Afghanistan
Criminal law, customary justice and informal dispute resolution

Country of Origin Information Report

July 2020
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The Afghan National Army held a shura, a meeting with the local leaders, after the two-day mission was complete. The leaders discussed what the ANA can do to ensure the local people’s safety and projects that will make their living conditions better.
Acknowledgements

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   The Netherlands, Office for Country Information and Language Analysis, Ministry of Justice

It must be noted that the review carried out by the mentioned department contributes to the overall quality of the report, but it does not necessarily imply its formal endorsement of the final report, which is the full responsibility of EASO.
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Disclaimer

This report was written according to the EASO COI Report Methodology (2019). The report is based on carefully selected sources of information. All sources used are referenced.

The information contained in this report has been researched, evaluated and analysed with utmost care. However, this document does not claim to be exhaustive. If a particular event, person or organisation is not mentioned in the report, this does not mean that the event has not taken place or that the person or organisation does not exist.

Furthermore, this report is not conclusive as to the determination or merit of any particular application for international protection. Terminology used should not be regarded as indicative of a particular legal position.

‘Refugee’, ‘risk’ and similar terminology are used as generic terminology and not in the legal sense as applied in the EU Asylum Acquis, the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees.

Neither EASO nor any person acting on its behalf may be held responsible for the use which may be made of the information contained in this report.

The drafting of this report was finalised on 30 June 2020. Any event taking place after this date is not included in this report. More information on the reference period for this report can be found in the methodology section of the Introduction.

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1 The EASO methodology is largely based on the Common EU Guidelines for processing Country of Origin Information (COI), 2008, and can be downloaded from the EASO website: http://www.easo.europa.eu.
# Glossary and abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>AAN</td>
<td>Afghanistan Analysts Network</td>
</tr>
<tr>
<td>AIHRC</td>
<td>Afghanistan Independent Human Rights Commission</td>
</tr>
<tr>
<td><strong>Baad, bad, ba’ad</strong></td>
<td>The practice of exchanging women/girls to resolve a dispute; exchanging daughters between families for marriage to avoid bride price costs&lt;sup&gt;2&lt;/sup&gt;</td>
</tr>
<tr>
<td><strong>Badal/ badaal</strong></td>
<td>The concept of revenge or retribution in the <em>Pashtunwali</em>&lt;sup&gt;3&lt;/sup&gt;</td>
</tr>
<tr>
<td><strong>Bacha bazi</strong></td>
<td>A practice whereby boys are exploited by wealthy or powerful men for entertainment, particularly for dancing and sexual activities&lt;sup&gt;4&lt;/sup&gt;</td>
</tr>
<tr>
<td><strong>Diyya/diyat</strong></td>
<td>Under Islamic Law, the payment of <em>diyya/diyat</em> (’Blood money’) is an alternative to ‘eye for an eye’ punishment (<em>qisas</em>)&lt;sup&gt;5&lt;/sup&gt;</td>
</tr>
<tr>
<td><strong>EVAW</strong></td>
<td>Elimination of Violence Against Women Law, which criminalises 22 forms of gender-based violence and was passed by Presidential Decree in 2009</td>
</tr>
<tr>
<td><strong>Hanafi</strong></td>
<td>Islamic jurisprudence in use in Afghanistan; one of the four schools of Sunni jurisprudence&lt;sup&gt;6&lt;/sup&gt;</td>
</tr>
<tr>
<td><strong>Hazara</strong></td>
<td>An ethnic group who are mainly Shia</td>
</tr>
<tr>
<td><strong>Hadd</strong> (plural: <em>hudud</em>)</td>
<td>A category of crime under Islamic Law. Punishment for crimes against God prescribed in the <em>Quran</em>, sometimes punishable by death&lt;sup&gt;7&lt;/sup&gt;</td>
</tr>
<tr>
<td><strong>Huqoq/ Huqoq</strong></td>
<td>A department within the Justice Ministry dedicated to resolve family issues or civil cases through mediation under the Civil Procedure Code prior to referral to court; provincial departments/offices exist in all 34 provinces&lt;sup&gt;8&lt;/sup&gt;</td>
</tr>
<tr>
<td><strong>Jirga</strong></td>
<td>A council or assembly of tribal elders held for dispute resolution; <em>jirgamar</em> refers to elders whose profession is dispute settlement&lt;sup&gt;9&lt;/sup&gt;</td>
</tr>
<tr>
<td><strong>Kangaroo court</strong></td>
<td>A tribunal outside statutory judicial authorities that does not follow official legal procedures</td>
</tr>
<tr>
<td><strong>Khunbaha</strong></td>
<td>In <em>Pashtunwali</em>, the word referring to ‘blood money’ or compensation&lt;sup&gt;10&lt;/sup&gt;</td>
</tr>
<tr>
<td><strong>Kuchi</strong></td>
<td>Nomadic Pashtuns</td>
</tr>
</tbody>
</table>

<sup>1</sup> FRC, Pashtunwali: an analysis of the Pashtun way of life, in Austria, BFA, AfPak: Principals of the tribal & clan structure, 5 April 2017, available at [url], p. 14; 19
<sup>2</sup> FRC, Pashtunwali: an analysis of the Pashtun way of life, in Austria, BFA, AfPak: Principals of the tribal & clan structure, 5 April 2017, available at [url], p. 8
<sup>3</sup> UNAMA, Afghanistan protection of civilians in armed conflict 2019, 22 February 2020, [url], p. 88
<sup>4</sup> ALEP, Stanford Law School, An introduction to the Law of Afghanistan, 2017, [url], p. 139
<sup>5</sup> ALEP, Stanford Law School, An introduction to the Law of Afghanistan, 2017, [url], p. 21
<sup>6</sup> ALEP, Stanford Law School, An introduction to the Law of Afghanistan, 2017, [url], pp. 87-88
<sup>7</sup> Afghanistan, MoJ, General directorate of huqoq, n.d., [url]
<sup>8</sup> ALEP, Stanford Law School, Introduction to the Criminal Law of Afghanistan, 2012, [url], p. 76
<sup>9</sup> Rzehak, L. Doing Pashto, March 2011, [url], p. 18
Maraka A specialist in dispute resolution of the jirga; member of the jirga
MoWA Afghanistan’s Ministry of Women’s Affairs
MoA Afghanistan Ministry of Agriculture
Namus The concept of sexual integrity and chastity of women according to the Pashtunwali; it is the duty of Pashtun men to protect the namus of the women of their household
Nanawatai The concept of seeking forgiveness under the Pashtunwali; nanatawai means the offender admits guilt and then gives blood money (khunbaha) or compensation of some kind
Nang Social honour of one’s family or household under the Pashtunwali; Pashtun men must defend the honour (nang) of their extended family as well
Narkh Code of punishments under the Pashtunwali
Pashtunwali A traditional social, cultural, and quasi-legal code regulating the Pashtun way of life. It is believed to have been adopted by Pashtuns from time immemorial
Qisas Under Islamic Law, Qisas are crimes against the bodily integrity of a person; when one person harms or kills another, an alternative to ‘eye for an eye’ punishment (qisas) is the payment of diyya/diyat (‘blood money’)
Sharia The religious law of Islam; Islamic canonical law
Shura A decision-making community council; often formed for non-state dispute settlement; made up of a group of people with community authority (elders) to discuss and find solutions to a problem
Swara Compensation marriage according to Pashtunwali
Ta’azir A category of crimes under Islamic Law
Ulema, ulama Muslim scholars/clerics
Zina Unlawful sexual intercourse between a man and a woman outside the legal relationship of marriage, including adultery and fornication

11 Nation (The), Understanding Pashtunwali, 6 August 2013, url
13 Nation (The), Understanding Pashtunwali, 6 August 2013, url
15 FRC, Pashtunwali: an analysis of the Pashtun way of life, in Austria, BFA, AfPak: Principals of the tribal & clan structure, 5 April 2017, available at url, p. 27
Introduction

The purpose of this report is to provide relevant and updated information for the assessment of international protection status determination, including refugee status and subsidiary protection, and in particular for use in EASO’s country guidance development on Afghanistan.

This report is meant to be read in conjunction with other 2020 EASO COI reports on Afghanistan, which provide relevant information regarding topics such as state structure and security forces, the main insurgent groups, targeted violence, security situation and armed conflict developments, key-socioeconomic indicators.

Terms of Reference

The terms of reference (ToR) of this report were defined by EASO based on discussions held with and input received from COI experts in the EASO COI specialist network on Afghanistan and from policy experts in EU+ countries within the framework of a country guidance development on Afghanistan. Terms of reference for this report can be found in Annex II.

Methodology

This report is produced in line with the EASO COI Report Methodology (2019) and the EASO COI Writing and Referencing Style Guide (2019). The information gathered is a result of research using public, specialised paper-based and electronic sources until 30 June 2020. Some additional information was added during the finalisation of this report in response to feedback received during the quality control process, until 15 July 2020. Sources in Pashto and Dari used in this report were duly assessed and informally translated by EASO.

Large sections of this report draw upon the EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017. Based on the consideration that, for its nature, the topic addressed in this report is not subject to rapid changes, in some cases, entire sections from the 2017 EASO COI report have been reproduced, after having thoroughly verified the current validity of the information and the accessibility of sources. In other cases, some content has been left out and updated with most recent information and sources. The sections on specific profiles targeted under societal and legal norms present in the 2017 EASO COI report have intentionally not been included, since some of these topics are addressed in other EASO COI reports and queries on Afghanistan due to be published in 2020.

Structure and use of the report

The report is divided into three parts. The first part focuses on presenting an overview of the socio-legal framework for punishment of crime in Afghanistan, describing the pluralistic legal system of codified and uncodified, formal and informal (customary) norms which govern Afghan society.

The second part focuses on the topic of land dispute as one of the main sources of conflict in Afghanistan, providing information on formal and informal mechanism of dispute resolution, including Taliban’s involvement in resolving land disputes.

The third part of the report provides an overview on the practices of blood feuds and revenge killing, including customary blood feud resolution and compensation, and prosecution by the state.

21 EU Member States plus Norway and Switzerland
22 EASO, EASO Country of Origin Information (COI) Report Methodology, June 2019, url
23 EASO, Writing and Referencing Guide for EASO Country of Origin Information (COI) Reports, June 2019, url
24 EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, url
Map 1: Afghanistan - administrative divisions, source: UNOCHA²⁵

²⁵ UNOCHA, Afghanistan - administrative divisions, January 2014, url
1. Overview of socio-legal framework for punishment of crime

1.1 Legal pluralism

Afghanistan has a pluralistic legal system whereby multiple sources of law interact with one another. Justice is administered on the basis of a mixture of overlapping and sometimes contradictory legal codes, which include the 2004 Constitution, international law, statutory law, regulations, sharia law, and customary (informal, traditional) law. Afghanistan’s highly diverse society includes urban, rural and tribal segments, each having norms and mechanisms to settle disputes; however, two dominant systems are used by Afghans to obtain justice: through the state, and through non-state systems.

The Constitution recognises Islam as the official religion of the state and Islamic principles are reflected throughout Afghanistan’s constitution, statutory laws and uncodified customary norms. Article 3 of the Constitution requires that ‘no law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan’. Article 130 of the Constitution explains the hierarchy of Afghanistan’s laws, stating that:

‘In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner.’

In communication with EASO in 2017, scholar Neamat Nojumi explained that Afghan laws are structured on three inter-related tiers: the constitution and statutory laws passed by Parliament, sharia laws adopted on the basis of legal volumes as determined by the Ministry of Justice, and customary law. Dr Nojumi noted that there is a hierarchical structure and approach in the application of laws: the constitution positions statutory law above sharia and customary law. Judges are obligated to apply statutory laws; if they do not suffice, the judge can apply the permitted version of sharia, and if that is not sufficient, a judge can apply customary principles, as long as they do not contradict the legal system or violate the basic rights of citizens.

