



Manifestations of Restorative Justice in Afghan Criminal Law

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Abstract

Restorative justice is a fresh area of research for scholars in anthropology and sociology and sometimes in criminal law. This area of study sees the crime as conflict between the victim and his criminal. From this perspective, the contemporary idea attempts to address the crime problem. One main concern of such restorative tendencies is to protect the victim or ensure compensation for losses sustained by the victim. Supporters of this restorative philosophy have attempted to define and specify objectives and principles for it. However, an analysis shows that an instance of restorative thought is expressed only in a few laws under review in Afghanistan, whereas some laws have restorative impact due to their date of enactment. Beyond legislation, jirgas and the people's councils for the settlement of disputes have these traces of restorative justice, and the laws of Afghanistan and the legislators of Afghanistan try to recognize these councils and to reform them while trying to resolve small disputes through these councils. This article applies an analytical-descriptive approach to examining the laws.

Keywords: *Restorative Justice; Penal Laws; Traditional Criminal Justice; People's Jirgas and Councils*

Introduction

Intellectual developments concerning the phenomenon of crime have gradually shifted from a focus on the crime and the criminal to the victim and the person harmed by the crime. With this intellectual transformation, crime has proceeded to be defined as the disputation between the state and the offender, rather than the disputation between individuals, hence the responsiveness toward crime has been articulated in harmony with this new perception. Restorative justice has arisen within this intellectual context and has been elaborated on, and expanded to such an extent that it is now one of the most important areas of criminal law. Some countries adopted law to give expression to the restorative justice approach.

Restorative answers to the crime originated from the customs and local traditions of different tribes in the world. John Braithwaite states: "Restorative justice has been the dominant model of criminal justice throughout human history and for all peoples of the world." (Braithwaite, 2006: 43). Also, the conducting of jirgas (councils) for resolution of disputes in Afghanistan goes back a long way; thus, it is important that the jirga dispute-resolution approach be re-analyzed in light of restorative justice teachings. This article addresses the question of the position of restorative justice in Afghan laws and among its people. This analytical descriptive will, therefore, consider the idea of restorative justice, its ideals and goals, and the status vis-a-vis substantive and procedural criminal laws in Afghanistan, and will regard its place within the people and policy of the present legislative Afghanistan.

1. The Restorative Justice Idea

Similar to other ideas in the liberal arts; however, restorative justice is not really defined, and each scholar has given a definition in accordance with his perspective and context.

1-1 Definition of Restorative Justice

Thinkers and jurists have defined and explained restorative justice from different visions. In his article, due to limitation of space and time, he cannot take an exhaustive time to look at all these definitions but here is how that term can briefly be defined:

"Restorative justice, as defined in Howard Zehr, 2004: 25, is said to be a philosophical framework to offer a distinctive and different kind of view on crime and criminal justice. It is the kind of justice which deals with the resolving of criminal cases within a framework of dialogue and meetings among the concerned parties involved in the dispute."

Restorative justice could also be defined through its processes:

"The processes and techniques of restorative justice will enhance the feeling of membership in the community and enhance the internal satisfaction and reassurance of both offenders and victims: These processes will enhance the feeling of belonging that the victim has by giving both parties to the dispute an opportunity to create a space within which offenders can be recompensed for the harm done to the victims through effective and constructive means." (Abbasi Mostafa, 2003: 87).

"Restorative justice creates a circumstance where all those parties who have played a role in the development of the crime come together, sit, and, hence, collectively decide how to restore the criminal case, the damage it has created, and the arising problems." (Marshall Tony, 2005: 15).

By the definition of Bizo Valgri, restorative justice can simply be defined as:

"Restorative justice is an approach that from the very first moment of the commission of a crime aims at delivering justice through remedying the injury, compensating the losses, and restoring that harm that is caused by committing a crime."

In other words, the theoretical framework of restorative justice is recognized in global and regional documents. It is connected with the deconstructing theory of the criminal justice system, which has three mechanisms: depenalization, decriminalization, and decourtization, which all aim to limit the criminal justice system's intervention and involve civil society in combating crime in diverse ways.

