

Online Dispute Resolution in a Traditional Justice System

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Abstract

This article examines the applicability of Online Dispute Resolution (ODR) in Afghanistan. It evaluates whether ODR can resolve disputes in a traditional justice system, like Jirga, where the formal justice system is weak. This analysis questions whether ODR can complement the traditional jurisdiction system, where the public relies on customary practices to solve disputes. Further, the analysis focuses on the applicability of ODR in insecure areas, where access to formal judicial processes is limited. The findings from this study suggest the development of effective dispute resolution mechanisms in Afghanistan, mainly using ODR.

Keywords: ODR, traditional justice system, insecure areas, Afghanistan.

Introduction

Disputes are inevitable, can arise between individuals and organizations and, in most cases, are unforeseeable. It is hard to predict the occurrence of disputes because the causes and the parties that get involved in the disputes are unpredictable. However, it is essential to develop an elegant dispute resolution system to solve the disputes. The system should solve the disputes in a manner that requires fewer resources and leads to an acceptable outcome for the disputing parties; in addition, it should be developed in a way that is consistent with the 'justice' environment in the venue in which it will operate.

In general, dispute resolution systems fall into two categories: 1) adjudicative processes, where a judge, jury or arbitrator determines the outcome and 2) consensual processes, which attempt to reach an agreement without the intervention of a formal judicial system.

There are advantages and disadvantages in both categories. Formal justice systems are not always accessible and are expensive and time-consuming. In addition, in countries such as Afghanistan formal dispute resolution systems are often seen as corrupt. People cannot trust, because decisions may be based on the amount of bribe that a party pays or other extralegal factors. Hence, alternative

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dispute resolution (ADR) is preferred as a substitute for the formal justice system.

ODR is one of the emerging forms of ADR. ODR adapts traditional ADR methods to the use of digital communication and information technology to support or fully facilitate one or more traditional ADR methods. ODR uses electronic communication to reproduce the existing procedures of ADR as closely as possible. For example, mediation by phone, videoconferencing or telepresence, closely approximate in-person interactions. ODR can provide a network-based platform for conducting dispute resolution with the help of a mediator to resolve disputes through the Internet and technology. ODR is a network-based dispute resolution process that uses information and communication technology (ICT) to help an impartial third party to resolve disputes.

ODR was created to provide an online means of accomplishing traditional face-to-face dispute resolution processes such as negotiation, mediation and arbitration. If the use of ICT allows for the creation of analogous dispute resolution approaches online, ODR might be the best method of resolving disputes even in dispute resolution environments that are traditional and not part of the formal justice system.

Generally, there are many opportunities for the implementation of ODR. ODR does not require physical presence and is therefore helpful in insecure areas. In conflict areas such as Afghanistan, an informal system delivered using ICT can substitute for the formal systems and may work as a complement to an informal system such as Jirga.

Another characteristic that makes ODR favourable is its cost-efficiency. It does not entail transportation and accommodation costs and makes it possible for the parties to avoid travel and submit their documents and communicate any time from anywhere, even when the time zones are different. Using technology reduces the amount of time that parties need to travel to present themselves or the needed documents, and in situations making it dangerous to travel or to be present for face-to-face sessions, ODR can provide a safe means of connection.

However, ODR too faces certain barriers. For instance, lack of awareness about ODR platforms and mechanisms is one of the primary universal challenges. In most cases, the public is unaware of ODR systems. According to the United Nations Conference on Trade and Development (UNCTAD) report in 2003, "[I]n developing countries ODR services [are] either starting or non-existing, and the vast majority of the ODR providers exist in the USA and Europe."¹ According to this report, ODR covers only 16% of dispute resolution services in developing countries, which is not comparable to offline dispute resolution. Therefore, it will require further promotion and public awareness efforts to establish the use of ODR in either formal or informal systems in developing countries.

