Traditional Dispute Resolution and the Use of Islamic Law

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About the Report

Introduction

In November and December 2013, the Peace Training and Research Organization (PTRO), supported by the United States Institute of Peace (USIP), undertook research activities in the provinces of Paktia and Takhar in eastern and northern Afghanistan in order to analyze the use of Islamic law by informal and formal practitioners in Afghanistan. The two provinces were chosen because of their differing levels of development, of access to state resources, and because of what they illustrate about the resilience of tribal structures and dominance of Pashtunwali. Paktia is a majority Pashtun population in which tribal affiliations demarcate communities, districts, and population groups. Takhar, in the north, is more ethnically diverse, with large Uzbek, Tajik, and Pashtun communities. The security situation in both provinces is distinct: Paktia suffers from more frequent incidents of insecurity and insurgent activities, and the Zurmat and Zadran districts are noted for being the home of the Haqqani network in Afghanistan. In Takhar, security is better and issues tend to revolve around the role of local commanders who continue to control areas of the district and are often affiliated with various political parties or regional power holders. The remit of the state institutions in both provinces differs, and in Paktia the reach of state institutions is more restricted.

This report outlines some of the main findings from the research, identifies some areas for further exploration, and makes tentative recommendations for people or organizations working on justice mechanism issues in the two provinces.

Methodology

Across the two provinces, fifty-four people were interviewed, including eighteen representatives of the formal justice sector, twenty-four members of informal justice bodies, and twelve disputants.

PTRO researchers made two visits to each province, with an approximately two-week gap between visits that was used to analyze data collected during the first round of interviews, to gather initial feedback from researchers, and to revise the interview questions in response to researchers' and respondents' concerns.

Research visits involved identifying formal and informal justice representatives in each location and approaching them to conduct interviews or to ask for further information on individual cases. Disputants were identified based on case information collected from formal and informal justice representatives, and individuals were approached for information regarding the progress of their disputes. Information was collected to provide sample narrative case studies.

In Paktia, researchers visited the Gardez and Ahmadabad districts (52 percent of Paktia interviewees came from Ahmadabab); in Takhar, most interviewees came from the Baharak and Taloqan districts (no less than 80 percent of Takhar interviewees came from Taloqan). Although primarily interviewed in provincial centers, many respondents were from surrounding districts, including Chamkani, Zadran, and Chak in Paktia province, and Farkhar in Takhar province.

The majority (more than 60 percent) of respondents in Paktia identified as Pashtun, with differing tribal affiliations. A significant minority (18 percent) were Tajiks. In Takhar, 40 percent of respondents identified themselves as Tajik, with equal numbers of Pashtun, Uzbek, and Arab participants (16 percent each).

Paktia

Respondents in Paktia noted that the practice of informal dispute resolution was the same in neighboring provinces within Loya Paktia (Greater Paktia), which is consistent with past research and experience. Thus, many of the findings can be presumed to be similar for both Paktia and Khost provinces. Paktia, Khost, and Paktika are all notable for their strong tribal organization; these tribal affiliations play a large role in informal justice mechanisms, which are dominant, and adherence to traditional Pashtunwali is widespread (notwithstanding that interpretations of Pashtunwali can vary from one individual to another and from one community to another).

Informal Mechanisms

The informal justice system is active and effective in Paktia, where it is employed to make decisions on many different case types.

Organization/Structure

Community or tribal elders usually lead the process of conflict resolution, often working as a group to reach decisions. The members of these informal *shuras* tend to have a long history in their

communities; many respondents stated that they had been chosen by the public or "elected" as peacemakers. The profile of these peacemakers varies, but many elders stated that they had family links to conflict resolution—for example, their fathers previously held the same position—or that they had been local commanders during the mujahedeen years. These informal practitioners also implied that their own good behavior and just manner in reaching decisions has consolidated their position in their communities.

