

Working within Cultures: Lessons for Justice Sector Practitioners from the AfPak Region

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Understanding Customary Justice Systems

- Why it is important – Afghanistan is a case study but these systems are present in many countries
- The norms and rules are the result of active participation and contestation
- Customary justice systems therefore are dynamic and flexible and can vary greatly even within small geographic spaces
- Some values like honor are found in all customary justice systems.

Understanding Customary Justice Systems

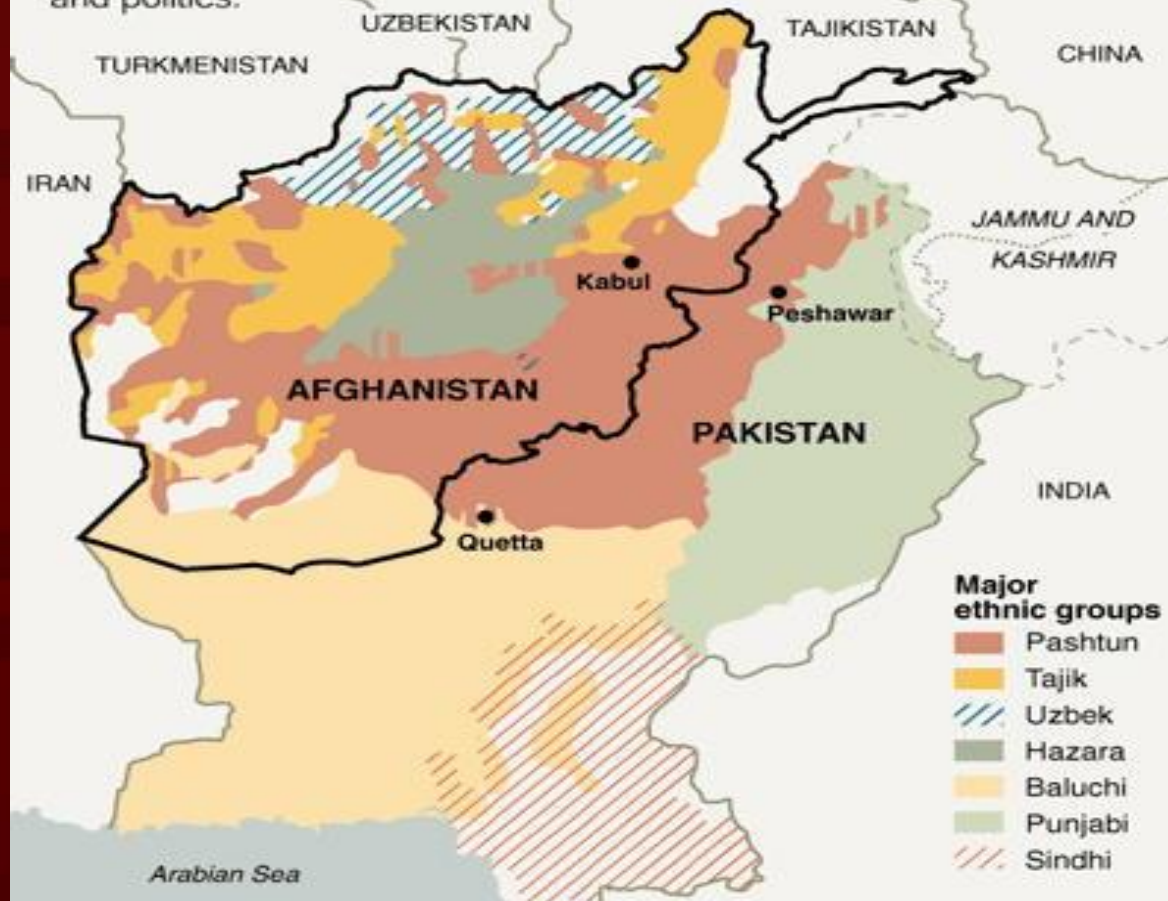
- Context matters: geography, socio-economic conditions, proximity to state systems, as well as religion can influence development
- Strategies used in the administration of customary justice vary greatly
- Intervention in customary justice systems is complicated



The Pashtun Belt

United by History and Loyalty

The Pashtun ethnic group is spread through both Afghanistan and Pakistan. Its strong tribal code explains much about regional alliances and politics.