Some scholars posit that restorative justice functions as an alternative to traditional forms of criminal justice—punitive or rehabilitative—when conflicts arising out of crime are resolved and when criminal behavior is prevented and offenders even reformed and rehabilitated, as follows:

1. The classical criminal system is constantly choked with a pile of cases of crime, resulting in pernicious and devastating consequences to the defendant and or offender;
2. The classical and traditional criminal justice grant a much-limited involvement to crime victims in different phases of the criminal process. Besides, this miserable experience extends to many other victims suffering secondary victimization due to the high volume of crime trial processes and also lengthy timelines for cases as well as expensive legal costs, thereby contributing to psychological torture and secondary victimization (Zare' Bid Sardareh, 2017: 323);
3. Traditional systems generally become isolated vessels—that is, like an ivory tower—bridged, thus never acting in light of the needs, emotions, and public opinion of society, incorporating community resources at the different stages of the criminal process and engaging civil society in managing criminality including crime suppression and prevention. (Mir Heydar, 2017: 207)

In sum, within the process and approach of restorative justice:

1. Crime shall firstly be viewed as a conflict between two persons—the offender and the victim—before finally the adjudication involves the state in the case.
2. Restorative justice promotes any victim-offender relation with his or her family and the local community in resolving the criminal conflict and in determining its outcome.
3. The main focus of the restorative process is typically on the restoration of material, ethical, and psychological losses caused by the crime, whereas punishing or rehabilitating the offender is of secondary concern. (Najafi Abrandabadi, 2002: 45)

1-2 Goals of Restorative Justice

Such a theoretical proposition concerned the perspectives on what restorative justice serves. Braithwaite put it as,

"As long as society believes that 'experts' can solve the problem of criminality through scientific means, there will always be a risk that ordinary citizens will refrain from participating in preventive programs that are carried out by themselves. I will only react to the criminal realities of my surroundings and neighborhood when I come to believe that official institutions alone cannot resolve the problem of criminality or provide the ground for the reintegration of offenders. But if this belief does not take shape within me, I will not respond when my neighbor or someone in my community violates the law and social norms, because there are others—such as prosecutors and the police—who are tasked with resolving such problems." (Braithwaite, 2006: 530)

He proposes:

"Crime is best controlled when all members of society actively participate in denouncing the offender, instilling a sense of shame in them, and in the offender's reform and rehabilitation as law-abiding citizens. Crime rates can diminish to a significant extent when people not only focus on their jobs and professions but regard crime and criminality as societal problems. Then, they pull together to sort it out and open up as many exits into society for offenders as rehabilitated citizens under law - not as mere subjects of police and legal authorities. Without social participation, the role of law will become little more than pointless punishment. The law and its official institutions achieve their effectiveness and ethical bearing only when society actively participates in addressing the criminality and victimization." (Braithwaite, 2006: 540)

Restorative justice is oriented wholly towards the attainment of four main objectives: personal relationships, reparative purposes, reintegration, and participation. Each of these is explained in detail below:

1. 2. 1 Primacy of Personal Relationships

For restorative justice, personal relationships are the essence and it sees crime and sets out to treat it from the angle of maintenance of personal relationships. By this delinquent act, that is violation of the personally existing relationship between himself and the victim through which he has to repair that relationship.

According to Howard Zehr, crime is an injury-an injury to individuals and to their interpersonal and social relationships-rather than an abstract phenomenon. Such injuries may be suffered not only by the victim himself, but also by all the participants-victims, offenders, and their families and society itself. Therefore, restorative justice would "repair" these injuries in the most efficient manner: personalization is the main contrasting element against impersonal and retributive qualities of classical criminal justice. (Abbas Shiri, 2017: 145)

1. 2. 2 Reparation

A crime causes injury to the victim and the community and, in reality, such injury is not limited to material content but also has emotional and moral dimensions. A crime might have dented the dignity and honor of the victim and can only be remedied by an apology and remorse shown by the perpetrator so that the wounds left in the victim's mind can heal. All remedies do not have such a healing effect and return what was lost. More than any conventional means of criminal justice, restorative justice achieves restoration of the effects of victimization and satisfies the victim.