The informal justice practitioners believe that corruption in the formal justice system has increased support for informal justice provision. The informal system, as such, addresses conflicts in locations where the government has no presence, access, or legitimacy. The nature of the individual *shuras* varies, and some of the *shuras* operate at a local community level while others provide districtwide or provincial coverage. Certain elders who are members of district or provincial councils are also engaged in conflict resolution; if the provincial council is involved in conflict resolution, only some members of the council (not the entire body) are engaged in resolving any given dispute.

The frequency of informal meetings depends on demand and incidents of specific cases. The nature of these specific cases determines the length of time required for resolution. One respondent noted that conflicts involving women, especially divorce cases (which are very rare in Paktia), often require more extensive investigation and therefore may take more than two months of discussion. Simple cases on average take two to three days to resolve. However, the noted time periods appeared to fluctuate among the different *shura*s and seem to be largely case specific.

Registration of Cases and the Case Process

The disputants bring and register their own cases with the informal justice system. There appears to be a great deal of choice for the parties to the conflict: in who addresses the case and who makes the decisions (elders or religious leaders), in which individuals (if any) represent the parties, and under what legal code the parties would like to be judged (i.e., Islamic/sharia law or Pashtunwali).[1]

Registration of cases, whether civil or criminal in nature, appears to follow a generally similar process. Either the disputants take their case to the district house (government office) and then the case is referred to local elders for resolution or the disputants come directly to the elders. The elders noted that they try to resolve a case and formally register their decision with the court. If they do not succeed in resolving a case, the case goes back to the court for resolution.

At the outset of each case, the elders "take authority" from both sides, which often includes some form of financial guarantee or security deposit. Subsequently, the elders launch an investigation to establish what occurred. After establishing the facts pertinent to the case, the elders make a decision, which may involve some form of repayment to the injured party, including the transfer of land or money in criminal cases. If disputants do not accept a case decision made by the elders, the security deposit is not returned.

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[1] Some informal justice practitioners described the practice of complainants sacrificing sheep in order to secure the services of the community elders in resolving a conflict.

When a decision is reached in the informal system, the different *shuras* noted that they write down the decisions and keep records of them. The format for noting cases, the facts of each case, and the solutions is broadly similar to the format used in the formal system, with a claim letter and case document prepared by a *shura* council before a decision is reached and delivered in writing.

If disputants are not satisfied with the outcome of the *shura,* they have the option to appeal the decision. In this instance, the disputants move from the primary *shura* to have their case heard in a secondary and/or tertiary (or supreme) *shura.* As the case moves through the different *shuras,* the parties to the dispute can alter their representatives.

If a relevant decision or prescribed punishment for a particular dispute is not readily available, then the informal actors refer to previous cases of a similar nature or they ask the advice of other local elders.

Case Types and Resolution

Many of the elders interviewed argued that there is a difference between "sin against man" and "sin against God" and that this should affect whether customary dispute resolution is appropriate. They argued that the former cases are considered the domain of the informal justice system, whereas the latter are the concern of the government and formal courts. These two types of cases were also described as "civil" and "criminal" cases. Thus, the informal system would deal with disputes over land but may refer family (including divorce) or criminal cases to the government courts. The scope of research did not enable a full analysis of whether this distinction exists in practice. Other pilot projects and engagement with elders in practice have suggested that it does not.

Land conflicts appear to make up the majority of cases addressed by community elders. Investigation into land conflicts can include looking at, or for, relevant documentation or interviewing witnesses. In these disputes, the production of proof of title or ownership of land mitigates the need for witnesses and investigation. However, most land disputes are between two sides that do not have the relevant paperwork. In these instances, elders reported that they take oaths from both sides and interview witnesses. If the elders cannot come to a decision, they divide the land between the two parties.

A division of labor often exists between elders and religious leaders depending on the nature of the case. Respondents noted that divorce cases tend to be referred to religious leaders more frequently than other types of disputes, whereas cases of injury or death are typically brought to local elders.