Although Article 130 of the Constitution was understood by observers to mean that it may only be used for civil matters, the US Department of States (USDOS) reported that it was also applied to criminal cases by many judges and prosecutors.

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34 Afghanistan, Constitution of Afghanistan, 26 January 2004, Art. 130, url
35 Nojumi, N., email, 22 September 2017, in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, url, p. 16
Afghanistan’s criminal law draws on several sources rather than one single source. However, Islamic law is considered to shape all aspects of Afghan criminal law, particularly the Criminal Penal Code. Under Islamic law, there are three types of crime: *hudud, qisas, and ta’azir* crimes.

Afghanistan enacted a new Penal Code in 2017 to replace the 1976 legislation. The new Penal Code was approved through the Presidential Legislative Decree on 15 May 2017 and entered into force in February 2018. The 2017 Penal Code aims at modernising and harmonising criminal law. The International Committee of the Red Cross (ICRC) noted that the new Code combines ten former separate criminal laws and the penal provisions of 33 laws of other scopes. The new Code also incorporates all mandatory crimes under the UN Convention against Corruption, the UN Convention against Transnational Organized Crimes (UNTOC) and its three protocols. Moreover, it incorporates the Rome Statute of the International Criminal Court (ICC), including war crimes, crimes against humanity and genocide.

Like the 1976 Penal Code, the new 2017 Penal Code regulates punishments that fall under the *ta’azir* crimes, while *hudud* and *qisas* crimes are regulated under Islamic law. Although *hudud* and *qisas* crimes are not included in the Penal Code, the Code still gives judges the authority to implement such punishments in accordance with Hanafi jurisprudence of Islamic Law. In Afghanistan, many disputes, ranging from disagreements over land to criminal acts, are settled outside of the formal court system, in informal institution such as local *jirgas* and *shuras*. Punishment is largely based on the concept of retribution and the type of punishment can differ significantly, but typically it is decided in a manner that is equal to how the perpetrator injured the victim. The USOS noted that, throughout 2019, traditional justice mechanisms remained the main recourse for many, especially in rural areas. In major cities, criminal cases were decided by state courts, most of which administered justice unevenly, adopting a mixture of codified law, *sharia*, and local customary norms. To resolve civil cases, authorities frequently resorted to the informal system, the government mediation mechanism through the Ministry of Justice *Huquq* (civil rights) office, or, in some cases, through negotiations between the parties facilitated by judicial personnel or private lawyers.

### 1.2 Hudud crimes

*Hudud* (plural of *hadd*) crimes are the most serious crimes under Islamic law and are considered transgressions against God. Since *hudud* punishments are specifically mentioned in the *Quran* and the *Sunna* (actions and sayings of the Prophet), their execution is mandatory.

Sources describe *hudud* crimes and punishments as follows:

- theft of property (amputation of the hand);
- adultery, fornication, illicit sexual relations (*zina*) (100 lashes, death by stoning, exile)

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41 UN, Afghanistan: UN mission welcomes new penal code, urges measures to protect women from violence, 22 February 2018, url
42 Rahimi M., Afghanistan’s new Penal Code: Whether or Not to codify Hudud and Qisas, The University of Texas at Austin, School of Law, url
46 ALEP, Stanford Law School, Introduction to the Criminal Law of Afghanistan, 2012, url, p. 87
47 On the punishment of exile, the ALEP report however noted that ‘while some jurisprudence suggests an offender should serve one year in exile, the Hanafi School does not require exile’. ALEP, Stanford Law School, Introduction to the Criminal Law of Afghanistan, 2012 url, p. 91
defamation, in particular regarding false accusations of illicit sexual relations (80 lashes);  
- drinking alcohol or ingesting intoxicants (80 lashes);  
- apostasy (repentance within 3 days or face death, banishment, imprisonment);  
- highway robbery (crucifixion, death, amputation of a foot or hand, exile).48

Although hudud crimes are ‘wholly inflexible’ in terms of enforcement, the standard of proof for most hudud crimes is very high and ‘witnesses must corroborate any claim before guilt can be established.’49 According to Siavash Rahbari, an expert on legal issues in Afghanistan and former law specialist for the Asia Foundation, ‘the new Penal Code takes a similar approach to hudud crimes as the 1976 code, meaning that hudud punishments continue to be a viable option under Afghan law but are wholly uncodified. The main difference between the codes is the reduced sentences for the taziri versions of the crimes.’50 (See Section 1.4 Ta’azir crimes and the new Penal Code)

In an email exchange with EASO in 2017, expert Neamat Nojumi noted that the formal Afghan legal system is bound by the more secular constitutional provisions and does not adhere to the ‘totality of hudud’ in the way that it is done in Saudi Arabia or Iran. Dr Nojumi further explained that hudud punishments are not applicable in Afghanistan’s formal legal system and practices, but they are adhered to and practiced by the Taliban and insurgent groups. Islamist groups in Afghanistan apply a literal form of sharia with emphasis on the implementation of hudud penalties.51 (See Section 1.8 Taliban’s parallel justice system)

In 2019, there were reports of criminal charges based on interpretations of Islamic law, for example reports of officials charging women and men with immorality or running away from home, or reports of police often detaining women for zina at the request of family members.52 In 2013, Human Rights Watch estimated ‘that half of all women in prison and about 95 percent of girls in juvenile detention in Afghanistan were arrested on “moral crimes”.’53 During 2019, those detained for ‘moral crimes’ continued to be primarily women.54

1.3 Qisas crimes

Qisas crimes in Islamic law in Afghanistan are those that deal with offences to the ‘bodily integrity of another’ such as homicide and physical injury.55 Qisas is a system of ‘equality in retaliation’ whereby the victim is permitted to inflict the same injury to the person who committed the qisas transgression against them. Punishments are not mandated specifically by the Quran, and therefore, victims can traditionally demand the payment of diyat, or blood money as a compensation. According to the Afghanistan Legal Education Project (ALEP), this ‘allows the victims and their families to serve in the unique position as decision maker with regard to punishment’ and they can decide whether to demand compensation or inflict the same injury on the offender as retributive justice; they may also decide to

50 Nojumi, N., email, 22 September 2017, in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, p. 17  
52 HRW, Submission to the Committee on the Elimination of Discrimination against Women Review of Afghanistan, 75th Session, 23 December 2019,  
53 Washington Post (The), In male-dominated Afghanistan, justice for women is complicated, 24 June 2019,  
54 Rahimi M., Afghanistan’s new Penal Code: Whether or Not to codify Hudud and Qisas, The University of Texas at Austin, School of Law,  
55 ALEP, Stanford Law School, Introduction to the Criminal Law of Afghanistan, 2012, pp. 87-100; Rahimi M., Afghanistan’s new Penal Code: Whether or Not to codify Hudud and Qisas, The University of Texas at Austin, School of Law,  
57 ALEP, Stanford Law School, Introduction to the Criminal Law of Afghanistan, 2012, pp. 87-88  
58 Rahim M., Afghanistan’s new Penal Code: Whether or Not to codify Hudud and Qisas, The University of Texas at Austin, School of Law,  
forgive the offender.⁵⁶ A detailed explanation of the categories of Qisas crimes and how they are handled under the Hanafi school can be found in the ALEP book on Afghan criminal law.⁵⁷

ALEP provides examples of Qisas crimes and punishments, which include:

- intentional murder (retribution of an equal nature or diyat mughallazah - higher than normal amount of diyat compensation);
- unintentional murder (monetary compensation);
- intentional or unintentional physical injury and maiming (retaliation under certain conditions, or compensation).⁵⁸

For Pashtuns, retributive revenge (badal) through the death of the offender (Qisas) is a synonymous concept in justice under the Pashtunwali, sometimes resulting in blood feuds.⁵⁹ See Chapter 3. Blood feuds and revenge killings

1.4 Ta’azir crimes and the new Penal Code (2017)

Ta’azir crimes in Islamic law in Afghanistan are acts that constitute violation of public morality and welfare.⁶⁰ These crimes are the least serious according to Islamic law, however they still encompass very serious offences.⁶¹ Ta’azir are all offences which are not included within hudud and qisas crimes; the punishments for such crimes cannot replace hudud or qisas punishments, but they may be used as an additional punishment or as an alternative punishment ‘when hudud’s demanding elements are not satisfied’.⁶² The punishments for the ta’azir crimes are decided by the state which has ‘a great deal of freedom’ in defining the crimes and determining the punishments, provided that such freedom is ‘exercised within the spirit of the general rules of Islam and the public interest’. Likewise, the execution of the punishment is at the discretion of the judges, who may impose multiple punishments for a single crime. Ta’azir punishments include ‘admonition, reprimand, threat, boycott, public disclosure, fines, seizure of property, imprisonment, flogging, and in some instances, death’.⁶³

Like the 1976 Penal Code, the new 2017 Penal Code regulates ta’azir crimes. Article 2(1) of the 2017 Penal Code stipulates that ‘this law regulates Ta’azir crimes and punishments.’ Article 2(2) of the same code stipulates that ‘offenders of crimes that fall under Hudud, Qisas and Diyat shall be punished in accordance with the provisions of the Hanafi jurisprudence of the Islamic law.’⁶⁴

Sources noted that, compared to the 1976 Penal Code, the new Code foresees reduced sentences for certain ta’aziri crimes.⁶⁵ For instance, some offences which were previously punishable by death

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⁵⁷ ALEP, Stanford Law School, Introduction to the Criminal Law of Afghanistan, 2012, p. 100-104
⁶² The ALEP report explained that for the hudud crimes, the standard of proof is ‘quite demanding’. It further stated: ‘For most crimes, including adultery, witnesses must corroborate any claim before guilt can be established. Witness veracity is evaluated in terms of gender, community standing, the content of the statement, and the number of witnesses present. Punishment for a hadd offense is only tempered when the accused repents prior to arrest. For instance, if a thief repents and returns stolen property before the sentence is executed, the hadd lapses’. ALEP, Stanford Law School, University, Introduction to the Criminal Law of Afghanistan, 2012, p. 87-88
⁶⁴ Afghanistan, 2017 Penal Code, Official Gazette N. 1260, 15 May 2017, Art 2(1); Art 2(2) (informal translation by EASO), available at url; Rahimi M., Afghanistan’s new Penal Code: Whether or Not to codify Hudud and Qisas, The University of Texas at Austin, School of Law, url
penalty became punishable by life imprisonment.\textsuperscript{66} ICRC lists some of the main developments introduced by the new Code as follows:

- The incorporation of alternatives to imprisonment (of up to 5 years) and incarceration of minors (of up to 3 years) with the discretion of the judge. Requires it (mandatory) where a sentence is 6 months or less. War crimes are excluded from such alternatives.