Effects of victimization can be mitigated through monetary compensation, restoration of security, restoration of dignity, empowerment, participation in democratic processes, and a feeling that justice has been done; all of which lessen the burden of loss from the shoulders of the victim. (Hossein Gholami, 2011: 58)

Braithwaite states that "When anything that is valued by victims is disrespected or violated, victims suffer pain and loss."

1. 2. 3 Readmission

A crime has occurred when the offender has done something really bad through engaging in an offense. But the offender can make arrangements for reintegration by compensating for and satisfying the victim and society over the harm caused. Yet the responsibility for reintegrating the offender does not lie merely on the shoulders of the offender; society must also fulfill its responsibilities toward the reintegration of the offender. Society, just as it assists the victim, so it needs to help the offender. (Najafi-Abbrandabadi, 2002: 93)

1. 2. 4 Participation

Participation is one of the ends of restoring justice, wherein a victim, offender, and local community must all embrace a restorative process fulfilling each person's reparative role in accordance with their part in the crime. Restorative justice will have no effect when being meditated, meeting, dialogued, or jiswa'd by markas; what it matters is joint agreement on the consequences of crime and the

precrime state. The stress lies on the necessity of creating participation by the victim by the offender and the community.

In other words, the dispute is between those affected by it among the victims, offenders, and the offender's community. Professional state criminal justice practitioners took this role away from them. In a restored process, proponents believe better support is provided for compensating the victim and reintegrating the offender, as opposed to the traditional system.

Such meetings are believed to equip the victim and offender in the restorative justice context with opportunities of expressing questions and concerns the victim has toward the offender, describing the victimization experience, and considering possible pathways to repair and healing.

1-3 Principles of Restorative Justice

1. Crime is first and foremost a disruption of interpersonal relationships; it is not merely a violation of the state. It harms not only victims and society but also offenders and requires all these to be involved in the process of restorative justice.
2. All those affected by crime have roles and needs in making amends for the crime and have responsibilities in responding collectively to it.
3. Reparation and resolution of crime-related issues should be aimed at achieving agreement, reconciliation, and avoidance of future harms.

Among the theorists and advocates of restorative justice, two models or tendencies are predominant:

The purist model, which calls for the complete abolition of traditional criminal justice and its replacement by restorative methods;

The maximalist model, which still allowed state involvement if the restorative methods fail.

Surely extreme tendencies within this discourse calling for the complete abolition of formal and traditional criminal justice are there. A moderate tendency, however, advocates state intervention only in cases when local restorative efforts have failed, or in cases of serious crime.

2. Restorative Justice in Afghanistan

Restorative justice has a long-standing history in the criminal law of Afghanistan, with traces in various laws. Generally, under Afghan law, restorative justice is studied and examined as a concept that encompasses institutions and conditions applicable to most offenses.

2. 1 Restorative Justice in the Laws of Afghanistan

Restorative justice has been rendered in Afghan law in many instances, and elements thereof can be found in instruments such as: The Afghan Penal Code, The Criminal Procedure Code, The Police Law, The Law on the Organization and Authority of the Attorney General's Office, and The Law on the Organization and Authority of the Judiciary.

2. 1. 1 Manifestations of Restorative Justice in the Afghan Penal Code

The general spirit of the development of Afghan penal legislation, mainly the Penal Code, was one of retribution. The focus was more on the crime as one type of human behavior that violates social values.

(Alpheston Mount, 2009: 187). This is so because the foundations for this code were laid at a time when any modern turns in criminal policy were becoming known. Besides, the Penal Code was made by an authoritarian regime that inflicted itself on the people, in which the idea of using citizenship rights as a most fundamental basis in state-building was seen as pure nonsense. (Ramin Moshtaqi, 2004: 87) One of the aims of restorative justice is the compensation of the victim who has been made to suffer as a result of the criminal activity. When harm or injury or loss occurs due to the commission of a crime against an individual, restorative processes should achieve redress for that harm. In restorative justice, repairing the damage caused to the victim in terms of material, moral, or emotional context is prioritized over restoring public order.

The Afghan Penal Code does provide for the compensation of victims of crimes. With respect to this, paragraph two of Article 6 states:

"A person who has caused damage as a result of committing a crime shall be sentenced to compensate for the inflicted damage."