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The Context

- **Context influences the patterns of alliance between actors in a dispute:**
 - a) Governance vs lack of governance in countries
 - Customary Justice is sometimes referred to as “adjudicated anarchy” and Pashtunwali is a good example. It is a body of principles and practice evolved over time, handed down orally for the most part and aimed at maintaining order in the absence of a central authority. Anchored in respect for **Autonomy** and **Equality of individual Pashtuns**.



The Context

- b) Sources of customary justice may be religious, historical, regional, local. Pashtunwali in practice is very pragmatic and fluid in practice due to dependence on interpretation by respected leaders chosen to adjudicate disputes

- c) The role of extended family, sub-tribes (groups of villages linked by blood relationships), tribes and confederations of tribes as in the case of the Pashtuns



The Context

d) North vs South, Urban vs Rural

- Pashtunwali dominates in rural and mountainous areas where central government control is historically minimal





Five Rungs of the Traditional Afghan Tribal System

1. Ethnicity

Pashtuns, who make up about 38 percent of the Afghan population, have two main branches. Their tribes and sub-tribes are spread across eastern and southern Afghanistan and northwestern Pakistan.

2. Tribal Confederations

The two biggest groupings of Pashtun tribes are the Durrani and the Ghilzai. They have been rivals at times but Afghans consider it rude to openly invoke the distinction. Unifying the whole structure of tribal authority is Pashtunwali, a traditional unwritten code of conduct that has governed tribal affairs for thousands of years.

THE DURRANI The country's dominant ruling group since its founding in 1747, when a grand meeting of tribal elders or "loya jirga" selected Ahmad Shah Durrani to be king. Generally considered the most urbanized, educated and liberal Pashtuns, many Durrani hold senior posts in the Karzai government.

THE GHILZAI Generally spread across rural parts of southern and eastern Afghanistan and northwestern Pakistan, the Ghilzai are viewed as more numerous, poorer and more conservative than the Durrani. One Ghilzai tribe, the Shinwari, agreed last week to join government anti-Taliban efforts.



POPULZAI
Hamid Karzai,
president of
Afghanistan.



ALIKOZAI Mullah
Naqibullah,
powerful tribal
leader north of
Kandahar who
died in 2007.



BARAKZAI Gul
Agha Shirzai,
governor of
Nangrahar
Province.

3. Tribes: Pashtuns' Primary Identity

The Durrani and Ghilzai each contain several dozen tribes; these are some of the main ones. Tribes are generally geographically based — Afghans can tell what part of the country someone hails from based on his tribe. Someone's tribe can be discerned from his name and the style of turban he wears, but not from physical appearance.



HOTAK Mullah
Muhammad
Omar, Taliban
leader.



ZADRAN Jalud-
din Haqqani, a
senior insurgent
commander in
eastern
Afghanistan.



KHAROTI
Gulbuddin
Hekmatyar, a
top insurgent
commander in
the northeast.

MOHAMMADZAI
Tribe of
Mohammad
Zahir Shah, the
former king.

NURZAI
Influential tribe
in southern
Afghanistan.

SHINWARI
Tribe that
agreed to fight
Taliban last
week.

TOKHI
Influential tribe
in southern
Afghanistan.

The Nurzai tribe
comprises at least 15
sub-tribes.



4. Sub-Tribes:
May consist of hundreds or thousands of people living in a tight swath of villages or towns; blood lines may go back centuries. Weddings can draw 1,000 people or more from the sub-tribes of the bride and groom, a demonstration of tribal unity.

