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**AFGHANISTAN'S LEGAL CULTURE FROM 1750 TO
THE TWENTY-FIRST CENTURY**

Jawad Hassan Zadeh

**A dissertation in satisfaction of the requirement for
the degree of**

DOCTOR OF PHILOSOPHY

**Birkbeck, University of London
School of Law**

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ABSTRACT

This thesis analyses Afghanistan's legal culture from 1750 to the present date. In implementing this task, historical legal developments are discussed in light of available records such as the Law Gazettes and recorded cases by the law courts as well as the analyses produced in the form of books, research papers and objective reports by national and international sources.

For the technical aspects of Afghanistan's legal history and legal traditions (legal culture), the thesis aims to provide in-depth descriptions as to how legal issues in Afghanistan have developed over a period of nearly three centuries. In this thesis, the legal affairs, their strengths, weaknesses and deficiencies will be discussed in light of the given situations. They will be discussed in relation to the internal and external aspects of Afghanistan's legal system in order to produce an informative research which shows whether in Afghanistan a *culture of legality* has been established. Through the completion of this thesis, the writer aims to provide insights as well as suggestions in relation to the issues discussed and analysed. The writer is conscious that on a topic like this, despite all the efforts he has made, there is, given the state of the question, simply no way of excluding any possibility of a gap or a lacuna.

DECLARATION

I, Jawad Hassan Zadeh, certify that this thesis has been composed by me. It is my own work and it has not been submitted for any other degree or professional qualification. It is my independent work and I have cited all the information that has been used from the work of others.

Jawad Hassan Zadeh

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or errors lie with the author. I extend my gratitude to Christian Bleuer, Dr Amin Tarzi, Dr Danny Singh, Dr Mohammad Nazif Shahrani and Dr Thomas Barfield for sending me their own academic articles and theses as well as the works of some of other researchers which have been quite useful for my research. I also thank Dr Antonio Giustozzi who gave me a doctoral thesis written on Afghanistan.

I express my gratitude to John Hougham, Janet Ferguson and Sarah-Jane Pretty for proofreading my work. There are a number of organisations I would like to thank for their help and support. These organisations based in Afghanistan are the AIHRC, UMAMA and the Afghan Civil Society Forum Organisation.

Finally, I would like to thank my wife Fereshteh Taheri and my two daughters, Maysa and Morsal who generously gave me all the support, love and caring I needed throughout this research and in other times.

TERMS OF REFERENCE

In this thesis, the terms *Shari'a* laws and Islamic laws are used interchangeably. The terms Islamic clergy, *mullah*, and *ulemā* convey the same meaning as well. Among these terms *ulemā* is the plural form of 'alim' which means knowledgeable and is used for persons of knowledge such as a *mullah*, clergy, astrologer, a nuclear scientist, an engineer, etc. In the context of Islamic studies, the term 'ilm' (knowledge), according to Wael Hallaq, signifies the knowledge of the Qur'an and the Sunnah, (traditions of Prophet Mohammad), and is the binary opposite of *ra'y*, which is 'considered opinion'.¹ In Islamic societies, the terms *alim* and *ulemā* are chiefly attributed to people with a knowledge of Islam. It also happens that within the circles of Islamicists and Islamists, the term *ulemā* also refers to a collective name for the Islamic religious authority.

Throughout this thesis, I have used legal and non-legal terminologies in Arabic, Dari-Farsi, Latin and Pashto languages. All foreign terms for which there are no standard spellings in the English language will be *italicised*. These terms will also show pronunciation signs for easier reading. All dates are written according to the common Western calendar. In this thesis, the languages of Farsi and Persian are one and the same. Different writers use these language names interchangeably. In Afghanistan, Farsi/Persian has been re-named as Dari.

In the area of Islamic laws and in the field of humanities, different spellings of the same terms are frequently used. Often spelling differences arise when

¹ Hallaq, *A History of Islamic Legal Theories*, 15.

transliterations are given by speakers of different languages. For instance, Fāzel in Arabic is transliterated as Fādel, which is how an Arab speaker pronounces the word. The same rule applies to *qāzi* that is written as *qādi* in Arabic. I have followed the general orthographic standards of the Dari-Farsi language, as this language is the *lingua franca* for all the citizens of Afghanistan.

Lastly, the term ‘Afghān’ must be clarified, as in recent decades this term has become controversial for members of the different ethnic groups of Afghanistan. The term *Afghān* is a polysemous word with three meanings and definitions. Firstly, it is the tribal name for the Pashtūns. Nile Green writes that before the early twentieth century, when the label ‘Afghān’ became an official state bureaucratic term denoting common national identity, it had for centuries denoted a narrower ethnic identity, equivalent to what we would now term Pashtūn or Pathān.² Secondly, Afghān is used for the nationality for all citizens of Afghanistan, who come from dozens of different ethnic groups. Thirdly, Afghān is used as the name for the currency in Afghanistan.

² Green, *From Conversion to the Taliban*, xiv.

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THESIS OVERVIEW

My thesis has 14 chapters. The first two chapters focus on the thesis' rationale and context. Chapter 1 sets out the research agenda and the hypothesis. Chapter 2 is dedicated to the research methodology and research methods. This chapter describes the rationale for the choice of research methods, the relevance of the mixed methods research methodology, data collection, research interviews and the research questionnaires. In Chapter 3, the existing primary and secondary source scholarship on Afghanistan's legal culture will be critically evaluated.

Chapter 4 offers a brief overview of Islamic legal concepts indispensable to the study of an Islamic legal system, one of which is Afghanistan's. In Chapter 5, this thesis introduces different religions of Afghanistan and highlights the relevance of her strong oral culture, and how the old and new religions form the mosaic of Afghan citizen's identity and the beliefs pertaining to the sense of religious justice. This chapter clarifies that Afghanistan is far from being a monolith or fixed to *Shari'a* beliefs. The chapter intends to show that norms and beliefs in Afghanistan come from a number of overlapping beliefs, and at times, there are no clear-cut differences between what is perceived as Islamic and non-Islamic beliefs.

Chapter 6 provides an elaborate account of the substantive justice based on *Pashtūnwāli* tribal code. It offers theoretical descriptions of tribalism, the institutions of *Pashtūnwāli* and demonstrates a number of substantive cases decided under *Pashtūnwāli* code. Chapter 7 presents an analytical understanding of legal pluralism and introduces Afghanistan's three

dominant customary justice mechanisms; *āqsaqāl*, *jirga* and *Shūrā*, used by members of different ethnic groups. The chapter also provides a background history of the ethnic groups of Afghanistan. Furthermore, the chapter discusses the dispensation of justice by the international non-governmental organisations (INGOs) as well as the insurgent groups due to necessity and state weakness.

Chapter 8, the longest chapter of this thesis is dedicated to legal transplants in Afghanistan. First, the chapter argues that legal transplants instigated by a national state are different to those brought to Afghanistan by foreign powers through military intervention and aid conditionality. Second, the chapter argues that legal transplants are prone to change and reversal, and in view that Afghanistan has suffered as a result of internal and international conflicts, the intervening factors such as regime changes, insecurity and the existence of weak or unpopular governments lead to the loss of gains. In this chapter, the research hypothesis is tested using the case-study method.