Various other articles of the Penal Code clearly state the necessity for the material compensation of the victim. For instance, in paragraph one of Article 407, it provides:

"A person who intentionally injures or strikes another person in a manner that results in amputation, impairment, fracture, or disablement of a body part, or causes permanent disability or loss of a sense, shall, in addition to compensation, be sentenced to medium imprisonment not less than three years."

Paragraph one of Article 408 also mentions compensation to the victim. Other articles dealing with victim compensation include Articles 411, 412, 495, and 516 of the Penal Code. These articles require offenders to compensate victims for the harm done.

Among the distinguished aspects of victim compensation in the Afghan Penal Code are:

1. Compensation as per the Penal Code relates only to tangible damages while it does not include moral or emotional damages which restorative justice highlights.
2. Apparently the understanding of compensation under the Penal Code would be from the idea diyya (blood money) which attaches a religious form to punishment.
3. Under the Penal Code, the responsibility of the offender goes beyond compensation into imprisonment or other penalties. In contrast, in restorative justice, the case may be ended once the offender compensates.
4. According to the Penal Code, if the offender is not able to pay the victim compensation, and the victim refuses to forgo the right, then the court may increase the punishment to make it heavy for the offender.
5. Article one of the Penal Code recognizes Shria-based punishment such as hudud, qisas, and diyya. In qisas, the victim plays a very crucial and central role which is indicating that the victim was honored in the light of the Penal code.

2. 1. 2 Manifestations of Restorative Justice in Afghanistan's Criminal Procedure Code

Briefly, From the perspective of Restorative Justice, we will study the Criminal Procedure Code of Afghanistan and see how the victims were put in place at various stages of legal prosecution.

Article 4 defines legal terminology in the Criminal Procedure Code. In paragraph 7, it introduces parties to the case as follows:

"Parties to the case: the prosecutor, the injured party, the claimant of personal right or their legal representative on one side, and the accused and the responsible party for personal right on the other side."

This paragraph clearly makes clear that sides of the other part of the criminal case as the injured party and the claimant of personal right.

Moreover, paragraph 16 of the same article further defines the victim:

"The victim is a person who has suffered any physical, material, or moral harm due to the commission of a crime." In the light of this legal definition, it is clear that the victim can neither be ignored in a criminal case nor the harm suffered by him or her be proved.

It mentions the rights of the victim in criminal matters under Article 6 of the said law:

1. Rights of victims and claimants of personal rights during prosecution period:
 1. Security to protection;
 2. Attendance in prosecution proceedings and the right to ask specific questions in homicides and other serious crimes;
 3. Right to the claim and receive property value and to claim damages as per legal provisions;
 4. Fair treatment with respect to human dignity and protection of personal integrity;
 5. Access to legal, financial, medical, psychological and social assistance;
 6. Right to raise objection to action taken by judicial police, experts, prosecutors and judges as per the law;
 7. The right to be furnished with proceedings' details, furthermore discussing outcomes thereof at various stages of prosecution.

Furthermore, paragraph 2 of this article imposes an obligation on the police, the prosecutor, and the court to take necessary and effective measures to enable victims to exercise the rights enshrined in paragraph 1. It states the following: "The police, prosecutor, and court shall each, within their respective jurisdictions, take and implement necessary measures to ensure the victim can benefit from the rights listed in paragraph 1 of this article."

The Criminal Procedure Code equally mentions the rights of the suspect, accused, and victim (or representatives thereof) to question the qualifications of experts as well as obligates the prosecutor and the court to take action accordingly upon hearing the grounds. Article 13 of the Code states: ""The suspect, accused, victim, or their legal representatives may request the disqualification of an expert in any of the cases mentioned in Article 12 of this law. The prosecutor or court is obliged to review the matter promptly and, if justified, assign a new expert."

The grounds for disqualification are spelled in Article 12, which includes:

- Close kinship
- Acting as legal counsel or legal advisor to the suspect, accused or victim
- Prior participation in the same case as judicial police officer, prosecutor, defense attorney, witness, or judge
- Acting as the treating doctor of the victim
- Doubt on impartiality or expertise of the expert.

