

An Analysis of the Role of Formal and Informal Systems of Conflict Resolution among the Swatis of District Batagram, Pakistan

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Abstract

The purpose of the paper is descriptive analysis with reference to the relative effectiveness of formal and informal conflict resolution systems among the Swatisⁱ of Batagram District, Khyber Pakhtunkhwa, Pakistan. The formal system works through formal courts while the informal system practices Jirga. The population of Batagram District is stratified in terms of socio-economic status. The main strata are Swatis, Stanadarⁱⁱ, Gujarsⁱⁱⁱ, and occupational castes^{iv}. The aim of this study was to analyze purposively selected land disputes that occurred between members of Swatis because, as descendants of conquerors, they claim to be equal among them. This is a qualitative research for which data was collected through interviews. Empirical facts have confirmed that the formal system is not only controlled by rich people, but is also slow, corrupt, and incompatible with people's cultural values. While culturally compatible, the informal system is controlled by powerful people because it operates within a social stratification system in which members are treated according to their socioeconomic status rather than meeting criteria of fairness alone. The role of the informal system in the fair resolution of the conflict is possible only if the competing groups are equal in power. The informal system was relatively more effective for lasting conflict resolution between members of the Swatis because they had almost equal power positions.

Keywords: Dispute, Conflict resolution, Adjudication, Arbitration, Mediation, Jirga, Sharia, Social equality.

Introduction

Conflicts of varying intensity are a permanent feature of human society (Avruch, 1998). Each society resolves conflicts by implementing different systems. Anthropologists have studied various small-scale societies and described various systems that are classified into a number of categories, i.e., avoiding conflicts, accepting other party's claim, coercion, bilateral negotiation, mediation, arbitration and adjudication (Levinson & Ember, 1996). In the anthropological literature, legal systems are broadly classified into formal and informal. Formal courts adjudicate trouble cases in which authority often relies on the rules and regulations that govern similar cases and the nature of evidence and arguments and then pass on a judgment in which one party wins and another loses (Levinson & Ember, 1996). In addition to formal courts, however, there are also informal conflict resolution systems such as the Jirga^v in Afghanistan (Tapper, 1983; Carter and Connor, 1989; Elphinstone, 1992; Glatzer, 1998), *moot* among the Kpelle of Liberia (Gibbs, 1997), Panchayat in India (Baxi & Gallanter, 1979; Moore, 1985) and mediation committees in China (Li, 1978; Clark, 1989). The main components of the informal system are mediation and arbitration. Mediation is usually conducted by a neutral third party and is a "triadic mode of dispute settlement" (Greenhouse, 1985, p. 90). In arbitration, the contending parties themselves submit their case to experts for resolution. Therefore, with these considerations in mind, the present research focuses on how formal and informal conflict resolution systems are used among the Swatis of Batagram.

The Swatis, who are the main subject of this article, conquered the present districts, Batagram and Mansehra during the 16th century (Ahmed, 1973). However, according to the Hazara Gazetteer (1883), "at the beginning of the eighteen century a Saiad named Jalal Baba, collected a heterogeneous following in the Swat valley West of the Indus, and, evicting the Turks, appropriated the country now held by the Cis-Indus Swathis". According to oral history, the Swatis conquered the area located in present-day Batagram and Mansehra districts during the 16th century under the leadership of Sayyed Jalal Baba and Mian Nazar, ancestors of Saydaan and Miagaan respectively. Conquered land was allotted to conquerors including

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Saydaan, Miagaan and Swatis. In proportion to their population, a huge portion of the land was allotted to the heterogeneous population of Swatis, who played a vital role in the conquest. The Swatis as a tribe do not claim common descent because “the tribe is...of very mixed genealogy” (Ridgway, 1983, p. 242), but nevertheless the role of genealogy below the tribal level is important to them, playing a vital role in the organization of members at the sub-tribal level and below as Swati tribe is divided into various sub-tribes and each sub-tribe is further divided into sections and each section into sub-sections. The Swatis who were allotted the conquered land attained the status of *dotaryan* (singular: *dotary*). Descendants of *dotaryan* are also known as *dotaryan* because they maintained land ownership and inherited land from generation to generation since the conquest.

