



Rebel rule of law

Taliban courts in the west and north-west of Afghanistan

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Key messages

- Taliban courts are becoming increasingly widespread across Afghanistan. They were seen by those interviewed as more accessible and easier to navigate than state courts, as well as quicker, fairer and less corrupt. However, those living in Taliban areas do not have much choice but to pursue their claims through Taliban courts.
- The Taliban have used their courts not only to delegitimise the state and erode state justice provision, but also to disempower and replace customary dispute resolution. This has undoubtedly helped them to consolidate control over territory and compel civilians to follow their rules.
- Understanding this system is becoming increasingly important, particularly for the prospect of peace talks and any intra-Afghan negotiations that may commence. It has implications for the future of justice in Afghanistan as well as the fate of legal norms and rights embodied in the current Afghan constitution.
- Questions remain, including around how women, government supporters and ethnic minorities experience Taliban justice. Further field research is also needed in other areas of the country, on criminal and capital cases, and on Taliban official policies and judicial norms. This will only become more relevant as intra-Afghan negotiations progress.

Introduction

When the Taliban came to power in the 1990s, they became well-known for brutal, if effective, sharia courts. After emerging as an insurgency in 2001, justice provision soon became an essential part of the Taliban's strategy. Seizing on widespread dissatisfaction with the lack of access to justice in Afghanistan, Taliban courts quickly settled disputes that state and customary mechanisms could not. Justice provision also enabled the Taliban to infiltrate new areas, soften the ground for future operations and enforce a strict set of rules on the civilian population. The Taliban have gradually uprooted and replaced customary and state systems of conflict resolution and justice with their own courts in the areas they influence and control. Taliban justice is the only justice system millions of Afghans are now able to access.

This briefing note traces the evolution of the post-2001 Taliban justice system and explores civilian experiences in Taliban courts. Understanding this system will become increasingly important, particularly when any intra-Afghan political talks commence (during which the Taliban system will presumably have to be reconciled with the current government system). It concludes with a discussion of the implications for political talks and raises a set of questions for further investigation. The paper is based on preliminary findings from field research in Afghanistan, which included research commissioned by the Norwegian Refugee Council (NRC), comprising more than 200 interviews with claimants and defendants in civil cases in Taliban courts. Additional interviews were also undertaken with approximately 40 legal experts and members of the insurgency.

Scholar Frank Ledwidge argues that 'there is no more effective weapon in the Taliban's armoury than an effective court' (Ledwidge, 2009). The same could be applied to insurgencies the world over, from the Maoists in Nepal to the Irish Republic Army, who seize upon the state's failure to provide justice and develop their own systems to demonstrate that they can do better. This paper is the first output from ODI's Centre for the Study of

Armed Groups, an initiative currently under development to enhance understandings of armed groups through research, analysis, convening and dialogue.

The justice gap

To understand why Taliban courts have become so prevalent, one must begin with the struggle to develop a functional state justice system in Afghanistan after 2001. Had it not been for this widespread failure to ensure access to justice for Afghans, sharia courts arguably would not have been such a powerful asset for the Taliban. In 2006, just one-fifth of Afghans surveyed said they would approach a government court to resolve their disputes (Asia Foundation, 2006). This improved over time, with nearly half of Afghans responding to the same annual survey saying they would use state courts in 2018 (Asia Foundation, 2018). Yet the 2018 survey still found that most Afghans regarded state justice as ineffectual, corrupt and difficult to access.

Part of the problem is that the legal system and code introduced after 2001 were mostly Western-inspired, making them difficult for some Afghans, particularly those from rural areas or without formal education, to understand and navigate (Suhrke and Borchgrevink, 2009; Swenson, 2017). Distance is also an obstacle, which in turn compounds other challenges. Afghan interviewees described having to spend time and money to travel to a court in a city or district centre, to engage in a confusing, costly, time-consuming bureaucratic process. Further, they would have no guarantee of a timely decision, as government courts can take years to rule on a case. The most significant problem, however, has been systemic corruption (Singh, 2015). In interview after interview, people relayed the belief that social connections and bribes often decide who wins and loses, and described how parties can end up paying ever-increasing bribes to 'outbid' one another in state courts.