The grounds for commencing a criminal prosecution are specified in Article 56 of the Code of Criminal Procedure, wherein paragraph 3 states that a request for compensation resulting from a commission of crime is one of the grounds upon which a criminal claim rests. Article 56, paragraph 3 reads:

"Information on the occurrence of the crime or the observations of signs thereof and the effect thereof on the part of any individual to any investigating or prosecuting authority, or a request for the compensation resulting from the crime by the plaintiff of personal rights."

Under restorative justice, compensation to the victim is the centre and soul of the criminal case. Basically, the compensation would be assessed in the presence of all three parties: the victim, the offender, and the local community. Otherwise, under the Criminal Procedure Code, the courts give a decision regarding the compensation. In all cases, restorative justice is deemed successful when the victim is justly compensated.

Article 65 of the Criminal Procedure Code establishes:

"If the victim is a child or mentally impaired, the complaint can be filed by their legal representative, depending on the circumstances."

The same law also mentions the victim's right to withdraw such complaints. Article 68 sets forth that:

"The withdrawal of the victim from initiating a criminal case, in the circumstances described in Article 63 of this law, occurs before the issuance of a final court verdict upon submission of a written statement of withdrawal."

Articles 189 to 201 of the Criminal Procedure Code speak of personal claims (haqq-ul-abd) and give the possibility for the injured person to instigate such a claim or withdraw it once instigated. The conferment of such a right to the victim regarding personal claims to be filed before court is in recognition of the importance being afforded to the victim in the entire criminal prosecution process.

Article 296 of the Criminal Procedure Code declares the personal claim as separate from the criminal case. It states:

"If a personal claim is filed jointly with a criminal case before the court, and the accused is acquitted or found not liable in the criminal case, this ruling does not affect the unresolved personal claim."

The same law, furthermore, relates the full execution of the judgment with the compensation of the injured party:

"A person convicted of a felony or misdemeanor can only be rehabilitated after the full execution of the sentence or pardon, and this includes the compensation awarded to the injured party by the court."

Therefore, the position of the victim is rather important in the Criminal Procedure Code. In this respect, two points are worth mentioning:

1. In restorative justice, crime is seen not as an offense against the state but as a dispute between the offender and the victim. The local community may also be considered a party to the dispute, if harmed in some cases. The resolutions are made via mediation sessions, community meetings, or family gatherings among the offender, victim, and local community.
2. The Criminal Procedure Code, however, does recognize certain rights of the victim in the whole process of prosecution. But it does not provide for the right of the victim or satisfies the victim so that it can hold up the process of prosecution of crime by the state. In fact, victim compensation or satisfaction cannot change the status of an offender within the jurisdiction of the legal system. Logical deduction from this approach of the law suggests that while some reflections of restorative justice are contained in the law in a supporting way for the victim, the heart of the laws itself in relation to the

offender is still grounded in classical criminal justice since dissatisfying a victim does not free the offender from criminal consequences. (Mostafa Abbasi, 2003: 98)

2. 1. 3 Manifestations of Restorative Justice in the Police Law

All police operations involving public order and discipline should be performed in compliance with the law. The police cannot expect to see their activities in criminal matters perceived as just and fair without legislation. It is no better than a bad law. This is the existing Police Law in Afghanistan: police have no authority to resolve criminal cases through participation by the parties at the initial stage of the crime.

Similarly, in practice, police often violate laws. Police may arrest an offender and, after receiving a bribe, release them thereafter. In some cases, they also obtain the consent of the victim to consider the case closed. (Alizadeh Mousavi, 2002: 250)

2. 1. 4 Manifestations of Restorative Justice in the Nun Government

The Afghan Law on the Attorney General does not provide powers to prosecutors also to resolve criminal issues by the identical participation of the criminal and the victim, similar to the Police Law. As applicable, prosecutors may continue to investigate the offender and refer the matter to trial "court".

2. 1. 5 Manifestations of Restorative Justice in the Law on the Organization and Authority of the Judiciary

Based on the unequivocal provisions of the Law on the Organization and Authority of the Judiciary, judges do not have the legal authority to reconcile the criminal with his victim or to discontinue a criminal case based on settlement. They can prosecute the offender and adjudicate the criminal case according to the law.