Locale and Methodology

District Batagram was selected for this research because both formal and informal systems are implemented for conflict resolution. Batagram is the capital city of a district located on the main Silk Road that connects Islamabad with Beijing. Geographically, Batagram district is located at latitude 34°-33' to 34°-58' and longitude 72°-51' to 73°-29' surrounded by Kohistan district in the north, Mansehra district in the east, Tor Ghar district in the southwest and Shangla district of Malakand division to the west. The district, which is predominantly occupied by Swatis, consists of two sub-divisions including Batagram and Allai. The researcher collected data from Swatis from across the district about land disputes that were contested in formal courts but were ultimately resolved through the Jirga.

Qualitative research was conducted to understand the process and procedure of conflict resolution. The overall methodology is inductive because various cases of disputes were examined in detail and then were generalized to the whole tribe. Individual as well as focus group interviews were conducted to understand the nature of conflicts in detail. Both types of interviews were helpful in cross examination of information. Interviews were open-ended and in-depth interviews were organized with neutral people. Interviews were also conducted with Jirga members and focus group interviews were conducted with the members of disputing parties. Among Swatis, conflicts normally occur over natural resources, therefore, the focus was to analyze those disputes in detail that happened over the ownership of natural resources. Though the ownership of land in the community under review is officially documented but even then conflict occurs over agricultural land, pastures, water holes and forest. The case studies are only referred to in this research and the detail narration is avoided for the sake of brevity.

Theoretical framework

In the patriarchal society of the Swatis, the patrilineal agnates are linked by genealogy and support each other through complementary opposition. In all kinds of disputes involving the use of physical force, the contending parties are united by genealogical connections. Members of the sub-tribe favor those who are close to them in terms of genealogical ties. Rivals use the formal system to tease each other and cause financial damage, and those who can manage the formal system and afford expensive lawyers to achieve justice become successful. In cases of murder, the decisions of the formal court are not wholeheartedly accepted, as the rivals pursue revenge. It is because, they prefer to resolve the conflict by not leaving the impression of weakness on the part of any of the contending parties in order to preserve social equality^{vi}. Since the decision of a formal court in favor or against either party is inferred by the people at large that the former is the winner and the latter the loser, such an emphatic declaration of one party as the winner and the other as the loser is seen against the concept of social equality.

During a long conflict, the constant loss of material resources and the killing of men in cases of revenge lead to a peaceful resolution of the conflict. This is because the sheer scale of the destruction on both sides forces the rivals to accept peaceful means and allow mediators to negotiate. Due to the ineffectiveness of the formal system, the traditional system is commonly chosen as a good alternative for conflict resolution because it promotes social equality and finds a solution that is socially acceptable. However, a fair decision is not the result of the role of the informal system, but of the equal position of the competing parties, because in the case of an unfair decision, any of the parties in a disadvantageous position can refuse to accept it. The

aim of the paper is to examine both formal and informal systems of conflict resolution, focusing on the fact that the informal system is preferred for conflict resolution because the process and procedure of a formal court is not compatible with the cultural value of social equality.

Formal System of Conflict Resolution

The British law in subcontinent is always termed as alien, imported and imposed and has always been criticized by the administrators, nationalists, and students (Cohn, 1959; Rudolph & Rudolph, 1965; Moore, 1985). The replica of this system is composed of different levels of courts which administer justice system in Pakistan.

“The major organs of the formal justice sector are the Higher Judiciary (Supreme Court & High Courts), District judiciary comprising courts of magistrates and sessions judges which are being supervised and controlled by the High Courts within their jurisdiction. Furthermore, they are assisted by the law officers at the Federal and the Provincial levels i.e. the Attorney General’s Office (AGO), and Provincial Advocate Generals’ Offices respectively. Recently Independent Prosecution Service Department has been established in each province. Institutional informal justice system is being developed in the country in various forms such as Offices of the Federal and the Provincial Ombudsman and Federal Tax Ombudsman; Alternate Dispute Resolution Committees (under Income Tax Ordinance 2001, Custom Act 1969 Sales Tax Act and Federal Excise Act 2005), Anjuman- e- Masalihat Committees at the Union Council level under Local Government Ordinance, 2001; and notified saliseen under Small Claims and Minor Offences Ordinance, 2002 (SCMOO). These are working under the normative standards at national and provincial levels and are facilitating public at large for dispensing justice through non-judicial mechanisms” (SJA, 2008).

