

Dispute Resolution Councils in Khyber Pakhtunkhwa: The Personification of Jirgas

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ABSTRACT

The establishment of Dispute Resolution Councils (DRCs) is a unique initiative undertaken by the Khyber Pakhtunkhwa government under the Police Reforms, 2016. It is a forum established for the pacific resolution of disputes using Alternative Dispute Resolution Mechanisms. The official rationale for its establishment is taken from the inefficient formal courts that are unable to deliver their basic function. On the other hand popularity and efficiency of Jirgas has become another reason for its establishment. Notwithstanding their popularity and efficiency Jirgas are not recognized at official level. In order to benefit from the popularity and efficiency the DRC have borrowed their structural and functional framework. Currently, there are functional DRCs at all district and in some tehsil levels all over the province. This study attempts to explore the DRC and Jirga by drawing a comparison of their mechanisms. It further explores the perception of the people about this claim by analyzing the views of the end users of both the forums. This study is conducted in district Shangla and district Peshawar. Primarily, it is qualitative study but for inferences some statistical data has been used. The sources of data collection were both primary and secondary. The study concludes that DRC is an improvised version of Jirga based on its mechanism. Similarly, the people who have taken recourse in DRC also consider it a version or alternative of Jirga.

Key Words: Dispute Resolution Councils, Jirga, Pakhtunwali

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Introduction:

In 2016, the provincial government of Khyber Pakhtunkhwa, Pakistan, initiated police reforms, replacing the century and a half old Police Act 1861 through an Act of the provincial assembly. Earlier in 2002 federal government had promulgated the Police Order 2002, repealing the Police Act 1861, but the subject was transferred to the provinces with the advent of eighteenth constitutional amendment in 2010 (Shigri, 2019). Subsequently, the government of Khyber Pakhtunkhwa passed the Police Act 2017 from the provincial assembly. The Act is aimed at making the institution autonomous in professional duties, accountable to the public, and defender of fundamental rights (KP. Police Act, 2017).

Besides other changes, the novel thing in the said reforms is the formation of Dispute Resolution Councils (DRCs) at police station level, as an alternative mean of dispute resolution. It is novel because in the past police had never been mandated to function as department of justice. The impetus for this study came from the rationale used for the establishment of DRC. DRCs have been established keeping in view the importance of Pakhtunwali and pervasiveness of Jirga in the Pakhtuns. DRC manual (2014) has used pakhtunwali as a context, base and reason for its establishment. The manual says that Pakhtunwali is an integral and vital part of the people living in Khyber Pakhtunkhwa. It is centuries old system but still relevant because the pakhtun society has woven it in its social fabric.

This study was conducted in order to compare the DRC with Jirga in their structural and functional aspects. Besides, the study was keen in taking the perception of the people about the DRC and its claim of providing an Alternative Dispute Resolution forum on the model of Jirga. The second part of this study was more significant because it was the people—end users—whose views matters more than official claim(s). The study is primarily qualitative, for which both primary and secondary source of data collections have been used. However, for substantiation of arguments some statistical data is also use. Primary data is collected through interviews. For this purpose a sample size of total thirty interviewees was taken from both the study areas. Apart from interviews, DRCs' files were also used as primary sources. The field study was conducted in two

different districts of Khyber Pakhtunkhwa, Shangla and Peshawar³⁴. The former have rural characters while the later one have urban dynamics. The secondary sources comprised of research articles, books, unpublished PhD dissertations, project reports and governmental websites.

The study has been organized in three parts: (a) Part one, contain a detail discussion on Pakhtunwali and Jirga with a focus on its judicial and dispute resolution functions; (b) Part two, has discussed DRC thoroughly; (c) Part three, have recorded and analyzed the perception of the people on the basis of their actual experiences.