Many Afghans have instead relied on customary dispute resolutions, particularly in rural areas. Yet these mechanisms have significant shortcomings. Customary

institutions vary in form and in the degree to which they can be relied upon. In some villages, elders are seen as fair arbiters and able to resolve most disputes, while in others, customary mechanisms might be little more than ineffectual rent-seeking rackets for local power-holders. Additionally, the Afghan state has mostly been antagonistic to informal mechanisms, fearing they might undermine state authority. This has, in turn, limited the enforceability and legitimacy of customary settlements (Swenson, 2017).

As Noah Coburn observed in 2013, nearly every credible analysis of insecurity in Afghanistan pointed to the lack of access to justice as a driving factor (Coburn, 2013). In the absence of a functional and responsive justice system, local conflicts fester and deepen. This has been particularly true of land and resource conflicts, which steadily intensified after 2001 and by 2015 were reportedly the leading cause of conflict (Gaston and Deng, 2015). Such disputes often erupt into violence, and many have dragged on for years without resolution (Wily, 2013; UNAMA, 2014). Yet, the international community has been slow to address the issue.

Few Afghans interviewed for this research had good things to say about the Taliban regime of the 1990s, but often caveated their remarks with an appreciation for Taliban justice. The state justice system's weak capacity and corruption, in this case, worked in the Taliban's favour. In adjudicating land and resource disputes in particular, interviewees viewed the Taliban as responding to community needs that the government had failed to address. Sharia courts have increased the Taliban's legitimacy, undermined the state and given the Taliban an advantage in what David Kilcullen refers to as 'the war for competitive control' (Kilcullen, 2011; Ledwidge, 2009; Weigand, 2017). Here, the Taliban needs only to be seen as less bad than the government – something it has broadly achieved with its courts. Unlike the government system, Taliban courts are widely accessible in rural areas, have uncomplicated procedures that are easy to follow, have judges who typically settle disputes quickly, and have considerably lower levels of perceived corruption.

The evolution of Taliban justice

Since the Taliban emerged in the mid-1990s, they have used sharia courts to resolve disputes, create social order and garner public support and legitimacy. Early on in their re-emergence as an insurgency, they reinstated their courts. Justice was the first value proposition the insurgency offered civilians: if you cooperate with us, we can bestow justice and security – and we can do so more effectively than the government. Unlike much of the Taliban's other service delivery and governance efforts, the insurgency's judges often adjudicated disputes originating far beyond where it could be said to control territory. Justice complemented Taliban military efforts; it was used to gain goodwill and a foothold in communities.

Early Taliban courts were nonetheless scattered, with roving judges and ad hoc courts reportedly operating in various parts of the south and east by 2007 (Giustozzi et al., 2012). A clearer structure emerged by 2009, comprising fixed courts in heavily influenced Taliban districts and roving judges in more contested areas. Much as is currently the case, courts primarily dealt with civil disputes and only occasionally with criminal cases (Carter and Clark, 2010).

During the US-led military surge that began in late 2009, Taliban judges were increasingly targeted in military operations. In response, Giustozzi et al. report that the Taliban streamlined their system towards the use of mobile judges and leaner structures, moving away from fixed courts (Giustozzi et al., 2012). Giustozzi et al.'s study – the only one to attempt to look at Taliban courts systematically during this period – paints a picture of increasing reach, despite the pressure the Taliban was under, and growing civilian demand. Nonetheless, the Taliban still struggled under significant military pressure to create and sustain justice capacity, to build coherent policies that adhered to the movement's stated principles and to deliver justice.

