 49
70. Mostly, inter vis-à-vis intra-family disputes over the distribution of property.
71. Yousafzai & Ali Gohar (2004), p.21
72. Ibid.
73. Ibid. p. 50
74. Rzehak (2011), p.20
75. In present *Loyal Jirga* of Afghanistan, women have been given representation. But the context in which *Loyal Jirga* is operated is quite different from other *Jirgas* which operate at local and community level.
76. Yousafzai & Ali Gohar (2004), p. 29
77. Ibid. p.20
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97. Local traditions are called *Narkh, Dastur, and Riway*.
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