



SPECIAL REPORT

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ABOUT THE REPORT

This report is part of the United States Institute of Peace's (USIP) ongoing effort to understand the pluralist legal system of Afghanistan. It examines, compares, and contrasts Islamic law with traditional forms of justice in an attempt to elucidate how such rule of law approaches interact as well as provide a fuller understanding of each system to better guide rule of law practice, policy, and change.

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Islamic Law, Customary Law, and Afghan Informal Justice

Summary

- Afghanistan's legal system has drawn on a mix of customary tribal law, primarily derived from the Pashtun community's code of *Pashtunwali* and Islamic legal traditions valued for their universal and unifying characteristics.
- Despite popular conceptions that Islamic law holds a supreme legal status, field surveys indicate that in practice, its provisions are often disregarded in favor of customary law intended to maintain community consensus. This consensus is often not between equals but is shaped by the relative authority of the persons resolving the dispute.
- A particular concerning outcome is the marginalization of Afghan women, despite Islamic legal precepts that enshrine them with individual rights, particularly in matters of family, inheritance, and marriage law that are not extended under *Pashtunwali*.
- A significant number of survey respondents voiced concerns about the credibility of Islamic religious scholars (*ulama*) participating in resolving disputes at the informal level, citing poor levels of training in Islamic legal precepts and concerns over their neutrality.
- Despite this finding, informal justice actors nonetheless expressed openness to overturning prevailing customary law and signaled their willingness to take a more Islamic legal approach to resolving disputes if they were educated by the particulars of Islamic law, especially as it pertained to women and understanding gender-related norms.
- Ultimately, religious leaders are in a unique position of wielding a supreme measure of authority on issues related to law and morality and can potentially play a role in pushing for legal reforms.

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Introduction

Securing a stable Afghanistan underpinned by the rule of law has proven exceedingly difficult despite the international community's avowed consensus of its fundamental importance. The rule of law can act not only as an antidote to extremism and violent conflict but also as

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The United States Institute of Peace is an independent, nonpartisan institution established and funded by Congress. Its goals are to help prevent and resolve violent conflicts, promote postconflict peacebuilding, and increase conflict management tools, capacity, and intellectual capital worldwide. The Institute does this by empowering others with knowledge, skills, and resources, as well as by its direct involvement in conflict zones around the globe.

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a desirable end in and of itself. Afghanistan's legal system has been shaped by its culture, multiethnic and socially diverse population, and long history. That system has historically drawn on two primary sources of law: customary tribal law and Islamic law. Afghanistan is a highly segmented society, historically split along tribal and clan lines and more recently among rival political parties and armed fighting groups. Yet it is also overwhelmingly Muslim. Islam has long served the spiritual needs of Afghans for fourteen centuries and has historically been a unifying force and source of law for an otherwise disparate population.

The current formal legal system aims to blend the customary and Islamic legal traditions within a constitutional order defined by civil codes and formal courts. Yet it struggles to establish a firm footing in administering and enforcing these laws, despite more than a decade of effort. An overwhelming number of disputes in Afghanistan are still decided within the country's informal system of justice.¹

To obtain a clearer sense of how informal justice systems operate within Afghanistan, this study widens the aperture of past analysis to decipher the role of Islamic law, and more concretely, the role of the ulama or Islamic religious leaders in the adjudication of disputes within the informal justice system. Beginning in 2011, the U.S. Institute of Peace (USIP), in partnership with the Afghanistan-based Peace Training and Research Organization (PTRO), commissioned the first study of its kind to examine the way in which Islamic law affects, influences, and determines outcomes within the Afghan informal justice system, particularly emphasizing gender-related issues. The multiprovince survey, conducted in Paktia and Takhar, interviewed various formal and informal actors, including litigants and their families, as well as informal justice leaders, local officials, and ulama members, the long recognized scholars of Islamic law.

The survey particularly emphasized the convergence of customary and Islamic legal doctrines, confirming a common perception that even as Islamic law is regarded as supreme, its superlative standing has only limited weight in Afghan informal justice decisions, particularly in matters involving the family. Instead, Islamic laws are often suborned by prevalent customary tribal norms, which are themselves assumed to conform with Islamic law. Despite this, informal justice actors nonetheless expressed openness to overturning prevailing customary law and signaled their willingness to take a more Islamic legal approach to resolving disputes if they were educated in the particulars of Islamic law, especially as they pertained to women and understanding gender-related norms.

A Tale of Two Laws: Pashtunwali and Islamic Law

Pashtunwali Examined

99 percent of our decisions are according to Pashtunwali, because we have to make decisions according to our custom and tradition.

—54-year-old informal justice leader, Gardez, Afghanistan

For purposes of both brevity and clarity, this report's analysis of Afghan customary law centers on the practices of the Pashtun people. This focus excludes many customary practices within Afghanistan's diverse ethnic mosaic, but it is warranted because Pashtuns represent the single largest ethnicity in the country and have had an important influence on Afghanistan's political, legal, and administrative history. Pashtuns inhabit parts of contemporary Afghanistan and Pakistan, with a number of them spread throughout parts of Central and South Asia since the first and second millennia before the common era—well before the advent of Islam. Today, though a precise number is difficult to pinpoint, between 40 and 60 percent of the current Afghan population identifies as Pashtun.² They are the single largest

ethnic group in Afghanistan, and for the past three centuries, nearly every ruler of the country has been Pashtun. The independent Afghan state originally emerged from a Pashtun tribal confederacy in 1747 under the leadership of its first king, Ahmad Shah Durrani.³

As a precise history of the Pashtuns is elusive,⁴ studying how Pashtuns articulate their origins offers insight into how the community organizes and interprets its current culture. Among Pashtuns, there is a common myth that their principal ancestor, Qays—also known as Kasay, Kish, and Imraul Qais Khan—received Islam directly from the Prophet Muhammad after traveling from the Hindu Kush to Arabia. When Qays converted to Islam, he assumed the name Abdurrashid.⁵ According to genealogical tradition, Abdurrashid had three sons, Sarbun, Gharghasht, and Baltan, who served as the patriarchs of the three Pashtun descent groups to which most Pashtun tribes can be traced. From this myth alone, one can derive two important and enduring features of Pashtun culture: first, the primacy of patrilineal descent among Pashtuns, wherein an individual is seen as belonging to his or her father's lineage,⁶ and second, the indivisibility with Islam—and as a consequence, the identification of being Pashtun while abiding by Islamic law.⁷