Acclamation, Credence and Nostalgia of Jirga among Pakhtuns:

The population of Khyber Pakhtunkhwa specifically that of the study areas, is predominantly Pakhtuns. Pakhtuns rely on an unwritten code known as pakhtunwali for governing their society, notwithstanding some variations and exceptions (Siddique, 2012). Pakhtunwali, besides other formal and religious codes, is the primary source for Pakhtuns to govern themselves and their society (Jan, 2010). Pakhtunwali is an elaborated framework including normative benchmarks, values, practices, social institutions and belief system. With its own particular notion of social contract, it tries to bring differing and competing perspectives and imperatives of various sections of society at par with each other. Moreover, it also responds to different variables and contexts like the geographical terrain, modes of production and local political economy (Kakar, 2005). James (1995) terms it a multitier phenomenon, although in an exaggerated and simplistic manner. One tier includes the laws and precedents,⁵ which are employed and enforced while dealing with or resolving a particular dispute. In the second tier, it has the custom that provides a manual of dos and don'ts for every pakhtun. In other tiers, it acts as a mindset since no pakhtun at will departs from it but it has to be embraced.

Pakhtunwali also pursues certain desirable notions of rights, justness and equity alongside enjoying longevity like the rest of normative frameworks. These notions, with their particular meanings, occasionally have the potentials to violate other national and international standards, principles and notions of justice. Major scholarly work in the field has focused this aspect of

3

⁴ For this study, DRC tehsil Alपुरi district Shangla and DRC Gulbahar district Peshawar were selected.

⁵ In Pashto language, Laws are Precedents are called *Narkhona*.

Pakhtunwali (and Jirga), by as something that contradicts national, constitutional, and international human rights norms, and hence should be discarded. Barth (1959) does not agree with this outright condemnation and uprooting of a system which has been functional and working for centuries; and which is accepted and supported by many, even today (Barth, 1959). Similarly, Siddique (2015), suggests that instead of uprooting this popularly accepted and supported system, the reform endeavors should pursue greater and possible linkages between the and informal dispute resolution systems in the area.

Jirga operates within the informal legislative code and normative framework of Pakhtunwali. The meaning and origin of Jirga is contested in the scholarship but it refers to both as a practice and an institution used for consultations, deliberation, decision -making, law-making, disputes resolution and adjudication of justice. According to Ahmed (1980), it is essentially a council of elders but with no designated/sanctioned headship (Barth, 1959). It is convened by an intermediary especially when it has to sit as a dispute resolution forum but its meeting could also be called on the request of the party (or parties) to the dispute. Now-a-days, state functionaries like the police, judiciary, and officials from the civil bureaucracy also refer disputes to Jirga. As an adjudicating forum, it uses multiple techniques for resolving disputes, notably, investigation, evidence collection and recording, consultation, mediation, conciliation and arbitration. Proceedings of the Jirga are usually public and parties are free to represent themselves personally or through a counsel frequently their relative or kinsmen. Witnesses play a vital role in the process and enjoy full and assured protection. In some cases, the choice of arbitrators is on the discretion of the parties involved. Whereas in other cases, the parties are bound to provide a guarantor and his job would be the implementation of the decision later on. The decisions of Jirga are mostly based on tribal conventions, traditions, and previous precedents. In some instances, sharia (Islamic law) is also applied but precedence is commonly given to tribal law over Islamic law in case of any clash between the two. The decisions of Jirga are made through consensus and they are binding on the parties to the dispute. Jirga system lacks any appellate authority (Taizi, 2007).

The continuing popularity of Jirga in Pakhtun areas is affirmed by recent empirical studies conducted in these areas. According to one study, 81.2% of the respondents reported the existence of Jirgas in their areas. Among the respondents, 88.8% reported the presence of civil and police administration while only 42.6% of them were aware of the presence of the formal courts. When

they were asked whom they would contact in case of an issue or a dispute, recourse to Jirga was at the top with 61.7 %, followed by civil and police administration (28.7%) while only a fraction 0.6% opted for formal courts (Akhtar et al, 2008).

Similarly, when the respondents were asked about their preferred forum in criminal disputes, 47.6% of them preferred Jirga, 37.7% opted civil and police administration while only 8% mentioned formal courts. In civil disputes, the responses were: 59.1% opted Jirga, 16.9% preferred civil and police administration and only 14 % proposed formal courts. However, only in complex cases the preference of majority respondents was formal courts (44.5%) as compared to Jirga (5.8%). These findings are very important and handy for gauging the confidence of Pakhtuns in the Jirga system vis-a-vis the formal court system. Nevertheless, this confidence is eroding when it comes to a host of issues and short-comings of Jirga. For example, the implementation capacity of Jirga system, its patriarchal nature, its minimizing inclusiveness and elite capture and human rights issues especially those of women (Shinwari, 2011).