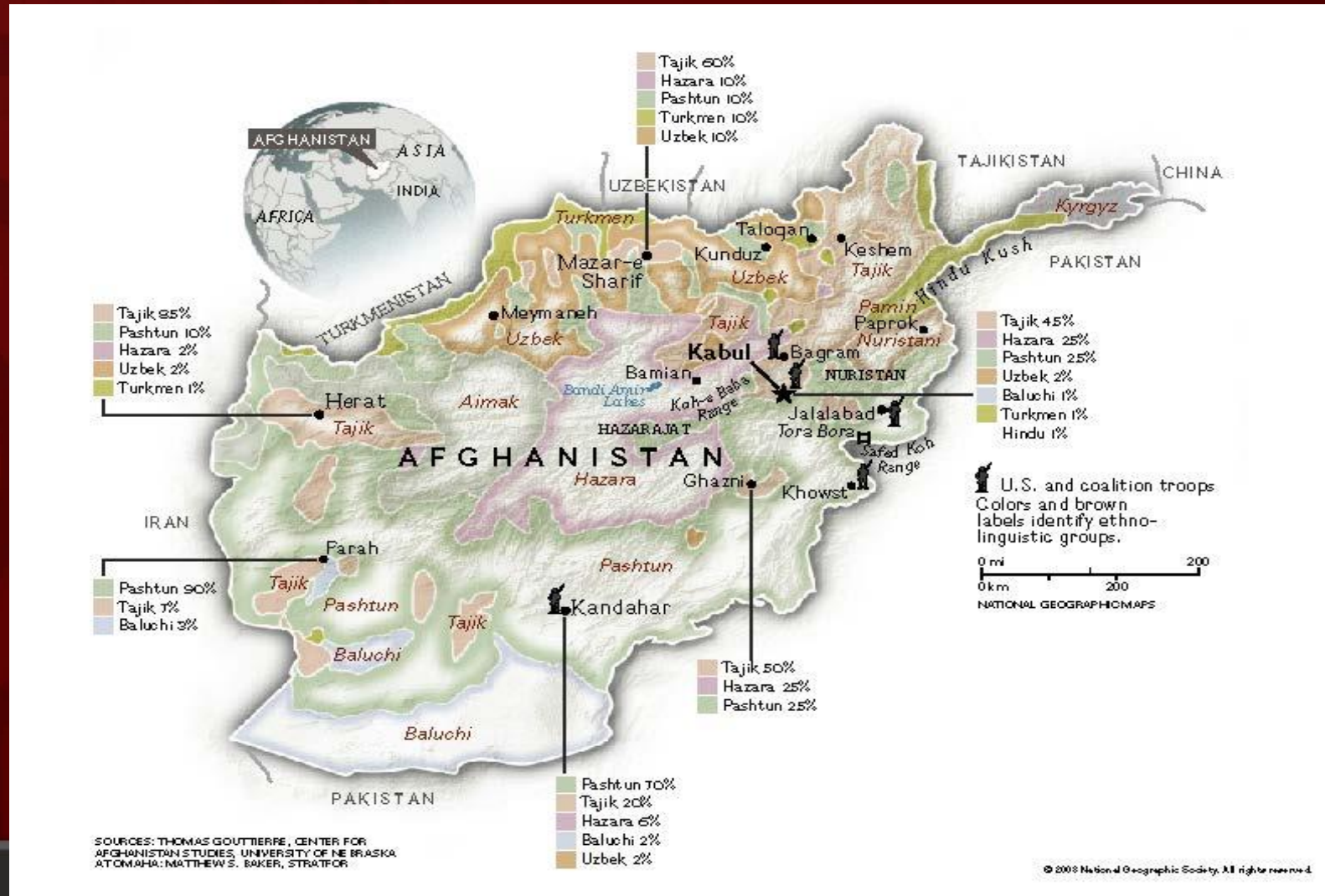


5. Families Include grandparents, aunts, uncles and siblings, living together in large compounds.

The tribal system in Afghanistan has no codified structure, and analysts differ on how to characterize many of the intricate, and often shifting, power relationships within it. This chart, which avoids academic and technical terms, presents the broad outlines of the way many Afghans say the system has traditionally operated.