Chapter 9 features the legal and political history of Afghanistan's constitutions from 1923 until 2004. This chapter identifies the strengths and weaknesses of the constitutions of Afghanistan and avoids the use of generalisations. Finally, the chapter suggests *transformative constitutionalism* as a suitable direction for the future of Afghanistan's constitution. Chapter 10 intends to show in what ways corruption affects Afghanistan's government, society and the dispensation of justice. It introduces fifteen categories of corruption unique to Afghanistan with a focus on the political economy analysis and political analysis of predation. This

chapter shows that corruption in Afghanistan is top-down and entrenched. This chapter demonstrates how corruption affects the citizens of Afghanistan, the institutions of government and the delivery of justice.

Chapter 11 provides a detailed account of Afghanistan's legal development stages within the modern-state system from 1880s to 2021. This chapter distinguishes the differences between the normal processes of law-making and enforcing the laws by competent, apolitical and independent institutions of the government, and the uncharacteristic processes where the executive branch of the government influences, threatens and even at times disables certain government institutions. In this chapter, I argue that issuing excessive presidential decrees for legal matters, hasty and unnecessary hiring and firing of state officials and issuing extra-ordinary orders, most of which may be the duty of the parliament and other institutions of the government; when these powers are usurped by the president, it forms a *legal interregnum*. This is not simply overpowering other institutions; it is usurping their powers into the president's hand. This chapter describes the legal institutions of Afghanistan in view of available historical information.

Chapter 12 is dedicated to judicial quality in Afghanistan. The chapter focuses on legal education, recruitment of judges, and discusses problems surrounding reliable and accessible public data such as court promulgations. The research and data used in this chapter clarify the low judicial quality. The chapter cites a case that illustrates the tendency of judges to set aside the abstract laws and use informal dispute resolution instead, particularly when the victims are women or girls.

Chapter 13, provides a historical account of women's status in society, in the government administration and how women are treated before the law. The chapter focuses on the national laws, international mechanisms and the problems encountered in Afghanistan for the implementation of EVAW law and the CEDAW convention. In regard to women's rights, access to employment, education and services, the chapter argues that these services are only accessed by a small minority of women who seek to be enabled. Finally, the chapter investigates certain women's rights that different governments have tried to improve since the 1880s.

Chapter 14 sums up the conclusions of the thesis. It describes how the quantitative and qualitative data used throughout the thesis support the hypothesis. The 14 chapters support the central theme of this thesis, *legal culture of Afghanistan*. In order to answer the research question and sub-questions and prove the hypothesis, this research uses the mixed methods research, and applies a number of research methods such as process tracing, case study, historical methods, political economy analysis, political analysis of predation and models of intersectionality.

CHAPTER 1: INTRODUCTION

1. Introduction

The legal culture and legal history of Afghanistan has not received adequate attention in Afghanistan's legal studies before. Primary legal sources are limited. Comprehensive first-hand studies of Afghanistan's legal situations are rare. There is, however, extensive quantitative data on Afghanistan's government, society and legal system conducted as patchy and separate research.

One may note, particularly since the 2014 US-NATO forces' drawdown in Afghanistan, that research on Afghanistan's legal situation have changed tune and are often framed within the binary of *success* or *failure*. This binary misleadingly undermines certain achievements. Punchlines such as "Why the U.S. efforts to promote the rule of law in Afghanistan failed?"³ do not inform researchers of the root causes of the alleged failures.

This research takes a different approach by highlighting why certain aspects of the rule of law do not work as well as intended, or why there is resistance to change, or why there are reversals, and in some areas perceived shortfalls or under-achievements. There are shortcomings in the way legal institutions operate in Afghanistan, but, over the past three hundred years, Afghanistan has also achieved notable successes in legal developments.

1.1 Problem Justification

³ Geoffrey Swenson's article titled "Why the U.S. efforts to promote the rule of law in Afghanistan failed," *LSE Research Online* 1, no. 42 (2017): 114-15, does not inform the reader of the underpinnings that lead to failures or to gaining minuscule successes; however, Swenson's PhD thesis titled "Addressing Crises of Order: Judicial State-Building in the Wake of Conflict" DPhil thesis, Pembroke College, 2015, eloquently describes why elements of legal pluralism hampered the rule of law efforts in judicial state-building in Afghanistan.

In the context of Afghanistan, there are large amount of analytical data in the form of reports and criticisms by researchers and scholars as well as observers on how abysmal Afghanistan's legal conditions are. The majority of these documents are written by individuals who may have received their education in a totally different environment to that of Afghanistan, or researchers may be strongly influenced by the universal philosophies, rationalism, logic and assumptions that are chiefly rooted in the West – issues that show stark differences to the realities in Afghanistan. This in turn ignores what is possible or what can be expected in Afghanistan. Taking this research dilemma into account, this thesis will try to discuss the root causes of certain problems in Afghanistan and will elaborate on those issues that work well and those that do not work that well.

1.2 The Aims of the Research

The overall aim of this thesis is to introduce Afghanistan's *plural legal culture* and *legal transplants*, not simply according to the legal sources but also according to its own patchwork of *de jure* and *de facto* authorities. This research posits that acts of governments are overrated as constituents of legal culture. In this regard, the lives, perceptions, religious and customary beliefs of the people of Afghanistan form the main foci of this thesis. It is based on the premise that different religions, cults and spiritual orders practised by the people of Afghanistan over several millennia form the backbone of the current legal mosaic of the country. This research highlights contributions to the legal wealth of the country which merit special attention. To the author's knowledge, this is the first research of its kind that pays special attention to

contributions of all the governments and the citizens of Afghanistan to its legal system – regardless of their numbers or religious convictions.

The Baha'is, Jewish, Christians, Hindus, Sikhs, *Kāfirs*, Sufi orders, the adherents of Shamanism and those of the cult of Zhun have lived in Afghanistan, and most have practised and continue to practise these faiths to the present day. The influences these faiths and spiritual orders and cults have left behind are apparent among the population of Afghanistan. Although the focus of this thesis is limited to the past three hundred years, the influences of pre-Islamic faiths and spiritual orders can be noted in Afghanistan's oral culture that manifest itself in the people's practices today. The citizens of Afghanistan may be better understood not for what they read but for what they say, hear and believe, which requires an in-depth study of the culture of orality and informality. Therefore, it is necessary to provide an account of these faiths and spiritual orders for a better understanding of the current conditions.

Islamic legal precepts, both historical and modern, will be discussed, as the vast majority of the population of Afghanistan profess to be Muslims. The thesis provides a history of the emerging legal institutions from former days to the present time that is indispensable for the study of law.

In the process of reform and legal development, the importance of legal transplants cannot be overlooked, as Afghanistan has been using legal transplants for a long time, and more apparently since the 1880s. Legal transplants will be investigated in two quite different time periods: first, the government-initiated legal transplants where state officials opted to

modernise their country and institutionalise the delivery of justice that is from 1880 to 2001, and second, the foreign-led legal transplants for the promotion of the rule of law through Western state-building efforts since 2001, where the state of Afghanistan has had limited choices of what to accept or reject.

1.3 Significance of the Study

This research is significant for anyone interested in Afghanistan and its legal culture, as it pulls together a number of legal themes and offers readers an instructive insight into understanding the plethora of structural and socio-cultural influences that have and continue to inform the perceptions around legality in Afghanistan.