The nature of the case typically dictates different processes or outcomes. For example, in cases of injury, efforts are made to resolve the case quickly through compensation (medical expenses and livestock). A delegation of elders will often visit the victim's house in order to reason with him or her regarding reconciliation. In cases of murder and ongoing fighting, the elders' first priority is to arrange a cease-fire. Brokering cease-fires is seen as a critical part of the informal system and a key role of elders. Cease-fires tend to be guaranteed against some form of payment or security deposit. If a cease-fire is broken, the case is referred to the relevant government agencies along with a report of the case compiled by the elders involved in the attempted reconciliation. During the cease-fire, elders at the community level usually try to convince the victim's side to accept reconciliation. There are various strategies for this, such as elders recounting stories of other successful reconciliations

and pointing out the negative consequences of revenge and enmity. Elders recounted instances where religious leaders were sent to the house of a victim to read passages of the Quran justifying reconciliation through Islam.

Most cases are resolved through Pashtunwali. The Pashtunwali code plays an important role in the informal system because it specifies punishments for particular crimes, includes taking oaths from opposing sides in a dispute, and is of greater benefit to the victim due to the compensation it calls for. If Pashtunwali is seen as conflicting with Islamic teaching, then Islamic teaching overrides any precedent set by Pashtunwali. Such situations are relatively rare, however.

In the case of murder, the punishment through Pashtunwali tends to be a levy of land, livestock, or young girls, along with an apology to the family involved. However, some of the punishments prescribed by different ethnicities or tribes are markedly different in severity. As a result, different parties to the conflict can demand that their own ethnic traditions be followed. The Ahmadzai ethnicity is recognized as the most severe, with the highest level of punishments and the most girls included in the bargain, while the Mangal tribe is relatively less severe. Yet, despite these prescriptive punishments, most parties to a murder case do not accept reconciliation and instead pursue revenge, according to elders interviewed. (The specific punishments refer not only to cases of murder but also to cases of injury, and local elders reported that they have fixed prices or fines for the body part that is injured.)

An Evolving System

The informal system, and its use of Pashtunwali, has evolved over time. One example of this evolution is that claimants and defendants are now allowed to select their representatives during the appeals process, whereas in the past, the elders who first mediated the dispute had this responsibility.

An often noted change is that whereas custom previously dictated that, as reparation for murder, the killer's family had to give a young girl to the victim's family, now the killer's family is more often obliged to hand over land or money. However, *baad* undoubtedly is still practiced. Interviewees noted it was more common for girls to be swapped for girls of another family (i.e., a daughter of Family A is married to the son of Family B in exchange for a daughter of Family B marrying a son or male relative of Family A) than to be given in exchange for a financial or a blood debt (due to a murder).

Limitations of the Informal System

There is social and cultural pressure on the disputants in a conflict to accept reconciliation through local elders. Elders make repeated visits to both sides' houses, during which the elders will not eat or accept food until the parties agree to reconciliation. Two informal practitioners mentioned that they impose their decisions through force via local *arbaki* groups (armed groups, typically with tribal affiliation) in the Loya Paktia region. Another potential enforcement mechanism is that claimants or defendants are compelled to accept decisions against their security deposits because they stand to lose this money if they do not agree with the decisions of the elders. Yet, the informal system in general appears to lack rigorous enforcement mechanisms, and as a result, there are reports of cases being solved but reparations never having been paid.

Religious Leaders

The role of religious leaders in dispute resolution is unclear and appears to vary. There is evidence to suggest that religious leaders are widely consulted and involved in brokering agreements between disputants in the informal system—although they rarely work on cases by themselves. Instead, disputants and community elders consult religious leaders if a case requires extensive knowledge of religious law or teachings. This applies to conflicts between neighbors, land or water disputes, and inheritance cases. Inheritance issues in particular need to be addressed in strict compliance with Islam. Inheritance issues are a recognized problem because many families in Paktia continue to deny inheritance rights to female family members. Because Islamic law has direct rules about quantities given to females and males, many families do not wish to settle inheritance issues in accordance with Islamic rules. A popular reference for Islamic legal work is the *Feqa Hanafi*, which is cited by elders as well as religious leaders as a primary source of information on the law-making process.