3. Restorative Justice from the Perspective of the Afghan Nation

Applied Restorative Justice has options from country to country. Some of the terminologies used by restorative justice scholars and researchers to refer to these methods include circle gatherings, mediation between victim and offender for restitution, and community service, among others.

With regard to Afghanistan, different ethnic or tribal communities across various regions undertake their projects of reconciliation to settle disputes in most cases. For instance, they differ from one place to the other, or from one ethnic group to another. Some of these, however, are at variance with restorative justice. For instance, bad-dadan (giving a girl in compensation) in a case of homicide is creating further crimes instead of preventing them. Therefore, violence against women - including bad-dadan- is criminalized in Afghan law.

Nevertheless, some local methods found in Afghanistan that the people themselves used to resolve disputes and bring about conciliation between offenders and victims have proved effective in impeding crime and promoting peace. (Alizadeh Mousavi, 2002: 240)

I have seen this personally in central Afghanistan: village elders, religious leaders, and important figures of the area together with tribal chiefs come down and can save the best way possible such mishaps. The best way according to them from mediators was agreed to by both parties and did not deviate from it.

Usually is referred to by the participants as marka-gar or marka-chi this arrangement of bringing both sides into the same session to face each other and openly express their demands in the mediation of these individuals is usually called reconciliation and peacebuilding Implementation. The gathering itself, however, is called marka. These methods apply not only to petty crimes, but even to severe crimes like murder or the elopement of girls.

4. From Formal Justice to Informal Justice

4. 1. Implementation of Formal Justice Since the Beginning of Legislative Movements in Afghanistan

Legislation in Afghanistan started with King Amanullah Khan. Amanullah dreamed of establishing the foundation of a modern state within Afghanistan; thus, he held reforms, among them laws and governance based on law. Under his tenure, the first constitution of Afghanistan, titled Regulation of the Royal Government of Afghanistan, was adopted. Then, a few other laws were added as required. (Moshtaqi Ramin, 2004: 154)

In fact, most of the regulations of the period of Amanullah were translations of Turkish laws without any considerable modification. Such are the high ups and downs that Afghanistan has walked through in the historic trail of legislation, causing severe hurdles in the law-making process. Broadly, these main challenges can be summarized in the following:

A ceaseless and perennial tussle between the advocates of Islamic Sharia, as the only and final law, should be kept opposition against those who hold that legislation is required for the proper organization of human relationships within society. For this first group, legislation is called an innovation (bid'ah) against Islamic law. On the contrary, the followers of legislation assert that the relationships among men are becoming increasingly complex and require formal structuring based on clear principles for the control and management of social conduct in society.

Since the initiation of legislative procedure has brought about considerable changes in the political system of Afghanistan, all those changes have been subjected to conflicting ideologies. Most of these ideologies were formed through coup or violence and can impact highly on the state of legislation. Each political regime would in turn disown their predecessor's laws and introduce new ones consistent with its prescribed political ideology. Over a long period, time, however, law difficulties or failures normally set in through the continual operation of the same laws. Afghan legislations are hardly such due to changes that happened in the regime from time to time.

Consequently, the transformation from orthodox formalism to a sort of justice-privatization or informalization is not fully applicable to Afghanistan, because, until now, a proper testing and evaluation of the outcomes of formal justice has not been possible owing to the advent of legislation. The theory, practice, culture, and social context for formal criminal justice implementation still suffer challenges in the Afghan society.

One of the authors of restorative justice indicates that countries such as Iran, Afghanistan, and other Middle Eastern nations are placed within a socially and culturally adverse condition for making formal justice feasible. In addition to their theoretical and practical issues, there are many others at the deep-rooted cultural and social levels. The diversity of culture along with the long-standing characteristics of criminal dispute settlements in certain regions is one of the most important factors hindering uniform and official applicability of criminal law to all. This also includes the most common informal ways of resolving disputes. Some legal scholars argue that these traditions, which are shared between Iran and Afghanistan, like Fasl, Khoonbas, and Patar, contain restorative elements in their application.