The experience of Western state-building and the advancement of the rule of law demands that more research, such as this thesis, be carried out in order to inform the academic community and the international stakeholders involved in Afghanistan, as well as the government of Afghanistan, of the emerging legal themes in line with globalisation and the universal quest for the rule of law promotion and the centrality of human rights.

1.4 Situating the Thesis

This thesis is at the intersection of several academic disciplines, including legal anthropology, legal pluralism, political economy analysis and historical methods. Its principal aim is to make a contribution to the field of legal culture and legal history of Afghanistan from 1750 to the present. Its main focus is to introduce the internal and external components of Afghanistan's legal culture, of which, legal transplants form an integral part.

1.5 The Research Question and Sub-Questions

My main research question is:

How has Afghanistan's legal history and legal culture been subject to change and evolution since the inception of the state in 1747 to the twenty-first century?

My sub-research questions are:

1. How has Afghanistan's legal culture evolved since 1747?
2. How have legal transplants shaped and continue to shape Afghanistan's laws?
3. What role does legal pluralism play in Afghanistan?
4. What is the status of women under the formal and informal laws of Afghanistan?
5. To what extent have the different religions of Afghanistan shaped its legal culture?

1.6 Hypothesis

Hypotheses are predictions of outcomes based on literature or theories.⁴ The working hypothesis for this study assumes that legal transplants have not created a consolidated *culture of legality* in Afghanistan. Their use has been less helpful and at times mimetic. The following is the working hypothesis:

Hypothesis: *State-sponsored legal transplants have not formed a culture of legality since the creation of a nation-state in Afghanistan.*

The working hypothesis of this study assumes that the more the state and its institutions support workable legal transplants and ensure the provision of the requisite education, provide adequate funds and enforce the state law

⁴ Creswell, *Mixed Methods Research*, 69.

nationwide without discriminations or derogations, then a realistic chance of instituting a *culture of legality* will emerge.

CHAPTER 2: METHODOLOGY

2 Introduction

In order to answer the research question and sub-questions, it is imperative that the methods and methodology utilised stand up to scrutiny. The scarce and extant scholarship on the topic of legal history and legal culture applied in the case of Afghanistan requires an eclectic approach that brings together past and present research in order to offer a body of knowledge that contributes to the academic community. Henn et al. make the important distinction between *method* and *methodology*.⁵ They state that method refers to the range of techniques that are available to us to collect evidence about the social world, and methodology concerns the research strategy as a whole.⁶ With this observation in mind, this thesis will utilise a variety of methodologies ranging from Political Economy Analysis (PEA), to legal pluralism and legal transplants. Applying these frameworks will be instructive in gauging the capacity for public trust, legal compliance, transparency in law, as well as public perceptions around legality and the ways in which legislation has been instituted across the modern history of Afghanistan. This will serve to provide a more holistic approach which will be more conducive to triangulating the data that emerges from the empirical chapters.

2.1 Quantitative Methodology

Quantitative methodology is a type of educational research in which the researcher decides what to study; asks specific, narrow questions; collects

⁵ Henn, Weinstein, and Foard, *Introduction to Social Research*, 10.

⁶ Henn, Weinstein, and Foard, 10.

quantifiable data from participants (a large number of participants); analyses these numbers using statistics and conducts the inquiry in an unbiased, objective manner.⁷ The first stage of this thesis uses quantitative data.

2.2 Qualitative Methodology

Qualitative methodology is a type of educational research in which the researcher relies on the views of participants; asks broad, general questions; collects data consisting largely of words or texts from participants; describes and analyses these words for themes and conducts the inquiry in a subjective, biased manner.⁸ In the second stage of this thesis, qualitative data collected through questionnaires and interviews will be used.

2.3 Mixed Methods Research

Mixed methods research is defined as an approach to research in the social, behavioural and health sciences in which the investigator gathers both quantitative (close-ended) and qualitative (open-ended) data, integrates the two, and then draws interpretations based on the combined strength of both sets of data to understand the research.⁹ Mixed methods research involves the collection, analysis, and integration of both quantitative and qualitative data. In this way, the value of different approaches to research (e.g. the trends as well as the stories of personal experiences) can contribute more to understanding a research problem than one form of data collection (quantitative or qualitative) could on its own.¹⁰ The mixed methods typology

⁷ Fisher, "Mixed Methods," 4.

⁸ Fisher, 7.

⁹ Creswell, *Mixed Methods Research*, 2.

¹⁰ Creswell, 2.

undertaken in this thesis is an explanatory sequential design. In explanatory sequential design, the intent is first to use quantitative methods and then qualitative methods to help explain the quantitative results in more depth.¹¹ Quantitative data may generalise themes and it may not contain first-hand accounts that are necessary to understand the issues better. This is done through triangulating both types of methods and using qualitative data to explain the quantitative data.

In mixed methods research, philosophical perspectives may be added.¹² Philosophical frameworks are general beliefs and assumptions about research, such as how researchers discover knowledge.¹³ This research uses legal pluralism, political economy analysis, historical methods and models of intersectionality.

2.4 Data Collection Procedure

Plano Clark conceptualised the stages of explanatory sequential data collection designs as three. In the explanatory design, the quantitative data is collected and analysed in the first phase, then the qualitative data will be collected to help explain or elaborate on the quantitative results.¹⁴ The rationale for this approach is that the quantitative data and results provide a general picture of the research problem; more analysis, specifically qualitative data collection is needed to refine, extend or explain the general picture.¹⁵

¹¹ Creswell, 6.

¹² Creswell, 8.

¹³ Creswell, 8.

¹⁴ Subedi, "Sequential Mixed Method Design," 572.

¹⁵ Subedi, 572.

2.5 The Rationale for using Mixed Methods Research

John W. Creswell describes the benefits of using mixed methods research as follows:

It is appropriate to use Mixed Methods Research when the use of quantitative or qualitative research alone is insufficient for gaining an understanding of the problem. Using only one method may be insufficient because of the inherent weaknesses of each approach. Quantitative research does not adequately investigate personal stories and meanings or deeply probe the perspectives of individuals. Qualitative research does not enable us to generalise from a small group of people to a large population. It does not precisely measure what people in general feel. In short, all research methods have both strengths and weaknesses, and the combination of the strengths of both provides a good rationale for using mixed methods. Quantitative research provides an opportunity for generalisation and precision; qualitative research offers an in-depth experience of individual perspectives.¹⁶

Mixed methods research compares the quantitative and qualitative data, reflects participants' points of view, fosters scholarly interaction, provides methodological flexibility and collects rich, comprehensive data.¹⁷ The quantitative data for this thesis has been collected first in order to understand and then to interpret them. This process has highlighted gaps in the existing quantitative research. The answers to my questionnaire – given by professionals with diverse experiences – aided me to refer to more quantitative data and in turn strengthen my arguments and alter some points. The mixed methods approach is therefore most expedient as it can mitigate potential shortcomings in the empirics and provide further insight on the initial arguments set forth in this thesis. The qualitative data gathered through

¹⁶ Creswell, *Mixed Methods Research*, 15.

