

# REFORMING INFORMAL LEGAL INSTITUTIONS (JIRGA) CAN EMPOWER STATE-BUILDING PROCESS IN AFGHANISTAN

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**Abstract-** In this research paper, What the informal system (Jirga) is?, The problems in formal courts system, Judges education and their attitudes and Corruption and individual abuses are discussed. The purpose of the research is to identify The Role of Informal Legal Institutions (Jirga) in the State Building Process in Afghanistan of using descriptive-qualitative methods as well as library resources (documents, books, as well as credible internet sites and articles) This study concludes below: Many times over the past century, Afghan political elites have utilized a loya jirga, or grand national assembly, when they have needed to demonstrate national consensus. Based on traditional village jirgas convened to resolve local disputes, loya jirgas have been used to debate and ratify constitutions, endorse the country's position and alliances in times of war, and discuss how and when to engage the afghan government armed opposition groups in peace talks.

Currently, three systems regulate disputes in Afghanistan such as State's laws, Islamic law (Sharia) and informal legal system (Jirga System). But 80% of population exists in local areas with isolated from state; they have turned to Jirga system and rejected state's system because they perceive it to be corrupt, slow and culturally different Even in many occasions when formal courts fail to solve dispute, according to Doing Justice; they "regularly refer cases to the informal system and accept, record their decision for pending cases.

**Keywords:** Reforming, Jirga System, State building, Afghanistan.

## 1. INTRODUCTION

Many times over the past century, Afghan political elites have utilized a loya jirga, or grand national assembly, when they have needed to demonstrate national consensus. Based on traditional village jirgas convened to resolve local disputes, loya jirgas have been used to debate and ratify constitutions, endorse the country's position and alliances in times of war, and discuss how and when to engage the Taliban in peace talks. The post-2001 political order is founded on two loya jirgas: the 2002 Emergency Loya Jirga, which legitimized the post-Bonn Agreement interim government; and the 2004 Constitutional Loya Jirga, which ratified Afghanistan's current constitution. ( Scott Smith , 2019 ) .

Afghanistan is a failed state with almost the total break down of its formal institutions (Englehart, 2010). And often announced as a failed state by international media. According to the Fund for Peace (FFP) Organization 2016 fragile states index, Afghanistan is still on high alert occupying 9th position. Since last ten years Afghanistan has been ranking in top 10. Afghans are losing hope in the government's efforts to reform the nation; traditional tribal politics are superseding government's initiatives (FFP, 2012, p. 3). Formal institutions are ignored at a large level; state is unable to exercise its sovereign power in remote and some semi-urban areas. In addition to the public rejection of formal institutions, local warlords, insurgents and tribal leaders deal problems their own way. Constitution is one of nations' foremost prestigious laws of 21 century; it is considered essential for the check and balances of state's three branches. As, the implementation of Constitution is always of concerns in developing countries. According to a survey, Afghanistan is a country where all of the articles of the Constitution have been breached, except one article in 13 years period since its establishment (Barakzai, 2016). Here I want to focus on the judicial sector institutions that plays very important role in the state building and transition and consolidation of democracy as a whole. The efficiency and productivity of the judicial authorities are only secured when there is no interference. That is possible only with full implementation of the Constitution.

The President of Afghanistan Ashraf Ghani in his speech on Constitution's day pledged to resolve issues in accordance with the laws of Afghanistan and also promised for the independence of judiciary, he further added that, institutions should not be subjected to politics and deals (Shaheed, 2017). But literally, the legal system is not functioning at all. Currently, three systems regulate disputes in Afghanistan such as State's laws, Islamic law (Sharia) and informal legal system (Jirga System). But 80% of population exists in local areas with isolated from state; they have turned to Jirga system and rejected state's system because they perceive it to be corrupt, slow and culturally different (Christensen, 2011, p.102). Even in many occasions when formal courts fail to solve dispute, according to Doing Justice; they "regularly refer cases to the informal system and accept, record their decision for pending cases (Doing Justice, p.18). Countries recovered from conflicts are always confronted with weak judiciary. In Afghanistan the situation is getting worse day by day, even in these days apart from Jirga justice that have been providing justice to Afghans, people refer their cases to Taliban's courts, which has created the environment of non-confidence in Afghan state, according to New York Times, In Pakistani cites of Quetta & Chaman many Afghans stay in long lines to solve their disputes by the exiled Taliban leaders. you will now not

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**pg. 5**

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find the number of people in the Afghan courts as you do in the Taliban's court (Ahmad, 2015). Internally, people in large number refer to these courts, these courts do not exist at one place, they travel from one place to another, due to the lack of judges and security concerns because their illegal operation.

