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

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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.

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. Thus, small domestic matters and immaterial monetary issues had remained the jurisdiction of local mechanisms called Maracca. The Jirga’s procedure, by then, had the similarity with that of Athens’s democracy. 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 - 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.

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 Sharī‘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 languages\(^{11}\) 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 *Sharī’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 jurists; owing to the fact that the previous is more authentic than the latter. As the work focuses on various facets of *Jirga* from *Sharī’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* (منځګړي) or *Ṣālis*,\(^ {12}\) (an impartial individual). Later on, dispute resolution through *Ṣālis* 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.\textsuperscript{16} Moreover, in both situations the wāk (power of attorney) should be given to such members (of Jirga) before commencing the process of Jirga.\textsuperscript{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 Customary\textsuperscript{18} Law or Constitution), Riwaj (Custom) and Sharī’ah (Islamic Law), too.\textsuperscript{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، دا کالي اوژه د نرخه مه اوژه، “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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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, house\textsuperscript{25} and movable property. Moreover, such person was considered as Kabarjan (arrogant\textsuperscript{26}; 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. 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. It indicates that all these small units had a simple local mechanism for dispute resolution, administered by the men. 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. With the passage of time, this small family of Pukhtoons had jumped from 350 to 400 tribes to 40 to 45 Million. 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. 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). 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. 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. In some areas, the composition had relied on local Pukhtoon Code of conduct, known as, Pukhtumwali, also known as Pukhtu.
The composition of Jirga was profoundly discussed by Danish and Anwar. 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 Shi‘ah and Sunni 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 Pakhtunwali. This clearly displays that one should know, at that time, the value of numerous aspects of Pakhtunwali. 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 tribe\(^ {39}\) and towns to villages.

\textit{Shari‘ah Appraisal of Historical Jirga Composition in Khyber Pakhtunkhwa:}

The Jirga structure, of ancient time, can be possibly found in the legal spectrum of Shari‘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. Shari‘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 arose at the level of persons who led these three concepts, technically called Qādī, Ḥākim 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). Shari‘ah, on the other hand, marked the reputation of a man vital for becoming
Qādī or Ḥakam (the administrator of Taḥkīm). 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 Qādī and Ḥākim. In addition, a Qādī and Ḥākim 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 Māwardi, a renowned jurist, Muftī (religious scholars, primarily, those had the capacity to issue verdict) could be consulted. 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 Muftī, 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. Sharī’ah, on the other hand, proposed principles for Hakam, Qādī 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. Some of these factors, of course, insured his moral standing in a society. Like Taḥkīm, free consent or Tarāđi (typically called Wāk in Jirga’s terminology) was always considered prerequisite for the parties to Taḥkīm (Jirga). On the same way, the Jirga-Mār should not be a party in his own case, and has to be entirely impartial. The same principles were elaborated by Sharī’ah for Qādī. In this regard, Ibni Nujaim stated, “There should be no Qarābah; a relationship between Qādī and a party that stops a person from becoming a witness, like, being siblings, spouses, father, son and vice versa”. Following the same principle, neutral people could be selected/appointed for Jirga, such as, Spin Giri. In addition, as per principles of Islamic law, Qādī must be appointed by the state - so a forceful implementation of his decision could be made. Here at this point, the difference between a Qādī 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 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 tlal” (interposing as Jirga). Secondly, the parties themselves would approach and request themselves (like filing a suit in the common law); 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), family matters, for example, Koranay Nāchāqi (domestic altercations or violence) in which cognizance was taken by a smaller gathering called Koranay Jirga (family Jirga). On the similar token, Sharī’ah accredited the initiation of an issue to a body termed as Taḥkīm. The concept of Suo Moto had broadly expounded by Imām Māwardī in his known book Aḥkām ul Sulŧāniyyah.

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’ (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.

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.

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, Ulasi 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 Ulasi Jirga. 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. Similar was the case of south eastern provinces of Afghanistan. This great and grand Jirga was called, primarily, when there had a common threat to the whole race. 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. It would hear matters of smaller scale within the domain of a village. 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 المدنات دون المناكح،... أو في نصاب

مقدر من المال فيجوز ويتخصّب بما خصّب.
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 Mukhālip (adverse party) had been given ample time to defend. 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., “إنَّ الْمُدَّعِي يَدَّعِي عَلَيْك بَِِذَا الْوَجْهِ فَمَاذَا ت َقُولُ,” 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. 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. دَارِ پہ سر ھم رښتيا وايه meaning thereby, “even on gallows speak the truth”. Secondly, their social life was very much dependent on each other as they lived in closely knitted society under the norms of Pukhtunwali. 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. الْمَرَءُ مُؤَخَّذٌ بِإِبْرَارِهِ, explained the same. 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 Qārāfī, the eminent Mālikī jurist, stated, “Resiling from Iqrār (confession or admission) is against Islamic legal system”. Shams-ul-Ai’immah, Imām Sarakhsi, had the same opinion. 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’ẓīr—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 wife (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. This process, astonishingly, of hearing was, predominantly, identical to that of Sharī’ah,
plainly explicated by Ibn Qudāma in a Hadīth-cum-maxim, 