¹⁷ Wisdom and Creswell, "Patient-Centred Medical Home Models," 3.

interviews and questionnaires has offered useful historical backgrounds to law, society and governments as the interviewees and questionnaire respondents have offered extensive direct and indirect interactions in the areas under research. In the words of John W. Creswell, “adding additional features to a basic mixed methods research design makes it an advanced research method.”¹⁸

2.6 Ethnography

Ethnography is the study of social interactions, behaviours and perceptions that occur within groups, teams, organisations and communities.¹⁹ Ethnographical research is conducted in different academic disciplines by anthropologists, archaeologists, psychologists, sociologists and other groups categorised as social scientists. The importance of ethnography in researching Afghanistan, its people and state cannot be overlooked. In the context of Afghanistan, ethnographic research conducted by different scholars will be used.

2.7 Historical Methods

Historical methods is referred to as the collection of techniques and guidelines historians use to research and write histories of the past. Legal history studies the origin and development of past legal systems and a legal historian should adopt an interdisciplinary approach to the subject, which means he/she should be informed by economics, political science, sociology and other relevant

¹⁸ Creswell, *Mixed Methods Research*, 6.

¹⁹ Reeves, Kuper, and Hodges, “Qualitative Research Methodologies: Ethnography,” 512.

social sciences.²⁰ This is so because a legal system of any country cannot be fully appreciated if it is considered independently: religion affects the legal system, politics affect it and so do the economic institutions of that country.²¹ In the context of Afghanistan's legal history, this research uses primary as well as secondary sources. The methodical approach taken in legal history is narrative history. Narrative history is a method of writing history that describes the main and most critical developments in a chronological way so that an overall picture of the past can emerge.²²

2.8 Case study and Process Tracing

The case-study and process-tracing methods will be used in order to test the hypothesis surrounding legal transplants in Afghanistan. The case-study method accounts for a large proportion of the research presented in books and articles in psychology, history, education and medicine as well as other fields.²³ It addresses a wide range of research questions.²⁴ Case studies are viewed as a qualitative research type or qualitative research method.²⁵ In this thesis, case study is a method rather than a research type.

2.9 Theoretical Perspectives

The theoretical framework is the blueprint for the entire thesis inquiry and serves as the guide on which to build and support the study.²⁶ It defines how the researcher philosophically, epistemologically, methodologically and

²⁰ Muradu, "Legal History and Traditions," 3.

²¹ Muradu, 3.

²² A2 History: "Introduction to historiography" 9.

²³ Starman, "The case study," 28.

²⁴ Harrison et al., "Foundations and Methodological Orientations," 1.

²⁵ Starman, "The case study," 30.

²⁶ Grant and Osanloo, "The Blueprint for Your 'House'," 13.

analytically approaches the thesis as a whole.²⁷ Theories are formulated to explain, predict and understand phenomena and, in many cases, to challenge and extend knowledge.²⁸ The following two theoretical frameworks shall be used for this research.

2.10 Political Economy Analysis

Political Economy Analysis (PEA), according to the Development Assistance Committee (DAC) of the Organisation for Economic Cooperation and Development (OECD), is “concerned with the interaction of political and economic processes in a society: the distribution of power and wealth between different groups and individuals, and the processes that create, sustain and transform these relationships over time.”²⁹ This research adopts a political economy lens in assessing corruption. Corruption has a negative bearing on the rule of law, and corrupt practices, such as diverting funds intended for the delivery of justice, erodes not only the state’s legitimacy, but also leads to citizens evading taxes or civic duties, or disobeying their leaders. In this context – using political economy analysis is justified and necessary.

2.11 Intersectionality

Intersectionality, a term coined by the legal scholar, Kimberlé Crenshaw, is a theory and an analytic tool to assess lived experiences within intersecting oppressions and may be better suited to analyse multiple forms of discrimination rather than single-axis approaches to discrimination.³⁰ As a

²⁷ Grant and Osanloo, 13.

²⁸ Sacred Heart University Library, “Theoretical Framework.” Last accessed 16 August 2020.

²⁹ Strand, Borchgrevink, and Harpviken, “Afghanistan: A Political Economy Analysis,” 1.

³⁰ Rice, Harrison, and Friedman, “Doing justice to intersectionality,” 6.

theoretical framework, intersectionality is the most suitable analytic tool to assess a number of intersecting issues. whereas individuals' experiences of injustice are multi-layered, complicated and may not be noted fully by another approach. The reality of the state, society, political system and the rule of law efforts by the international community demands that multi-dimensional issues such as marginalization, discrimination or negligent and systematic injustices are assessed through intersectionality.

2.12 Data Collection

I have collected the quantitative data through purchasing available books on Afghanistan, its history, governments, society and the law. From 2014 to the present, I have obtained more than a hundred books, written in English, Dari-Farsi and Pashto. The languages of these books are identified in the bibliography.³¹ The sources to search for the relevant books were the four Bloomsbury University of London libraries (Birkbeck, City, SOAS and UCL). Between 25 October 2019 and 15 June 2020 before a lockdown was enforced due to COVID-19, I visited the British Library, the National Archives and the Isma'ili Institute's library in search of scarce sources on Afghanistan. In particular, I looked for sources on ethnic and religious minorities like the Jews, Hindus, Sikhs and Ismailis. These were sources that were not available digitally or in the bookshops.

³¹ Some books were out of print temporarily. I sought after a book for four years and I only managed to buy it in 2019. There were four books that, due to their rarity and high value, vendors sold at a very high price – nearly four times the price of a book on a bookshelf in the UK. These books are *The Hazaras of Afghanistan* by Sayed Askar Mousavi; *Afghanistan: A Country Law Study* (monograph) by Gholam H. Vafai; *A Political and Economic History of the Jews of Afghanistan* by Sara Koplik and *Law in Afghanistan: A Study of Constitutions, Matrimonial Law and the Judiciary* by Mohammad Hashim Kamali.

I have also accessed quantitative data in the public domain. The first set of public records were accessed through Academia, EconStor, JSTOR, Google Scholar, HAL, Research Gate, Sage, Springer and the Social Science Research Network (SSRN). The second set of public information records were accessed through Internet downloads for the law gazettes: *Adālat* (Justice), *Agāhī Hoghūghi* (Legal Awareness), *Mizān* (Scale), *Qazā* (Judgement), *Sāranwāl* (Prosecutor), *Wekālat* (Legal Representation); legal circulars by the Supreme Court of Afghanistan as well as legal statistics made available periodically, quarterly and annually; bench guides, legal news, newspaper articles, research papers and academic theses as well as reports produced by international non-governmental organisations including the Asia Foundation, the Chr. Michelsen Institute (CMI), the International Development Law Organisation (IDLO), Medica Mondiale, Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), U4, USAID, the United Nations branches as well as legal reports and analyses produced by other organisations or governments.

I have accessed quantitative data through web portals of Afghanistan government ministries such as the Attorney General's Office, the Ministry of Interior, the Ministry of Justice, the Supreme Court of Afghanistan, the Ministry of Education and the Ministry of Women's Affairs. I have also accessed articles and reports produced by the Afghanistan Research and Evaluation Unit (AREU), the Afghanistan Analysts Network (AAN) and the Afghanistan Independent Human Rights Commission (AIHRC). These data are produced mainly in English, but there are Dari-Farsi and Pashto translations.