Beyond the significance it attaches to genealogical descent and religion, however, Pashtun identity emphasizes the importance of acting in accordance with the norms of other Pashtuns, or Pashtunwali. To be a Pashtun means observing Pashtunwali, or “the way of the Pashtuns.”⁸ This way is divided between a discrete set of values and corresponding norms or practices (*narkh*).⁹ While typically unwritten, the rules of conduct of Pashtunwali are primarily centered around the concept of *nang*, which is translated as “honor.” This conception involves defending one's own rights and the rights of one's tribe, as individual identity is inextricably linked to tribal identity. Thus, Pashtuns are generally judged as honorable according to their behavior as observed by their fellow Pashtuns. Honor, within Pashtunwali, can also be understood as the means to establish relationships with others. Certain actions help to build one's honor, while others negate honor or bring about shame.¹⁰ Moreover, only men can accrue honor, but both men and women can negate it, which imposes a set of norms that are aimed at preventing a loss of honor. Because it is not codified, however, honor can only be demonstratively proved through various social practices, such as hospitality (*melmastia*), maintaining community cohesion (*jirga*), and observing gender boundaries (*namus* and *pardah*).

Namus is routinely defined as virtue,¹¹ but within the realm of Pashtunwali it is perhaps better understood as that which must be “defended” to ensure one's honor is maintained, or perhaps less obliquely, not lost.¹² The demand for namus has a similar rationale as nang, except that it focuses on those members of society for whom a Pashtun man feels responsible in a very special way: his wife (or wives) and daughters but also his unmarried or widowed sisters and possibly all female members of a household. In the Pashtunwali-based worldview, the honor of a Pashtun man and the honor of all females for whom he is responsible are interdependent. Defending a female's honor entails providing them with shelter and care. A Pashtun man who does so accrues honor and maintains his reputation within the community.

Another particularly prominent way to maintain a female's namus is the routine use of *pardah*, or seclusion.¹³ The rationale for such a stringent measure stems from the importance ascribed within Pashtunwali to how other Pashtuns evaluate one's behavior. A woman who is almost invisible to others cannot shame herself. The combination of patrilineage issues with this seclusion—considered a vital means of ensuring namus—often relegates women to lowly and isolated social status.¹⁴ Women may not own property because the norms of namus obligate males to provide from their property to their close females. Because of patrilineage, a woman cannot even inherit from her husband, nor may any of her female children. They, like their mothers, remain dependent on the male Pashtuns within their family. Therefore, a woman, who is deemed only to receive protection from a Pashtun

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man, cannot attain the ownership of the means to protect herself. These norms can be seen in practice in Afghan marriage customs, which include an abundance of both cross-cousin marriages and levirate marriages, wherein the brother of a deceased man becomes obligated to marry his brother's widow.¹⁵ Both forms of marriage ensure that property and children remain within the protection and control of particular patrilineages. In both forms of marriage, male- and community-centered motives are the chief concern for marital unions as opposed to the consent of the bride and groom.

Can Pashtunwali's norms be considered substantive law? Legal norms differ from most social norms because their adherence is maintained by institutions tasked with the function of dispensing punitive measures to ensure their enforcement. This distinction becomes blurred in the case of Pashtunwali, as individuals and communities see themselves as tasked with maintaining their personal honor through directly enforcing sanctions when norms are seen as having been broken. This social enforcement mechanism gives Pashtunwali an element of legal practice and enforcement when matters of dispute arise. Furthermore, the strong emphasis on personally defending one's status or honor within Pashtunwali makes it difficult for subscribers to delegate enforcement to other persons or institutions—including the state.

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Islam and Islamic Law in Afghanistan

Overall I don't think that our cultural and traditional laws are according to Islamic law, because many decisions are against Islamic rules and regulation.

—Twenty-three-year-old informal justice disputant, Gardez, Afghanistan

Islam, as a political social order and faith, began to make inroads into current-day Afghanistan as far back as 652 CE, only two decades after the Prophet Muhammad died.¹⁶ Islam's expansion led to the development of a substantive yet flexible legal system. Beginning with Muhammad's reign as head of the city-state of Medina (r. 622–32), followed by the rule of the Rightly Guided Caliphate (i.e., Abu Bakr, Umar, Uthman, and Ali) (632–61) and the Umayyad (661–751) and Abbasid (751–1258) dynasties, Islam expanded in all directions from Arabia to include parts of South and Central Asia.¹⁷ It encapsulated new lands, principally populated by non-Arab, non-Muslims, who possessed their own distinctive cultural and social practices. While generally tolerant of indigenous customary practice (*urf*), particularly among faith communities designated as People of the Book, this religious-based empire saw a political and social need to unify its territory under its own set of laws.

The origins of Islamic law emerged from the series of prescriptions contained in what believers regard as the literal word of God: the Quran (literally "The Recitation") as revealed to the Prophet Muhammad. Despite widespread perception, the Quran, however, was not principally a legal text. Of the three hundred verses that can be considered prescriptive, nearly half of it is concerned with personal ritual practice (*ibadat*). The other half, however, deal in matters related to marriage, inheritance, commercial transactions, and other economic issues, as well as crimes, punishment, and evidence. These are often conveyed in both generalized sentiments as well as prescriptive statements. More than a century after the Quran's revelation, however, scholars came to routinely rely upon a second source of law, the Sunnah, or the body of precedents attributed to the Prophet. These were used to contextualize the varied Quranic prescriptions and add to the body of what was regarded as divinely ordained. Armed with these sources, scholars sought to make legal interpretation more systemic, expansive, and flexible, positing a number of legal doctrines that extended the reach of Islamic law to novel situations while attempting to fit within the broader theological outlines of the revealed sources. Debates over the methods of interpretation led to the creation of various schools of jurisprudence (e.g., Hanafi, Maliki, Hanbali, Jafari, Shafi'i)¹⁸

and the emergence of a scholarly set of elites, regarded as both appropriate interpreters as well as guardians of Islamic law,¹⁹ known broadly as the ulama.²⁰

Islamic law was not considered simply a scholastic or philosophical endeavor. Alongside the ulama stood political rulers (e.g., the caliphs, sultans, amirs, etc.), who were charged with establishing order and ensuring legitimacy by creating courts staffed with judges (*qadis* or *qazis*) and legitimizing the law by dispensing justice equitably to Muslims and non-Muslims and men and women.