Dispute Resolution Councils: a *Sarkari*⁶ Jirga:

Section 73 of the KP Police Act, 2017 states: ‘The Provincial Police Officer for out of court amicable settlement of petty nature cases, may constitute Dispute Resolution Councils at district, sub division or police station level, which shall consist of such number of members and shall conduct its business in such a manner as may be prescribed.’ DRCs were started and established in February 2014 through and administrated order, by incorporating them in the criminal justice system as an alternative forum for the resolution of small petty disputes. At one point, the Peshawar High Court raised a question over its legality. Subsequently, a legal cover was provided to the DRCs by amending Article 68 of the Police Order 2002 in August 2015 (KP Police Book II, 2017). Later on, they were included in the KP Police Act 2017.

The KP Police Book II (2017) defines DRCs as, ‘an indigenous state regulated hybrid of traditional and modern alternative dispute resolution mechanism based on the principles of Restorative Justice and Pakhtunwali.’ In 2014, the provincial police department issued a manual

⁶ Sarkari in common language means governmental. I borrowed this name from one of respondent during interviews.

about the DRCs. The manual (2014), besides the vision and mission statements, has discussed the structure, functions and procedure of the DRCs.

According to manual, the functions of the DRCs include: (a) amicable resolution of disputes, using mediated arbitration and conciliation; (b) fact finding, where DRCs are empowered to send its facts finding report, in case a party being on fault does not agree to resolve the instant issue, to the concerned Station House Officer for necessary action; (c) Observation of police investigation in contested case. The DRC in such case will monitor the police investigation. The investigation report shall be shared with members of the DRC and in case of any disagreement with the report, the members can send its dissent to the district police chief.

The aim is to establish a DRC at every police station but initially at least one DRC in every district has been established. Each DRC has 21 members. The members are selected by the district police officer from among the different sections of society. The members elect one of its colleagues as secretary of the DRC, who is responsible for the administrative functions of the DRC. The members are divided into seven panels, with each panel having three members including one female. The panels are assigned different cases. For coordination and cooperation between the DRC and the police, an Assistant Sub Inspector is deputed as liaison officer. Each DRC is provided with a dedicated jury room, supporting staff and other required materials by the concerned police station.

According to the manual, the district police officer shall refer complaints to the DRC. No DRC member will take up any complaint without the approval of the district police chief or any police officer so empowered. A case once taken up by a panel will proceed till its disposal. A party dissatisfied with the outcome of the DRC can submit a review request before the district police officer or a five member DRC review committee, excluding the initial members. The liaison officer is responsible for summoning the parties, recording statements, minutes, providing legal information and keeping records.

The members are refrained from taking up complicated civil cases and sub-judice cases. Only those sub-judice cases could be heard where both the parties have been consented. The decision of the case should not be against the constitution of Pakistan or things explicitly prohibited under the law. Moreover, it cannot award any punishment to any party. The members are required

to show utmost neutrality while hearing cases. Currently, there are eighty three functional DRCs in the whole province.

DRC and Jirga: Peoples' Perceptions:

The disputes are native while the system for its resolution, including the body of laws, is alien. He argues that we inherited a justice system from the British colonial government of India. The law regime and courts system were transported by the British Indian Government from England, Europe; where it developed in a different context and took the shape of common law justice system. India with multicultural and different geographical parts could not grasp the common law system. In India, every cultural and geographical group/nation had peculiar dispute with an indigenous system of law and system for its resolution (Siddique, 2014).

As stated earlier, the population of this study comprises predominantly Pakhtuns areas. For instance, the population of Shangla comprises of 96.76% Pakhtuns while in Peshawar the percentage is 90.17% (KPBOS, 2021). Pakhtuns have their own body of codes and conduct, popularly known as Pakhtunwali as discussed prior in chapter II of this study. Pakhtunwali has embodied almost every aspect of a Pakhtun individual and social life. In this regard, Jirga and a body of laws, *Narkhona*,⁷ is part of pakhtunwali. So, Jirga is the forum for resolution of disputes while *Narkhona* are the laws used for disputes' resolutions.