The other set of online data collected over the past six years are historical publications by Afghanistan governments. There are also publications by Western writers. These publications include the Kabul Times, the *Khalq* (Masses), the *Parcham* (Flag), the *Zhwandūn* (Life), the *Mirman* (Women), the *Kabul*, *Kandahar* and *Adab* (Etiquettes) magazines as well as a trove of 570 old books digitised by New York University. These materials were printed by Afghanistan governments from 1871 to 1913.³² The sources which digitise an exponential number of books and magazines written in English, Dari-Farsi and Pashto are the Internet Archive, the Library of Congress, the World Digital Library, Afghanistan Centre at Kabul University, the Arthur Paul Afghanistan Collection at the University of Nebraska-Omaha, New York University and Washington University.

Online legal literature and legal teaching materials produced by Stanford University, the International Development Law Organisation (IDLO), the Justice Sector Support Program (JSSP), the Max Planck Institute of Comparative Public and International Law and Touch Point were other sources accessed and downloaded. These sources have produced legal guidebooks, training materials and bench guides on all aspects of Afghanistan's laws.

I have sought digital data available in the public domain through general searches for academic theses written on Afghanistan. I have also searched for items on three of the Afghanistan Analysts Network's legal bibliographies printed in 2010, 2013 and 2019. Circa two hundred undergraduate and

³² The BBC, "The fate of rare books from Afghanistan." Last accessed 18 August 2020.

postgraduate theses written on Afghanistan in different universities around the world have been collected. The majority of these theses were written in European or other Western universities.

It has also been necessary to translate and transcribe some data. These are *Mizān* publication's court data from 2009 to 2020 from Dari-Farsi which were translated into English by the author. *Mizān* is the Supreme Court of Afghanistan's publication which provides sample data in its bi-monthly paper. A number of court promulgations, reports and other documents were also translated from Dari-Farsi into English. I have tried to access court data for prosecutions in the cases of Elimination of Violence Against Women (EVAW), but regrettably this type of information is very hard to come by. In two separate reports, the United Nations Assistance Mission in Afghanistan (UNAMA) identifies that government officials are reticent in sharing information.³³ UNAMA states that access to some areas of Afghanistan was impossible due to insecurity and weak systems of record-keeping at all levels in government institutions that contributed to challenges in acquiring accurate information on violence against women cases.³⁴

In order to access data on cases relating women, the author asked two separate researchers based in Kabul to contact the relevant government institutions in order to access such data. They were unable to assist due to restrictions on access to information pertaining to women's cases as well as restrictions due to COVID-19.

³³ UNAMA, "Still a Long Way to Go," iv.

³⁴ UNAMA, "A Way to Go," 11.

2.13 Qualitative Data Collection

Between 25 October 2019 and 02 June 2020, the author interviewed sixteen professionals of Afghanistan origin and collected data in forty semi-structured questionnaires and three technical questionnaires in order to gain further information to explicate issues not addressed by the available quantitative data. The questionnaires and interview questions are shown in Appendices 1-7.

Information on members of certain ethnic and religious groups of Afghanistan is scarce and available research data do not explain how these individuals are treated under different rules, in informal institutions and by the state's legal system. In order to represent the views of all the groups of the Afghanistan population, including different faith groups as well as men and women, the following steps were undertaken.

The author visited several places of worship in London to speak to Afghan Sikhs and Hindus. There are no identified places to find Afghan Jews in Europe or elsewhere. The author emailed three individuals: Irena Vladimirskiy, a historian of Jewish people, Sara Aharon and Esther Frogel, two second-generation Afghan Jews of Afghan parents. Sara is an author and Esther has conducted her doctoral thesis on the experience of second-generation Afghan Jews in the United States of America. They both have interviewed Afghan Jews for their research. Sara kindly passed my information to her contacts and on 24 November 2019, the author received a phone call from Jack Abraham from New York.

Jack is an Afghan Jew who resides in the United States. Jack was born in Afghanistan and received his education in England and Israel. The author carried out Internet searches to find other Afghan Jews for interview with no success. He contacted Christer Angerbjörn in Sweden for Christian contacts. Christer aided this research immensely and printed copies of the research questionnaire and delivered them to two Afghan Christians who filled them in. One Afghan Isma'ili took part in interviews and filled in the research questionnaire. All forty respondents and interviewees involved in this research are from Afghanistan.

A number of individuals who have taken part in my research through filling in my questionnaire have authored numerous academic papers, theses and books on Afghanistan. When choosing respondents for my questionnaires and interviews, I planned to contact Afghan citizens with average and high levels of education. There are a couple of respondents with primary and high school education. One female respondent who has acquired basic Farsi education asked her friends to read my questions to her and then she gave her answers which were recorded by her friends. I take this move as the highest manifestation of this respondent's helpfulness and her eagerness to assist my research.

2.14 The Research Questionnaire

I developed my questions for qualitative data collection after having studied and considered the quantitative data. This enabled me to better formulate my questionnaire shown in Appendix 1. In order to gather comprehensive information for this research, a semi-structured research questionnaire,

technical questionnaires and face-to-face interviews allowed the participants to express their values and experiences in a way significant to them. For instance, question 1 of the research questionnaire, “What do you think about the purpose of the numerous constitutions of Afghanistan?” was used to test the knowledge of the respondents. Question 6 was, “If you were asked to propose ways to improve *Loya Jirga*, what would you say?” This question, and others like this, gave full latitude to the respondents to freely express their thoughts. There were questions for which the respondents were expected to put a tick mark. I do not believe that a Likert style questionnaire with multiple answers would have given me useful information for this research. Upon receipt of the questionnaires, it was noted that the respondents had provided very detailed, useful and often rare first-hand information that could not be found in articles or books.

I am aware that my questionnaire was quite lengthy and some questions may have appeared repetitive to a few of the respondents. This raised criticisms by two respondents. I have taken this criticism into account for future research. Having known, observed and studied my countrymen and women in their personal and professional capacities for twenty-six years, I am aware of the fact that Afghan citizens are keen to be fully heard. I have given the most latitude to the respondents and, to my knowledge, and based on numerous positive feedbacks received, the respondents were respected and their freedom of expression was too. As a result of my experience in this field, I have become well versed in navigating Afghan social and cultural particularities and sensibilities throughout responses during the data collection process.

2.15 The Questionnaire Respondents

I used a purposive sampling approach in selecting the respondents for the research questionnaire. The time and scope of investigation in this research not being limited, my research benefited from the information given by respondents with extensive experience, individuals who have lived through different governments of Afghanistan. Interviews were conducted in places comfortable for the participants. One of the respondents could only answer questions through Facebook Messenger. Although this interview took slightly longer and was completed in a few sessions, it was conducted to the respondent's satisfaction.

The questionnaire respondents were carefully selected to be from medium and high levels of education. This meant that their views, although not from a large number of people, would be representative of the diverse population of Afghanistan. Tape-recording interviews would insult the respondents and the interviewees. I made a verbatim record of the interviews and in some areas, the interviewees wrote their answers to my questions by hand or they typed. When interviews were conducted over the phone, answers were typed and at the end the respondents and interviewees were given the option to review and finalise their answers. One respondent used this method of verification after the completion of the interview over the phone.

Stratification in research relates to ascertaining which category of people or which characteristics are most relevant to the research. John W. Creswell and J. David Creswell describe stratification as specific characteristics of individuals (e.g., gender, females and males, education, etc.) that are

presented in the sample and the sample reflects the true proportion in the population of individuals with certain characteristics.³⁵ For this research, the respondents' and interviewees' age, gender, levels of education, maturity and their personal or professional interactions with different governments formed the stratification descriptors. A respondent or interviewee of very young age could only help with his or her experiences that could be limited to a shorter period of time. A respondent aged seventy or over could offer information relating to several governments of Afghanistan.