The introduction of Islam also revolutionized the status of women.²¹ Previously, Arab tribal law generally regarded women simply as property, lacking human dignity, personality, or even a soul. Islam accorded women equal religious status before God because according to the Quran, women and men were created from one soul and both have equal rights to salvation by God. The Quran, however, offered women more concrete rights. It specifically banned the killing of baby girls and granted women the right to inherit land and property. Marital rules were rewritten to include a woman's right to divorce, and polygamy was dramatically circumscribed. Moreover, under Islamic law, marriage was no longer viewed as a status but as a contract (*nikah*), which, while imbued with religious, moral, and spiritual overtones, still required offer, acceptance, and consideration in the form of property (*mahr*). Crucially, Islamic law required consent and the capacity to grant consent on the part of the marriage partners.

Islam, along with elements of its legal character, had long been incorporated within Afghan society when the first Afghan state emerged in the late eighteenth century. The nascent Afghan state began in earnest under the leadership of Ahmad Shah Durrani, whose crowning in 1747 came at the encouragement of prominent members of the ulama. From that point on, Islam increasingly became a source of authority to unite the disparate peoples of Afghanistan. When Abd' al-Rahman Khan (r. 1880–1901), the Justinian of Afghanistan, took the reins of power, he introduced a coordinated state-based court system that made Islamic law the supreme law of the land, a legal trait that has largely remained in place to the present day.²² Despite his best attempts, however, Abd' al-Rahman, like his successors, was never fully able to consolidate legal authority in the hands of the state. The reasons for this failure to extend the legal system beyond Kabul—then and now—include a number of elements, such as the lack of infrastructure, human resources, and an overarching lack of legitimacy.²³ And while legitimacy perhaps appears conceptually vague, it is sought after in Afghanistan as the country has witnessed numerous inter- and intrastate conflicts as well as an entire spectrum of competing forms of political organization, from monarchy to socialism to communism, not to mention attempts at theocracy and the current nascent democracy. Fidelity to Islam has perhaps been the only common denominator.

Converging Pashtunwali with Islamic Law

Pashtunwali's relationship with Islamic law is complicated and, especially with respect to women, often contradictory. Most Pashtuns simply assume their practices conform with Islamic law, in part because they self-identify as Muslims. Those who have more closely examined their norms and the dictates of Islamic law assert that Pashtunwali and Islamic law occupy different personal spheres. Islamic law establishes the bounds of one's personal relationship with God and offers a direction to one's individual moral compass, while Pashtunwali links one's honor to the collective society. This bifurcation is at best overly simplistic and at worst, ignores the whole of Islamic law. It is obvious from even a superficial understanding of the marital rules described above that Islamic law intentionally regulates interpersonal conduct. Islamic law is not simply confined to ritual obligations to God but also ethical rules that extend to the proper conduct among believers, between men and women, between children and their parents, and with the whole of humanity. Unlike the currency of

Unlike the currency of honor within Pashtunwali, the motive for one's conformity to Islamic law stems from one's individual faith in God, as opposed to perceptions held among clan or tribe.

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As Pashtuns routinely invoke the myth of Qays to back up their assertion that Pashtunwali is intimately consistent with Islam and Islamic law, some also assert that any norms extending from a place of honor fall within the dictates of Islamic law through doctrine that accepts a role of custom, or 'urf.²⁴ Specifically, 'urf refers to "recurring practices that are acceptable to people of sound nature."²⁵ Historically used to incorporate and explain divergences between customary practices and divine law, the doctrine of 'urf remains controversial because it assumes "space" within Islamic law for practices that predated the advent of Islam. On a more practical level, the doctrine was intended as a means by which Islam could be adopted into local practice to facilitate wider adoption of Islamic law by different cultures. According to classical Islamic law, to constitute 'urf, or an acceptable form of customary law, a practice must meet a number of conditions. The most relevant are that, first, the custom must represent a common and recurrent phenomenon and, second, the custom must not violate a definitive principle of Islamic law. If a violation is absolute, there is no doubt that the custom must be set aside. If, however, the custom opposes only certain aspects of the text, then the custom may act as a limiting factor on the text.²⁶ Like any legal doctrines, however, the accommodative force of 'urf is subject to constant reevaluation and interpretation across schools of law and geographic areas. Islamic law's accommodation of customary law is not a constant.

During the ascendancy of Amanullah Khan (r. 1919–29), the Afghan state made vigorous efforts to declare certain aspects of Pashtunwali as contrary to Islamic law.²⁷ Successive governments have continued such trends. Even the Taliban, invoking their particular interpretations, concluded that certain customary practices violated Islamic law. Beginning in 1998, the Taliban issued decrees banning the practice of *baad* (the selling of young girls in marriage as a means of dispute resolution) on the grounds that 'urf did not apply and that certain Pashtun practices violated Islamic law. The Taliban also banned levirate marriages on the grounds that widows had the right to choose their own husbands, whether or not they belonged to the husband's family or tribe.²⁸

The Afghan Informal System of Justice and the Role of Religious Leadership

According to the USIP-PTRO survey, the single greatest source of localized disputes in Afghanistan centered or indirectly touched on matters of property ownership. Land ownership and control is often seen as the cause of a number of conflicts, including physical altercations and even murder, in addition to disputes over land boundaries, titling, and the permissibility of establishing homes. Another related recurrent issue is disputes concerning inheritance—specifically, how to parcel out land to members of one's close family when the wishes of the deceased are unknown or disputed. Another major subset of disputes, which could not only set off property disputes but also perhaps represent the greatest clashes between customary and Islamic law, are disputes that arise out of marriage, divorce, and a woman's right to inherit.

There are two primary structures for adjudicating informal justice in Afghanistan: *jirgas* and *shuras*. These institutions echo Afghanistan's dual sources of legal inspiration. As noted earlier, in the context of Pashtunwali, identity is inextricably linked to membership within a particular tribe, and consequently, individual honor and shame are closely linked to the honor and shame of the tribal group to which one belongs. All such questions therefore require thorough consultations with other Pashtuns who may be affected by them. In many cases, it may be sufficient to ask elders for advice. In other cases, all concerned persons

are called together for consultations. In the tribal structure of the Pashtuns, the demand for consultation has been institutionalized through the jirga. Generally, every gathering of Pashtun men that is held to solve a question of common interest may be called a jirga. Depending on the matter at hand, a jirga can also be a dispute resolution mechanism in which decisions are made by consensus.