Lack of non-verbal communication can be listed as another challenge in ODR. The most frequently heard concern about ODR has been that online processes and interaction cannot match the richness of face-to-face sessions that are the

1 UNCTAD, *E-Commerce and Development Report*, New York and Geneva, UNCTAD, 2003. Available at: https://unctad.org/en/docs/ecdr2003ch7_en.pdf.

heart of offline sessions. ODR is a voluntary process, and the disputants make decisions with the assistance of an impartial third party (mediator) to resolve the disputes. The mediator helps parties understand each other's perspective and identify the issues. Hence, the lack of non-verbal communication requires mediators to have sufficient communication skills that have been adapted to an online environment. Effective communication not only makes it possible to reduce deadlock, and build trust, but also helps settle the negotiation and convince others. According to Maureen Nokuthula Sibiya, effective communication has verbal and non-verbal communication components, and approximately 60% of communication is non-verbal, including body posture, smile, tone of voice, accent, facial and gestural movements and physical appearance.² So ODR can miss 60% of the components of effective communication, which is a huge part of communication. For example, a thumbs-up can be more meaningful than a word: unlike a word, a thumbs-up is not easily communicable over the Internet.

The other concern about ODR is its confidentiality. There are questions about confidentiality related to the privacy of information when parties disclose their concerns in the ODR process. Parties worry that providers may store and record disputants' sensitive concerns and private concerns disclosed during the ODR process. So the disputants may want protection against unauthorized access to data or unauthorized and unexpected use of data they may not want to be shared. This is an issue in formal and informal systems.

An alternate dispute resolution that is specific to Afghanistan is Jirga, which is a method of conducting alternate conflict/dispute resolution by elders who get together and resolve disputes. The outcome of Jirga is based on a two-thirds majority recommendation or decisions recommended by the elders.³

In Afghanistan, Jirga is preferred because the decisions are generally more transparent and more often seen as free of corruption. The processes are clear and remove many of the elements in the formal justice system about which parties might worry. The discussions on solving the dispute are public, and the results are publicly announced. Members of the Jirga try to resolve disputes in a manner that is acceptable to and supported by both parties involved in the conflict.

Jirga is preferred because it is an efficient mechanism for dispute resolution: it is cheap and requires less time and does not involve lengthy bureaucratic procedures. In most cases, a conflict is solved in a matter of days or weeks, but resolving a dispute through the formal system takes months and even years. Understandably, people do not want to get stuck in lengthy bureaucratic procedures in which there is no inherent trust.

Not every decision made by Jirga is free from criticism. It is often said that Jirga decisions are not always just and fair and may be based on the dominant

2 M.N. Sibiya, *Effective Communication in Nursing*, 2018. Available at: www.intechopen.com/books/nursing/effective-communication-in-nursing.

3 M.O. Nosworthy, *Jirga / Shura (Afghanistan)*, School of Slavonic and East European Studies, University College London, UK, 7 September 2019. Available at: [www.informality.com/wiki/index.php?title=Jirga/_Shura_\(Afghanistan\)](http://www.informality.com/wiki/index.php?title=Jirga/_Shura_(Afghanistan)).

tribal-cum-religious values and that due inspection and investigation of the issue do not take place. In most cases, Jirga is gender- and sex sensitive in Afghanistan. Mostly, membership is not granted to women and children.⁴ For example, in solving a dispute over a murder case, Jirga resolutions may include giving the sister or daughter of the guilty party as bride to the other party (*bad dadan*) to prevent future enmity. In short, Jirga is based on local cultural norms and values and may thus sacrifice the rights of some parties, ignoring the principles of individual and human rights.

So why is Jirga popular as a dispute resolution mechanism? When formal systems are weak, even if there are problems with local practices such as Jirga, parties will turn to traditional forms of dispute resolution to handle problems. If ODR could be adapted to Jirga, technology-based 'traditional' dispute resolution could be a viable alternative to the untrusted formal legal system in Afghanistan. However, some challenges may hinder the implementation of ODR in a traditional society such as Afghanistan's.