Certain obstacles were identified as impediments to religious leaders taking on a greater role in conflict resolution, including a clear belief that religious leaders do not want to be involved in conflict resolution. Poor security and the fear of being viewed as collaborating with the government mean many religious leaders are restricted in their activities. Furthermore, the lack of district-level madrasas in districts such as Ahmadabad was seen as a reason for the leaders' lack of involvement—the leaders lack the relevant educational background for conflict resolution. Those who are qualified to resolve conflict, such as the *mullah imam,* are not always from the local area, meaning that they struggle to be included in the process. Underpinning this is the belief that religious leaders risk losing their popularity by being heavily involved in social issues, and religious leaders are reluctant to taint their own Islamic authority by intervening in social disputes. Despite this reluctance, religious leaders are in a position of authority in decision making, meaning that their decisions are rarely challenged openly. If religious leaders could be mobilized to play a greater role in conflict resolution, they could be very influential.

Formal Mechanisms

The formal system, based on Islamic principles, is generally acknowledged as legitimate but for a number of reasons is not entirely trusted. There is a strong belief that Islamic principles are not implemented correctly in formal government processes. The employees in the government court system are considered to be corrupt and to work only for their own benefit. Examples were given of criminals paying for reduced prison time or to avoid punishment altogether. Furthermore, there are allegations that the formal system is under pressure from foreigners, and that is why government employees do not adhere to Islamic law.

Formal practitioners recognize the challenges of complying with Islamic law, and one respondent noted that there is no flexibility in sharia law. As a result, the formal courts follow national or constitutional laws that are Islamic but not strictly sharia. The national or constitutional law is seen to be in line with the needs and necessities of the times. Laws themselves go through a process of development: they are first written by lawmakers, then sent to parliament, and then signed by the president. Changes in the laws are rare, but there is flexibility to alter laws, and some civil society groups spend their time reviewing articles to lobby for alterations in parliament. It is evident that the

creation of national law is more heavily influenced by politics and the political factions in parliament than by Islamic reasoning.

Despite the political nature of law making, practitioners stated that they consider the formal law to be based on Islamic principles derived from the Quran, hadiths, the *Feqa hanifi*, and *Majallat al-Ahkam*. If there is no obvious solution to a case, adjudicators will refer to the *Feqa hanafi*.

The formal justice system distinguishes the role of Pashtunwali in informal mechanisms, stating that a sin against man can be dealt with through forgiveness and that, within this, Pashtunwali has a role to play. For sins against god, Islamic law must be applied through the formal system.

Afghan law permits disputants to choose to resolve a case through "reconciliation" (typically arrived at in practice through elders' dispute resolution) for many matters. Land conflicts are dealt with primarily by encouraging reconciliation outside the informal system. Judges will frequently refer land cases that arrive in the court system to elders.(However, before any such referral, the court first checks if the dispute is over civil or government land. If it is over government land, then the two parties occupying the land would be in violation of laws prohibiting seizing government assets.)

If, upon completion of a case, the defendant is unsatisfied with the decision at the district level, the defendant can appeal in a secondary court at the provincial level. If the defendant is still unsatisfied, the appeal can reach the supreme court (the national level). Each court has differing time periods, established under law, in which to deal with cases.

Due to security concerns and problems accessing the formal system, as well as the formal systems' lengthy procedures, practitioners observed that it can take as long as four to six months for a decision to be reached, regardless of the timelines set out in law. For this reason, many judges and practitioners recognize the value of informal dispute resolution and may encourage reconciliation.

Cooperation and Referrals between Justice Systems

There is a significant difference in reported cooperation between the two justice systems, with some respondents saying that there is little or no contact between the two, and others maintaining that a mutually beneficial relationship exists. The nature of the relationship varies according to the different government institutions. One elder stated that his *shura* had a relationship with the police but not with the courts. Other respondents reported widespread cooperation with the courts, government departments (both local and national), and other agencies, such as the National Directorate of Security (NDS) and the United Nations Assistance Mission in Afghanistan (UNAMA). Where cases concern women (family, divorce, or runaways), the human rights and women's departments of the government are contacted.