A shura, derived from the Arabic term “consultation,” is mentioned in three different verses in the Quran, each involving a different set of circumstances.²⁹ The first verse only deals with family matters. The second proposes it as a means of securing a positive afterlife. The third verse advises on how mercy, forgiveness, and mutual consultation can win over people. Given the scope of such a term, the concept of shura was seen under Islamic law as either a recommended form of governance or a requisite one, as the requirement to consult was imbued by the Prophet among his followers during his lifetime. In Afghanistan, the term shura is used widely to describe any organized body of participants, administrative body, council, or consultative and meditative process. In essence, all consultative bodies organized to bring tribal leaders and representatives together are called shuras.³⁰

Each of the forums, while broadly similar, maintain some distinct traits. Survey inquiries as to which figures are entrusted with decision-making roles within jirgas and shuras also yielded broadly consistent results. In predominantly Pashtun areas, such as Paktia province, tribal leaders were seen as the preeminent decision makers. In Takhar, where shuras were seen as more prevalent, the criteria for decision-maker status was more discretely defined but also potentially involved a broader scope of persons: Those figures had connections, often tribal, to their respective communities;³¹ were often chosen from within the community; and possessed generational ties to the practice of dispute resolution, often because their fathers had similar positions during their time.³²

Understanding the Informal Justice System’s Jurisdiction

Even as the Afghan state has undertaken a long-running struggle to establish a monopoly of legal authority within its borders, Afghanistan’s formal and informal legal systems operate in parallel, both drawing on Islamic and customary legal sources. In general, analysts of the Afghan legal mosaic have concluded that while the formal system of justice is best equipped to adjudicate criminal matters,³³ the informal system is better equipped to handle civil matters.³⁴ Formal and informal legal actors have used the Islamic legal doctrines of *huquq Allah*, or “the rights of God,” and *huquq al-‘ibad*, or “the rights of man,” to justify and rationalize the persistence of these separate spheres of legal authority.³⁵

Generally, Islamic jurists articulated the legal doctrines of *huquq al-‘ibad* and *huquq Allah* to carve out the appropriate—but limited—extent of governmental authority to adjudicate disputes in order to ensure that Islamic law operated as a system where the rule of law prevailed but also where a balance between the interests of society and one’s private interests could be struck. The term rights of God does not actually refer to God’s rights but simply those interests that serve the public well-being, such as order and security. The term *huquq al-‘ibad* is understood as a purely private right that attaches to the individual as a result of his or her relationship with another individual and thus is concerned with a set of expectations that might involve individual concerns (e.g., exclusive possession of certain property).³⁶ Under *huquq al-‘ibad* or *huquq Allah*, the application of the law is divided between matters that deserve the attention of the government to account for a larger public interest and a series of “residual interests,” which, while significant, do not require and perhaps even discourage direct government intervention.

In deciding whether a particular injury affects a public or private interest, classical jurists generally asserted that the more an injury damaged the community at large, the

more Islamic law permitted a government to prosecute a wrongdoer. By contrast, the more a particular injury damaged or impinged on a private interest, the more reluctant Islamic jurists were to involve government to resolve the matter. Such disputes, they argued, should instead be resolved between the parties so that governments need not intrude into private disputes. This line of thinking was motivated by the principle that governments should never become obstacles to justice or, worse, vehicles for politicizing personal disputes. Despite these broad principles, jurists often came to different conclusions about whether a public or private interest was more at stake for a particular offense.³⁷

Thus, the Islamic legal discourse into *huquq al-'ibad* and *huquq Allah* offers observers important insights into the jurisdictional divide between Afghanistan's formal and informal systems of justice. Contrary to the common perception that the formal state system of justice competes with the informal, the systems may support one another within delineated areas of jurisdiction and responsibility. The *huquq al-'ibad* and *huquq Allah* legal doctrines further suggest that when a dispute reaches the state or formal system of adjudication, it is considered to be within that tribunal's exclusive domain and, by implication, outside the domain of informal jurisprudence. The reverse may also hold true, as disputes addressed within the informal system are seen as not subject to state intervention.

The Role of Religious Leaders in Afghan Informal Justice

All people are Muslim—they want religious leaders to be involved in their decisions.
—Head of a solidarity council, Takahr Province

In the Golden Age of Islam, the *ulama* were viewed as the institutional guardians of Islamic law not only because of their understanding of the particulars of Islam but also because of their fealty to God as opposed to any earthly political authority. Remnants of this august public perception remain, as identified in this and a number of related studies. A survey conducted by the Asia Foundation found that a majority of Afghans felt that religious leaders were perceived as serving the interests of Afghan society more than any other type of public figure and, as a consequence, believed “religious leaders should be consulted” regularly about local problems.³⁸

The reality is perhaps more complex. Generally, the *ulama*'s prestige has diminished throughout the Islamic world, including in Afghanistan, because their authority has often forcibly been linked to political rather than purely religious considerations. As with most contemporary Muslim-majority nations, Afghanistan began to incorporate *ulama* into the state's bureaucracy, and the state began to take control of private religious proprietary endowments, or *awqaf*, which had for centuries financially supported the *ulama* and helped ensure their independence. In 1896, Abd' al-Rahman began to assert control over the religious endowments. In certain instances, the Amir even crushed attempts to evade these efforts, such as the Ghilzai revolt in the Ghazni region. The effect has been a steady erosion of the *ulama*'s standing, as religious leaders co-opted by the state began to be characterized as state stooges. When it has come to resolving matters at the informal level, the role of the *ulama* has been circumspect or, at times, outright ignored, given that they are increasingly seen as formal actors.

According to the survey results for this study, while religious leaders were held in high esteem, there was an overwhelming perception among informal justice actors that the *ulama* were not considered to be part of standing *shuras*. Members of the Afghan *ulama*, to the extent they were involved, were consulted only as knowledge leaders in various discrete matters, such as settling disputes concerning marriage, divorce, and inheritance, broadly

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described as family law; making rulings on land and water use; and witnessing agreements or serving to persuade individuals to forgive specific grievances.