Political Ramifications of Identity



The Context

- e) Gender, age, and other differences among actors
 - Men play dominant roles in most customary justice systems including Pashtunwali. Men are entrusted with maintaining the honor of family/community while women bear the onerous task of being the honor bearers – they cannot gain honor (in most cases) but their behavior can result in loss of honor
 - Older men and women play important roles in adjudicating disputes and maintaining communal harmony



Strategies in the administration of customary justice

a) Insider vs Outsider knowledge

- Local expertise regarding zar (gold), zan (women), zamin (land) is valued and people choose customary justice over more formal structures because of this
- Speedy resolution of disputes and the ability for quick restitution is also prized
- Pashtunwali is an honor based system and going outside for resolution can be seen as dishonorable – especially for women.



Strategies in the administration of customary justice

b) Role of clerics

- The rise of the ulema in Pashtun jirgas can be traced to the war against the Soviets in the 1980's
- Rise of Salafi interpretations of sharia
- Conflation of Pashtunwali with Sharia: Taliban justice is an example of the uneasy relationship between sharia and tribal customary practices
- The recent entry of the Islamic State will complicate the situation



Strategies in the administration of customary justice

- c) Role of patron-client relationships within clan/tribe
- In Pashtunwali like other customary justice systems the aim is to maintain community stability, provide restitution to the victims, and prevent a cycle of blood feuds through mediation and arbitration
 - Community will harness any existing relationships including those based on marriage, status and wealth



Strategies in the administration of customary justice

In Afghanistan, the maliks or traditional political elites (often based on land ownership) are often recruited for this purpose

- d) Role of particular tribes, individuals and groups
- The Pashtuns have traditionally turned to certain groups and individuals from certain families for dispute resolution
 - This is particularly important when enforcement is through the use of sanctions like public apologies, ostracism, payments in cash or kind



Strategies in the administration of customary justice

- e) Dominance of men in leadership, dispute resolution and the normative content of customary justice – in Pashtunwali, women are often used along with cash to settle disputes

- f) Most common disputes: Theft, Land Issues (Ownership, encroachment, irrigation), Adultery/Rape, Marriage/Engagement, Crime/Personal Injury (eyes, feet, hands, rest of the body valued equally)



Intervention in Customary Justice Systems

a) Injection of new ideas, skills, knowledge based on internal values to ensure cultural legitimacy:

- Bringing customary law into line with Islamic law requires buy in from elders and tribal leaders which might be difficult
- Dispute resolution training (often fails to take into account existing power asymmetries and can therefore fail to increase legal empowerment for marginalized groups like women).



Intervention in Customary Justice Systems

Training women as mediators may help them challenge the interpretation and application of discriminatory customary justice norms.

b) Transformation of customary systems in ways that can simultaneously meet the interests of male powerholders. Involving men rather than challenging them and appealing to their sense of responsibility for the well-being of female family or community members may result in positive outcomes.

c) Supporting legal aid and assistance programs and helping to train paralegals.



Intervention in Customary Justice Systems

d) Providing assistance to legitimize customary justice where it complements the formal system, improving public knowledge of the positive/negative aspects of customary systems, supporting development of guideline and minimum standards and codes of conduct in customary systems.

e) The role of shaming



Dangers of Intervening in Customary Justice

- By formalizing practices you put at risk the fluidity which has made it effective
- Bring the government which is distrusted into the process especially at the level of enforcement which is seen as a community activity
- In the case of Afghanistan, the specter of Pashtun domination of local practices which vary across communities will result in conflict.



Lessons for Justice Sector Practitioners

- Strength of customary justice systems is based on:
 - Lack of trust in government/state systems
 - Cost, speed as well as accessibility of customary justice systems
 - Cultural preference for restorative penalties aimed at reconciliation and reintegration as opposed to retributive punishments
 - Familiarity with the process as well as the adjudicators