الْبَيْنَةُ عَلَى الْمُدَّعِي، وَالْيَمِينُ عَلَى مَنْ أَنْكَر”

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 Sharī'ah. 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 Arbakyān81 but later on, in Colonial structure, it was known as ‘Khāsadār’ 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 Ḑada.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 Špin-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, Šulaḥ and Qāḍā 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 Qāḍā. 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 Špin-Girī, having knowledge of Narkh or Pakhtunwali. Moreover, Špin-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 Ṭabkīyān; otherwise, through excommunication (social boycott). The party refuses to accept Jirga’s decision, is sometimes banished through militia (Ṭabkīyān) and is declared as Kabarjan (the arrogant). 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, Melmastiyā, 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 Qād̝ ī and Ḥākim 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), Maɋzūf (one who has been penalized in Hadd-e-Qazf), incapable person and etc. Moreover, Sharī’ah encourages consultation with Ahli-ʿilm (people of knowledge). The same pattern is followed in Jirga where Spin Patki are consulted in complex matters. On the same way, in Taḥkīm the Tarāđi of parties is utmost important. Additionally, Qād̝ ī or Ḥākim 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 Māwardi. 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 Khilāfatu al-ʾUmawiyyah (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.

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 January, 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.gsdrc.org/docs/open/ssa/j101.pdf](http://www.gsdrc.org/docs/open/ssa/j101.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](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. Šālīš 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...

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 Gohar, *Towards understanding Pukhtoon Jirga*, (Peshawar, Just Peace International, 2005), 20

20. Mohammad Anwer Lashkari, *Ulasi 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/jargas.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-Murghnhāni, Abul Hassan Burhan ud Din, Al-Hidāya Fī Sharh Bidāyatul Mubtadī Ma’ a Sharh al-`allāma `abd al-hai al-Kanwī, (Pakistan, ‘Idāra al-Qurān wa-al ‘Ulūm al-`Islāmiyya, 1996), vol.5, 385. (Added year of publication) Original text flows as under: "وَهَذَا إِذَا كَانَ الْمَحْكُومُ بَصَفَةِ الْحَاكمِ فَإِنَّهُ بَيْنَ الْقَاضِيِّ وَالْمُحْكُومِ وَهُمَا يُنْفِقُانَ فِي بَشْرَةٍ أَطْهَرَةَ.

41. See for details Shams ud Din Mohammad bin ‘Abdullah al-Zarkashi al-Miṣrī al-Hanbali, Sharh al-Zarkashi, (Saudi Arabia, Dārul ‘Abikān Riyād, 1993), Vol. 7, 236.; Abu bakr bin Mohammad bin ‘Abdul Momin bin Hariz bin Mo’allā al-Hussaini al-Hasni, Taqi ud din al-Shāfi’i, Kifāyatul Akhyār Fi Halli Ghāyatil Ikhtiśar, 1st Edition. (Damascus, Dārul Khair, 1994), Vol. 1: 550.; Abu al Walfād Mohammad bin Ahmad bin Ahmad bin Rush al-Qurtabi al-Undulusi al-Shāhīr, Bidāyat ul Mujtahid wa Nihāyat ul Muqtasid, 1st Edition (Lebanon, Dārul Kitub al Ilmiyyah Beirut, 1999), 1:768.; Muhammad bin Ahmad bin Abī Sahl Shamsul Aima al-Sarakhsī, Al-Mabsūt Lil Sarakhsī, (Beirut, Dārul Ma‘rifa, 1993), 15:71.

42. Abu al Hassan ‘Ali bin Mohammad bin Mohammad bin Habīb al Biṣrī al-Baghdādī (also known as Al-Māwardī), Al-Hāwi al Kabīr Fī Fiqhil Mazhab Imām Shaf’ī I which is Sharh 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 Qaḍī, 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 Badi’ah Fī Ma‘rifati Ikhtilāf Ahli-Sharī‘ati, (Lebanon, Dārul Kutub al Ilmiyyah Beirut, 1999)., 2:454. The original text flows as under:

"عِنْدَ الشَّافِعِي وَأَحَْْدَ وَمَالِك يجوز ومَُُمَّد بن الحسن يشترط أن يكون القاضي عالمًا، ولا يجوز أن يكون عاميًا، به قَالَ مِن الزَّيْدِيَّة القاسم.

45. Al-Mousū’atul Fiqhiyyatul Kuwaitiyah, 2nd Ed., (Kuwait, Dār ul Salāsil, 2004), 10:241.

46. Aezaz ur Rehman and Neha gauhar, Reforming The Jirga System: Sensitisaton 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:“... صلى الله على الفاضل يكونه أهلاً للشهادة....”

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
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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)75-51.