Among all legal topics specifically addressed in the Quran and Sunnah, aside from purely ritual matters, family law predominates. Scholars both past and present have asserted that family law is at the proverbial heart of Islamic law because of the clear and explicit nature of what the Quran and Sunnah say about the family. The survey data left unanswered what the precise threshold was to trigger consultation with Islamic legal doctrine. A significant number of responses, however, indicated that ulama members are still important in regulating certain cultural practices. Religious leaders were particularly ardent in their opposition to celebrating the holiday of Nowruz, which marks the Persian New Year and is believed to have its origins in Zoroastrianism.

Religious leaders have an important role in conflict resolution, but at the moment they do not work honestly, they are not impartial in their decisions.

—Forty-three-year-old provincial council member, Paktia Province

Currently, all the religious leaders are political.

—Thirty-nine-year-old local elder and businessman, Paktia Province

There is a notable disconnect between the recognition of the ulama's social importance and members' relegation to adjudicating only certain matters. One particularly important concern was ulama bias. The USIP-PTRO survey found that a significant number of respondents voiced concerns about the credibility of the ulama who participated in resolving disputes informally. Some regarded their participation as either unreligious or worse, as self-interested.³⁹ Respondents, while not uniform in their rationale, suggested that perhaps the ethnicities of the disputants could explain the bias,⁴⁰ but others believed it was simply inappropriate for such religious figures to become involved in local dispute resolution because they ran the risk of diluting their social standing in the community. Some thought religious leaders could be particularly persuaded by bribes. Since the Taliban period, during which religious authority took wholesale control of the functions of governance, the reputations of religious figures adjudicating disputes has suffered.

In both Paktia and Takhar, when the survey asked disputants and decision makers what their point of reference was for determining the dictates of Islamic law, they noted that ulama spoke only of the Quran, making few references to the Sunnah, which includes far more maxims of a legal nature than the Islamic sacred text. Rarer still were any precise references to a body of jurist-made law, as in Hanafi jurisprudence. The patchy set of references to common religious legal authority raises questions about general awareness of the particulars of Islamic law and speaks to the ulama's perceived willingness to resort directly to the Quran without referring to the established body of already interpreted law, representing centuries of intellectual development. The Islamic law that prevails at the informal level amounts to a kind of "folk sharia."⁴¹ At worst, "the Islam practiced in Afghanistan... would be almost unrecognizable to a sophisticated Muslim scholar. Aside from faith in Allah and Mohammad as the Messenger of Allah, most beliefs relate to localized pre-Islamic customs."⁴² Current Afghan state law regarding family matters is derived from the Maliki—as opposed to the prevailing Hanafi—school of jurisprudence, in line with a broader trend among a number of Muslim-majority states of embracing the Maliki school's more tolerant rules regarding a woman's right to obtain a divorce compared to the more restrictive rules of Hanafi jurisprudence.⁴³ Consequently, even to the extent Afghan ulama might apply Islamic law at the informal level, their application may not conform with the state's approach to Islamic law or broader trends among Muslim-majority states.

Tensions between Customary and Islamic Law

While the Afghan informal justice system relies on a number of dispute resolution techniques, which routinely involve compensating aggrieved parties with livestock, land, and money, a number of customary practices conflict with various understandings of Islamic law. The first category of these practices are concrete impingements upon a women's ability to consent in marriage. As mentioned above, under Islamic law's contractual rubric of marriage, both parties must consent. Common forms of redress under informal justice practices, however, include giving away girls to resolve disputes (*baad*), exchange marriage (*badal*), and purported honor killings, which typically stem from a woman's effort to escape marriage. Despite being one of the principal focuses of the USIP-PTRO survey, evidence of the persistence of the practice of *baad* appeared inconclusive. According to those surveyed, the practice does not currently exist in Takhar, and in Paktia, it is either nonexistent, goes unreported, or may have changed. Takar respondents repeatedly asserted the practice has never really existed and does not now; in Paktia, respondents reported that the practice of *baad* has been eclipsed by offers of land and money.⁴⁴ Others stated that the traditional practice has been replaced by a similar practice, wherein the victim's family demands the perpetrator's family pay the price of a dowry and marital costs of a girl the victim's family has chosen from within the victim's respective community.⁴⁵

Any loss of women's property was explained away in terms of the purported benefits accrued through male guardianship.

The second category of customary practices that are inimical to Islamic law is the routine deprivation of women's right to inherit property. Under Islamic law, female relatives may inherit property from their male relatives, albeit in smaller shares than identically situated inheriting males. In contrast, in Pashtunwali only males have the right to own property. Respondents justified the bypassing of Islamic legal dictates in this case on the grounds that society as a whole would benefit from greater social cohesion. Any loss of women's property was explained away in terms of the purported benefits accrued through male guardianship. The survey also found an overall reluctance among women to press for their inheritance rights for fear of social stigma. According to one interviewee, "Women don't have the courage to ask for their rights from their brothers or relatives because it is shameful for them." Cases where women may press for their rights can result in backlash. In one case, two daughters tried to press for inheritance rights in Paktia and were rebuffed by a local shura. One daughter committed suicide after most of the land was allocated to other male relatives in a bid to promote reconciliation within the larger family. When asked why this pre-Islamic custom could continue in the face of clear Quranic mandate, one informal justice actor in Takhar suggested that the process for resolving local disputes was primarily oriented toward reaching consensus between the parties rather than supporting an individual's favored understanding of the law.

While the informal system places a high premium on consensus building, the USIP-PTRO survey indicates that reaching consensus is not a function of equals under customary law but rather the relative authority of the persons resolving the dispute. The makeup of the participants to a shura or jirga influences the ultimate result. The ulama might be well positioned to adjudicate disputes within the informal system, but their authority remains inversely proportional to the legal authority of existing tribal and customary norms, as understood by those involved in the dispute. The most salient rationale for limiting or intentionally ignoring such positions under Islamic law is deference to customary law and perhaps, more obliquely, to maintaining patriarchal and tribal authority.