- Death Penalty offenses are reduced from the former 54 to 14. Several crimes formerly liable to death penalty are assigned in the new Code a form of imprisonment called the “first degree continued imprisonment (30 years).”\textsuperscript{67}

ICRC further notes that the new Code criminalises, \textit{inter alia}:

- Illicit manufacturing and traffic in firearms;
- Sexual abuse of boys, extending the prohibition to all related acts, including knowingly attending a performance that involves such practice;
- Forced virginity testing of women suspected of having engaged in consensual extra-marital sex (clearly distinguished from rape).\textsuperscript{68}

The original version of the draft 2017 Penal Code proposed to legislators contained a specific chapter on the elimination of violence against women, which included, among others, all provisions of the Elimination of Violence Against Women law (EVAW).\textsuperscript{69} The EVAW law, enacted by presidential decree in 2009, is considered the main legislative protection in Afghanistan for women victims of gender-based violence, including harmful traditional practices.\textsuperscript{70} Due to the opposition against the EVAW law by a number of conservative members of parliament, eventually President Ghani ordered the Ministry of Justice to remove the EVAW chapter from the new Penal Code. Activists campaigned to preserve the EVAW law in its stand-alone form decreed in 2009\textsuperscript{71}, and the law is now applicable alongside the new Penal Code\textsuperscript{72} and implemented on an \textit{ad hoc} basis.\textsuperscript{73}

The UN and other observers raised concerns over the removal of the chapter criminalising violence against women\textsuperscript{74} as well as over the presence in the Code of vague provisions allowing the application of \textit{sharia} law and the execution of its punishments for some criminal offenses\textsuperscript{75} under the discretionary

\textsuperscript{66} AI, Amnesty International Report 2017/2018 – Afghanistan, 22 February 2018, \url{url}, p. 69
\textsuperscript{67} ICRC, Afghanistan Penal Code, 2017, nd., \url{url}
\textsuperscript{68} ICRC, Afghanistan Penal Code, 2017, nd., \url{url}
\textsuperscript{69} Netherlands, MFA, Country of Origin Report Afghanistan, March 2019, \url{url}, p. 51
\textsuperscript{70} UNAMA/OHCHR Injustice and Impunity: Mediation of Criminal Offences of Violence against Women, May 2028, \url{url}, p. 15; Article 5 of the EVAW states: ‘The commission of the following [22] acts shall be deemed as violence against women: Rape; Forcing into prostitution; Recording the identity of victim and publicizing it in a manner that damage the personality of victim; Setting into flames, using chemicals or other dangerous substances; Forcing into self-immolation or suicide or using poisonous or other dangerous substances; Causing injury or disability; Battery and laceration; Selling and buying women for the purpose or under pretext of marriage; Baad (offering a woman in marriage to compensate for a murder or restore peace); Forced marriage; Prohibiting from right of marriage or choosing husband; Marriage before the legal age; Abusing, humiliating, intimidating; Harassment/ persecution; Forced isolation [denying visit to family]; Forcing a woman into drug addiction; Depriving from inheritance; Preventing from possession of personal property; Denying right to education, work and access to health services; Forced labour; Marrying more than one wife without observing the provision of Article 86 of Civil Code; Denial of relationship.’ Afghanistan, Law on Elimination of Violence Against Women (EVAW), 2009 Presidential Decree No. 91 of 20 July 2009, Art. 5, \url{url}
\textsuperscript{71} HRW, World Report 2018: Events of 2017, Afghanistan, 1 January 2018, \url{url}, p. 3
\textsuperscript{72} Netherlands, MFA, Country of Origin Report Afghanistan, March 2019, \url{url}, p. 51
\textsuperscript{73} Netherlands, MFA, Country of Origin Report Afghanistan, March 2019, \url{url}; Appro (Afghanistan Public Policy Research Organization), New Penal Code and EVAW Law: To Incorporate or Not to Incorporate?, July 2018, \url{url}, p. 5
\textsuperscript{74} UN News, Afghanistan: UN mission welcomes new penal code, urges measures to protect women from violence, 22 February 2018, \url{url}; Appro, New Penal Code and EVAW Law: To Incorporate or Not to Incorporate?, July 2018, \url{url}, p. 1
\textsuperscript{75} FIDH/Armanshahr Foundation/OPEN ASIA, Update for the 1st European Union (EU)-Afghanistan Special Working Group on Human Rights, Good Governance and Migration Kabul, Afghanistan 5 May 2018, \url{url}; Rahimi M., Afghanistan’s new Penal Code: Whether or Not to codify Hudud and Qisas, University of Texas School of Law, \url{url}
power of the judge.\textsuperscript{76} UNAMA noted that that the new Penal Code, contrary to the Penal Code of 1976, no longer mentions ‘honour killings’ as a mitigating circumstance in murder cases.\textsuperscript{77} Monitoring the period 2015-2017, UNAMA found that the enforcement of national legislation aiming to protect women from violence remained a challenge in Afghanistan; in cases of murder and honour killings of women between 2016 and 2017, UNAMA found a \textit{de facto} impunity.\textsuperscript{78}

The implementation and awareness of the EVAW law throughout 2019 are described as limited.\textsuperscript{79} During 2019, AIHRC recorded 4,693 incidents of violence against women, including 238 cases of murder of women, 96 of which constitute honour killings. The same source stated that incidents of violence against women in 2019 were about 8.4% higher than 2018, noting that such a high level of violence is due to various factors, including low levels of public awareness of women’s rights, weak rule of law, and insecurity across various parts of the country.\textsuperscript{80} In a research paper published in 2020, the executive director of the Rule of Law Program at Stanford Law School, Mehdi Hakimi\textsuperscript{81} stated that ‘the EVAW Law’s passage in 2009 marked a historic step in fighting violence against women in Afghanistan. A decade later, however, this legislative initiative has been little more than a symbolic triumph. The reality is that violence against women and girls is rampant—perpetrated by both private and State actors.’\textsuperscript{82}

In its report for the year 2019, UNAMA noted that, despite the fact that the practice of \textit{bacha bazi} has been criminalised in the new Penal Code, there are reports that such crime continues to exist and is mainly perpetrated by the Afghan national security forces. There was only one case, to UNAMA’s knowledge, in which such a crime was successfully prosecuted under the provisions of the revised Penal Code.\textsuperscript{83}

\subsection*{1.6 Practices of corporal and capital punishment by the government}

Article 29 of the Constitution prohibits ‘punishment contrary to human dignity’\textsuperscript{84}, and Afghanistan is a party to the UN Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (UNCAT) since 1987.\textsuperscript{85} However, corporal punishments by the state are permitted by law in Afghanistan due to the pluralistic legal system whereby Islamic and civil laws interact with one another (see Section \textit{1.1 Legal Pluralism}), allowing individual judges and courts to determine how to prescribe punishments under either code.\textsuperscript{86}

In 2015, Human Rights Watch described corporal punishment by district Afghan courts as occurring with ‘regularity’ for crimes of adultery, noting that some district judges kept a lash in their office.\textsuperscript{87} However, reports of corporal punishment, including the use of lashings and beatings, are more frequent in areas controlled by Anti-Government Elements (AGEs).\textsuperscript{88} The report published in 2019 by

\textsuperscript{76} Rahimi M., Afghanistan’s new Penal Code: Whether or Not to codify Hudud and Qisas, University of Texas School of Law, \url{url}
\textsuperscript{77} UNAMA/OHCHR, Injustice and Impunity: Mediation of Criminal Offences of Violence against Women, May 2018, \url{url}, pp. 22-23
\textsuperscript{78} UNAMA/OHCHR, Injustice and Impunity: Mediation of Criminal Offences of Violence against Women, May 2018, \url{url}, pp. 21-23
\textsuperscript{80} AIHRC, Summary Report on Violence against Women 2018-2019, 23 March 2020, \url{url}
\textsuperscript{81} For more information on Mehdi Hakimi, see Mehdi Hakimi, Biography, n.d, \url{url}
\textsuperscript{83} UNAMA, Afghanistan protection of civilians in armed conflict 2019, 22 February 2020, \url{url}, p. 9
\textsuperscript{84} Afghanistan, Constitution of Afghanistan, 26 January 2004, Art. 29, \url{url}
\textsuperscript{85} UN Treaty Collection, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, Participants, status at 30 June 2020, \url{url}
\textsuperscript{86} ALEP, Stanford Law School, Introduction to the Criminal Law of Afghanistan, 2012, \url{url}; Rahimi M., Afghanistan’s new Penal Code: Whether or Not to codify Hudud and Qisas, University of Texas School of Law, \url{url}
\textsuperscript{87} HRW, Dispatches: A court-sanctioned lashing in Afghanistan, 2 September 2015, \url{url}
\textsuperscript{88} Australia, DFAT, DFAT Country Information Report Afghanistan, 27 June 2019, \url{url}, p. 43; RFE/RL/Gandhara, Taliban Revive Harsh Rule In A Remote Afghan Province, 1 March 2019, \url{url}; Guardian (The), ’I lost consciousness’: woman whipped by the
The Australian Department of Foreign Affairs and Trade (DFAT) stated that reports of cruel, inhuman or degrading punishment by government officials persist, and such incidents are largely undocumented; however DFAT did not provide information on the sources of such reports.\(^89\)

The death penalty in Afghanistan is envisaged under both the Penal Code and Islamic law.\(^90\) The 2017 Penal Code significantly reduces the number of crimes for which the death penalty applies.\(^91\) Article 170 of the new Penal Code stipulates:

> ‘Death penalty shall be applied in the following cases unless it is defined differently within the law:
> 1) Genocide, crimes against humanity, war crimes, offence against the state, terror and explosion, abduction and hostage taking, banditry that results in the death of a person.
> 2) Intentional murder as defined within the law.
> 3) Crimes that lead to the occupation of the territory of the Islamic Republic of Afghanistan, entirely or partly, by a foreign government or crimes that harm the national sovereignty, territorial integrity or independence of the country.
> 4) Gang rape of a woman.
> 5) Gang rape of a man that results in the death of the victim.’\(^92\)

In a 2016 article, AAN analysts noted that although the death penalty is legal in Afghanistan, according to both the criminal code and Islamic law, actual executions have been implemented on an *ad-hoc* basis.\(^93\) DFAT stated that, as of mid-2018, there were 720 prisoners on death row; however, actual executions have been rare since 2001.\(^94\) Approximately 100 individuals were sentenced to death during 2016\(^95\), five men were executed in November 2017 for abduction and murder, and at least three prisoners were executed in 2018.\(^96\) According to information available to the UN, no executions were held in 2019. However, as of November 2019, some 700 people were reported to be on death row, including about 100 convicted of crimes against internal and external security.\(^97\)

### 1.7 Customary justice

Customary and local interpretations of Islamic laws are intertwined and combined in processes of traditional dispute resolution.\(^98\) Drawing upon traditional practices, local customs and religion, informal justice mechanisms have existed in Afghanistan for centuries.\(^99\) Sources note that customary and informal dispute resolution mechanisms are complex systems, are not monolithic, and should be

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understood as involving numerous justice actors ranging from *jirgas* and *shuras*, to include also individual religious scholars, jurists, community members, NGOs, and national institutions.\(^\text{100}\)

In 2017, scholar Neamat Nojumi explained that customs and customary law continue to play a valuable and important role in Afghan society. Customs are adhered to by individuals within a family, while customary law encompasses normative principles adhered to by a community, and those traditions differ among groups. For example, Tajik, Hazara, Uzbek, and Turkmen follow different social codes from Pashtuns in relation to marriage, inheritance, and public appearances, though there are some overlapping issues across all groups, such as gender discrimination and blood feud practices.\(^\text{101}\)

Throughout 2019, traditional justice mechanisms remained the main recourse for many Afghans, especially in rural areas where the formal legal system often does not exist and local elders and *shuras* are the primary means of resolving both criminal matters and civil disputes. According to the USDOS, such informal institutions and the Taliban also imposed punishments without regard to the formal legal system.\(^\text{102}\) According to the 2019 Survey by the Asia Foundation\(^\text{103}\), more than 46% of Afghans have applied to *shuras* or *jirgas* to solve their disputes, 41.5% to state courts, and around 25% to the *Huquq* department. The preference revealed urban-rural divide: rural inhabitants appealed more to *shuras/jirgas* (48%), while urban residents preferred appealing to state courts and the *Huquq* department (around 52% and 30% respectively).\(^\text{104}\) The survey further found that the vast majority of Afghans believed that local *shuras* and *jirgas* are fair and trusted (81.2%), that they follow local norms and values (74.4%), that such institutions are effective at delivering justice (74.2%), and that they resolve cases quickly and efficiently (73.2%).\(^\text{105}\)