The respondents were in the age brackets: 24-35 (18), 41-49 (8), 52-58 (5) and 60-74 (9). The respondents' levels of education were primary school (1), high school (2), undergraduate (15), master's degree (16), doctorate (2), Legal Practice Course (1) and qualified medical doctors (3). By gender they were women (6) and men (34). By religious origin they were Christian (2), Jewish (1), Hindu (2), Sikh (1) and Muslim (34). By ethnic group origin the respondents were Brahminic, Hazāra, Ismaili, Tajik, Sādāt, Uzbek, Pashtūn and Sephardic Jew. The respondents were based in Afghanistan (13), England and mainland Europe (25) and the United States (2). The majority of respondents worked or had worked for several governments of Afghanistan in different capacities and had heard, experienced or studied the themes investigated in this thesis. For more information on the respondents, please refer to Appendices 8-9.

Feedback from a couple of respondents suggested that some of the questions were repetitive. The claim to repetition may not be quite true, as for a question

³⁵ Creswell and Creswell, *Research Design: Qualitative, Quantitative*, 150-51.

such as “Do you agree with *jirga* or with *Shūrā*?” the answer may hardly ever be, “I do agree or I do not agree with *jirga* or *Shūrā* under any circumstances.” For this reason, I planned that the respondents’ answer on *jirga* (Pashtūn tribal assembly) and *Shūrā* (consultation) in family matters and dispute resolution are separated. Upon completion of the questionnaires, it is evident that the questions were designed well.

When analysing the questionnaire information, it was noted that Questions 25 and 26 were confusing for the respondents and for the author at the analysis stage. These were, “Do you believe that Afghan citizens go to *jirga* because it is a better way to receive justice?” and “Do you believe that Afghan citizens go to *Shūrā* because of the same reason?” These two questions limit the respondents’ liberty to say nothing but a “yes,” or “no” and these replies would not show what the intention of the respondent was. This type of research anomaly shall not happen in future research by this author.

Most of the respondents thought the themes in the questionnaire were useful and answering the questions sparked interest for some respondents to study legal and historical issues. A few respondents have expressed their keen interest in getting involved in similar research in the future. A few individuals in Kabul did not have access to electricity, Internet or computers, but despite this limitation, they completed the questionnaires. Two individuals based in Afghanistan thought that one of their colleagues was a better person to complete the questionnaire.

Three individuals completed the questionnaire over the phone where questions were read out to them and they gave their answers. I had planned

to see one of these three respondents in London on 13 March 2020. This meeting had to change due to COVID-19 lockdown. Instead, the questionnaire was filled in over the phone. Seven individuals completed the questionnaire in the author's presence. Questions were asked and their answers were typed. They did not see a need to read back the answers after typing. This helped and expedited information recording with no need for member checks. Despite this, at the end of each interview, each respondent was offered the option to check their answers. All respondents were asked whether they want to be named in this thesis.

For respondents who met the author in person, the question of being named in this research was asked at the very end, giving the full picture of the questions and answers, and to enable the respondents to make informed decisions whether to be named or not. All forty respondents knew they had the choice of remaining anonymous (communicated in the questionnaire's introduction page, verbally and by email). All respondents knew that the information they provided was to be used for my thesis in the United Kingdom. The same information was communicated to the interviewees.

The information provided in the questionnaires offered rich knowledge. Most of the respondents patiently provided detailed answers to the questions. Although the number of respondents was small, their diverse backgrounds and multi-ethnic and multi-faiths origins, as well as their different levels of education means they represented a valid sample of the wider population of Afghanistan.

2.16 Referring to Qualitative Information

In this thesis, the individuals who filled in the research questionnaire will be referred to as “respondents”. Those who were interviewed will be identified as “interviewees” In both areas, where respondents and interviewees have consented to be named, they will be named. A number of themes in the qualitative data will be cited as block quotes and other themes will be cited in numerical forms (i.e., x number of respondents have taken position y or z on an issue).

2.17 The Interviews

For gaps in research where information was vague, rare, incomplete or confusing and needed further investigations, sixteen interviews were conducted with nine individuals and one organisation. All of these individuals also filled in my research questionnaire. For issues relating to the lives of the Hindus, Sikhs and the Jews, unstructured interviews and a separate small questionnaire was used. These were completed by four individuals: one Jewish, one Sikh and two Hindus.

These interviews sought specific information and did not aim to collect general data. The modes of interviews were face-to-face, by telephone and email. Due to the global COVID-19 restrictions, further face-to-face interviews could not be conducted as was planned towards the end of March 2020. All interviewees located in Afghanistan, Europe and the United States of America were very helpful and replied to the author’s texts, emails and calls punctually. Two of the interviewees preferred to remain anonymous.

2.18 Ethical Issues

Being aware of cultural sensitivities, tape-recording the interviews was not appropriate. When interviews are tape-recorded, interviewees may refrain from expressing themselves freely. As a researcher, I had no power over the interviewees or questionnaire respondents. The interviewees and questionnaire respondents based in Afghanistan held Afghan citizenship, and the majority of respondents based in Western countries were citizens of Afghanistan by birth; two were asylum seekers based in Europe, two were recognised refugees in the United Kingdom with leave to remain and the rest held dual citizenship.

The majority of interviewees and questionnaire respondents had lived through several governments of Afghanistan. Except two younger persons, one with primary and another with intermediate education and no formal designations, the rest were higher education students, journalists, civil servants, former diplomats, university lecturers, writers, employees of international organisations or current and former government employees. There is no reason to believe that the interviewees or questionnaire respondents had reasons not to express themselves freely and openly.

2.19 Data Validation

The information obtained qualitatively must be accurately recorded and be the actual work of the respondents. In completing the questionnaires, data accuracy and data validation was considered in all the stages of design, implementation and analysis. In order to help the respondents understand all the questions and themes, there were explanatory comments for some

questions. The questionnaires were produced in three languages: English, Dari-Farsi and Pashto. The respondents had enough time to respond to questions. Two respondents had not initially answered all the questions. They were asked to answer the blank parts, and they did.

Prior to interviews, the interviewees were given plenty of time, written questions and when during the interview, certain issues could not be discussed, this was respected by the author. The individuals selected for interviews were suitable for the themes and subjects of the interviews based on their cultural and religious knowledge, origin, age, education and academic attainment. In order to store the collated information and ensure their safe storage, the author has applied the GDPR rules and complied with the Birkbeck, University of London's ethical research protocol.

2.20 Insider/Outsider and Reflexivity

According to Amani K. Hamdan, reflexivity is researching myself and reflecting on my personal beliefs and values both as a researcher and as a member of the researched group.³⁶ Reflexivity is a source of privilege because it provides the reader with the researcher's unique perspectives on the research endeavour.³⁷ The author of this thesis shares a similar cultural, language and socio-economic background with the interviewees and questionnaire respondents. The author has directly worked with national and international organisations in Afghanistan and in Britain for twenty-six continuous years. He has worked with citizens of Afghanistan on a daily basis

³⁶ Hamdan, "Reflexivity of Discomfort," 378.