An Agenda for Change: The Persistence of Practices Inimical to Islamic Law

I think the religious leaders [could] play a high role in conflict resolution, but they keep themselves very silent. If they preach and advise the people, they can bring many

changes and reform the society, but unfortunately they keep themselves silent and don't want to be involved in conflict resolution.

—Fifty-four-year-old informal justice leader, Gardez, Afghanistan

Although many informal system actors, disputants, and decision makers have limited or marginalized the role of the ulama, this is not necessarily a static state of affairs. Many of those surveyed insisted that as Afghanistan has faced change and a tumultuous past, they have endured and are willing to change as well. Throughout Afghan history, religious leaders have been—and are—in a unique position of wielding a supreme measure of authority on issues related to law and morality and can potentially help push for legal reforms. Perhaps the easiest agenda items for reform within the informal justice system are the practices that ulama and Afghans alike have agreed are inimical to Islamic law. The USIP-PTRO survey helped identify key areas of concern for both religious leaders and informal justice actors.

First, many informal justice decision makers surveyed lamented that, inasmuch as the ulama's views on certain matters have been disregarded, they nonetheless welcome and seek their participation. This desire might be regarded as simply a means to confer legitimacy to informal justice decisions, but at the same might offer the best avenue for ulama to involve themselves in decisions affecting otherwise marginalized women and young girls. Of course, this contention assumes that local ulama are well-versed in the particulars of Islamic jurisprudence, especially as it pertains to family law.

Second, reinvigorating the ulama within Afghanistan requires not only education targeted at understanding Islamic law but also mechanisms that ensure their independence from the state's political and financial control. Additional training is needed to make local religious leaders more aware of substantive Islamic law. Also helpful would be training that speaks to how local ulama can overcome concerns that engaging in informal dispute resolutions could dilute their community status or that their local participation is somehow inconsistent with their spiritual and religious leadership within their community. Existing Islamic legal or sharia faculties at Afghan institutions of higher learning offer an ideal means to train local ulama and strengthen institutions of higher education in the process.

Third, while religious leaders need to play a direct role within informal justice processes, the most important step remains better coordinating these processes with a coherent, well-respected state judiciary. In the battle among various legal authorities of Afghanistan—tribal, religious, and state—if the state cannot exert its authority, power will devolve to a disinterested or disregarded religious authority or the authority of the various tribes, whose traditions, while varied, often take little or no account of the rights of women. If state and religious authorities refrain from playing their role as guarantors of individual rights, the potential for abuse is even greater.

Finally, the potent force of religious authority in Afghanistan should be brought to bear on the broader discourse of honorable behavior, nominally seen as the exclusive domain of Pashtunwali. Islamic leaders inside and outside Afghanistan should employ a fundamental concept rooted in the Quran: human dignity (*karamah*).⁴⁶ An inherent notion in the Quran, Sunnah, and other work within the Islamic tradition, a discourse on dignity not only amplifies and expands widely accepted notions of honor but has the broader effect of speaking to the inherent value of both men and women, their inherent capabilities, and, perhaps most potently, their value before God and the rights God has bestowed upon them.

While religious leaders need to play a direct role within informal justice processes, the most important step remains better coordinating these processes with a coherent, well-respected state judiciary.