The disputants often have the final say on which system will deal with a case. But there also instances of continual referring, where cases that are not solved by local elders are passed to the judiciary, only to be passed back to elders if the government deems the case suitable for resolution by the community. In criminal cases, local elders can secure the release of arrested suspects with a guarantee of good behavior on the understanding that the elders will broker some form of reconciliation. This action is based on the significant trust that elders engender within their

communities, and does not work without the agreement of all parties to the dispute. If one side does not abide by the agreement, the case is referred back to the government system.

Participants in the formal system stated that they refer only rights-based conflicts and cases that can be managed through mediation or forgiveness to the informal system. However, it was evident from discussions with elders and case examples that in practice this is not the case; some criminal cases are indeed dealt with by local *shura*s and are at times referred from the government. There is some evidence to suggest a geographical distinction: in Ahmadabad district, there is a preference that disputants try to deal with their cases through religious leaders or elders, and the court formally writes to elders asking them to solve a case and then report back with their decision. This is not a recognized process in the provincial center, and informal actors commented on difficulties with formal courts as the courts in the provincial centers are more likely to refuse to accept the decisions made by local *shuras*.

Informal practitioners seem to believe that the formal system does not correctly apply Islamic law . One respondent noted that the courts need advice on the best application of Pashtunwali. On the flip side, judges and formal practitioners were often critical of the practices of local *shura*s. They argued that the decisions made in the informal courts are frequently unjust.

Overall, it is clear that the elders feel that they receive more cases from the courts than they refer to the formal system. Although some practitioners on both sides recognize the need for more closely aligned practices, the relationship between the two appears to be marked by deep distrust. Despite evident instances of cooperation, there is little recognition, from either the formal or the informal system, of the other and little support for their contrasting roles.

Disputants

Formal legal practitioners stated that the disputants and community members do not understand the formal legal system due to lack of education. Some practitioners articulated the belief that workshops for community members could increase public awareness.

Informal practitioners stated the belief that disputants have full information about both systems and can decide whether they wish to seek formal or informal resolution for their case. In truth, the majority seems to prefer the informal system due to the speed of resolution and because the punishments are harsher and the benefits are higher. This is compounded by disputants' lack of relevant knowledge of the formal system. There are also cultural limitations on which system is utilized, and cases involving women are rarely referred to the formal system because they are shameful for the families involved.

TAKHAR

Takhar province, based in the north, has a very different ethnic and tribal makeup than Paktia province. The informal justice mechanisms in the area are distinct and less influenced by tribal codes. Customary law such as Pashtunwali does not play a role; instead, the local traditions and customs of the society prevail. The Gujar community in Takhar has rules similar to Pashtunwali, including the forced taking of each other's wives.

Informal Mechanisms

Organization and Structure

The informal mechanisms in Takhar comprise both traditional dispute resolution *shuras* of community leaders and National Solidarity Programme *shuras* that are also engaged in decision making and development programs. These *shuras* have a more restricted dispute resolution remit and appear to restrict their activities to family conflicts in Takhar.

Members of *shuras* stated that they were either elected or they were selected due to family connections. For example, one former jihadi commander, due to his popularity and role as a local leader, was elected to the local *shura*. Those in the solidarity council were elected through voting at the local mosque. Both religious leaders and community elders are involved in consultation and making decisions, but religious leaders are favored for matrimony, divorce, and inheritance disputes, because they have greater knowledge of what sharia law prescribes on these issues. In many community councils, religious leaders are council members alongside community elders.

Meetings to discuss cases are convened both regularly and on an ad hoc basis. Individual cases reportedly take an hour to half a day to address. Some cases require multiple meetings to resolve, but all are recorded in the council's registration or logbook.

Registration of Cases and Case Process

Disputants are responsible for bringing their own cases to the informal system. All cases are recorded in the registration book (for decisions). At the outset of the decision-making process, the *shura* requires agreement from the two disputing parties (authority) that they will accept the decision that the elders will make regarding their case. They also take guarantee letters (which are backed by a financial obligation) from both sides that they will accept the decisions made by the *shura*. If the disputants disobey the decision, the *shura* can fine the relevant party—this fine is used to benefit the community, for instance, by purchasing wood for the local mosque.