54. Māwardi, Ahkām ul Sultāniyyah, (Dārul-Ḥadīs, Cairo) 1:119 ... The original text is as under:

"وَلاَ تََْلُو وِلاَيَةُ الْقَاضِي مِنْ عُمُومٍ أَوْ خُصُوصٍ، فَإِنْ كَانَتْ وِلاَيَتُ مُطْلَقَةَ التَّصَرُّفِ فيِ جََِيعِ مَا تَضَمَّنَّهُ فَنَظَرُهُ مُشْتَمِلٌ عَلَى عَشَرَةِ أَحْكَامٍ: أَحَدُهَا: فَصْلٌ فيِ الْمُنَازَعَاتِ، وَقَطْعُ التَّشَاجُرِ وَالخُْصُومَاتِ، إمَّا صُلْحًا عَنْ ت َرَاضٍ، وَيُرَاعَى فِيهِ الَْْوَازُ، أَوْ إجْبَارًا بُِِكْمٍ بََت ٍ ي ُعْتَبََُ فِيهِ الْوُجُوبُ .. .

55. Gazetteer of the Peshawer 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-Umawiyin wa Rusūmahum fil-Undulus, 1st Edition. (Madina Munawwara, ‘Imādatul Bahath-ul-’Ilmī Bil Jāmi‘atul Islāmiyyah, 2003), 2:667. The original text goes as.....

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, Kunař, 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-Mahāsin ‘abdul-Wāhid bin Ismā’el al Rūyānī, Bahr ul Mazhab (Fi Furū’i Mazhab al Shāfi‘ī), 1st Edition, (Beirut, Dār-ul-Kutub ul ‘Ilmiyyah, 2004), 11:66.
65. Muhammad Nawaz Khan, Kaleem Ullah Bariach and Faizullah Khan Panezai, “The Role of Jerga 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, Uiasi Mataluna, (Peshawer, 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 که کري نو زمکه دی پري بدکه شي".”
69. Another proverb, being Narkh (uncodified custom), asserts, "پښتون خان بانلي خو قام نه بانلي" , 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 Salāsil, 2004), 18:1·4.
72. Shahāb ud din bin Ahmad bin Idrīs bin ‘Abdur Rahmān al-Mālíki alias Imām al-Qarāfī, 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 Sarakhshī, Al-Mabsūt, (Beirut, Dārul-Ma’rifā, 1993) 18:1·4.
74. The Pashto terminology in use 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 Gohar, 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.
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78 Further minute details can be traced from...‘Alāudin abu bakr bin Mas‘ūd bin Ḍahmad al-Kāsīni, Badā‘i ‘ul-Sanā‘i Fi Tartibī-Sharā‘i’, (Beirut, Dārul Kutub-ul-‘ilmīyyah, 1986), 2nd Edition, vol.7, 6-7

79. Jawad ur Rehman, The role of Jerga in conflict resolution, P.11-12; ...https://www.academia.edu/26454452/The_role_of_Jerga_in_conflict_resolution?auto=download (accessed on 26-4-2019)

80. ‘Alī Ḥaidar Khwājām Amīn Afandi, Durar-ul-Hukkām Fi Sharḥ Majallatil Ahkām, 1st ed., (Beirut, Dārul Jail, 1991), 4:298. The original text flows as under:

لا تُسْمَعُ الدَّعَاوَى غَيرُْ الْعَائِدَةِ لأَِصْلِ الْوَقْفِ أَوْ لِلْعُمُومِ كَالدَّيْنِ الْوَدِيعَةِ وَالْعَقَارِ الْمِلْكِ وَالْمِيرَاثِ وَالْمِقَاطَعَةِ فِيِ الْعَقَارَاتِ المُوقُوفَةِ أوْ التَّصَرُّفِ بَِلِْْجَارَتَينِْ وَالتَّوْلِيَةِ الْمَشْرُوطَةِ وَالْغَلَّةِ بَعْدَ تَرْكِهَا خََْسَ عَشْرَةَ سَنَةً،... أَمَّا مُدَّةُ مُرُورِ الزَّمَنِ فِيهَا بمُِرُورِ الزَّمَنِ،... مُرُورُ زَمَنِ السَّن َتَينِْ، فَحَسَبَ ذَيْلِ قَانُونِ الأَْرَاضِي لاَ تُسْمَعُ دَعْوَى التَّصَرُّفِ فِيِ الأَْرَاضِي الخَْالِيَةِ وَالْمَحْلُولَةِ الَّتِِ ف ُو ِضَتْ مِنْ طَرَفِ الحُْ كُومَةِ لِلْمُهَاجِرِين”

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:

اربکي هغه قومي سپايان دي، چې د جرګې په وخت کې د جرګې امنيت ساتي او د پرېکړو څارنه یې کوي. اربکيان په ھر قوم کې يو ميرلري او ھغه له قوم څخه تکړه ځوانان له ځان سره منظموي او کله، چې اضطراري حالت پېښېږي او يا جرګه جوړيږي ميرخپل اربکيان را غوړي، وسله وال کوي بي او خپله، خپله ټاکي، دوی په قام کي خانگه مصونيت اري او خوکه نه شي کولاي، هغه ته زيان ورسوي. کوم وخت، چې اربکيان په یار کومارل کيږي، دوی اجراتو ته تول قوم غاره ږدي او مني ېي

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.