The drawdown of international forces, completed in 2014, marked a new phase in the Taliban's evolution (Jackson and Amiri, 2019). This relieved the Taliban of much of the military pressure they had been under, allowing them

to rapidly expand throughout rural areas. The Taliban also reportedly focused considerable energy and channelled more resources and effort into developing its governance systems (Jackson, 2018). Drawdown gave the Taliban greater space to implement a more sophisticated justice system, address past shortcomings, and expand the courts' territorial reach. They became increasingly able to establish a monopoly on justice in many areas, to the exclusion of both state and customary institutions.

Taliban court structure

Taliban courts now operate in a three-tiered system, mirroring the government court structure. Fixed primary courts, the first tier, operate in most (if not all) districts with significant Taliban influence. These courts are usually in well-known locations and hear claims on one or two scheduled days per week. Courts rule on issues from both Taliban and government-controlled areas. Provincial-level courts, the second tier, deal with appeals and complex cases. Appeals were previously logistically challenging to lodge, necessitating a trip to the Supreme Court in Pakistan (the third tier). While appeals are now accessible in each province, still relatively few people seem to appeal their cases. Many interviewees said they would not appeal for fear of incurring the Taliban's ire. The provincial court may also deal with cases that are heavily politicised (for example, if a Taliban commander is implicated and local judges may be afraid to rule against him, or be incapable of impartiality) or exceedingly complicated (for instance, long-standing land disputes). The third tier, which is the least clearly understood, is the final appeals court (i.e. for secondary appeals), the Supreme Court.

While the Taliban had articulated some elements of this three-tiered system in documents and statements as early as 2009 and 2010,¹ the system did not appear to function as intended – with a roughly consistent structure and policies across Taliban areas of influence – until much more recently. Nonetheless, there is a slightly different arrangement in areas with relatively

stable or consolidated Taliban control or influence, than in areas where the Taliban is on the defensive or engaged in active fighting. Where the Taliban have greater control and adequate resources, they typically have a fixed primary court in each district, which is usually staffed by a judge, a mufti (who provides religious guidance) and a secretary (who records judgements). In Herat and Faryab, for example, organised district courts exist in most districts.

By contrast, the court structure in contested districts is usually more streamlined or ad hoc. Some districts have stable courts with designated meeting days but might only be staffed by a judge. Other areas, particularly in more remote districts, have ad hoc structures, such as local justice committees comprised of elders. In yet other cases, such as frontline parts of Faryab, Taliban district governors, military commanders or fighters adjudicate disputes. In more remote regions, the Taliban have bestowed judicial authority on local committees. Where the Taliban is in a heated battle for military control or in areas that are simply too remote, they do not seem to have the ability or resources to establish stable structures.

Taliban court procedure

Almost anyone can bring his or her case to a Taliban court. Defendants are usually summoned by phone or through a letter. Some government officials have referred cases to Taliban courts or, where they were a defendant, were guaranteed safe passage by the Taliban to travel to the court. This, therefore, means that the Taliban expect everyone to show up for their court date. Where individuals refuse to do so, the Taliban has been known to pick them up and deliver them to the court, even if they reside in government-controlled areas and cities. These Taliban deliveries of defendants tend to incur travel costs for the defendant and, occasionally, a beating.

In a civil case, the first step for a claimant is to compose a written statement to present to the court; defendants must also prepare a written statement providing their side of

1 See Clark (2012).

the story. An elder or a mullah might help in drafting these according to the Taliban format, crafting compelling religious arguments and presentation strategies. Cottage industries of paid statement-writers have evolved where courts are well-established. Written testimony is often supported with documentation (i.e. land deeds, contracts) and witnesses. Particularly where no documentation exists, or where it is not decisive, witnesses play an important role. For instance, documents appeared just as important as witnesses to proving in the case of a woman from Faryab with an inheritance claim.²

The contours of a case partly shape the process. In more complicated land cases, for example, court officials often inspect the land personally, using their visit to talk to elders, neighbours and other potential witnesses. In family or domestic cases, written documents are typically neither relevant nor decisive, making witnesses (usually family members and customary authorities) essential. Debt cases, by contrast, are relatively clear-cut and simple to resolve.