When a decision is reached, the two parties involved are required to give their thumbprints, and the outcome and their names are listed in the registration book. In addition, upon reaching a decision, both sides of the conflict agree in a commitment letter not to repeat the offence.

Although some disputants can hire lawyers, such representation is extremely rare in the informal system, and disputants tend to represent themselves throughout the proceedings.

Types of Cases and Decisions

Overall, those interviewed in Takhar credited the informal system for maintaining a degree of flexibility. While they acknowledged that this flexibility can mean that outcomes may vary and decision making may change as conditions change, the interviewees also felt that the same flexibility gives the informal system space to exhaust all available avenues before referring a case to the formal system. Only when informal bodies cannot broker an agreement between the disputants is a referral to the formal system made.

Whereas the informal system in Paktia appeared to handle all types of disputes in practice, the informal system in Takhar mainly addresses civil disputes. Many of the *shuras* in Takhar do not involve themselves in criminal cases, because they have limited punitive power within Takhar province. Instead, they refer these cases to the relevant authorities. The only criminal cases resolved by the informal *shuras* are simple disputes. For example, a boy was killed by accidental electrification while swimming in a river. The father of the boy swore revenge on the homeowner whose electrical line had caused the death. Religious leaders and elders intervened after the burial ceremony and through condolences, citation of the Holy Quran, and negotiation were able to convince the father that his son's death was an accident; he forgave the homeowner and stopped seeking revenge.

Some practitioners believe that only traditional law is applicable, although others said that decisions on inheritance and family cases should be based on sharia law as well as local customs. Different legal methods are ascribed to different cases: for example, inheritance cases and violent conflict cases are addressed differently. Religious leaders are essential in dealing with cases such as inheritance or divorce due to their experience with religious law.

If a case cannot be resolved in the informal system, the elders will refer the law to four powerful elders to discuss an appropriate resolution. However, this course of reaching a decision does not appear to be standardized across all *shuras*.

An Evolving System

Informal judgments, although theoretically based on Islamic law, are also based on traditional rules passed down through the generations. An example is the "nine times" Afghan compensation—where the victim of a crime must be compensated nine times by the perpetrator. It was acknowledged that traditional rules change as society changes (and as old rules become impractical), and respondents noted that current cases are decided on the basis of logic and agreement between the parties, rather than on power and authority, as they were in the past. Examples of changes were provided: one respondent noted that the communities had stopped celebrating the new year by erecting a flagpole due to warnings from religious leaders that this practice was against Islam. Customs such as celebrations at weddings have also changed, leading to a positive impact on incidents of family or intracommunity disputes. For example, at weddings, the groom no longer dances around fire seven times, guests are no longer required to buy the groom handkerchiefs, and the *walwar* (bridal price) has decreased from 400,000 to 200,000 Afs.

Respondents reported a difference between local customs and Pashtunwali, but said that Pashtunwali may be relied on in certain circumstances, particularly regarding conflict resolution. Islamic rules are seen as particularly relevant in land issues. Customary measures are also different in different localities. For instance, although the exchange of girls to resolve disputes is traditionally accepted in some parts of the province, it is not acceptable in other areas.

Religious Leaders

Religious leaders play a restricted role in the formal and informal systems in Takhar. However, there appear to be certain cases for which the role of a religious leader is necessary or beneficial. In the informal system, religious leaders act as witnesses for cases such as divorce or alimony. Inheritance issues are cited as needing the intervention of religious leaders because inheritance is often denied

for women, and the disbursement of inheritance has clear rules in sharia law. Sharia dictates that the share of one boy is equal to that of two girls, and that a wife's share is one-eighth the share of a man.

Some legal practitioners felt that religious leaders implement the law unfairly, applying prejudice on the basis of ethnicity. Members of the formal court stated that they consult with religious leaders only if they are seeking negotiation, not punishment or a decision. Religious leaders are recognized as excellent negotiators due to the trust they have from the wider population. As a result, they are often involved in encouraging forgiveness in murder cases.

One limitation on the role of religious leaders is the fact that the mullah imam is not always from the local area, whereas elders are. Notable mullahs in Takhar include Malawi Noorkhan of Baharak's mosque and Mullah Ruzi Mohammad.