## 2. THE PROBLEMS IN FORMAL COURTS SYSTEM

Appointments to the judiciary and removal of judges In failed states, state's norms are given very limited validity, the rule of law is not known to these states and the separation of powers is less limited. Courts are either working not at all or notoriously autocratic, corrupt and politicized. These all factors result in the lack of trust in the state's administration of judiciary increases day by day (Malek, 2006, p.10). As, the process of appointing, transferring, promoting, evaluating, and disciplining of judges is based on administrative independence (Christensen, 2011). The current Afghan state is appeared from failed states and highly centralized system, which cannot represent people's wills. On the other hand, the independence of judiciary is safeguarded by the Article 116 of the Constitution. Whereas, According to the Article 117 of the Constitution; the President monopolizes huge power over the appointment of judges. The President enjoys full authority in the selection of the Supreme Court judges; just the Parliament's approval is needed, but the Supreme Court makes appointments to the primary and appeal courts. In addition, cases exist where the Parliament has voted for the removal the Supreme Court judges for not complying with their responsible, but the President has denied their removal. Furthermore, in districts and provincial levels judiciary is under huge influence of provincial governors and Warlords they easily make appointments and removals. Members of the Parliament are also involved in appointment and removal of judges. Therefore, appointment, promotion, transfer from one place to another and removal of judges are the most influential factors of have a well-running judicial mechanism.

## 3. JUDGES EDUCATION AND THEIR ATTITUDES

Judges are not qualified as needed to deal with cases. "Lack of high-quality legal education, qualified staffs and poor communication skills are the major challenges in Afghan judiciary (Bahrami, 2015)". And justice officials have suffered degradation of their personal qualification during the war years (AMoJ, 2005, p.07). In addition to their education, the lack of trained and qualified judicial personnel hinders the courts and results in very few cases being processed (Leonard, 2009). The legal education and judicial institutions have neglected the demands for the profession. The curriculum has not been changed for decades (Mujeeb, 2016). Many university graduates were trying to apply for NGOs' posts, because of lucrative salaries. People with less educational and professional background recruited to the judicial system. Furthermore, during the process of education there is no field work and research related to Afghan judiciary problems, students choose topics for research irrespective of the on-going challenges in our legal sector. Those lectures and professors working in law schools are not able to project good education, because they were also the part of decades war. Moreover, there are two kinds of education system for judges, firstly, religious education which is acquired in religious schools, after graduation they became part of judiciary through entrance exam and a short-term training. Secondly, the formal education system, where judges are chosen from law schools and Sharia schools. There exists a huge tension between religious graduated judges and university graduated judges. This is because of the weak government for not having a unified curriculum and not having the ability to supervise educational institutions. All these multifaceted challenges hinder the effective functioning of formal judicial system.

## 4. CORRUPTION AND INDIVIDUAL ABUSES

Perceived corruption, lengthy process of trials and lack of Afghan's familiarity with formal court system is that limit trust to the courts (Dominguez, 2015). In addition, their wages are low and not always paid on time, their working condition are generally completely inadequate. Their distribution across the country is unequal, resulting in a Kabul-centered system with uneven presence in many provinces and districts. The result is a demoralized workforce and an even present risk of corruption (AMoJ, 2005, p, 07). And most of the personal working in courts is not able to use new technology, though they have been enrolled in computer and English language classes several times. They usually communicate through the system of in-files record keeping and there is no swift and trust-worthy mailing system. As their wages are not enough for making their living and their safety is of high concern. Because, they are on first row of insurgents' target list. Furthermore, The perception of corruption in Afghanistan's judiciary is leading citizens to turn to the Taliban to resolve their cases swiftly and with a lack of red tape (Alikozai, 2016). And sometimes people are threatening to take their cases into state's courts by insurgents. Moreover, recently individual abused by judges echoed in mass media, which further implicated doubts about formal courts, judges are reported of abusing and harassing women. In Jalalabad city of Afghanistan one young women complained about a judge for immoral demands, she was divorced. She wanted to sue her husband for not giving her part of inheritance. The judge in charged asks her, if you have sex with me, I will solve your problems and I will give you more money. The women reported that issue, but no action was taken against that judge. Same cases reported from other cities too, e.g. Women are always under sexual abuses at legal centers. By hearing all these events, people really stop going to courts, because the place like courts are expected for delivering fair justice. Moreover, judicial officials' behavior is not well suited; they insult people who go there without paying them. Therefore, people have chosen to file their cases into informal justice system, as we are going to discuss in the next paragraph.