Notes

1. I borrow the definition of informal justice provided by Dr. Noah Coburn: "A series of mechanisms that are outside state control—though not necessary beyond its influence—and...are used to resolve disputes and conflicts in a manner perceived to be legitimate by local communities." The UN definition encompasses the resolution of disputes by third party actors without recourse to formal state judiciaries and recourse to statutory law. See Noah Coburn, "Informal Justice and the International Community in Afghanistan," *Peaceworks* no. 84, U.S. Institute of Peace, Washington, DC, 2013, 11, available at www.usip.org/publications/informal-justice-and-the-international-community-in-afghanistan (accessed February 11, 2015). See also Unicef, UN Women, and UN Development Programme, "Informal Justice Systems: Charting a Course for Human Rights Based Engagement," New York, 2012, available at www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruleoflaw/informal-justice-systems/ (accessed February 11, 2015). Admittedly, no definition can be both very precise and sufficiently broad to encompass the range of systems and mechanisms that play a role in delivering rule of law and access to justice. As detailed below, informal justice venues vary considerably, encompassing many mechanisms of differing degrees and forms of formality. Degrees of formality vary with respect to legal or normative framework, state recognition, appointment and interaction, control and accountability mechanisms, and systems of monitoring and supervision, including the maintenance of case records and the implementation of referral procedures.
2. See, e.g., Kenneth Janda, Jeffrey M. Berry, and Jerry Goldman, *The Challenge of Democracy: Government in America* (New York: Houghton Mifflin, 2010), 46; "Afghanistan's Complex Ethnic Patchwork," *The Asian Wall Street Journal*, March 10, 2011; Asger Christensen, *Aiding Afghanistan: The Background and Prospects for Reconstruction in a Fragmented Society* (Copenhagen: NIAS Press, 1995); William J. Taylor, Jr., and Abraham Kim, *Asian Security to the Year 2000* (Derby, PA: Diane Publishing, 2000), 58; Susan Hawthorne and Bronwyn Winter, *September 11, 2001: Feminist Perspectives* (Melbourne: Spinifex Press, 2007), 225.
3. See, e.g., Richard Tapper, *The Conflict of Tribe and State in Iran and Afghanistan* (London: St. Martin's Press, 1983).
4. Most historians acknowledge that the origin of the Pashtuns is somewhat unclear, although there are many conflicting theories, some modern and others archaic, both among historians and the Pashtuns themselves: "The origin of the Afghans is so obscure, that no one, even among the oldest and most clever of the tribe, can give satisfactory information on this point." Mohan Lal, *Life of the Amir Dost Mohammed Khan of Kabul*, vol. 1 (Cambridge: Cambridge University Press, 2012), 3.
5. *Ibid.*, 5.
6. N.V. Benokraitis, *Marriages and Families*, 7th ed. (Upper Saddle River, NJ: Pearson Education, 2011).
7. See Palwasha Kakar, "Tribal Law of Pashtunwali and Women's Legislative Authority," Harvard Law School, Islamic Legal Studies Program, n.d.
8. See Asta Olesen, *Islam and Politics in Afghanistan* (New York: Routledge, 1995). Note, however, that urban and educated Pashtuns disdain this image. See also Declan Walsh, "Arithmetic on the Frontier," *Granta* 112 (2010), 161, 171.
9. There are a number of highly regarded norms and values within Pashtunwali. Central among these are the honor of the individual and honor of groups, fighting spirit and bravery, equality and respect for seniors, consultation and decision making, willpower and sincerity, compensation and retaliation, generosity and hospitality, and pride and zeal. A person who embodies these values and rules of behavior of Pashtunwali and who leaves no doubt that he does his utmost to abide by them is respectfully called *ghairatman* and represents the ideal Pashtun. Lutz Rzehak, "Doing Pashto: Pashtunwali as the Ideal of Honourable Behaviour and Tribal Life Among the Pashtuns," Afghanistan Analysts' Network, 2011, available at aan-afghanistan.com/uploads/20110321LR-Pashtunwali-FINAL.pdf (accessed February 11, 2015).
10. The code of honor among the Pashtuns has many similarities with codes of honor in the Mediterranean, the Caucasus, Central Asia, the Middle East, East Africa, and the Philippines. See Mark Moritz, "A Critical Examination of Honor Cultures and Herding Societies in Africa," *African Studies Review* 51, no. 2 (2008), 99–117; and Todd K. Shackelford, "An Evolutionary Psychological Perspective on Cultures of Honor," *Evolutionary Psychology* 3 (2005), 381–91.
11. *Namus* is also defined as "reputation," "esteem," "conscience," and "chasteness."
12. Rzeha, "Doing Pashto."
13. *Ibid.*
14. *Ibid.*
15. *Ibid.*
16. Nancy Hatch Dupree, *An Historical Guide to Afghanistan* (Kabul: Afghan Air Authority, Afghan Tourist Organization, 1970), 492.
17. During the eighth and ninth centuries, the eastern parts of modern Afghanistan were still in the hands of non-Muslim rulers and populated by Hindus and Buddhists. Abbasid rule in the west, however, began to recede as early as 819 as regional sultanates sought to separate authority away from the caliphate and became rulers in their own right, particularly in the areas east of Baghdad. From 819 to 999, the Samanid Dynasty, a Persian-Muslim empire, took control of most of what was to become Afghanistan. From 977 to about 1080, the Ghaznavid Dynasty, a Turkic-Muslim dynasty, replaced the Samanid Dynasty to next take control. By 1040, the Great Seljuq Empire, also a Turkic-Muslim dynasty, wrestled control from the Ghaznavids.
18. Much of the debate among the various schools concerned the proper classification of action since an action may be classified as either forbidden (*haram*), discouraged, neutral, recommended, or obligatory (*fard*). In both the Western and Islamic systems of law, only the first and the last of these categories constitute legally enforceable categories.
19. The ulama (Arabic for "scholars") have served as the religious leadership within Islam. Importantly, they gained their status through their learned standing rather than through ethnic or tribal prestige. Thus, the ulama may refer to anyone who possesses intimate knowledge of Islam (ʿilm). It includes theologians, religious teachers at *madrasas*, and prayer leaders (called *imams* and *mullahs* among Sunnis), who often preside over various religious functions. The most prestigious members of the ulama are the jurists (*fuqaha*). Broadly speaking, the jurists are viewed as possessing the most intimate understanding of the religious texts and the various doctrines of Islamic law, especially those within their particular school of jurisprudence. If designated to the position of *mufiti* (a jurist-consultant) or even selected to serve as a judge (*qadi* or *qazis*), jurists were expected to adjudicate

disputes in accordance with doctrines of Islamic law and generally obliged to do within their particular school of jurisprudence. See, e.g., Senzil K. Nawid, *Religious Response to Social Change in Afghanistan, 1919–29: King Aman-Allah and the Afghan Ulama* (Costa Mesa, CA: Mazda, 1999).