Formal Mechanisms

In Takhar, the formal justice system appears to be well developed and to have a well-rehearsed procedure for accepting and processing cases. Most legal practitioners in Takhar have been in the same or similar roles for years.

The formal justice system includes different departments that are responsible for different aspects of law: criminal, rights based, family conflict, and property disputes. Cases involving family disputes or those involving children are often heard in Kunduz, where—unlike in Takhar—there is a structure of dedicated family courts.

Those interviewed in Takhar had a different interpretation of the distinction between sin against man and sin against God. For instance, they noted that in murder cases, if the family of the victim gives up its right to reparation, the court can reduce the prison sentence. Local elders and religious leaders reportedly play no part in the formal system, but they can address reparation and reconciliation issues for such cases at the local level, particularly in rural areas. Civil cases and criminal cases are entered into different registration books, and the process for investigation differs, with criminal cases requiring investigation, witnesses, and police activities, while civil or land disputes require the claimant to produce physical evidence in terms of a land title.

The formal system may appoint legal investigators for civil cases involving family, legal, or business issues. The investigation team is given ten days to investigate an individual case. The formal system covers a wide array of civil cases, including possession, business, loan, and family cases, such as divorce and alimony cases. The process for registering these cases is broadly similar across different legal instruments, and the majority of legal practitioners noted the need for cases to be registered formally with the government, after which a case dossier or file is created and passed through to the court.

Basis of Law

Most respondents in the formal system claimed that constitutional law matches sharia law, and that there is no difference between the two. Interviewees stated that they act on the basis of Hanafi law, the Sunnat, and the Quran, and that no individual teacher or religious leaders influence the judgment

of the court. Some mentioned specific legal texts, including *Hedaya* from the *Feqa hanafi, Majallat al-Ahkam*, and *Fathull Qadir*.

Formal respondents denied that Pashtunwali or other traditional codes play a role after a case arrives at court, but these are in fact influential in local areas. Some respondents reported that they seek guidance in customary law if the legal codes of the Hanafi sect do not provide a suitable explanation. If necessary, the supreme court can provide guidance as to where customary or traditional law applies.

Changes in the law or new laws are formulated nationally by the elected legislative bodies and approved by the president, with some respondents saying that the judicial branch also plays a role in making laws. It was acknowledged that laws change over time with the requirements of society. How this process works in practice, however, was not clearly articulated.

In the formal system, on the rare occasions that there is no existing guidance or laws pertaining to a particular case, the judiciary in Takhar will refer to Hanafi law to find a solution. This recourse is noted in Article 130 of the Constitution. There is flexibility within formal decrees, and one respondent gave an example by noting that Hanafi law states that a woman can seek a divorce if her husband is absent for eighty years, although in Maliki jurisprudence this time is limited to four years. The Afghan legal system follows Maliki jurisprudence as opposed to Hanafi in this instance. The use of Islamic laws is mentioned in Article 2 of the Constitution, and the laws are derived from the decrees of scholars, hadiths, and the verses of the Quran.

Despite the systematic application of formal law, it is apparent that the preference of practitioners is for peace, and therefore they are allowed to involve informal processes in order to broker peace before entering the legal process. One respondent noted that the system attempts to prioritize the use of national laws for criminal cases and Islamic laws for civil cases; if a solution does not exist in Islamic law, the traditions of society will prevail.

International laws are also used provided that they are not against Islamic law. There is a recognized need for the formal system to adapt to the changes that Afghanistan has recently undergone; one respondent noted that because there is no legal article to cover Internet robbery, the law must evolve.

Cooperation and Referrals between Justice Systems

Most formal justice representatives stated that they do not receive referred cases from the informal system; some denied the necessity of the informal system, stating that it does not work in accordance with the law and cannot resolve cases of sin against God. However, referrals from the formal to the informal system are reportedly made in cases of sin against man, when the dispute may be able to be solved through mediation or negotiation and where the case is simple enough (in the judgment of the court) for local elders to address. The formal system tends to refer cases that are eligible for reconciliation to the informal system because the community peacemakers are more likely to facilitate peace. If the informal mechanism is unable to resolve a dispute, the case is sent back to the original court.