In 2017, Dr Nojumi further noted that the diversity of non-state justice comes mainly from the segmentation of the population into urban, rural, and tribal sectors, with the principles of enforcement being based on accepted norms in each context. He noted that in the urban centres within city districts or at the centre of the rural districts people do often have the option to access both forms of state and non-state mechanism while in the peripheries of the cities and rural districts accessing the state justice system is limited. Within the tribal belt of Afghanistan, mainly across the border with Pakistan and in part with Iran, non-state justice forms the dominant legal system. Within these localities, Afghan tribal communities have the presence of a generation of ‘traditional expertise’ (*Jirgamar*) whose profession is dispute settlement. Nojumi made the observation, based on his research of Afghans’ experiences of local governance, that non-state justice is widely understood by the population, and such mechanisms as *jirgas* and *shuras* are seen as an affordable and functional way to resolve disputes more effectively than can be done through state institutions due to their basis in social trust with


\(^{101}\) Nojumi, N., email, 22 September 2017, in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, [url](#), p. 18

\(^{102}\) Asia Foundation (The), Afghanistan in 2019: A Survey of the Afghan People is The Asia Foundation’s fifteenth annual public opinion survey in Afghanistan. The Asia Foundation describes the Survey as ‘the longest-running barometer of public opinion in Afghanistan’. Since 2004, the Survey has gathered the views of more than 129,800 Afghans on topics such as security, elections, governance, the economy, essential services, corruption, youth issues, reconciliation with the Taliban, access to media, migration, the role of women, and political participation. For the purpose of the 2019 Survey, the Asia Foundation conducted face-to-face interviews with a national sample of 17,812 Afghan respondents aged 18 years and above, across all 34 provinces from July 11 to 7 August 2019. For more information on the methodology used for the Survey, please see Asia Foundation (The), Afghanistan in 2019: A Survey of the Afghan People, 2 December 2019, Appendix 1: Methodology, [url](#), p. 257


\(^{104}\) Asia Foundation (The), Afghanistan in 2019: A Survey of the Afghan People, [url](#), pp. 23, 144

\(^{105}\) Asia Foundation (The), Afghanistan in 2019: A Survey of the Afghan People, 2 December 2019, [url](#), p. 23
adjudicators. In a 2014 article, Nojumi also noted that non-state systems are oriented toward the re-establishment of harmony and the prevention of disruption in the community and in relationships. He makes the point that traditional customs and norms within a family may or may not apply to other families; noting that negative practices such as honour killings and retribution are usually carried out and planned in secret, without involving the broader community; by contrast, customary law is meant to be a consultative process.

Neamat Nojumi observed that although popular, there are numerous aspects of customary laws that contradict *sharia* and vice versa, particularly in relation to women’s rights, which are neglected or denied. Although it is a widely held perception among Afghans that customary laws are in line with Islamic *sharia*, in practice the two contradict one another at times, as well as also contravening official state laws in some practices. In its report for the year 2019, Amnesty International pointed out that traditional and informal forms of justice continued to be implemented in Afghanistan contrary to the principle of rule of law, human rights standards, and Afghan laws.

For more information on dispute resolution through non-state mechanisms like *jirga* and *shura*, see Section 2.2.2 Customary and traditional mechanisms.

### 1.8 Taliban’s parallel justice system

After being ousted from power in 2001, the Taliban re-emerged gradually transitioning into an insurgent parallel system of governance. The Taliban dismiss the Afghan Constitution as a product copied from the West and imposed on a Muslim society, rather than based on the principles of Islam. In 2020, in territories under their control, the group continued to operate a parallel judicial system (see also 2.3.3 Taliban involvement in land disputes), based on a strict interpretation of *sharia*.

Taliban courts are described as ‘kangaroo courts’. It is reported, however, that many Taliban commanders impose arbitrary punishments without reference to such a system.

The Taliban courts have become significantly widespread and they are also reported to reach far beyond Taliban-held areas. Taliban courts receive cases from people who live in government-control cities and who do not necessarily support Taliban rule but may feel that they have no viable

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106 Nojumi, N., email, 22 September 2017, in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, [url](https://example.com), pp. 21-22
107 Nojumi, N., The merits of non-state justice: An effective mechanism for a stable Afghanistan, 5 November 2014, [url](https://example.com)
111 AI, Human Rights in Asia-Pacific; Review of 2019 - Afghanistan, 30 January 2020, [url](https://example.com)
112 Clark K., Bjelica, J, One Land, Two Rules (1): Service delivery in insurgent-affected areas, an introduction, Afghanistan AAN, 6 December 2018, last updated 15 April 2020, [url](https://example.com); Smith S.S., Service Delivery in Taliban Influenced Areas of Afghanistan, USIP, April 2020 [url](https://example.com), p. 3
113 Haress G., Why the Taliban should read the Afghan Constitution, AAN, 9 April 2019, last updated 9 March 2020, [url](https://example.com)
115 Salaam Times, Taliban brutality takes center stage with couple’s execution in Ghor, 28 April 2020, [url](https://example.com)
116 Freedom House, Freedom in the World 2020 - Afghanistan, 4 March 2020, [url](https://example.com)
alternative.\textsuperscript{118} An increasing number of Afghans across the country were reported to seek justice in Taliban courts due to feeling frustrated\textsuperscript{119} with the state’s bureaucracy, corruption, and lengthy processing times.\textsuperscript{120} Various sources reported that Taliban courts were a preferable alternative\textsuperscript{121}, and that they were perceived as accessible, fast, and less corrupt\textsuperscript{122} than the government-established courts.\textsuperscript{123} Neamat Nojumi observed that people might turn to the Taliban when one side of the dispute did not receive a favourable verdict either from the state or non-state justice process.\textsuperscript{124}

Primary Taliban courts are established at a district level and have hearings on one or two days a week.\textsuperscript{125} Describing the provision of services provided by the Taliban in Dasht-e Archi, a district in Kunduz province, AAN analyst Ali Obaid, reported, for instance, that the Taliban have established a justice committee which operates as a primary court. To register their cases, people submit their letters to the committee and get a receipt with an exact date for the hearing. Depending on the complexity of the specific case and availability of Taliban’s judges, the court can take a few days to review the cases. Ali Obaid further explained that ‘locals usually take their cases to the Taleban court, where they are adjudicated faster, without corruption and with satisfactory outcomes. For many people, the only available option for their grievances is the Taleban court. Although they do not readily admit it, they often register their cases with the Taleban court so that they can force the opposing side to attend the hearing and accept the Taleban verdicts.’\textsuperscript{126}

In Dashti Simi and some parts of Shnai Simi, areas within Nad Ali, a district in Helmand province, the Taliban operate a mobile judiciary service. However, due to concerns by the group of being attacked by government and foreign forces, such a mobile justice service is not operated prominently and it is not easily accessible.\textsuperscript{127} In Andar district of Ghazni province, the Taliban exercise full control of the justice sector and, according to a case study by AAN, the local community said to prefer justice services provided by the Taliban courts.\textsuperscript{128} Similarly, in Obeh district in Herat province, local respondents told AAN that the they felt disheartened by corruption within the official justice system, and that Taliban courts are faster and more efficient. In some cases, however, people said they were forced to resort to Taliban courts since they had no other option.\textsuperscript{129} In the district of Zurmat, in Paktia province, local government officials interviewed by AAN stated that the Taliban courts play ‘a key role in the district, where different cases are registered daily in their court’; cases are mainly said to be land disputes or family conflict. Moreover, according to AAN’ source, if a Taliban court cannot reach a verdict, they can refer the case to a Taliban court based in Pakistan.\textsuperscript{130}

\textsuperscript{118} Jackson, A., Weigand, F., The Taliban’s war for legitimacy in Afghanistan, Current History, 118 (807), November 2019, \url{url}, p. 145;
\textsuperscript{119} Arab News, Afghans turn to Taliban in forgotten province, 9 February 2020, \url{url}
\textsuperscript{120} National (The), Afghans flock to Taliban courts seeking swift justice, 20 May 2019, \url{url}
\textsuperscript{121} Smith S.S., Service Delivery in Taliban Influenced Areas of Afghanistan, USIP, April 2020 \url{url}, p. 6
\textsuperscript{122} Semple, M., Afghanistan’s Islamic Emirate Returns: Life under a Resurgent Taliban, WPR, 18 September 2018, \url{url}; Jackson, A., Weigand, F., Rebel rule of law - Taliban courts in the west and north-west of Afghanistan, ODI/HPG/NRC, May 2020, \url{url}, p. 1; Obaid A. One Land, Two Rules (3): Delivering public services in insurgency-affected Dasht-e Archi district in Kunduz province, AAN, 26 February 2019, last updated 9 March 2020, \url{url}
\textsuperscript{123} Jackson, A., Weigand, F., The Taliban’s war for legitimacy in Afghanistan, Current History 118 (807), 2019, \url{url}, p. 145
\textsuperscript{124} Nojumi, N., email, 22 September 2017 in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, \url{url}, p. 83
\textsuperscript{125} Jackson, A., Weigand, F., Rebel rule of law - Taliban courts in the west and north-west of Afghanistan, ODI/HPG/NRC, May 2020, \url{url}, p. 4
\textsuperscript{126} Obaid A. One Land, Two Rules (3): Delivering public services in insurgency-affected Dasht-e Archi district in Kunduz province, AAN, 26 February 2019, last updated 9 March 2020, \url{url}
\textsuperscript{127} Sabawoon A. M, One Land, Two Rules (6): Delivering public services in insurgency-affected Nad Ali district of Helmand province, 2 June 2019, last updated 9 March 2020, \url{url}
\textsuperscript{128} Muzhary, F. R., One Land, Two Rules (7): Delivering public services in insurgency-affected Andar district in Ghazni province, AAN, 13 June 2019, last updated 9 March 2020, \url{url}
\textsuperscript{129} Kazemi S. R., One Land, Two Rules (2): Delivering public services in insurgency-affected Obeh district of Herat province, AAN, 9 December 2018, last updated 9 March 2020, \url{url};
\textsuperscript{130} Bleuer C., Sadat S. A., Ali O., One Land, Two Rules (8): Delivering public services in insurgency-affected insurgent-controlled Zurmat district, AAN, 4 September 2019, last updated 9 March 2020, \url{url}
Punishments enforced by the Taliban parallel justice system include execution, mutilation and stoning to death. UNAMA stated to have documented four cases in 2019, in which the Taliban executed punishments against women based on their own justice system for committing adultery or having an ‘immoral relationship’. ‘In three of these cases the women were lashed and, in one case, the woman was executed, accused of eloping.’ During 2019, Afghanistan’s Independent Human Rights Commission (AIHRC) documented 13 extrajudicial trials against women, noting that the perpetrators of these incidents are ‘fugitives’, and they are in the areas controlled by the anti-government armed groups. These incidents occurred in Faryab and Ghor provinces.

Media sources reported cases of women being flogged for going out without a male guardian, or for wearing a burqa without covering the face. In 2018, in Shahruk district in Ghor province, a boy and a girl were shot dead by the Taliban for ‘running away from home’. In March 2019, a pregnant woman in Sancharuk District in Sar-e-Pol province was sentenced to death by the Taliban and instantly killed along with her unborn child for reportedly criticising the Taliban by calling their war against the government ‘illegitimate’. In January 2020, Afghan officials accused the Taliban of executing at least six members of the same family, including an infant girl, in a remote village in Faryab province. According to Afghan officials, the Taliban sentenced the family to death for ‘immoral acts’, accusing them of working in prostitution. However, according to Andkhoy district chief Sultan Mohammad Sanjer, locals claimed that the real reason behind this execution was the fact that a family member was a former Taliban militant who recently took part in the peace process.