The dichotomy of formal judicial system and informal traditional system can be found in all areas of Pakistan (Chaudhary, 1999) and Batagram district is no exception in this regard. In principle, it is the duty of the formal legal system to provide impartial justice and resolve conflicts in a transparent and fair manner. However, bad practices do not allow the system to work as people expect. According to people's perception, the formal justice system is less effective because of the nature of the law that governs the official justice system, which was imposed by the British colonial government (Chaudhary, 1999). Other causes have to do with the temperament of those who run the system, which are in many cases corrupt, making justice accessible only to the powerful and those who can pay to buy justice (Law Reform Commission, 1970). This is because people perceive that in the vast majority of cases the real culprits go unpunished due to a flawed formal system in which lawyers save their clients. Since this is a simple face-to-face society where criminals are usually known to the whole community, the release of criminals from formal trial comes as a shock to the people and develops distrust among the victims in the effectiveness of the formal legal system. Therefore, the decisions of the formal court are not stable to permanently resolve conflicts.

Moreover, the process of decision-making in formal courts is very slow. A simple civil case takes years to decide. “One big problem at the courts is a delay. All people who are related to criminal justice like the lawyers, the judges, the police, the legal process serving staff, etc. all are responsible for the delay” (Chaudhary, 2018, p. 43). “There is a widespread complaint that criminal cases are generally delayed inordinately by some magistrates with a view to extracting illegal gratification. ..., ‘oiling of the wheels’ is necessary make even the judicial machinery run smoothly and with speed at this level.” (Law Reform Commission 1967 – 70, pp. 414- 15).

Five cases of land disputes were studied. They were contested in formal courts of various levels including civil, session and high courts, lasting an average of fifteen years and finally returned to the disputing parties for resolution through the traditional Jirga. The slow performance of formal courts in Pakistan is a common phenomenon. For example, “*Dawn View on the Slow Pace of Justice*” (2018) is “to elucidate further, there are over 2m cases pending before various courts in Pakistan, a large majority of them in the lower judiciary. Shockingly, it takes between 20 to 30 years for a moderately complex civil case to be resolved”. Further, “Pakistan’s judicial system, particularly the lower courts or trial courts, is so painfully slow and corrupt that it has become a torture for anybody who may have to face a case in court of law. The

situation is torturous for those who find themselves involved in civil cases” (Anjum, 2018). “According to the National Corruption Survey conducted by Transparency International in 2002 and in 2006, the three most corrupt government agencies were the police, the political sector, and the judiciary” (Chaudhary, 2018, p.36). “Below the level of the High Courts, all is corruption. Neither the facts nor the law in the case have any real bearing on the outcome. It all depends on who you know, who has influence and where you put your money.” (Hoebel, 1965, p. 45). “It is not only judges, lawyers and police that are corrupt; all those who are affiliated with courts and or have anything to do with the courts work either after charging money or having been approached by friends, relatives or influential people” (Chaudhary, 2018, p. 44). “..., corruption among the subordinate officials and process – serving staff as well as among the investigating staff is rampant with the result that no action is taken by them unless the parties involved approach them and tender some extra-legal consideration. ..., ‘papers move only on golden or silver wheels.’” (Law Reform Commission, 1967-70, pp. 414-15).

During interviews, respondents complain about the corrupt nature of civil servants in the courts who take bribes. Therefore, those litigants who are influential, have connections with smart lawyers, can pay bribes and can afford to hire expensive lawyers to get justice are at an advantage. Furthermore, the decisions made by the formal system are not consensual and therefore incompatible with the cultural value and individual thinking of the rivals, because the cases are not analyzed within a cultural framework that promotes social equality – that none of the rivals is stronger or weaker, but equal. A formal court studies the case in isolation and does not involve the disputing parties in the formulation of the decision. Interview data shows that the Swatis believe in a tradition of social equality, but formal laws do not conform to this tradition, as in a given dispute, a formal court, based on the evidence, emphatically declares one side the winner and the other the loser. It leaves no room for collaborative or integrative solution to the problem e.g. a land dispute resulted in a murder between rival groups. The case was fought in formal court for more than nine years, but to no avail. Under the traditional system of coercive self-help, both groups were aided by their agnates, and in cases of revenge several people were killed during the feud. The differing rulings of the formal court in favor of one or the other were not wholeheartedly accepted, and the case was finally settled by the traditional system of *nanawati* (submission or asylum) supported by the efforts of religious leaders.