All the interviewees, I interviewed in Shangla, had taken recourse in Jirgas of their localities in the instant cases they were perusing in DRC. Some have been failed in getting a resolution for their cases in local Jirgas due to various reasons. Form the interviewees' interviews, three different reasons were deduced that may be responsible for the non-functioning of local Jirgas in these cases. These factors include: political biases, socio-economic power differential between the parties and the lack of force mechanism of Jirgas. They opted DRC in the hope that it is an alternative to Jirga

⁷ Narkhona are not similar among the Pakhtuns. There are minor variations in the laws of Pakhtuns of different tribes and regions. The tribal, geographical and economic lines make these variations in the laws.

without these shortcomings of the local Jirgas. For instance, Mr. Mohammad Khan, who had alleged his opposite party of owing Rs. 60000, told:

Before going to DRC, I submitted my complaint to the local Jirga of my village. After a couple of meetings of the local Jirga, I withdrew my complaint because the Jirga members were biased against me. The opposite party in my case has political affiliations and he was using it on the members of the Jirga. After that I submitted a complaint in the DRC because I considered it a sarkari (governmental) Jirga. (M. Khan, personal communication, November 12, 2021)

In another complaint a female, Ms. Bakhroon, alleged his cousins of not giving her due Islamic share in their ancestral property. She was represented by her husband in the DRC. Her husband told me,

We took our matter to the local Jirga multiple times but it failed to resolve it. My wife's cousin are wealthy people and we are poor. And you better know that poor and females are powerless. Although, this Jirga resolves issue of other 'powerful' people. (Bakhroon, personal communication, September 17, 2021)

A complainant, Mr. Nadeem Khan, told me:

I engaged the local Jirga to resolve my issue but it failed because of the non-participation of the opposite party in the Jirga. Contemporary Jirgas are not like the Jirgas of the bygone times. In the old times we had elders, who were neutral, respected and powerful. These characters were enough for a Jirga to work. Now, we have no such people. The golden time has passed. (N. Khan, personal communication, August 19, 2021)

In some cases, the DRC Shangla has relied on and maintain the decision of the local Jirgas in the instant cases. The record of cases selected from DRC Shangla for this study shows that in four out of thirty cases, the DRC has maintained the decisions of Jirgas previously held in these cases. In one case where the DRC had failed to resolve, the local Jirga has resolved the dispute later on.

On the other hand, in Peshawar, only 10% of all the interviewees informed me about the existence of local Jirgas in their localities. However, none of them have taken recourse in the local Jirgas in

the instant cases before filing them in the DRC. The apparent reason for the non-existence of local Jirgas is the urban characters of the areas falling under the jurisdiction police station Gulbahar where the DRC is situated. Even so, majority of the interviewees were nostalgic about the bygone era of Jirgas in their areas. Almost all of them equated DRC with the Jirgas, they had seen or heard about. For example, Mr. Imtiaz Afridi told me,

We have shifted to the city years ago. In our village, there was local Jirga that was efficient and effective. I went to the DRC with a hope that I would get a speedy justice like the one we were getting in our ancestral village's Jirga. (I. Afridi, personal communication, September 10, 2021)

Likewise Mr. Sajjad Ahmad stated,

“DRC could revive the Jirga system we used to have and which had been vanished in the city in the recent past. People still remembers the effectiveness of those Jirgas in resolution of disputes” (S. Ahmad, personal communication, September 19, 2021).

From the above discussion, it can be argued that individuals who prefer Alternative and Informal dispute resolution forms perceive Jirga and DRC, interchangeably. All the complainants in the DRC Alpuri district Shangla, whom I interviewed, told that they have approached Jirga forum before reaching out to DRC. The reliance of DRC on Jirga decisions in some cases and the recourse to Jirga after failure in DRC by one complainant also shows that DRC and Jirga are considered the extension of one another by its users and members.

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