In February 2020, AIHRC informed it was investigating a video footage showing an Afghan woman being stoned to death. At the time of the report, it was not clear yet whether the footage referred to an incident which occurred in 2015 in Ghor province, as the Taliban claim, or a more recent stoning in the Taywara district of Ghor province, as Afghan journalists and activists state. Radio Free Europe/Radio Liberty reported that in response to a Twitter post by a spokesperson for Afghan President Ashraf Ghani, Sediq Sediqqi, stating to be ‘utterly shocked and saddened’ after watching the video, a Twitter account linked to the Taliban replied that the punishment of ‘stoning for adultery is Islamic ruling that cannot be rejected by any Muslim’. However, both the Taliban and government officials denied being the perpetrators of this act.

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133 AIHRC, Human Rights in Asia-Pacific; Review of 2019 - Afghanistan, 30 January 2020, url
134 UNAMA, Afghanistan protection of civilians in armed conflict 2019, 22 February 2020, url, p. 19
136 RFE/RL, Taliban Revive Harsh Rule In A Remote Afghan Province, 1 March 2019, url;
137 Guardian (The), ‘I lost consciousness’: woman whipped by the Taliban over burqa without veil, 18 April 2018, url;
138 Guardian (The), ‘I lost consciousness’: woman whipped by the Taliban over burqa without veil, 18 April 2018, url
139 Pajhwok, Taliban gun down runaway woman, boy in Ghor, 24 October 2018, url
140 Salaam Times, Taliban murder pregnant woman, unborn child in Sar-e-Pul, 25 March 2019, url;
141 EASO COUNTRY OF ORIGIN INFORMATION REPORT - AFGHANISTAN: CRIMINAL LAW, CUSTOMARY JUSTICE, DISPUTE RESOLUTION — 21
144 AIHRC, Human Rights in Asia-Pacific; Review of 2019 - Afghanistan, 30 January 2020, url
145 UNAMA, Afghanistan protection of civilians in armed conflict 2019, 22 February 2020, url, p. 19
147 RFE/RL, Taliban Revive Harsh Rule In A Remote Afghan Province, 1 March 2019, url;
148 Guardian (The), ‘I lost consciousness’: woman whipped by the Taliban over burqa without veil, 18 April 2018, url;
149 Pajhwok, Taliban gun down runaway woman, boy in Ghor, 24 October 2018, url
150 Salaam Times, Taliban murder pregnant woman, unborn child in Sar-e-Pul, 25 March 2019, url;
152 EASO COUNTRY OF ORIGIN INFORMATION REPORT - AFGHANISTAN: CRIMINAL LAW, CUSTOMARY JUSTICE, DISPUTE RESOLUTION — 21
153 UNAMA, Afghanistan protection of civilians in armed conflict 2019, 22 February 2020, url, p. 19
155 RFE/RL, Taliban Revive Harsh Rule In A Remote Afghan Province, 1 March 2019, url;
156 Guardian (The), ‘I lost consciousness’: woman whipped by the Taliban over burqa without veil, 18 April 2018, url;
157 Pajhwok, Taliban gun down runaway woman, boy in Ghor, 24 October 2018, url
158 Salaam Times, Taliban murder pregnant woman, unborn child in Sar-e-Pul, 25 March 2019, url;
159 EASO COUNTRY OF ORIGIN INFORMATION REPORT - AFGHANISTAN: CRIMINAL LAW, CUSTOMARY JUSTICE, DISPUTE RESOLUTION — 21
161 EASO COUNTRY OF ORIGIN INFORMATION REPORT - AFGHANISTAN: CRIMINAL LAW, CUSTOMARY JUSTICE, DISPUTE RESOLUTION — 21
162 UNAMA, Afghanistan protection of civilians in armed conflict 2019, 22 February 2020, url, p. 19
164 RFE/RL, Taliban Revive Harsh Rule In A Remote Afghan Province, 1 March 2019, url;
165 Guardian (The), ‘I lost consciousness’: woman whipped by the Taliban over burqa without veil, 18 April 2018, url;
166 Pajhwok, Taliban gun down runaway woman, boy in Ghor, 24 October 2018, url
167 Salaam Times, Taliban murder pregnant woman, unborn child in Sar-e-Pul, 25 March 2019, url;
169 Reportedly, Six Family Members Shot Killed by Taliban in Faryab, 19 January 2020, url
170 ABC news, Afghan officials say Taliban kil 6 members of same family, 19 January 2020, url
171 The reliability of the account referred to as linked to the Taliban by RFE/RL could not be verified by EASO
172 SediqSediqqi, [Twitter], posted on: 1 February 2020; IAEFG, [Twitter], posted on: 2 February 2020 url
173 RFE/RL, Afghan Rights Group Investigating Video Of Woman Being Stoned To Death, 3 February 2020, url
2. Land disputes

2.1 General

In Afghanistan, the land is a primary source of local conflicts\textsuperscript{144} and violence.\textsuperscript{145} The disputes over land were reported to occur in the context of growing urbanisation, population growth, and high numbers of returnees to the country\textsuperscript{146} as well as because of longstanding war, tribal conflict, and ineffective land administration.\textsuperscript{147}

As noted by Afghanistan Independent Joint Anti-Corruption Monitoring and Evaluation Committee (MEC) and United States Institute of Peace (USIP), the predominant types and nature of conflicts around land and water varied by region and depended on the strength of the government, tribal networks, and the presence of powerful locals and warlords in the area.\textsuperscript{148} Abubakar Siddique, a senior correspondent for Radio Free Europe/Radio Liberty (RFE/RL), explained in his interview with EASO in 2017 that land disputes occurred mainly among individuals and families and involved powerful elites while in rural areas land conflicts could expand to include whole families, communities, ethnicities, tribes, or clans within one tribe.\textsuperscript{149}

Land tenure in Afghanistan is largely based on customary practices, tradition, or local memory.\textsuperscript{150} Land registration remains ‘highly irregular’ with only cities, or even only parts of the cities, having been formally surveyed. In peri-urban areas, ownership is held through the unregistered title (\textit{urfi qabala}). Despite the efforts of the government and international agencies to have the land surveyed and registered, owning land ‘outside of the formal titling system’ was reported even in the capital.\textsuperscript{151}

Local media reported on numerous cases of families and individuals involved in conflicts over land and property in different regions of Afghanistan. For instance, in May 2019, a verbal clash between two families over inherited land in a village in Khost district, Baghlan Province, turned into an armed clash, as a result of which three persons, including one woman, were killed.\textsuperscript{152} The same month, unknown gunmen were reported to have killed seven members of a family due to a personal feud that was possibly connected to a land dispute in Kabul.\textsuperscript{153} In April 2020, it was reported that six people were killed and 26 injured because of clashes over land ownership among tribesmen from Durbaba and Nazian districts in Nangarhar Province\textsuperscript{154}; in the same month, four persons, including two women, were injured in a clash between two tribes over land ownership in Dan Patan district, Paktia Province.\textsuperscript{155} Reporting on a land-related conflict in Dehdadi district of Balkh Province, in which two persons were killed and one injured, Pajhwok Afghan News noted that the residents felt that the authorities were unable to respond to such cases of violence.\textsuperscript{156}

\textsuperscript{144} Choudhury, N., Power, Inequality, and Local Land Conflict in Afghanistan: A Study of Kabul’s Peri-Urban Areas, Afghan Institute for Strategic Studies (AISS), 2019, url, p. 1. AISS defines itself an ‘independent, not-for-profit research institute’ which aims to address strategic issues related to Afghanistan, see [website], n.d, url

\textsuperscript{145} Muzhary F. R., One Land, Two Rules (10): Three case studies on Taleban sales of state land, AAN, 15 April 2020, url

\textsuperscript{146} New Humanitarian (The), Land disputes add to Afghanistan’s security woes, 10 September 2013, url

\textsuperscript{147} MEC, Final Report of the Public Inquiry into Land Usurpation, November 2014, url, p. 13

\textsuperscript{148} MEC, Final Report of the Public Inquiry into Land Usurpation, November 2014, url, p. 41; USIP, Addressing land and conflict in Afghanistan, June 2015, url, p. 8

\textsuperscript{149} Siddique, A., Skype interview, 11 August 2017, in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, url, p. 74

\textsuperscript{150} AREU, LGAF – Afghanistan, 22 June 2017, url, p.7; Denmark, DIS, Report from Danish Immigration Service’s fact finding mission to Kabul, Afghanistan, 25 February to 4 March 2012, May 2012, url, pp. 40-41

\textsuperscript{151} Choudhury, N., Power, Inequality, and Local Land Conflict in Afghanistan: A Study of Kabul’s Peri-Urban Areas, Afghan Institute for Strategic Studies, 2019, url, p. 1

\textsuperscript{152} Pajhwok Afghan News, Woman among 3 killed over land dispute in Baghlan, 9 May 2019, url

\textsuperscript{153} Ariana News, Seven members of a family shot dead in Kabul, 27 May 2019, url

\textsuperscript{154} Pajhwok Afghan News, Nangarhar: 6 killed, 26 injured in clash over land, 7 April 2020, url

\textsuperscript{155} Pajhwok Afghan News, 3 dead as rival tribes clash in Paktia, 9 April 2020, url

\textsuperscript{156} Pajhwok Afghan News, Increasing crime incidents worry Balkh dwellers, 26 October 2019, url
Summarising, sources reported on land dispute situations caused by issues such as:

- the arrival of displaced people, refugees, returnees, or IDPs, including those who have left their place of origin and return to reclaim their land /property after an extended period away\(^\text{157}\);
- involvement of insurgents or armed groups in local intra-tribal or intertribal divisions over land, including arming one side against another\(^\text{158}\);
- illegal land sales and land-grabbing by powerful elites, warlords\(^\text{159}\), strongmen\(^\text{160}\), or powerful individuals\(^\text{161}\), or receiving land distributed or obtained through corruption and bribery of officials\(^\text{162}\);
- claims over contested definitions of private, public, national, or commonly held land ownership\(^\text{163}\), such as land being used for informal camps and settlements\(^\text{164}\);
- multiple and competing claims for the same land, involving warlords, powerful commanders, political or armed local actors\(^\text{165}\);
- security and tenure over highly valued urban property, involving politicians and parties\(^\text{166}\), or land disputes in urban areas where property is taken by powerful individuals and elites\(^\text{167}\);
- conflicts over government-owned land\(^\text{168}\) or land recognised to belong to the government after the construction of residential buildings\(^\text{169}\);
- ownership disputes between individuals and family members, such as disputed inheritances\(^\text{170}\).