Traditionally, losing a case in a formal court weakens the loser's social standing and fame, and therefore the loser in a formal court will not accept the decision made against him and will continue to be hostile until the dispute is resolved by the traditional system, which believes in collaborative and consensual action to resolve conflict between rival groups. Since the formal court does not work to the satisfaction of the people. As a result, its weaker role forces hostile groups to seek an alternative mechanism of judicial redress. Thus, the informal conflict resolution mechanism in the patriarchal setting is a substitute for dispute resolution.

Informal System of Conflict Resolution

In Pakistan, two types of Jirgey (singular: Jirga) are recognized as alternative dispute resolution systems, i.e. traditional and public bodies. A traditional Jirga is regulated by the people, while a public body Jirga is a state-sponsored institution (SJA, 2008). In Swatis' society, the informal system of conflict resolution is the traditional Jirga (plural: Jirgey). The traditional Jirga is regulated by two types of leaders, traditional and religious. The legitimacy of traditional leaders is asserted by their *dotary* status coupled with a capacity for coercive self-help. They administer the Jirga through a code called *Pukhtu* or *Pukhtunwali*.

A number of anthropologists e.g. Spain (1995) associates *Pukhtunwali* with a number of distinctive features such as *melmastia* (hospitality), *badal* (revenge) and *nanawati* (submission or asylum). However, *Pukhtu* is both a spoken language and a code. This code, which is reflected at different levels of segmentation, can be understood in light of the system of segmentary lineages. At the lower level there is a system of cooperation between brothers is called *roorwali*, a system of opposition between collateral agnates is known as *tarborwali*, a system of support between lineage members is called *tabarwali*, social equality between sub-tribe members is called *azizwali* and this overall system at the tribal level is called *Pukhtu* or *Pukhtunwali*.

The systems at different levels of the tribe are regulated by the *Pukhtunwali* code, which aims to protect the interests of the group under consideration. *Pukhtu* reflects a sense of competition, which is done through *siali* (real struggle) to achieve all those qualities that society considers good. A higher level of achievement increases social status, prestige and distinguishes a man as a good *Pukhtun*.

Overall, the status of religious leaders is determined based on their piety, neutrality, and expertise in Islamic teachings and jurisprudence. Religious leaders from any strata can play an effective role in conflict resolution. The way traditional and religious leaders deal with conflicts is similar because both receive help from customs and Islamic teachings. Competition among leaders to become part of the conflict resolution process often occurs because successful conflict resolution increases their social status and also increases the number of followers. Traditional leaders involved in the conflict resolution process usually have a powerful position in society. However, the effectiveness of religious leaders in conflict resolution is conditioned by their status as pious, neutral, just, rational, and maintaining a reputation for dispassionate judgment of disputes to be resolved justly.

Ideally, the *Jirga* is an informal institution that plays the role of a neutral third party without formal authority. A *Jirga* usually includes high-ranking and prestigious members. The influential and neutral local people forming the *Jirga* are commonly known to everyone in the area for their position of power or piety. *Jirga* members are preferably selected from people who have previous experience in handling similar cases. The number of members of the *Jirga* depends on the nature of the case. The size of the *Jirga* is usually larger to deal with more complex and important cases. The mediation process has three important components. First, the members of the *Jirga* go between the contending parties and the disputants usually empower the *Jirga* in advance with a mandate to settle the dispute. Second, the *Jirga* holds independent meetings with rivals to negotiate with them and get their feedback on terms that are feasible and acceptable to both groups. Third, the *Jirga*, based on agreed terms, declares conciliation proceedings (*rogha*) at an invited public meeting. Reconciliation (*rogha*) takes place in community places such as the *hujra* (men's house) or *jumaat* (mosque) in a manner open to the public.