## 5. THE INFORMAL SYSTEM (JIRGA)

In this part I want to talk about the mechanism of informal judicial institutions and their interaction with Islam and international legal documents and finally I will be talking about people perception and views about these Jirga system. Informal Justice system, which is called Jirga, it has been deeply rooted culture in Afghanistan and Pakistan, but with different names and at different prospective where people come together to solve their problems with their own created rules and regulations, but currently this term is used in developed manner for some kinds of formal gatherings too. Afghanistan and Pakistan 2400 KM dividing border is home for Jirga since hundred years. Because, on both sides Pashtun tribe is living, which is almost with 50 millions population. Most importantly, on Pakistan's side of border the system is weaker than Afghan side, this is because Pakistan had been a colony of Great Britain for several decades, as we studied in RYAN SAYLOR's book on State Building in Booms Times about colonial legacies that colonizer establish institution into their colony, the same British rulers did before 1947 when Pakistan declared its independence from Indian sub-continent ruled under Great Britain. In the legal context, Jirga is informal sitting or gathering of Tribal leaders for resolving cases referred to them by a party or parties of the conflict. A Jirga can be convened at any level of tribal organizations all over Afghanistan, it attracted many Western scholars after 9/11 event, to conduct research about Jirga (Wardak, 2003), its mechanism is different across Afghanistan. People bring civil and criminal cases into this system. There is no constitutional provision for Jirga to be a source of dispute settlement in Afghanistan. But formal officials of courts refer cases when they fail to resolve. Just our civil law code says; if there is no provision in the laws of Afghanistan to solve an issue, the parties to the dispute can refer their case to local custom. Solving criminal cases by Jirga is in a little bit of concern when it comes to social order and the due process of law, because Tribal leaders or those who decide or not government officials, the way they conduct criminal trials are fair or not, where as restoring social order, punishing criminals is the duty of state's officials. Informal justice institutions are widely preferred for solving disputes in short time and limited corruption compared to formal courts (Coburn, 2013). But there are evidences that "informal justice system is not immune against corruption, nepotism, and other factors influencing the procedural fairness" (Röder, 2012). Both systems have shortcomings, but it's people preference to choose the Jirga system.

Some donors want to integrate both systems, but Afghan government specifically Ministry of Justice and Ministry of Interior Affairs is against this move, because they say that informal justice system or Jirga system is against international standards and Islamic law in many contexts. But the common perception about rejecting informal system by Afghan officials is considered losing their incentives of side-payment. And to some extent informal justice system is against Islamic law and international standards. These examples can be the discrimination against women, trials without due process of law, the nonrecord taking of trial process and the non-existence of these informal institutions in written pattern that cause the wide and mixed application of rules, which bring complexities to codify. Informal justice system ruling is not binding on parties; these rules are with no enforcement power. That is the reason people many times reject decision taken by Jirga. In addition the members of the Jirga system are not educated, they don't know about the modernity and human rights. The general perception on Jirga system at national level is controversial, because this system is not functioning all over Afghanistan. And it is attributed to one ethnicity living along side border with Pakistan. The other ethnicities have their own informal institutions. Therefore the issue of formalization or integration into formal system is not on agenda, but some donor countries come up with such initiatives.