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\(^\text{157}\) NRC, Strengthening Displaced Women's Housing, Land and Property Rights in Afghanistan, November 2014, \url{[url]} p. 27; Denmark, DIS, Report from Danish Immigration Service’s fact finding mission to Kabul, Afghanistan, 25 February to 4 March 2012, May 2012, \url{[url]} pp. 40-41; Muzhary, F., Resettling nearly half a million Afghans in Nangrahar, 12 May 2017, \url{[url]}; Pajhwok Afghan News, Corruption hits hard land distribution to returnees, 1 May 2017, \url{[url]}


\(^\text{159}\) Rao, S., Turkstra, J., Enhancing security of land tenure for IDPs, FMR 46, May 2014, \url{[url]}; p. 15; IWPR, Afghanistan: Teacher’s Land Seized, 21 November 2017, \url{[url]}

\(^\text{160}\) Pajhwok Afghan News, 33,000 acres of govt, private land grabbed in Khadahar, 28 October 2019, \url{[url]}; Pajhwok Afghan News, 23,000 acres of land reclaimed from Balkh grabbers, 6 February 2020, \url{[url]}

\(^\text{161}\) Pajhwok Afghan News, 650,000 acres of government land usurped nationwide, 15 March 2017, \url{[url]}

\(^\text{162}\) MEC, Final Report of the Public Inquiry into Land Usurpation, November 2014, \url{[url]} p. 27; UNAMA, The Stolen Lands of Afghanistan and its People, August 2014, \url{[url]} p. 10, 17

\(^\text{163}\) Rao, S., Turkstra, J., Enhancing security of land tenure for IDPs, FMR 46, May 2014, \url{[url]} p. 15; AREU, LGAF - Afghanistan, 22 June 2017, \url{[url]} pp. 43-44


\(^\text{166}\) Rao, S., Turkstra, J., Enhancing security of land tenure for IDPs, FMR 46, May 2014, \url{[url]} p. 15

\(^\text{167}\) Siddique, A., Skype interview, 11 August 2017, in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, \url{[url]} p. 73; Washington Post, In Afghanistan, the Taliban isn’t the only group battling for land, 31 May 2016, \url{[url]}


\(^\text{169}\) Pajhwok Afghan News, 2 people killed over land dispute in Logar, 18 January 2017, \url{[url]}

\(^\text{170}\) Denmark, DIS, Report from Danish Immigration Service’s fact finding mission to Kabul, Afghanistan, 25 February to 4 March 2012, May 2012, \url{[url]} pp. 40-41; MEC, Final Report of the Public Inquiry into Land Usurpation, November 2014, \url{[url]} p. 34; Siddique, A., Skype interview, 11 August 2017, in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, \url{[url]} p. 73; Pajhwok Afghan News, 2 killed 1 injured in clash over land in Parwan, 1 April 2017, \url{[url]}; Pajhwok Afghan News, Woman among 3 killed over land dispute in Baghlan, 9 May 2019, \url{[url]}
UNOCHA’s 2019 report stated that ‘disputes over land pose immediate protection and early recovery challenges in humanitarian operations.’

2.2 Land disputes among nomadic and sedentary groups

The real number of nomadic households in Afghanistan is unknown. Antonio Giustozzi, a researcher with an extensive number of publications on nomad-settler conflicts in Afghanistan, noted that the number of ‘actively migrating nomads’ — fully active nomadic households and actively migrating members of partially settled households — was estimated at 1.5 million in 2004 but is expected to be much lower today.\(^\text{171}\) The Independent General Directorate of Kuchi, established within the Ministry of Agriculture (MoA)\(^\text{172}\) in 2006 to monitor, report on and solve nomad-related issues, estimated the number of semi-nomads at 150,000–220,000 while reporting that full nomadism was substantially extinct.\(^\text{173}\) According to Giustozzi, nomadism in Afghanistan is ‘hybridised’ with remaining semi-nomads partially integrated within settled communities\(^\text{174}\); the clear distinction between farmers and nomads has blurred by 2001 with the emergence of semi-sedentary nomad groups.\(^\text{175}\)

MoA, which is responsible for pastures, ‘seems to consider’ the Pasture Law of 1971 as the basis of its operations.\(^\text{176}\) While the Pasture Law distinguishes between private, community, and public pastures and allows nomads to access only public pastures, the distinction between the types of pastures is often blurred which ‘makes the emergence of conflicts easy’.\(^\text{177}\)

Although the large majority of nomads are Pashtuns, there are also Uzbek, Pashai, Aimaq, Baluch, Turkmen, and Gujar nomadic communities.\(^\text{178}\) The state granted Kuchi-Afghan nomads, who are Pashtuns and reside in southern and eastern parts of the country\(^\text{179}\) — special representation in the parliament; the regulation, however, was reported to be violated by some candidates who lacked Kuchi origin.\(^\text{180}\) Jogis, a small semi-nomadic community, were reported to be denied from owning property and accessing jobs, education, and healthcare because of their stateless status.\(^\text{181}\) The members of the community received their first national ID cards to vote in the October 2018 Wolesi Jirga (House of People) elections but some claimed that their ID cards were not accepted by the government afterward.\(^\text{182}\) Another nomadic group that was reported to remain not recognised by the government were Mosulis.\(^\text{183}\)

As noted by Giustozzi, the Kuchi Directorate estimated that about 45% of nomads, semi-nomads, and settled nomads were involved in some type of conflict. About 20% of those involved in land disputes were active nomads involved in conflicts with other active nomads, 60–70% were active nomads involved in conflicts with settlers, and 10–20% were active nomads involved in conflicts with settled

\(^{171}\) UNOCHA, Humanitarian Needs Overview – Afghanistan, December 2019, [url]
\(^{172}\) Giustozzi, A., Typologies of nomad-settler conflict in Afghanistan, AREU Issues Paper, AREU, January 2018, [url]
\(^{173}\) Giustozzi, A., The Role of the Afghan State in Managing Nomadism and Nomad-Settler Conflict, AREU, December 2018, [url]
\(^{174}\) Giustozzi, A., Can the Afghan state intervene successfully in the conflict between nomads and settlers?, AREU, February 2020, [url]
\(^{175}\) Giustozzi, A., Nomad-settler conflict in Afghanistan today, October 2019, AREU, [url]
\(^{176}\) Giustozzi, A., Typologies of nomad-settler conflict in Afghanistan, AREU Issues Paper, AREU, January 2018, [url]
\(^{177}\) Giustozzi, A., The Role of the Afghan State in Managing Nomadism and Nomad-Settler Conflict, AREU, December 2018, [url]
\(^{178}\) Giustozzi, A., Typologies of nomad-settler conflict in Afghanistan, AREU Issues Paper, AREU, January 2018, [url]
\(^{179}\) Giustozzi, A., Typologies of nomad-settler conflict in Afghanistan, AREU Issues Paper, AREU, January 2018, [url]
\(^{181}\) RFE/RL, Afghan Nomads Cite Poor Representation in Elections, 11 October 2018, [url]
\(^{182}\) Afghanistan Central Statistic Office (CSO) had no information about the exact number of Jogies living in the country as of 2019, see Pajhwok Afghan News, Jogies say ID cards issued to them not accepted now, 19 June 2019, [url]
\(^{183}\) RFE/RL, Jogis: Afghanistan’s Tiny Stateless Minority Strives to Survive Without Rights, Services, 14 October 2019, [url]
\(^{184}\) Pajhwok Afghan News, Jogies say ID cards issued to them not accepted now, 19 June 2019, [url]
\(^{185}\) RFE/RL, Afghanistan’s Tiny Stateless Minority Strives to Survive Without Rights, Services, 14 October 2019, [url]
nomads. The reasons for the disputes comprised denial of access to pastures, disputes over borders of villages’ pastures and public pastures accessible to nomads, construction of houses on pastures by nomads, taking pastures for cultivation by farmers, nomads’ herds damaging farmers’ crops, a conflict between various nomad communities, and a conflict between nomads and the authorities.

The blocking of nomad migration routes was reported to occur largely on the southern fringes of the Hazarajat. Hazarajat is a mountainous region that comprises the provinces of Bamiyan and Daykundi and parts of the provinces of Ghazni, Ghor, Uruzgan, and Wardak, which are the traditional homeland of the Hazara. Hazarajat is heavily dependent on agriculture for economic and employment opportunities; it is highly vulnerable to droughts and floods and has a ‘severely underdeveloped’ infrastructure. The blocking of access to land by Hazara farmers, who prevented nomads from reaching pastures to avoid damage to crops grown on the nomads’ route and village pastures, was reported to take place particularly in Behsud district of Wardak Province and in parts of Ghazni Province. The passages on the nomads’ migration route in Behsud, which was ‘the most violent spot of nomad-farmer conflict in Afghanistan’, were reported to be under the control of local Hazara militias.

Beyond the areas in Hazarajat, the conflict between nomads and settlers ‘has spread to many corners of the country and pits mostly Pashtun nomads versus Hazara, Tajik and Pashtun settlers’. Furthermore, Uzbek nomads were reported to be involved in a conflict over the use of pastures with farmers of several Pashtun tribes in Kalam Guzar area of Kunduz Province. Both sides have appealed to Uzbek or Pashtun politicians and strongmen for help and support. In Khost and around several villages in Farah, the conflicts were reported to involve Baluchi nomads and Alokozay farmers.

As found by Giustozzi, land grabbing and illegal appropriation constituted the most important type of conflicts related to the nomadic population in Afghanistan. Urban expansion, intensified by the return of Afghans from Pakistan, Iran, and other countries and internal migration from rural areas, caused a rise in prices of land in pasture areas. The demand for land created prerequisites for ‘grabbing pastures and turning them into townships’ and brought competition and fight between nomads and settlers for appropriating the pasturelands to build on them or sell them for urban development.

### 2.3 Land dispute resolution

#### 2.3.1 Formal mechanisms

Land related disputes are considered civil matters under the statutory law. Land-related disputes are mediated by Huquq (Rights) offices; however, in its 2019 report, UNAMA expressed concerns over their effectiveness and capacity to enforce court decisions and land titles.

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186 Giustozzi, A., Can the Afghan state intervene successfully in the conflict between nomads and settlers?, AREU, February 2020, p. 1; Giustozzi, A., Nomad-settler conflict in Afghanistan today, October 2019, AREU, p. 16
189 Australia, DFAT, DFAT Country Information Report, Afghanistan, 27 June 2019, p. 10
191 Giustozzi, A., Nomad-settler conflict in Afghanistan today, October 2019, AREU, p. 20
192 Giustozzi, A., Can the Afghan state intervene successfully in the conflict between nomads and settlers?, AREU, February 2020, p. 1
193 Giustozzi, A., Nomad-settler conflict in Afghanistan today, October 2019, AREU, pp. 24-25
196 Choudhury, N., Power, Inequality, and Local Land Conflict in Afghanistan: A Study of Kabul’s Peri-Urban Areas, Afghan Institute for Strategic Studies, 2019, p. 1
197 Giustozzi, A., Nomad-settler conflict in Afghanistan today, October 2019, AREU, pp. 1, 22-23
198 MEC, Final Report of the Public Inquiry into Land Usurpation, November 2014, p. 44
199 UNAMA, Afghanistan’s Fight Against Corruption – Groundwork for Peace and Prosperity, May 2019, p. 42
Sources reported that there was little expectation of obtaining fair treatment at courts, and frequently such courts are not present or lack appropriate staff. Disputants in land disputes with the means to pay off or bribe judicial officials were able to obtain favourable outcomes. Furthermore, in attempts to obtain different outcomes, court orders were occasionally ignored and the same case was re-tried simultaneously in various courts. Challenges within the court system dealing with land disputes included lack of documentation or fraudulent land documents, lack of awareness about court proceedings by litigants, delays, and the lack of safety for court officials who reportedly experienced threats, and beatings.

According to the research conducted by Giustozzi on nomad-settler conflicts, the authorities remain often ‘the first port of call for help’ in case of land disputes. However, while 40 % of nomads and settlers involved in land disputes said they appealed to the authorities, none of them mentioned receiving any help. Some government officials claimed success in resolving disputes involving nomads through third-party mediation but said that the state was frequently able to solve only minor issues, e.g. the seizure of animals and limited damage to crops.