During a dispute, opposing groups use violent and peaceful means to resolve the conflict in such a way as to leave a good impression of equal strength on both sides, because in the cultural framework it is preferred to be called "stronger" rather than "weaker". Therefore, neither side wants to be labeled as "weaker". That is why they act with force against each other in the first moment. The process of mediation to settle a dispute usually begins when the contending parties realize that neither of them can subjugate the other. The intervention of mediators therefore depends on the willingness of the disputants. Mediators do not achieve justice, but only facilitate the rivals to reach a compromise. However, a compromise is reached through the traditional process to achieve a decent output for the opponent. Mediators emphasize the importance of peaceful settlement of the dispute and permanent reconciliation through peaceful means. Thus, the *Jirga* evaluates the coercive capabilities of the contending parties according to the entrenched system of conflict resolution to find a safe exit without leaving the impression of weakness on one side or the other. Regardless of who is wrong, the social equality of both sides would be promoted and both sides would engage in dialogue to reach a consensual decision on the issue at hand.

It is evident that the judiciary of the formal legal system is used by people to harass each other and the real resolution of conflicts is achieved through mediation by the *Jirga*, e.g. the studied cases of land disputes were permanently resolved by the *Jirga*. In these land disputes, the rival groups were the Swatis with an equal position of power. So, after using physical force, they finally turned to a peaceful settlement and let the *Jirga* resolve it. It was found that the fair resolution of such disputes resulted from the equal power position of the competing parties in which the *Jirga* was the facilitator.

From the above discussion, it is clear that the traditional *Jirga* system still works and proves to be resilient in resolving conflicts. The logic behind the effectiveness of the *Jirga* is certain benefits that fit into the mindset of the local people. The primary advantage is the autonomy of the rivals and respect for their consent in the overall conflict resolution process, which culminates in an agreement in an informal and less confrontational atmosphere. Conflict resolution by *Jirga* is cheaper and less time-consuming than formal

court proceedings. The business of Jirga is purely regulated by traditionally accepted practices and precedents. The participation and consent of the respondents are the determinants of the success of the Jirga. It has been observed that mediation through Jirga is the preferred method of conflict resolution.

Apart from the traditional Jirga in Swatis' society, arbitration is also an informal system of conflict resolution. Through this method, disputants willingly present their case to experts to settle the conflict in the light of Islamic Sharia. The arbitration process of Sharia experts is not controlled by the state. Rather, arbitration is used and decisions are made by religious leaders in light of formal Islamic jurisprudence, and enforcement of these decisions does not require physical force, as the disputants willingly accept the binding nature of these decisions. However, religious experts do not have the authority to apply the Islamic penal system because they use Islamic teachings for deliberations that culminate in a consensual decision. Thus, in the given context, Islamic injunctions in relation to the conflict are carried out by the community itself to the satisfaction of the parties involved in the conflict. The resolution of conflict through Sharia is permanent and accepted by the disputants and the conflict is permanently resolved.

Therefore, people follow the decisions of the Jirga and the verdict of the Sharia, which satisfy their socio-psychological needs. In the same tradition, people are strongly connected to each other to gain social status and ensure justice for them. To achieve justice one needs to be powerful and that comes from numerical strength. Numerical strength depends on the size of the sub-tribal group to which one belongs, as well as on the extent of marriage ties. Because consanguinal and affinal kin are important for coercive self-help, hence, strong social relationships are maintained to provide physical support during conflict. Investments in social relationships, which are mostly non-economic, are mandatory for prestige and status. Moreover, if we look at the issue from a functional point of view, none of the rival would want to be the loser, because as a loser, he would lose prestige, fame and, as a result, might not be able to defend his own interests in society. Given that informal conflict resolution is an important area in the studied society. Therefore, both types of leaders are dedicated to maintaining contacts with people and sacrifice their time to resolve disputes between rivals. In response, people associate with leaders because of their important role in society.

The Jirga is neither inclusive nor is its role equitable because it operates within a patrilineal framework that enforces social stratification, especially when there is conflict between members of the upper and lower strata. Because in this case the Jirga convinces the lower stratum member to compromise by claiming that he is weaker, he is unable to face the powerful. The justice of the Jirga is therefore limited to the resolution of conflicts between members of genealogically connected lineages of the Swati tribe, who claim social equality and occupy almost equal positions of power. Members of a traditional Jirga are not always unbiased, but favor an individual or group based on family ties, political bloc, and economic interests. There are therefore question marks over the Jirga's transparency and fair decision-making. It is evident that the effectiveness of the traditional system is understandable in case of conflict between members of Swatis who have equal coercive powers.