## 6. WHAT COULD BE THE SOLUTION

After the 9/11 incident, international community helped Afghans hundred billions US dollar to form a democratic government based on people wills to promote state-building processes, but unfortunately the security is worse than the 1980s. The quick change into informal institutions is impossible. It is really tough to penetrate in most of the rural areas and most of the population is living in rural areas. People suffer too much from corrupted and irresponsible judiciary. The informal judicial system is also not trusted, but still people like it. And strongly oppose to bring their dispute into formal court system. In addition, the current state is not in a position to enforce and exercise its full authority to its territory. Therefore, it will be complicated to build the broken judiciary.

Rebuilding the broken judiciary is only possible when people's trust is reinstalled. That is possible only through independent appointments to judiciary, non-intervention by the executive, legislative body and local Warlords. In addition, on local level a huge propaganda is going on against state's institutions. The states courts are considered foreigners influenced institutions and totally against Islamic principles. The actors instigating anti-state rhetoric is conveyed by systematic mechanism installed by insurgents. The Tribal elders have enormous power to control people and propagate on their behalf. Because they don't want the state to penetrate. If the State's power is exercised, then there will be no room for these elders to follow their personal wills. Whether reforming the Jirga system or transplanting it to formal justice system will be better for future development. I think it is beneficial to reform those informal institutions (Jirga system) rather than transplanting to the formal system. Because, once Jirga becomes part of formal legal system, it will be difficult to remove, but for temporary purposes if Jirga system is reformed then it will be better. As almost 80% of people solve their disputes through informal institutions.

If the government of Afghanistan establish a commission of formal officials (legal entities, political elites, local elders, religious experts and people who know local custom) to work to gather and establish offices on local levels for the communication purposes. After communication with local elders who play important roles in Jirga system

they need to come up with the following reforms; All those laws which contradict Islamic principles and international standards such as, discrimination against women in disputes resolutions, e.g.; in some parts of Afghanistan, if murder happens then if the case is referred to Jirga, the Jirga may decide to compensate woman in response to the victim family from the murderer family. Therefore, this is the against Islam, Islam says that crime is a personal act, it should not be attributed to anyone else, but people in Afghanistan are doing this evil act. A few months before, in many provinces of Afghanistan a member of victim's family Khan Wali Adil held so many protests, demonstrating that his young brother was killed, when Jirga decided to compensate his brother's death with two females from murderer family, he rejected, he was educated, he wants to forgive the murderer family with out compensation. Still he is on strike, but government is unable to respond to his demands, because the social structure is too strong and government can not penetrate, his father in response to a TV interview said; my son is not balanced well mentally, and he can not decide on his own, because in our community all people share good and bad, if I decide the way he is trying, I will be bad person in the eyes of people and even people will stop me to live in this community. Ten on hundred of cases happen on weekly basis, but those cases don't exposed and not surfaced in mass media due the strict rules on of family honor. Government should introduce registration system, a local Clark and some measure for the enforcement of Jirga's those decisions, which are not in contradiction with Afghan laws. By establishing such institutions and reforms the state-building process may step by step get improved. Otherwise its impossible restores peace and implementation of the Constitution of Afghanistan.

## CONCLUSION

Currently, three systems regulate disputes in Afghanistan such as State's laws, Islamic law (Sharia) and informal legal system (Jirga System). But 80% of population exists in local areas with isolated from state; they have turned to Jirga system and rejected state's system because they perceive it to be corrupt, slow and culturally different Even in many occasions when formal courts fail to solve dispute, according to Doing Justice; they "regularly refer cases to the informal system and accept, record their decision for pending cases.

Finally, if we improve our judicial system and systematically solve core problems which currently exists in the formal institutions about appointing, removal, security of judges and corruption, political intervention in judicial decision by Warlord and different factions. We can establish functioning judicial institutions. More importantly, we can gradually bring women to be part of Jirga system, currently women are not part of Jirga, and the lack of women is challenge because when there is a case, in which women involves, the process to reach to a fair decision is impossible. So, we can bridge tradition and modernity in a very trusty way, otherwise the people of Afghanistan are not educated enough to tolerate instant changes. Back in early twenty the instant changes to legal institutions toppled regimes of the times and resulted into riots. Therefore, by reforming our informal judicial institutions, government can extend its sovereign power to the villages of Afghanistan. Which can help in the state-building processes. In the long run government can consolidate its further polices and plans for the well-being of country socio-economic development.

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