In February 2020, the Pajhwok Afghan News published a statement of the head of the Ministry of Urban Development and Housing (MUDH), according to which 1 600 people applied to judicial organs over land grabbing instances during the solar year that ends on 21 March 2020. Security forces reportedly helped to ‘recover 250 000 acres of land from grabbers’. More than 15 800 people involved ‘were referred to judiciary organs’, with strongmen being found among the land grabbers.

2.3.2 Customary and traditional mechanisms

Land disputes are frequently resolved through informal community resolution mechanisms engaging local elders or through shuras (gathering of elders) and jirgas (councils). According to the Asia Foundation’s 2019 survey, land disputes solved by shuras and jirgas formed more than 49 % of the cases solved by these customary institutions.

As noted by various sources, the Afghans often preferred the customary law system to resolve disputes due to a better familiarity with the system, lower costs, emphasis on community harmony, and lack of trust in the formal system because of corruption, distance, and delays. Jirgas and shuras were reportedly preferred particularly by rural inhabitants, who generally perceived the formal justice
system as corrupted and inaccessible: resulting from a more extensive use by the rural population, jirgas and shuras solved a larger number of cases than formal mechanisms.\(^{209}\)

Decisions made by jirgas and shuras are outside the justice system of the state and are not legally binding or formally recognised, and their decisions sometimes violate the sharia and the statute law as well as human rights.\(^{210}\) USDOS reported that, in 2019, in rural areas local elders and shuras, which were ‘the primary means of settling both criminal matters and civil disputes’, ‘imposed punishments without regard to the formal legal system’.\(^{211}\) According to CEDAW 2020 report, ‘many cases of gender-based violence and discrimination against women and girls are referred to jirgas and shuras for advice or resolution, especially in rural and remote areas’. Furthermore, the decisions made by the informal justice mechanisms were reported to frequently discriminate against women.\(^{212}\)

In his research of land conflicts involving nomadic populations, Antonio Giustozzi noted that non-state mediators – typically from neighbouring tribes or clerics – had reportedly greater access than state institutions as they were able to enter Taliban-controlled areas. However, mediation costs were reported to be high: for instance, in Farah, a mediation allegedly cost AFN 480 000 [EUR 5 680], which was shared equally between the two communities engaged in the conflict.\(^{213}\) Only a minority of conflicts had successful non-state mediation; moreover, in some instances, the solution was only temporary or partially successful.\(^{214}\)

### 2.3.3 Taliban involvement in land disputes

According to the researcher Ashley Jackson, dispute resolution is the Taliban’s ‘primary non-military form of engagement with civilians and the first “service” it offers’.\(^{215}\) During the communication with EASO in 2017, Abubakar Siddique explained that in some cases the Taliban might not allow jirgas and other social bodies to form, wanting people to rely on the Taliban’s systems to resolve their disputes.\(^{216}\)

Land disputes—as well as the cases related to divorces and robberies—were reported to be the most common cases heard by the Taliban courts\(^{217}\) (see also 1.8 Taliban’s parallel justice system). Researching conflicts related to the nomadic population, Antonio Giustozzi gave an example when a tribal elder admitted seeking and obtaining support from the Taliban in some cases the Taliban might not allow jirgas and other social bodies to form, wanting people to rely on the Taliban’s systems to resolve their disputes.\(^{216}\)

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\(^{209}\) Nader, J., Roberts, F., Inclusive local peacebuilding in Afghanistan – Lessons from practice, in Incremental peace in Afghanistan, ACCORD, issue 27, June 2018, url, p. 81. This report draws on research by the British and Irish Agencies Afghanistan Group (BAAG) in 2017, which aimed to document examples of community and civil society-led peacebuilding initiatives. The research involved a desk study and 15 semi-structured interviews with employees of a number of international and Afghan NGOs operating in Afghanistan.

\(^{210}\) UNAMA, The Stolen Lands of Afghanistan and its People, August 2014, url, p. 37; Wardak, A., A Decade and a Half of Rebuilding Afghanistan’s Justice System, 2016, url, pp. 11-12; NRC, Skype interview, 29 August 2017, in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, url, p. 78

\(^{211}\) USDOS, Afghanistan 2019 Human Rights Report, 11 March 2020, url, p. 10

\(^{212}\) CEDAW, Concluding observations on the third periodic report of Afghanistan [CEDAW/C/AFG/CO/3], 10 March 2020, url, p. 4

\(^{213}\) Giustozzi, A., Nomad-settler conflict in Afghanistan today, October 2019, AREU, url, p. 43

\(^{214}\) Giustozzi, A., Can the Afghan state intervene successfully in the conflict between nomads and settlers?, February 2020, AREU, url, p. 2

\(^{215}\) Jackson, A., Life under the Taliban shadow government, Overseas Development Institute (ODI), June 2018, url, p. 19

\(^{216}\) Siddique, A., Skype interview, 11 August 2017, in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, url, p. 82

\(^{217}\) National (The), Afghans flock to Taliban courts seeking swift justice, 20 May 2019, url

Primary Taliban courts are established at a district level and have hearings on one or two days a week. Shadow district governors make decisions concerning minor issues and, as underlined by Jackson, ‘are often the first port of call for dispute resolution’, particularly for disputes over land or resource ownership as well as for civil cases or in the locations ‘where Taliban judges are overstretched or absent’. Researcher Michael Semple observed the work of the Taliban district administrator in Chapa Dara, Kunar Province, whose role was to adjudicate disputes related to land ownership, grazing rights, debts, and elopement; at the same time, a district judge (qozi) was engaged in dealing with ‘difficult’ cases. AAN-published research revealed that in Topra Kash, Kunduz Province, a Taliban district governor was ‘supported by the military committees’: in case of a land dispute, the governor would ‘ask the military commander of the specific village’ to implement the court’s decision. When disputes over land and/or resource involve several districts, tribes, or villages, an outside commission of Taliban elders can be formed.

Women were reported to be able to appeal to Taliban courts—particularly in cases related to inheritance, divorce, and family issues—either directly or via their male relatives.

During 2017-2020, the official website of the Taliban, the Voice of Jihad, claimed to resolve ‘slight and major disputes and feud that disturbed the peace’. In February 2020, Taliban reported on resolving an enmity between two families, which lasted for more than two decades and claimed ‘several lives’, during a ‘peace and reconciliation ceremony’ of the ‘Islamic Emirate’s Dispute Resolution Commission for the legal and social problem of the public’ in Modol district of Nooristan Province. The news stated that ‘[t]he tribesmen appreciated the step taken by the Islamic Emirate and expressed joy and satisfaction over the reconciliation efforts that ended a 20-year long dispute between two families.’ In other cases, it was mentioned that intra-tribal conflicts were settled in Mehtarlam, the capital of Laghman Province, and Marwara and Shigal districts of Kunar Province.

In January 2018, Pajhwok Afghan News reported on an armed clash between civilians and Taliban militants over a land dispute in Musa Qala district of southern Helmand province, when Taliban’s shadow governor for Helmand ‘wanted to distribute land owned by Alizai tribe to Ishaqzai tribesmen’.

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219 Jackson, A., Weigand, F., Rebel rule of law - Taliban courts in the west and north-west of Afghanistan, ODI/HPG/NRC, May 2020, [url], p. 4
220 Semple, M., Afghanistan’s Islamic Emirate Returns: Life under a Resurgent Taliban, WPR, 18 September 2018, [url], p. 19
221 Jackson, A., Life under the Taliban shadow government, Overseas Development Institute (ODI), June 2018, [url], p. 11
222 Semple, M., Afghanistan’s Islamic Emirate Returns: Life under a Resurgent Taliban, WPR, 18 September 2018, [url]
223 Ali, O., One Land, Two Rules (3): Delivering public services in insurgency affected Dasht-e Archu district in Kunduz province, AAN, 26 February 2019, [url]
224 Jackson, A., Life under the Taliban shadow government, Overseas Development Institute (ODI), June 2018, [url], p. 19
225 Jackson, A., Weigand, F., Rebel rule of law - Taliban courts in the west and north-west of Afghanistan, ODI/HPG/NRC, May 2020, [url], p. 6
227 Voice of Jihad, Islamic Emirate resolves 20-year-old feud between two Families, 26 February 2020, [url]
228 Voice of Jihad, Mujahideen resolve 17 year-long feud between 2 tribes, 8 October 2017, [url]
229 Voice of Jihad, Mujahideen resolve dispute over water issue between two tribes; 4 minions killed, 15 January 2017, [url]
230 Pajhwok Afghan News, 4 tribesmen killed in clash over Helmand land dispute, 15 January 2018, [url]
3. Blood feuds and revenge killings

3.1 Pashtunwali and blood feuds

Among Pashtuns, blood feuds arise from the principle of _badal_, retributive justice, which is the central component of _Pashtunwali_. It requires the restoration of honour through carrying out revenge or that those who commit an injustice against another’s honour must compensate those who have been wronged. While _Pashtunwali_ is dominant across tribal Pashtun communities, its practice can be also observed among non-Pashtuns and among other ethnic groups. Furthermore, _Pashtunwali_ has tribal and regional variations.

Blood feuds characteristically occur in areas where the government and rule of law is weak or non-existent, where there is easy access to weapons, leading to a quick escalation of violence. Because of the lack of state enforcement and or police forces, in most rural areas some relatively minor incidents concerning land disputes can rapidly escalate into violence. However, as noted by Neamat Nojumi in 2017, in some cases, any homicide or killing, which is not mitigated, can potentially lead to a blood feud, regardless of the presence or the absence of the government.

Blood feuds for revenge-taking can be the result of personal violence or wrongdoing that is seen as being against honour, disputes involving land, or family conflicts and relationships. To be perceived as ‘dishonourable’ or shameful is among the most serious transgressions for Pashtun men and families. In Pashtun society, shame is strongly connected to a woman’s behaviour, which is believed to reflect the reputation of her family and, specifically, male family members. As men are

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231 The central concepts in _Pashtunwali_ revolve around notions of honour (nang) and shame, as well as hospitality (melmastia) and dignity (ghairat). See, Norway, Landinfo: Afghanistan: Blood feuds, traditional law (Pashtunwali), 1 November 2011, pp. 7; FRC, Pashtunwali: an analysis of the Pashtun way of life, in Austria, BFA, AfPak: Principals of the tribal & clan structure, 5 April 2017, available at [url], pp. 29-36, 42


233 Nojumi, N., email, 22 September 2017, in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, [url], p. 84


237 Waheed, A., Skype interview, 26 August 2017, in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, [url], p. 83

238 Giustozzi, A., Nomad-settler conflict in Afghanistan today, October 2019, AREU, [url], p. 42

239 Nojumi, N., email, 22 September 2017, in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, [url], p. 83


241 Norway, Landinfo, Afghanistan: Blood feuds, traditional law (Pashtunwali), 1 November 2011, [url], p. 7

responsible for the accumulation of honour and reputation through protection of their property and families, they have the duty to protect the honour of the women (nang) under their responsibility. Failing to protect women’s honour means a drop in respectability within the community; the namus (social honour of family) becomes a frequent cause of conflicts.

Revenge killing happens mainly among Pashtuns, but in cases involving women’s honour, it occurs among all ethnicities that see it as a customary transgression. Blood feuds are not solely based on Pashtunwali and can occur among other ethnic groups. According to Ahmad Waheed, clashes and feuds do occur and are likely to develop between different ethnic groups living in the same area; for instance, Hazara and nomadic groups, or in regions where Pashtun and Tajik or Uzbek groups border each other.