Conclusion

The legally pluralistic society of Swatis was studied and the traditional system was found to be effective and resilient in conflict resolution. The effectiveness of the traditional system is rooted in cultural values and works to satisfy rivals in a cultural context emphasizing social equality, autonomy and participation. This alternative dispute resolution mechanism in Swatis does not guarantee the elimination of the conflict but somehow satisfies the disputing parties.

Power to resolve conflict is divided between local leaders and formal courts. The intervention of leaders, thorough mediation, in conflict resolution depends on the willingness of the groups in conflict, because these leaders are not formal office holders. They cannot impose and implement their decisions for conflict resolution, but using their consensual power, they only develop the consensus of the rivals to resolve the dispute. The terms are set primarily by the rival groups, and the leaders merely rationalize these terms within a traditional framework to achieve group consensus toward settling the dispute. Thus, the traditional Jirga system works to satisfy the ego and the notion of social equality of the contending parties, to ensure the

social glory of both groups and to protect them from being undervalued at any end. Consensus building ensures the autonomy and participation of competing groups in the conflict resolution process. In addition to mediation, the role of religious leaders is also evident in arbitration, where a case is submitted to them for resolution in the light of Sharia law. Again, it is the responsibility of the religious scholar to analyze the case to decide it in the light of Sharia law, and it is the responsibility of the contending parties themselves to carry out the decision.

The role of formal courts is not effective because the procedures of formal courts do not meet the notion of social equality between groups. A strong court ruling in favor of one side as the winner is a slander of the losing side. Losing in battle is not acceptable within the traditional framework of social glory, honor and group prestige. Thus, the decisions of the courts do not contribute positively to the permanent resolution of disputes.

It is evident from the above discussion that traditional mediation is very effective in permanently resolving the conflict. Plus, through arbitration, Sharia law is lucrative, and rivals willingly submit their cases to be decided in the light of Sharia. Formal laws are not effective for various reasons, mainly because of their inconsistency with traditional notions of justice, equality and tribal autonomy.

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ⁱ Swatis (differently spelled: Swati, Swatay and Swatiaan). According to Hazara Gazetteer (1883) “ at the beginning of the eighteen century a Saiad [Sayyed] named Jalal Baba, collected a heterogeneous following in the Swat valley West of the Indus, and, evicting the Turks, appropriated the country now held by the Cis-Indus Swathis [Swatis]. In district Batagram, Swatis is numerically, politically and economically a dominant group. Most of the Swatis are *doteryan* (inherited landowners).

ⁱⁱ Stanadar is basically a status given to people who contribute to the preaching and teaching of Islam. In the society under study, stanadar is further divided into different groups classified on the basis of ascribed and achieved status. Saydaan (singular: Sayyed) claim that they are genealogically connected with the Holy Prophet Mohammad (P.B.U.H). Hence, Sayyed is an ascribed status. Miagaan (singular: Mian) is an achieved as well as ascribed status. It is an achieved status for one who devoted himself for the cause of Islam and becomes Mian (holy man). The descendants of Mian are also known as Miagaan for whom the status is ascribed. Another group within Stanadar is Mulyaan (singular: Mula) is also an achieved as well as ascribed status. Mula is a religious scholar having the knowledge of Islam. Therefore, to become a religious scholar is an achieved status. However, the status for the descendants of Mula as Mulyaan is an ascribed status.

ⁱⁱⁱ The Gujars are mostly landless and known for keeping livestock and working on the land for their landlords. However, some of the Gujars have bought land and they are small landowners.

^{iv} The members of occupational castes include barbers and blacksmiths who provide occupational services to their patrons in return for payment in kind. However, this traditional system is on decline as the specialists of different occupation prefer to provide skilled services in return for cash money or open shop in a market. Some of them bought land and hence enjoy better economic emancipation than before.

^v Jirga denotes two meanings i.e., a council of traditional as well as religious leaders who meet to resolve a dispute and, a process of consultation.

^{vi} Social equality among Swatis is connected with the application of physical force. All *dotaryan* are equal because they have the ability to use physical force for retaliation. Social equality exists and is maintained within the members of Swatis. Social equality is important for rival groups since restoring equality, disturbed by the offender, is necessary to resolve a conflict.