Most countries turned to indigenous models of restorative justice for inspiration as most formal criminal justice systems failed to respond suitably to crime. But in Afghanistan, socio-cultural obstacles in the form of a tribal fabric, political transitions in quick succession, bad governance, misunderstanding of the law, and the aspect of law contradicting Islamic Sharia have inhibited the growth of formal justice as well as strengthened informal mechanisms.

It seems that upholding the essence of informal justice-the sphere which contains certain elements of restorative justice-and reforms to those mechanisms are urgently needed to adjust the criminal justice system today-the present-day state-centered, punishment-directed criminal justice organization-abiding by Afghanistan's criminal justice requirements. Drawing upon foreign experiences could be useful as well as instructive in legislative policymaking.

4. 2. Towards Formalization of Informal Justice in Afghanistan

The political system which came into being in late 2003 promoted the idea of reform in the political, social, economic, and cultural realm. Especially unlike very much, the legal field was under reform. One of the ways a government can try to improve the justice system and increase access to justice is to formally recognize the jirgas and councils that resolve disputes in Afghanistan.

Historically, jirgas and markas have served as mechanisms to resolve disputes among the people. The settlement of civil and criminal disputes has always had a history in Afghanistan whereby tribal jirgas or local elders would be called upon to mediate. Unfortunately, sometimes the very opposite occurred, that is, due to some lack of established standards, these jirgas went unrecognized in courts of law.

For her part, bad-dadan is one of the practices in some areas of Afghanistan in which jirgas give girls of marriage to settle disputes. Lawsese, this custom was believed to be aimed at settlements. In practice, however, bad-dadan rarely aided reconciliation and often led to even worse outcomes for the victims. This dire consequence has prompted the Afghan legislature to declare bad-dadan a criminal act in the Law on the Elimination of Violence Against Women (Article 5).

To this end and to restrict the evil entailments from the practice of jirgas and markas in the settling of disputes, the Ministry of Justice had on 4 October 2010 (12 Mizan 1389) prepared a draft law, which it entitled "Law on Jirgas and Reform Councils." However, this draft has not been given force as yet.

Article 2 of the Draft Law on Jirgas and Reform Councils states the objectives as follows:

1. To prevent supper inhuman and illegal udjil solution of disputes by jirgas and reform councils.
2. To ensure access to affordable jastice and fair justice, simplified in its proceedings, before formal judicial or legal proceedings commence.
3. To encourage and nurture sound local customs and traditions, notwithstanding what may be their level of acceptance.
4. In the process of ensuring justice, it ensures legal and Islamic rights of citizens, particularly women and children, as basically disadvantaged people.
5. To mitigate the workload over legal and judicial institutions, mainly the courts.
6. To strengthen the relationship of the jirgas and reform councils with the judicial and legal-oriented establishments.
7. To define what should be included under the duties and power of jirgas and reform councils.

Once More, the Illustrated Objectives in the Draft Law on Jirgas and Reform Councils Are In Sync with the Theoretical Foundations of Restorative Justice.

Proponents of restorative justice maintain that traditional criminal justice has overburdened itself with casework and neglected victims' rights in the entire criminal process. Accordingly, restorative justice has been proposed as a remedy for this predicament, a suggestion discussed in the draft law concerning the jirgas. However, Article 4 of that draft limits the functions of bare jirgas and reform councils to merely settling the disputes of a civil and legal nature between natural persons. The draft states in clear terms: "1. Jirgas and reform councils are recognized as informal mechanisms for resolving civil and legal disputes between natural persons." Hence, Paragraph 1 of Article 4 restricts the jurisdiction of jirgas and reform councils to civil disputes. Such an exclusive limitation to civil disputes raises a number of difficulties:

First, such restriction contradicts the aims tackled by Article 2 of the draft law. This was also stated in Paragraph 2 of Article 2, which lists the provision of easy, cheap, and fair justice as an aim. However, justice shall not be restricted to civil and legal matters. Besides, Paragraph 4 of Article 2 emphasizes the need to ensure Islamic and legal rights of citizens, especially women and children as vulnerable groups. Women and children suffer more from crimes than civil disputes, which is a pointed reference to criminal matters.