There are two main mechanisms of business dispute resolution in Afghanistan; one is the formal mechanism through the courts, and the other is the traditional method through the Jirga. *Jirga* is a Pashto word – in the local language, *Jirga* is equivalent to 'council' or 'committee'. In practical terms, Jirga is the leading, long-established forum for dispute resolution and decision-making processes in which elders from various segments of society gather to talk or make decisions about something. Jirga is the backbone of dispute resolution, mostly in rural areas in Afghanistan.^{5,6}

Many factors influence the efficiency of the formal justice system in Afghanistan. One of them is political instability, which has hindered access to the formal jurisdiction system. In the fight for power, the formal justice system has been eroded. Parties involved in conflicts have changed the basis for formal institutions to cope with their political agenda. For instance, in Afghanistan, the constitution is the source of all laws and regulations. It is acknowledged as the 'mother law', and, in theory, no other rules and regulations can contradict it. However, the formation of this mother law has not been for the sake of law empowerment; instead, the enactment of each constitutional element was purposeful.⁷

An illustration of the negative impact of political instability and regime change on the establishment of a competent court and formal dispute resolution system is available from the time when Afghanistan came under the Soviet Union's control (1980-1988). The regime changed to judicial systems based on

- 4 T. Ginsburg, 'An Economic Interpretation of the Pashtunwali', *University of Chicago Legal Forum*, 89, 2011. Available at: http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/uchclf2011§ion=7.
- 5 A. Wardak, 'Jirga—A Traditional Mechanism of Conflict Resolution in Afghanistan', *Institute of Afghan Study Center, Reichel*, 2003, pp. 1-20. Available at: <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN017434.pdf>.
- 6 D.H. Ahmadi, *The Overview of Traditional Jirga in Afghanistan*, Bloomington, IN, Xlibris Corporation, 2012.
- 7 M.Q. Wafayezada, *Ethnic Politics and Peacebuilding in Afghanistan The Root Causes of Political Conflicts and the Problems of Democratic Transition*, Scholar's Press, 2013.

the Soviet model. Because of this policy, property rights were demolished. With the announcement of the anti-feudalism policy, the landowners lost their property, and the farmers denied repayment of their loans.

Widespread corruption is another phenomenon that has undermined the efficiency of courts and the formal dispute resolution system. In most cases, people do not refer to the formal system because it is corrupt and untrustworthy. On the other hand, decisions made by the formal justice system are hard to implement. Law enforcement agencies such as the police are also corrupt, managing to find ways around court decisions.

Meanwhile, courts do not have access to the whole territory of Afghanistan, first because there is a lack of resources and professional juries. Afghanistan does not have enough trained juries and professional staff. Furthermore, budget limitations make it impossible to train sufficient numbers of professional staff in the short run. In the national budget report of 2020, 48% of the budget is being derived from international aid and other foreign sources. The limited budget has thus prevented the government from expanding its jurisdiction in the whole territory. Simultaneously, insecurity is another major barrier to public accessibility to the formal jurisdiction system. The insurgents control a large proportion of the territory and do not allow courts to function in the areas under their control.

In view of the foregoing factors, traditional dispute resolution plays a vital role in solving the common disputes between individuals and businesses in Afghanistan. The traditional dispute resolution mechanism encompasses sets of norms and values that shape Afghans' behaviour and facilitate the way people interact with each other, do business, resolve disputes and maintain long-term relationships. Given the multi-ethnic and tribal nature of Afghan society, cultural norms and values vary across ethnic groups and tribal communities. Afghan culture is a mix of customary practices, and tribal values are not uniform but show distinctive features across ethnic groups.⁸ Tribal customs and local norms have been strong enough to resist even Islamic values. Local customs and practices combine tribal norms and customs with Islamic norms and values.

Traditional dispute resolutions systems are based on norms and unwritten regulations. Most social interactions in an informal institution depend on trust and trustworthiness between individuals and groups. In Afghanistan, the traditional system is structured by religious traditions and customary tribal values. Social support is garnered through kinship, polygamy and economic incentives. In dispute resolution, more than in any other realm, ordinary citizens are dependent on the informal system. In the event of any dispute, elders and tribal leaders get together and make decisions on the issues.