³⁷ Hamdan, 378.

and has received first-hand and second-hand accounts in Afghanistan (six years) and the United Kingdom (twenty years). The author's work with the International Committee of the Red Cross (ICRC), Medical Emergency Relief International (MERLIN), Afghanistan Government institutions, British Government institutions and the British Red Cross Society (2004-2021) has given him certain advantages like being able to contact numerous high-profile Afghan citizens in different parts of the world.

The author's pre-existing professional profile made it easy for him to receive the full trust of the participants. Employing reflexivity throughout the research process entails that the researcher is paying close attention to his or her involvement in the research.³⁸ The author of this thesis has gained extra advantages during his work with Afghans and Westerners (European and British). This has shaped his in-depth understanding of Afghans and Westerners, their values and prejudices as well as their biases. In the production of this research, he has insider/outsider knowledge as an Afghan-born person having naturalised as a British citizen.

2.21 The Research Dilemma

For studying Afghanistan, there may be more than one or two research dilemmas. Those relevant to this thesis are the scarcity of certain types of data – in some cases data that is perceived to be quite sensitive in Afghanistan. These are data about women. Furthermore, there is scarcity or the absence of consistent and reliable government data. Another dilemma is the lack of accurate population estimates or census data. A full census head count has

³⁸ Hamdan, 379.

never taken place in Afghanistan and accurate court statistics are rare. In many areas, the government-issued data may not be quite accurate.

In Afghanistan, population estimates may bulge from a few thousands, to hundreds of thousands and even to millions without a logical explanation. These depend on who is making estimates and for what purposes they are used. For instance, for electoral jerrymandering, a village of ten thousand inhabitants may be reported to hold a few hundred thousand people, and likewise, a city whose population is less likely to vote for a certain leader may have two million people counted as one million. The author takes a pragmatic approach in dealing with this type of research dilemma and uses more than common-sense and analogical deductions. In the context of post-conflict developmental states like Afghanistan, one has to take into consideration that there may be inconsistencies and/or distortions in publicly accessible data.

2.22 Limitations to the Research

One of the major limitations to this research was accessing detailed court data or court promulgations. Court data produced by the government of Afghanistan and international sources are patchy and fragmented. In order to refer to court data, the author had to refer to hundreds of separate documents. The Supreme Court of Afghanistan has only produced two sets of court promulgations over the past twenty years that are available in the public domain. Other forms of available court data are issued periodically, quarterly and annually as well as bi-monthly in *Mizān* publications. Bulletin is written in the English language where the Supreme Court of Afghanistan records a selective assortment of court data. The data recorded on these publications

are anonymised and, in most cases, it is difficult to follow a pattern for cases for men and women or children.

A further limitation of this research was inadequate quantitative information on the informal legal culture of the Turkic groups of Afghanistan (Kazakh, Kirghiz, Turkmen and Uzbek). In order fill in this research gap, two individuals with the right knowledge provided useful information.

There has been scarcity of research materials on Hinduism, Zoroastrianism and the cult of Zhun. However, the researcher has used all the available extant literature on this subject matter.

2.23 Conclusion

In this chapter, I have described the introductory information for this thesis, and elaborated on the methodology, research methods and perspectives that will be followed throughout.

On a broad subject such as the legal culture and legal history of Afghanistan, the author uses both quantitative and qualitative data through the mixed methods explanatory design in order to merge and triangulate both sets of data. The next section sets out the review of the relevant literature.

CHAPTER 3: LITERATURE REVIEW

3 Introduction

The literature review has been described as the foundation and inspiration for substantial and useful research.³⁹ According to Thomas and Hodge, the purpose of a literature review is three-fold. Firstly, it provides an examination of existing pieces of research; thus it is the starting point for identifying the information and terminology relevant to the research undertaken and for becoming familiar with the subject area.⁴⁰ Secondly, it allows the author to critically evaluate the quality of existing scholarly writings and to identify best research techniques and practices.⁴¹ Finally, the literature review aims to highlight different types of scholarship and their methodologies, and critically evaluate findings on different themes relevant to the issues being studied.⁴²

Creswell & Creswell state that a literature map enables a person to understand how the proposed study adds to, extends, or replicates research already completed.⁴³ It is a visual summary of the research that has been conducted by others and is typically represented in a figure.⁴⁴ The following literature map details the quantitative data accessed, read and cited, as well as some research that were not cited in this thesis.

³⁹ Boote and Beile, "Scholars before Researchers," 3.

⁴⁰ Thomas and Hodges, "Doing a Literature Review," 105.

⁴¹ Thomas and Hodges, 105.

⁴² Thomas and Hodges, 105.

⁴³ Creswell and Creswell, *Research Design: Quantitative, Qualitative*, 34.

⁴⁴ Creswell and Creswell, 34.

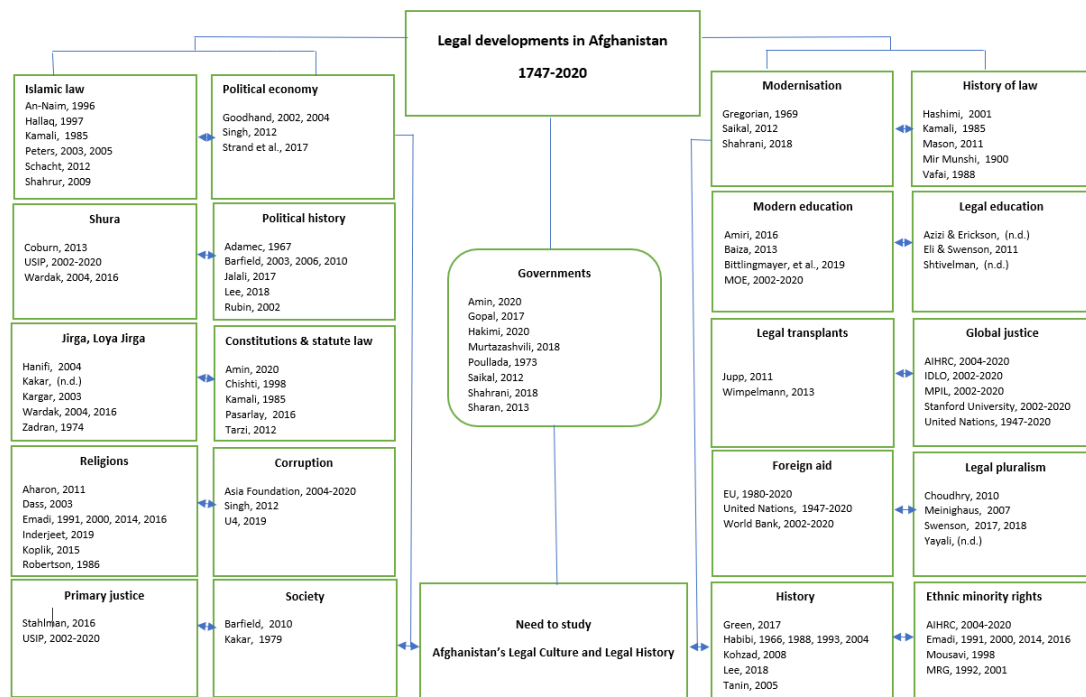


Figure 3: Thesis Literature Map.