Participants in the informal system noted that they share information with the formal system in Takhar and respond to requests for information. Informal bodies refer mainly criminal cases to the government authorities; however, when they do this, some *shura* members indicated that they warn disputants of the limitations of the Afghan government's judicial system. The relationship between informal and formal mechanisms appears to differ depending on a *shura* and its individual members. In Fakhar, for instance, one *shura* noted that it had strong links with district-level government actors such as the chief of police, the district administrators, and district commanders.

Many individuals from the informal system did not believe in the effectiveness of the formal system and stated that although it is based on sharia law, the formal system does not adhere to this law. This lack of implementation was underpinned by the opinion of some that the courts are corrupt, unprofessional, and prejudiced.

There appears to be a complicated relationship between informal justice actors and the formal system. Informal actors spoke of regular contact between themselves and the court systems, with requests for information going in both directions, while also pointing out the failings of the formal mechanisms. Informal bodies seem to refer cases to the court only as a last resort. There were some reported instances of informal actors proactively contacting government representatives to persuade them to hand over responsibility for cases. For example, after robbing a girl, a young man ran away and was arrested in Kunduz. The head of the local council persuaded the Kunduz authorities that he could resolve the case, and with the agreement of the disputant parties, arranged for the two to marry. This was reported as a satisfactory outcome for the two parties involved.

Community Understanding

The majority of formal law practitioners believed that community members have a very limited understanding of the laws and their application. One respondent recounted a case that involved interfamily fighting and resulted in a man having his teeth damaged. Both parties were given jail sentences, one for six months and the other (the one who broke the man's teeth) for three years. Although the respondent could refer to Afghan law and understood that the case was resolved in the formal court, he was unaware of why the decision was made and felt the court provided no explanation.

Conclusion

Overall, the use of Islamic law in the formal and informal systems is neither strict nor uniform. The prevailing constitutional law used in the formal system is not fully representative of sharia, and although there is an overarching adherence to Hanafi jurisprudence, there are also alterations and instances in which Maliki jurisprudence is followed.

Both provinces, Takhar and Paktia, have a strong tradition of dispute resolution, and Paktia is clearly dominated by adherence to Pashtunwali. Both systems have evolved over time. Different tribes interpret traditional dispute resolution in different ways, and there are distinct tribal prices and punishments in effect.

Cooperation between the informal and the formal system in both provinces is marked by a lack of trust and a reticence to speak openly about levels of cooperation. There are clear examples of cooperation on a regular basis, but acknowledgement of such cooperation tended to be followed by a comment on the limitations of the formal or informal system. Furthermore, there are aspects of each system that the other system either does not agree with or interprets as fundamentally incorrect. Formal practitioners do not accept the process of giving oath or the role of elders in taking security deposits. Informal actors object to the lack of government effectiveness or efficiency and bemoan the high rates of corruption.

Disputants seem free to select their own representatives and to select which system they approach for their disputes. Yet, they lack relevant knowledge on the formal systems and the inner workings of the informal system. This raises the question of just how free the disputants are to select the formal or informal system and whether the decisions they make are fully informed.

Although the limitations of the formal system are well-known—namely corruption, a lack of trust, and a lack of efficiency—limitations to the informal system may reduce the effectiveness of people's decision making. In Paktia, in particular, findings suggest that some disputants are put in a position where they are obliged to accept the decisions of elders. The practice of dividing land in land disputes where no title is held may lead to ineffective decision making and unsustainable resolution. The system as a whole and the traditional customs on which it is based appear subject to misuse by power holders.

More work is needed to educate community members and potential disputants about the relative merits and limitations of both systems in order to raise awareness and ensure that informed decisions are made when pursuing resolution. Trust needs to be built with the formal system if it is to process more cases. Because of corruption, the system is not viewed as conforming to Islamic law, as decisions made in instances of crime often result in lenient punishments that are not supported by sharia.