Taliban judicial norms

While more research is required to better understand the norms governing Taliban judicial practices, fieldwork sheds some light on these frameworks. It is important to stress that sharia is not a legal code in the Western sense, but a moral code that emphasises social harmony and affords significant weight to the circumstances of a given case. Sharia draws from the Qur'an, hadiths, other Islamic texts, analogy and local custom, but the interpretation and application of these sources are left up to religious scholars. This broadly applies to how things work in Taliban courts. According to interviews with Taliban officials and participants in these courts, as well as an analysis of some of their written decisions, Taliban judges appear to rely on a mixture of sources to handle

disputes, dependent on the nature of the specific issue at hand.

It is, however, important to note that written Taliban policy instructs Taliban judges to consult the *Majallat al-Ahkam al-Adliyya*, the Ottoman Empire's codification of Hanafi jurisprudence, for guidance on civil disputes.³ The *majalla* consolidates and clarifies Islamic guidance on contracts, torts and some principles of civil procedure (excluding family and divorce law).⁴ The development of the *majalla* represents a significant turning point in the evolution of sharia as it adapted Islamic traditions to the nation-state. This formed the basis of early legal codes in Lebanon, Iraq, Syria, Kuwait and Turkey, and heavily influenced legal development in Egypt, Algeria, Tunisia and Morocco (Mallat, 2007). Several Taliban court officials referenced the *majalla* as a source they consulted frequently, particularly to resolve disputes over business, debt, inheritance and ownership. On inheritance, in particular, the outcome of most cases appeared to be roughly consistent with the established Islamic norms contained in the *majalla*.

Once a case is settled, Taliban policy dictates that the court secretary records the decision in a set format.⁵ Typically, three copies of the decision are created: one for the court and a copy each for the claimant and defendant. In copies of decisions from Faryab and Herat obtained through fieldwork, the format was largely consistent with Taliban policy, which states the vital details of the parties to the case, the evidence provided and the full decision the court has taken.

Civilian perceptions of Taliban justice

During fieldwork in Faryab, Herat and elsewhere, a picture emerged of a fairly sophisticated, widely used and surprisingly consistent system. Afghans from major cities and more remote

2 Woman from Kohestan, Faryab, April 2019.

3 Taliban document, undated, 'Taliban instructions to judges', obtained in March 2019.

4 Available open source: [http://legal.pipa.ps/files/server/ENG%20Ottoman%20Majalle%20\(Civil%20Law\).pdf](http://legal.pipa.ps/files/server/ENG%20Ottoman%20Majalle%20(Civil%20Law).pdf). See also Hallaq (2009).

5 Taliban document, undated, 'Taliban instructions to judges', obtained in March 2019.

districts alike brought claims to Taliban courts and the majority said they were satisfied with the experience and outcome. People may have been afraid to say negative things about the Taliban, but this does not seem to have been the case. What is essential to emphasise is the relative nature of such statements. Interviewee accounts strongly suggested that Taliban courts succeeded, in part, because other options were so comparatively poor and their prior experiences so dissatisfactory. Taliban courts seemed to be well regarded because of what they were not, relative to other systems: not as hard to reach and navigate, not as slow and not as corrupt.

Relative accessibility

Interviewees broadly emphasised four critical advantages of Taliban courts. The first was their relative accessibility: courts were often nearby and logistically easy to access; processes were simple and widely understood; and people stressed the degree to which all – even government workers – could take their claims to a Taliban court and receive an impartial hearing.

People viewed accessibility not only as physical proximity but also in terms of comprehensibility and reliability. Physical proximity to state courts did not appear to influence whether people had tried their claim in state systems. Additionally, interviewee accounts challenged the idea that most people turned to Taliban courts after state courts had failed them. Very few of those interviewed had even attempted to access justice through state courts to begin with, finding them harder to navigate than the Taliban system. Nearly three-quarters of interviewees in Faryab and Herat had not previously tried to settle their claims through government courts. Most of those interviewed simply felt that state courts would not provide a just resolution to their problem.