20. The ulama were far more than just the religious leaders within Islam. They served dual roles, one of representing the interests of the state to the laity but also the interests of the laity to the state. At the same time, their legitimacy historically was predicated upon their general independence from politics and state control. Moreover, the existence of the ulama did not translate into a singular unified source of religious authority among Muslims because in early Islam, there was no concerted effort to impose a single body of interpretation, especially in matters pertaining to Islamic law. Consequently, tolerance of both diversity of religious opinions within Islam (*ikhtilaf*) and of other faiths was considered the rule rather than the exception within early Islam. With both a penchant for decentralized religious authority and a lack of significant theological and religious tension among the various schools of jurisprudence, the ulama were largely able to retain a considerable degree of autonomy from political authorities. The lack of centralized authority or hierarchy among the scholars also made it difficult for political authorities to exercise control over them. Consequently, in practice, religious and political spheres came to be seen as quite separate, with each realm essentially following a policy of mutual benefit or at the very least one of “live and let live.” Khaled Abou El Fadl, “The Place of Tolerance in Islam,” *Boston Review* (December 2001–January 2002).
21. See Hamid Khan, “Nothing is Written: Fundamentalism, Revivalism, Reformism, and the Fate of Islamic Law,” *Michigan Journal of International Law* 273, no. 277 (2003), 330. See also Zainab Chaudhry, “The Myth of Misogyny: A Reanalysis of Women’s Inheritance In Islamic Law,” *Albany Law Review* 611 (1997), 511.
22. Hanafi jurisprudence, in particular, was recognized as the preferred school of jurisprudence for Afghanistan. The school of law is named after the famed Persian scholar Imam Abu Hanifa (d. 767 CE).
23. In addition, the lack of these resources is complicated by population patterns combined with a varied geography within the country. More than 70 percent of the current population resides outside of urban areas—a number far lower than at virtually any other period in history—but it serves as a reminder that the reach of justice systems is not likely to be improved simply by building courthouses and prisons.
24. Kakar, “Tribal Law.”
25. Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: The Islamic Texts Society, 2003), 369.
26. *Ibid.*, 374.
27. Ali Banuazizi and Myron Weiner, *The State, Religion, and Ethnic Politics: Afghanistan, Iran, and Pakistan* (Syracuse: Syracuse University Press, 1988), 132.
28. See Juan R.I. Cole, “The Taliban, Women, and the Hegelian Private Sphere”, in *The Taliban and the Crisis of Afghanistan*, Robert D. Crews and Amin Tarzi, ed., (Cambridge, MA: Harvard University Press, 2008), 118, 143–44.
29. Quran 2:233; 3:159, and 42:38.
30. Specifically, unlike Paktia, Takhar is populated by a hodgepodge of different kinds of shuras. While a significant number of shuras operate along the framework of being headed by a group of community decision makers, there is also a discrete set of National Solidarity Program shuras broadly aimed at developing the ability of Afghan communities to identify, plan, manage, and monitor their own development projects. The geographic reach of a particular shura varies. Some operate at a purely local level. Others have district-wide or even provincial-wide coverage.
31. Which earned them the designation “elder.”
32. In Paktia, community decision makers were chosen for their specific leadership within a particular tribe. Some community decision makers, however, were often chosen for their particular acclaim within the community, meaning they had served as local commanders during the mujahideen years (1979–89). In addition, a community decision maker’s behavior and “just manner in reaching decisions” helped them maintain their respective position within the community. In any case, mere “election” was a necessary but insufficient condition for remaining within their respective positions.
33. While it often claimed that the informal system only handles civil matters, our survey indicates that the informal system remains involved in criminal matters, even if at the periphery. One reported case involved a matter in which the police arrested a criminal suspect. An elder intervened with the police, secured the suspect’s release with personal guarantees of good behavior, and asserted the elder would seek to broker some form of reconciliation in the matter. Informal decision makers would even become directly involved in cases of murder or ongoing fighting by arranging ceasefires, visiting a victim’s home to convince them about the need for reconciliation. If community decision makers are ineffective or an arranged-upon ceasefire is broken, the case is then referred to the relevant government agency or court. This kind of intervention on the part of community decision makers is often termed peacemaking and often paves the way for resolving the dispute by offering formal judicial actors a set of facts to further investigate a matter and minimize the length of a criminal investigation, which is especially important in light of a general scarcity of resources for the justice sector.
34. See, e.g., Thomas Barfield, “Informal Dispute Resolution and the Formal Legal System in Contemporary Northern Afghanistan,” draft report, U.S. Institute of Peace, Washington, DC, 2006, available at www.usip.org/sites/default/files/file/barfield_report.pdf (accessed February 11, 2015); see also Coburn, “Informal Justice.”
35. For a more in-depth analysis of Islamic legal treatment of huquq Allah and huquq al-‘ibad, see, e.g., Anver Emon, “Huquq Allah and Huquq al-‘Ibad: A Legal Heuristic for a Natural Rights Regime,” *Islamic Law and Society* 13, no. 3 (2006), 325–91. See also Ibrahim Abdullah al-Marzouqi, *Human Rights in Islamic Law* (Abu Dhabi: Diane, 2000), 139–42, asserting that the huquq Allah–huquq al-‘ibad distinction can be used to capture both the individual and public interests involved in any rule of law; Miriam Hoexter, “Huquq Allah and Huquq al-‘Ibad as Reflected in the Waqf Institution,” *Jerusalem Studies of Arabic and Islam* 19 (1995), 133, 134; Kemal Faruki, “Legal Implications for Today of al-Ahkam al-Khamsa (The Five Values),” in *Ethics in Islam*, Richard G. Hovannisian, ed., (Malibu, CA: Undena Publications, 1985), 65–72; and Intisar A. Rabb, “The Islamic Rule of Lenity,” *Vanderbilt Journal of Transnational Law* 44 (2011), 1299–351.
36. According to Bernard Weiss, huquq Allah and huquq al-‘ibad in effect organize the relationship between the individual and the Muslim state. For Weiss, huquq Allah represents “public law” and is upheld against individuals by the state. Huquq al-‘ibad covers private matters that allow individuals to order their affairs without state interference. See Bernard G. Weiss, *The Spirit of Islamic Law* (Athens, GA: University of Georgia Press, 1998), 181–84.
37. To add further complexity, Islamic legal jurists recognized that not all legal disputes could be neatly divided between purely public and purely private interests but instead involve a set of “mixed” interests (*huquq mujtama’a* or *huquq mukhtalata*), and it is here—in a potential sea of mixed rights and interests—where

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arguably the majority of disputes lie. In some cases, the public component is the more significant; in other cases, the private component is the more significant element. Islamic legal scholars therefore reasoned that if a private interest were more significant, a private individual maintains the discretion either to uphold his right or forgive the violation despite the public interest. Alternatively, if the public interest is seen as paramount, the private victim may not waive his rights—meaning how an interest was understood carries important legal implications not only for the kind of interest involved but whether the dispute in question could be resolved by the government or among individual disputants themselves. See Rabb, “Lenity.”

38. Robert D. Lamb, “Formal and Informal Governance in Afghanistan: Reflections on a Survey of the Afghan People,” Occasional Paper no. 11, Asia Foundation, April 2012.
39. In Takhar, the involvement of the ulama was more pronounced, meaning they were consulting in matters beyond family law. It was also clear from respondents surveyed that they were regarded as more reputable than those surveyed in Paktia.
40. When queried about which ulama members were chosen to aid or assist in resolving a particular matter, it turns out that most decision makers typically only consulted local ulama. In both Takhar and Paktia, participating members of the ulama typically hailed from the same ethnic group as the disputants or ideally were directly related to one of the disputants. This suggests informal actors may ultimately place greater premium on geographic proximity or ethnic background rather than the religious acumen of a particular religious leader, which has traditionally been seen as the proper standard for religious leader involvement in disputes.
41. See J Alexander Thier, “Reestablishing the Judicial System in Afghanistan,” Working Paper no. 19, Center on Democracy, Development, and the Rule of Law, Stanford University, 2004.
42. Christina Jones-Pauly and Neamat Nojumi, “Balancing Relations between Society and State: Legal Steps toward National Reconciliation and Reconstruction of Afghanistan,” *American Journal of Comparative Law* 52 (2004), 836, 849-50.
43. Mohammad Hashim Kamali, *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law, and the Judiciary*, (Leiden: Brill, 1997), 159.
44. In one instance, a victim’s family was offered four million Pakistani rupees, or about 37,000 USD.
45. Another example of such changes was in a disputants’ ability to change who represented them in the case of appeal. Previously, community decision makers selected parties’ representatives in case of appeal.
46. See, e.g., Mohammad Hashim Kamali, *The Dignity of Man: An Islamic Perspective* (Cambridge: Islamic Texts Society, 2002).

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