Among the Pashtuns, revenge is part of Pashtunwali; however, Abubakar Siddique explained that even among Pashtuns, many different tribal formations influence how blood feuds occur. As noted by Thomas Ruttig, while blood feuds are not limited to situations arising from resource conflicts, most feuds occur within certain ethnic sub-groups. For instance, in the case of Pashtun society, these sub-groups comprise core family, extended family, ‘clan’ sub-tribe, and tribe. Ahmed Waheed pointed to cousin rivalry (turboor) among Pashtun families as a factor that escalates blood feuds. The adherence to Pashtunwali, as observed by Neamat Nojumi, fades away as one moves toward the urban centres and is not effective or enforced among urbanite Pashtuns.

Under Pashtunwali, the taking of revenge does not need to be immediate. Feuds can go on for generations and impact entire tribes or communities. In an email to EASO on this issue in 2017, Thomas Ruttig gave the opinion that the number of revenge cases has grown exponentially because the conflict in Afghanistan has exacerbated the causes for conflicts like blood feuds. He explained that there is a high probability that blood feuds will continue to be violent, as such issues are not easily forgotten. Antonio Giustozzi gave the following example of a land dispute, which grew into a blood feud that lasted more than a decade and affected more actors than were involved in the beginning:

‘In one case recounted by an interviewee in Derai (Khost), in 2003 some nomads killed the son of a local landholder who was complaining to them about their planting wheat on his land. The nomads claim to own that land, which they bought in the past. Afterward, the colonel stormed the nomad

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243 Norway, LandInfo, Afghanistan: Blood feuds, traditional law (Pashtunwali), 1 November 2011, p. 7
244 Norway, LandInfo, Afghanistan: Blood feuds, traditional law (Pashtunwali), 1 November 2011, p. 7; FRC, Pashtunwali: an analysis of the Pashtun way of life, in Austria, BFA, AFPak: Principals of the tribal & clan structure, 5 April 2017, available at url, pp. 51-52
245 Waheed, A., Skype interview, 26 August 2017, in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, url, p. 84
246 Nojumi, N., email, 22 September 2017, in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, url, p. 84
247 Waheed, A., Skype interview, 26 August 2017, in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, url, p. 84
249 Ruttig, T., email, 27 September 2017, in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, url, p. 84
250 Waheed, A., Skype interview, 26 August 2017; Siddique, A., Skype interview, 11 August 2017, in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, url, p. 84
251 Nojumi, N., email, 22 September 2017, in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, url, p. 84
254 Ruttig, T., email, 27 September 2017, in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, url, p. 86
settlement, killing seven. The blood feud that started in this way is still going on and resists all attempts by the elders of the two communities to end it, even if the elders agreed that the nomads would withdraw from the occupied land. The conflict spread as the local villagers started attacking nomads indiscriminately, not just the Niazi, who were originally involved.

3.2 Customary blood feud resolution and compensation

Under Pashtunwali, blood feuds can be avoided through seeking forgiveness (nanawatai) of the injured party and requesting that they forego badal. Nanawatai can be sought by the individual offender approaching the offended party to ask for forgiveness or through a jirga with local tribal elders and the ulema (clerics); however, nanawatai is not applicable in cases related to namus and not normally sought in a case of murder as Pashtun society considers forgiving murder as a disgraceful and coward act. As explained by Neamat Nojumi, taking revenge is linked to the ‘ability to apply violence’; according to the researcher, ordinary Afghans cannot easily take revenge against people in the position of power and those protected by armed men and security.

According to LandInfo, the vast majority of decisions resolved through customary dispute resolution resulted in peace (sohl), or the payment of compensation. The payment of ‘blood money’ (khubnaha) is done to avoid further cyclical revenge and ‘blood shed’ and to resolve disputes peacefully: under Pashtunwali, once compensation is paid, the blood feud ‘must end’. As explained by Ahmed Waheed, the likelihood of permanence for decisions that end feuds depends on the situation and level of trust between parties: in some cases, a lasting solution is achieved, while in others decisions are broken and not upheld. Further, decisions to end feuds or disputes may be undermined by territory changing hands, or, if the government becomes weaker in the local area. If the parties have the will to resolve it, they may pursue a new decision from the government or Taliban; however, if they do not wish to resolve it, parties abandon this and focus instead on assuring their protection.

Instead of paying blood money, families can give the offended party one or several girls for marriage, which occurs in rural areas. The practice of exchanging girls between families, known also under the term swara in Pashto, is a customary solution as a form of compensation to address revenge killings of young men. According to the Pashtun practice of baad, women and girls are given or exchanged

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256 Giustozzi, A., Nomad-settler conflict in Afghanistan today, October 2019, AREU, url, p. 42
259 Nojumi, N., email, 22 September 2017, in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, url, p. 89
260 Norway, Landinfo, Afghanistan: Blood feuds, traditional law (Pashtunwali), 1 November 2011, url, p. 14
261 Rzehak, L. Doing Pashto, March 2011, url, p. 18
262 Waheed, A., Skype interview 28 August 2017, in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, url, p. 89
267 UNHCR, CORI Thematic Report, Afghanistan: Blood Feuds, February 2014, url, p. 38
to settle family debts or resolve family disputes;\textsuperscript{268} for instance, a woman can be given to the ‘offended’ family in order to avoid the escalation of blood feud between families.\textsuperscript{269} The practice of baad, which is prevalent in rural areas\textsuperscript{270}, results in forced (at times early) marriage for the women and girls given in exchange.\textsuperscript{271}

In 2019, it was reported that two girls of Kuchi communities were exchanged for access to clean water resources to avoid disputes, serious conflicts, and blood feuds.\textsuperscript{272} The exchange marriage decision is made by families or jirgas, and women and girls are expected to comply.\textsuperscript{273} As explained by Abubakar Siddique, women and girls given to other families as compensation might find themselves being divorced by their husbands or being forced to divorce by their in-law-families as soon as another conflict between the two families arises.\textsuperscript{274}

According to RFE/RL, also boys in rural areas were ‘often impelled to marry because of long-held local or tribal traditions: customs on the inheritance rights of widows, the settlement of blood feuds, or prearranged agreements between families to exchange their children for marriage’. The source mentioned that child marriages of boys were less frequent than child marriages of girls and tended to remain underreported.\textsuperscript{275}

In June 2020, RFE/RL reported on an incident described as an ancient customary revenge which took place in Manduzai, a district in the province of Khost. A mob made up of hundreds of members of the Pashtun tribe Mangal burned down the houses of four families whose male members were accused of having killed seven members of a rival family and injured three others a few days before. According to the source, the burnings occurred after a jirga, a council of Mangal tribal leaders, met and ‘invoked an ancient custom to mobilize a Cheegha or tribal posse against a real or perceived atrocity’.\textsuperscript{276}

### 3.3 Prosecution by the state

Article 25 of the 2009 EVAW law prohibits baad exchange marriages\textsuperscript{277}, and the new 2017 Penal Code no longer mentions ‘honour killings’ as a mitigating circumstance in murder cases.\textsuperscript{278} Monitoring the period 2015-2017, UNAMA found that the enforcement of national legislation aiming to protect women from violence remained a challenge in Afghanistan; in cases of murder and honour killings of women between 2016 and 2017, UNAMA found a de facto impunity\textsuperscript{279} USDOS reported that in 2019 the ‘implementation and awareness of the EVAW’ remained limited.\textsuperscript{280}

In 2015 and 2016, local media reported on tribal elders declaring bans on the marriage to settle blood feuds in Balkh, Khost, and Paktika.\textsuperscript{281} According to a media source, no cases of arrest and/or

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\textsuperscript{268} HRW, I had to run away, March 2012, [url](url), p. 32

\textsuperscript{269} IWPR, Hope for Afghan women traded to end feuds, 17 January 2017, [url](url);

\textsuperscript{270} RFE/RL, Rural Afghan girls continue to fall victim to ‘baad’ marriages, 28 July 2015, [url](url); IWPR, Hope for Afghan women traded to end feuds, 17 January 2017, [url](url)

\textsuperscript{271} Pajhwok Afghan News, Forced and early marriages: a form of trafficking in persons, 29 March 2017, [url](url)

\textsuperscript{272} Diplomat (The), Afghanistan’s Most Vulnerable Women, 9 April 2019, [url](url)


\textsuperscript{274} Siddique, A., Skype interview, 11 August 2017, in EASO COI Report, Afghanistan Individuals targeted under societal and legal norms, December 2017, [url](url), p. 90

\textsuperscript{275} RFE/RL, Boys with Brides: Afghanistan’s Untold Dilemma of Underage Marriages, 12 August 2019, [url](url)

\textsuperscript{276} RFE/RL, Tribe Burns Down Houses Of Alleged Murderers In Southeast Afghanistan, 16 June 2020, [url](url)

\textsuperscript{277} HRW, I had to run away, March 2012, [url](url), p. 33

\textsuperscript{278} UNAMA/OHCHR, Injustice and Impunity: Mediation of Criminal Offences of Violence against Women, May 2018, [url](url), 22-23

\textsuperscript{279} UNAMA/OHCHR, Injustice and Impunity: Mediation of Criminal Offences of Violence against Women, May 2018, [url](url), pp. 6; 21-23

\textsuperscript{280} USDOS, Afghanistan 2019 Human Rights Report, 11 March 2020, [url](url), p. 8

\textsuperscript{281} Pajhwok Afghan News, Ulema in Khost ban blood feud marriages, hefty bride price, 15 September 2015, [url](url); Pajhwok Afghan News, Balkh clerics declare blood feud marriages illegal, 14 August 2016, [url](url); Pajhwok Afghan News, Paktika jirga decides against blood feud marriages, 22 September 2015, [url](url)
prosecution of *jirga* elders or family members were reported in Afghanistan in connection with the *baad* practice as of August 2019. In May 2020, RFE/RL reported on the murder of an 18-year-old woman in Baharak district, Badakhshan Province, after she rejected a family-arranged marriage, ran from home, and took refuge at the district police headquarters with her boyfriend. After being entrusted to her brother, the woman was murdered by him for dishonouring the family. According to the provincial office of AIHRC, the case was mishandled by the police and was one of many similar cases of violence against women.

According to a confidential source interviewed by the MFA of the Netherlands, perpetrators of blood feuds or honour killings are not usually prosecuted because of the assumption that women should not ‘dishonour’ their families by being engaged in the things not allowable by the community. Local authorities tend to avoid involvement in matters related to honour killings, asking community elders to find a solution to a related dispute.

In an interview with EASO in 2017, Ahmad Waheed explained that the weakness of state judiciary systems to resolve such conflicts also contributes to their continuation, as feuds become intermixed with existing rivalries, the broader conflict and taking sides to protect oneself, thus contributing to the complexity of resolving the underlying cause. As a consequence, few conflicts are resolved and feuds become increasingly prolonged and complex with time. Similarly, Neamat Nojumi indicated that, traditionally, Afghans did enjoy greater access to dispute resolution in the past and could opt for state or non-state mechanisms; however, with the rise of Islamist armed groups and a new generation of strongmen within the government, access to justice became limited, contributing to the overall weakening of the justice systems of the country.

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282 Inside Over, Baad Tradition: Virgins Given Away to End Disputes in Afghanistan, 29 August 2019, [url](#)
283 RFE/RL, Horrific Murder Of Teenage Girl Again Puts Spotlight On Afghanistan’s ‘Honor’ Killings, 7 May 2020, [url](#)
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Annex II: Terms of Reference

Overview of socio-legal framework for punishment of crime

- Legal pluralism
- Hudud crimes
- Qisas crimes
- Ta’azir crimes and the new Penal Code (2017)
- Taliban’s parallel justice system
- Customary justice

Land disputes

- Land disputes among nomadic and sedentary groups
- Land dispute resolution
- Formal mechanisms
- Customary and traditional mechanisms
- Taliban involvement in land disputes

Blood feuds and revenge killings

- Pashtunwali and blood feuds
- Customary blood feud resolution and compensation
- Prosecution by the state