Women could access the courts, both directly and indirectly. Several women interviewed went to the court and lodged their claim directly, while others chose to have a male relative act as their proxy. Most of those interviewed felt they received a satisfactory outcome. These cases included a mix of inheritance claims and divorce

or family issues. While a small sample, and one in which nearly all of the women won their case, it is nonetheless striking. Again, the relative nature of access to justice is important to consider. It was clear from these women's accounts that justice was nearly impossible for them to secure via state or customary mechanisms.

Relative speed

Second, interviewees often talked about the relative speed of Taliban courts. There were, of course, instances where military imperatives and/or local politics delayed decisions, but this did not appear nearly as commonplace as in state courts. Many of those who had tried to access justice in state courts had long-standing claims, including land disputes that had run on for years or decades. Here, too, the picture is more complicated than people's perceptions initially suggest. While Taliban courts were seen by interviewees as far faster than state courts, they were not always as fast as commonly assumed. In Faryab and Herat, speed of resolution varied by district and, at times, by case type. Debt cases were swiftly resolved, taking an average of nine days to settle from the time a claim was brought, with many decisions rendered in one court session (i.e. on the same day). Divorces and domestic issues typically took slightly longer but were generally resolved within around six weeks. In contrast, land and inheritance cases usually took about three months to conclude, with some taking more than a year. The emphasis on speed in people's accounts seemed instead to denote confidence that the Taliban would hear their claim quickly, follow a clear process and make a fair decision.

Perceived fairness

Third, people emphasised fairness and the relative lack of corruption in Taliban courts. Typical of this sentiment, one interviewee from Faryab said that in government courts, 'if someone is rich or high-profile, they will get released. If somebody is poor, no one will ask about him. In the Taliban courts, it is not like this. Both rich and poor are equal. Everyone is equal.'⁶ This, of course, raises questions about

6 Interview with a man from Almar, Faryab, February 2019.

what people view as ‘fair’ or ‘unfair’, and how the Taliban has created and maintained perceptions of fairness.

Ethnic, tribal and economic power still influenced some processes and outcomes, but most of those interviewed believed that all Afghans were treated equally in Taliban courts. In Herat, in particular, many interviewees felt that the fact the Taliban explained the verdict to them was important. It allowed them to understand the logic that led to the decision and to accept the verdict as having a basis, even where they were on the losing end of a case.

Religious basis and legitimacy

Fourth, some respondents emphasised the importance of the Islamic nature of the courts. That the courts were ostensibly based on Islamic law shaped people’s perceptions: this religious grounding made them more reliable and legitimate. Taliban processes were based on familiar Islamic norms and participants mostly viewed these processes as rational and appropriate. Women, especially those engaged in divorce and family cases, seemed to particularly value the Islamic legitimacy of the courts.⁷ In several divorce cases, Taliban judgements provided some protection and a degree of choice that women felt they could not obtain through any other means. That divorce was granted ‘according to sharia’ appeared to make divorce more acceptable and less shameful in these women’s views compared to a divorce pursued through the state courts.

Pragmatism

Most people were ultimately practical, rather than ideological, in their decisions to pursue a case through Taliban courts. The bottom line for many was that the Taliban, unlike the state or customary authorities, could solve their problem. Also the Taliban, critically, had the coercive force and territorial influence required to enforce verdicts.

However, it is important to emphasise that few people interviewed felt they had any viable alternative to Taliban courts, particularly in Taliban areas. Some of the earlier literature on Afghan justice has presented participation in Taliban courts as voluntary and suggested that civilians engage in ‘forum shopping’,⁸ picking the system (state, customary, Taliban) most likely to yield a beneficial result. For people living in Taliban areas, such forum shopping is not really an option. Even if state courts resolve a dispute in a Taliban area, they are unable to enforce their judgement. Additionally, the Taliban has been known to punish those who take their cases to a state court instead of a Taliban one.