Furthermore, modern restorative justice has indigenous roots wherein it often functions to resolve criminal and penal conflicts. Jirgas have historically and present day been convened for those purposes in Afghanistan. Conversely, Article 23 of the draft grants judicial and legal authorities limited power to refer minor offences to the jirgas. It states, "Judicial and legal authorities may refer juvenile criminal cases that do not require detention, as well as adult misdemeanors involving fault and limited harm, to jirgas for resolution. If the jirga successfully resolves the personal rights aspect of the case, the public rights aspect is considered concluded."

Article 23 presents several serious problems:

1. It runs counter to Article 4 of the draft, which confines the authority of jirgas and reform councils strictly to civil and legal disputes, whereas Article 23 gives them some authority over selected criminal matters.
2. Traditionally, jirgas were never just civil; they always dealt with both civil and criminal cases; in fact, criminal disputes were often at the center of the jirga's concern since local leaders were deeply worried that unresolved tensions risked cyclical violence.
3. The draft limits the authority of the jirgas on the jurisdiction of certain classes of misdemeanors (qobahat), which departs from both the principles of restorative justice and more so the general practice of traditional jirgas.

This draft law on jirgas and reform councils is insipid at its worst for all that it states so far. Restorative justice is perhaps the most modern of all today's schools of thought, demanding much more than the subject matter contained in the draft. The laws officially recognizing informal justice mechanisms thus mark a very positive step towards the revitalizing and regulation of authentic modes of conflict resolution. It also opens very interesting avenues toward the incorporation of the most recent developments in criminal justice.

Certainly, should the continuing halting movement pick up speed and be infused by greater energy and commitment, it could pave the way toward the incorporation of the new trends in criminal justice within the emerging Afghanistan legislative process-by drawing from their theoretical and practical insight.

Conclusion

1. Keeping in view the paradigm of restorative justice, it perceives crime as a conflict between individuals and not the state acting against the individual. Therefore, they insist on using meetings, pathways of jirgas, mediation, and dialogue points behind the offender and victim that incorporate the community and compensating to restore the offender to society and give a feeling of security for both the victim and the local community.
2. This approach heralded a new development in criminology, being mostly advanced to replace the traditional procedures of prosecution, criminalization, and punishment-with a view to preventing crime and solving disputes among faiths.
3. The proponents of restorative justice can be broadly classified into two models: The purist model, without conditions, rejects traditional criminal law and demands complete replacement by restorative methods. The maximalist model considers restorative justice a complementary method besides traditional criminal justice and suggests that initially restorative approaches should be tried, failing which recourse can be sought from the conventional criminal justice system.
4. These ancient base traditions and custom of various tribes around the globe have served as the foundation upon which restorative thought has been built. Scholars have gleaned from these traditions to build the modern restorative model. It also has scripture roots, such as qisas and reconciliation in Islam considered restores practices.
5. Because restorative justice is a new concept in the discourse of criminality, Afghanistan's criminal laws have not entirely been designed following its principles. However, certain legal provisions do have some features of restorative justice.
6. The gathering of jirgas and the organization of neighborhood meetings to sort out and resolve the criminal matters of the different ethnic groups in Afghanistan have been practiced for quite a long time. The only real worry that continues to persist is that they may not lead to the justice that needs to be achieved. There is always a chance that it would infringe the rights of a victim and might even create secondary victimization.
7. Lawmakers are slowly trying to revive and reconstruct ancient traditions and customs by reform. This is, however, a slow, lethargic reform movement.

Recommendation

1. In addition, it will be more probative or it will prove additional as even with restoration methods as a respectful attempt to clear the case loads in the heaviness to these judicial and court systems. As this is shown by too much corruption in these institutions, it creates an additional situation of injustice and trampling of citizens' rights, which is more of a devastating and serious hurdle in the realization of citizens' rights. Application of restorative methods will save these rights from the severest infringement.
2. Formal recognition of informal justice in Afghanistan has not yet matured and is only the subject of scholarly discourse; there is a need to work out the discussions and open them up for a public, nationwide debate and discussion-for consideration and deliberation among legislators.

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