It is worth mentioning that the use of Jirga or traditional mechanisms is not confined to minor issues alone. Traditional systems play a vital role on the national and political levels too. For example, historically, the constitution itself was approved through a traditional mechanism (Jirga) by the clergy and tribal leaders. King Amanullah Khan regained the country's independence from Britain

8 T. Barfield, *Afghanistan: A Cultural and Political History*, Vol. 36, Princeton, NJ, Princeton University Press, 2010.

and enacted Afghanistan's first constitution (1923) through the traditional Loya Jirga. More importantly, the traditional view of approving the constitution was constitutionalized in 1964; the constitution formally gave the power of amendment and approval of the constitution to the Loya Jirga.⁹ Since then, all constitutional amendments have been approved through the Loya Jirga. There is even an article in the constitution that mandates this traditionalist concept. In terms of dispute resolution, Jirga's decisions are easy to implement. These are based on the embedded code of honour rather than any legal code, and sometimes this results in clashes with the state law. Therefore, to decide whether the outcomes are fair or not, one must consider the dominant codes of honour enshrined and respected by the tribes. Jirga consists of a set of meta rules addressing the legitimate subjects of conflict and legitimate ways of resolving them. It is a cultural system that channels, and thus limits, private violence.¹⁰

The central concept of this tribal law is *Nang*, usually translated as 'honour'. In tradition, certain actions and issues build and construct honour for a member of the tribe, as well as specific actions that harm and destroy the honour. Jirga decisions are usually based on the values of a positive reputation. In simple terms, Jirga intends to rebuild the harmed honour of an individual through accepted local ways.

Afghanistan is an unsafe and hazardous country in which to seek justice in any form. In some areas people are unable to hold Jirga and resolve their disputes because of the dangers involved in travel and assembly. ODR provides an opportunity, perhaps the best available, to achieve conflict resolution. For instance, when I was working in Afghanistan, I had contact with most of the elders in the area where I was located. Whenever any disputes came to us, I referred them to the elders to resolve through Jirga. However, one day a man came to us for help with a family issue that he had with his wife and his father-in-law. He was unable to go to Jirga, because the Taliban controlled that area and would not allow him there. I called his father-in-law over the issue. He suggested giving him some time to talk with his daughter and his family. Three days later we received a call from his father-in-law. He and his daughter were ready to discuss the issue and resolve it. I invited the man to either come to our office or discuss the problem over the phone. He preferred the latter option, and we had long discussions and negotiations over the phone in a group call. Actually, the issue was not resolved on the first day, and I continued the discussions for the second day. Finally, I found out what was important to them and what was a good option for them to reach an agreement. Although this ODR example did not have a full and complex ODR platform, it worked well for them to use a phone call to reach an agreement. Thus, ODR can be effective even in dispute resolution systems that are traditional and not part of a formal justice system like Jirga and where complex and expensive ODR platforms are not available.

9 A. Wardak, 'Building a Post-war Justice System in Afghanistan', *Crime, Law and Social Change*, Vol. 41, No. 4, 2004, pp. 319-341.

10 Ginsburg, 2011.

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In sum, dispute resolution is most often handled according to the norms and customary practices in Afghanistan. Formal systems are unable to cover the entire territory. Widespread corruption in the formal dispute resolution mechanism is one of the leading factors that divert public trust from the formal jurisdiction. In addition, insecurity and dangerous situations make even traditional systems like Jirga impossible. ODR is therefore needed and is a unique and equitable system of dispute resolution to cover the entire country.

2 Conclusion

ORD can be a good mechanism in Afghanistan for several reasons. First of all, it serves as a means to achieve acceptable traditional justice in the absence of formal justice systems. The formal system is unable to provide services in most rural areas. Moreover, since insecurity has further limited the reaches of formal justice systems, ODR can be a good alternative. Second, ODR can be seen as corruption free. In Afghanistan formal systems are corrupt and untrustworthy, making ODR an excellent alternative.

However, some measures are required for the successful implementation of ODR in Afghanistan. The ODR providers need to protect and secure confidentiality of disclosures in the ODR process and comply with Internet privacy statutes. ODR providers must also store the communication data securely in order to protect the disputants' confidentiality that are disclosed in the ODR process.

Public awareness is needed to familiarize people with the ODR system. Currently, people are not aware of ODR, so it requires some public awareness efforts. Further, ODR should understand the local values and build public trust. The mediator's job is to build trust and reassure the parties that their grievances can be heard and that they have the opportunity to express themselves.