People who had tried to resolve their disputes through elders and customary mechanisms often expressed frustration that, after much time and effort, elders did not have the power to enforce their decisions. Others complained that the elders often advocated compromises, instead of concluding who was right or wrong. In many areas, however, Taliban courts seemed to have effectively disempowered and side-lined customary dispute resolution mechanisms. Interviewees suggested that the use of informal mechanisms has declined as Taliban courts have become more prominent.

Conclusions and implications

Taliban courts are becoming increasingly widespread across Afghanistan and are reasonably consistent in form and process. Perhaps most striking was how openly Taliban courts operated. When asked, for example, most interviewees could clearly describe when the court met, its location, and the process for registering and deciding disputes. Afghans who brought their cases to Taliban courts emphasised the speed, accessibility, relative fairness and ability to enforce verdicts within the Taliban system.

7 A note of caution is warranted as women comprised just over a tenth of Taliban court participants interviewed to date (30 women in total), and women pursuing family issues made up a third of that sample.

8 See, for example, Coburn and Dempsey (2010).

That said, those living in Taliban areas did not have much choice but to pursue their claims through Taliban courts. The Taliban have used justice not only to delegitimise government, but to replace other forms of dispute resolution and social order. This has undoubtedly helped them consolidate control over territory and ensure that civilians follow their rules (lest they risk punishment in the Taliban courts).

One of the most pressing questions now is what this means for the prospect of peace talks and any future intra-Afghan political settlement. The Taliban are seeking to co-opt and modify the state healthcare and education systems, for example, and are already working with state systems on the ground, suggesting that some agreement with the current government is possible. Their approach to justice has been radically different to that of the state: they have actively targeted prosecutors, judges and police, and sought to undermine the functioning of the government justice system by nearly every means possible. There are normative and procedural differences between the current state system and the Taliban system, although there is significant common ground (for example, with regard to family law). This has implications not only for the future of justice in Afghanistan but also for the fate of the legal norms and rights embodied in the current Afghan constitution.

This paper has sought to contribute new insights into how Taliban courts work and to discuss Afghan experiences with the Taliban justice system. The scope of this research was limited and many questions remain. To generalise more broadly about Taliban justice requires further field research in other regions in the country, including the east and

south-east. Interviews in various provinces, such as Helmand, Kunduz, Logar and elsewhere, suggest strong similarities, but Taliban structures differ across regions, as do local norms that may influence justice provision. The role of ethnicity, political positioning and gender also merit greater examination. Further enquiry is needed into whether government supporters or ethnic minorities truly get an impartial hearing in Taliban courts, as most interviewees suggested.

Additionally, more exploration is needed to find out how women perceive and experience Taliban justice. Women interviewed could obtain divorces when they had not consented to the union or had been mistreated. Many female interviewees also described being able to access inheritance and property rights in Taliban courts. While some women could access justice on certain issues through Taliban systems, that is not the whole picture. Given the difficulty of interviewing women in these areas and the risk of selection bias, these findings should not be seen as representative and more fieldwork is required. Further, this study looked primarily at civil issues and only examined a handful of criminal or capital cases. Much remains unknown about Taliban official policy and de facto practices, particularly concerning hudud punishments,⁹ such as death, stoning and amputation.

Finally, the norms and factors that influence Taliban judicial processes require deeper analysis. While fieldwork uncovered Taliban documentation and policies that help illuminate the structure and policies that the leadership would like to impose, much is left up to the judges themselves. More work on Taliban judicial norms and practices will only become more relevant as and when peace talks progress.

⁹ Islamic law divides crimes into those committed against man and those committed against God, or against God's limits (hudud). Offences warranting hudud punishments can include unlawful sexual activity (zina), unfounded accusations of zina, alcohol consumption and robbery. Hudud punishments can include lashing, stoning and amputation. See Kamali (2019).

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