3.1 Definitions of Legal Culture

Describing the legal culture, a theme with a number of general definitions would be indispensable here. Legal culture is not the combination of *legal* and *culture*, but this compound term conveys multiple meanings in different societies and in different legal systems. Legal sociologist, David Nelkin, describes legal culture in its general sense as relatively stable patterns of legally oriented social behaviour and attitudes, and argues that identifying elements of legal culture range from facts about institutions such as the number and role of lawyers or the ways judges are appointed and controlled, to various forms of behaviour in litigations, issues related to prison rates, and the nebulous aspect of ideas, values, aspirations and mentalities.⁴⁵ He further describes legal culture as *what we are* not *what we do*.⁴⁶

⁴⁵ Nelkin, “Concept of Legal Culture,” 1.

⁴⁶ Nelkin, 1.

Comparative legal scholar and lawyer, Ralf Michaels, describes legal culture as multiple different ideas, not always sufficiently separated, and relies on the description of Eugen Ehrlich calling legal culture, the *living law*.⁴⁷ Roscoe Pounds regards legal culture as *law in action*.⁴⁸ Friedrich Carl von Savigny posits that law reflects the culture of a given society, where reception in another culture is not possible as law is a product of that society's particular attributes such as language, family, religion and so on.⁴⁹ Werner Gephart discusses law as *recht als kultur*, meaning law as culture.⁵⁰

Csaba Varga claims that law is a living culture with specific rules and by replacing some of them we can only change it superficially.⁵¹ Varga finds legal culture to be a phenomenon shaped through cultural-historical and institutional development.⁵² Ditlev Tamm, Professor of History of Law and Comparative Law at the University of Copenhagen, refers to the ideas and behaviours of those within the law – like lawyers, judges and police officers, as the *internal legal culture* and the perceptions of law from the broader society, like what the people expect of the law and whether they trust legal institutions as the *external legal culture*.⁵³ Susan Silbey categorises legal culture and cultures of legality by examining societal interactions with the

⁴⁷ Michaels, "Legal Culture," 1-7.

⁴⁸ Michaels, 1-7.

⁴⁹ Acar, "Concept of Legal Culture," 145.

⁵⁰ Gephart, "Law as Culture," 1-43.

⁵¹ Varga, *Comparative Legal Cultures*, 21, 27.

⁵² Varga, 21, 27.

⁵³ Tamm, "The Normative Complex," last viewed on 22 August 2020.

law in three stages:⁵⁴ (1) being before the law,⁵⁵ (2) being with the law⁵⁶ and (3) being *up against* the law.⁵⁷ These definitions, particularly those of Susan Selby due to their relevance to Afghanistan's conditions, where law can more easily be circumvented, form the backbone of normative understanding of legal culture.

3.2 Legal Literature

Within the existing scholarship in the academic circles, a few books offer an in-depth analysis of Afghanistan's laws. By date order, the first one was written by Sultan Mohammad Khan, the secretary of Abdur Rahman Khan (r. 1880-1901), *The Constitutions and Laws of Afghanistan*, published in 1900. Khan's book was written during the genesis of state law under Abdur Rahman Khan's supervision. The book describes the legal procedures of the 1800s. The second book was written by Mohammad Hashim Kamali, *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary* in 1985. This book discusses different types of enacted laws from up to the 1980s. Kamali identifies tribalism as a hindrance to progress and legal reforms, but does not elaborate on this subject.

The third book (monograph) held by the Library of Congress in the United States of America was written by Gholam H. Vafai, *Afghanistan: A Country*

⁵⁴ Silbey, "Legal Culture and Culture of Legality." last viewed on 22 August 2020.

⁵⁵ Some people describe the law as fair and see it as a disinterested set of rules relevant to other people. Other people, for instance, may say, "Well, you dropped this banana on the floor; someone will fall and fracture his or her limbs." There is a general good for the law.

⁵⁶ People are self-interested and pursue their rights. People talk about lawyers, judges, courts and accessibility of law and justice.

⁵⁷ People experience themselves without alternatives. They do not have power and look for ways around the law. When opportunities arise, they play the law but refrain from engaging in criminal behaviour. They find ways to get things done.

Law Study, in 1988. This monograph presents an account of laws in the 1980s with a focus on historical and political developments since the 1880s, governments and legal system, criminal law, criminal procedure, fair trial procedures, constitutional guarantees, domestic relations and the law of contract. The fourth book has been authored by Nighat Mehroze Chishti, *Constitutional Development in Afghanistan*, which was printed in Pakistan in 1998. Chishti's book is based on articles written by the Pakistani writer, Dr Anwar Khan, the American archaeologist, anthropologist and scholar, Louis Dupree, and the Scottish statesman and historian, Mountstuart Elphinstone. These scholars and politician were not legal experts or legal historians. In her book, Chishti downplays Afghanistan's constitutions and argues that all constitutions of Afghanistan failed to serve their intended purpose. Chishti's work is not based on cases, examples, observations or primary or secondary legal materials.

The fifth book on the rule of law in Afghanistan was edited by Whit Mason in 2011, titled, *The Rule of Law in Afghanistan: Missing in Inaction*. This book discusses Afghanistan's legal developments since the beginning of the Western military intervention in 2001. A report completed by the Afghanistan Civil Society Forum Organisation (ASCFO) in 2011 titled "A First Step on a Long Journey: How People Define Violence and Justice in Afghanistan 1958-2008" investigates violence and justice over half a century. This report relies on qualitative data collected through interviews and questionnaires.

Shoaib Timory wrote an academic article in 2019 titled "Judicial Review and Constitutional Interpretation in Afghanistan: A Case of Inconsistency"

Timory investigates judicial review as a mechanism that protects the supremacy of the constitution.⁵⁸ He concludes that while in Afghanistan there is some clarity on the subject of constitutional review and the role of the Supreme Court, constitutional interpretation is more controversial.⁵⁹

The sixth and most recent book on the rule of law in Afghanistan has been authored by Abdul Salim Amin in 2020, titled, *Judicial Independence in Afghanistan*. Amin focuses on the lack of judicial independence in Afghanistan and show cases how the judiciary is subservient to the executive branch. Amin separates personal independence of the judges from institutional and collective independence of the judicial authorities. Timory and Amin investigate important constitutional issues in regards to judicial independence, judicial review and highlight burgeoning problems of interferences of the executive branch on judicial institutions.

There are a number of useful historical books which offer insights into Afghanistan's history of the distant past as well as the more recent period. Ali Ahmad Kohzad a renowned Afghan historian is the first writer whose work describes pre-Islamic Afghanistan with great detail. His book *AFGHANISTAN DAR PARTAW TARIKH* [Afghanistan in the Light of History] was printed in Kabul in 2008. Abdul Hai Habibi, another historian from Afghanistan, has authored *The History of Afghanistan after Islam*. Habibi describes the pre-Islamic and Islamic eras in Afghanistan. There are other historical accounts on Afghanistan written by the political leader, Abdur

⁵⁸ Timory, "Judicial Review and Constitutional Interpretation in Afghanistan," 223.

⁵⁹ Timory, 224.

Rahman Khan (r. 1880-1901), and by two Afghan historians, Mir Mohammad Ghūbār and Faiz Mohammad Kāteb Hazāra.

Nile Green, an American writer edited *Afghanistan's Islam: From Conversion to the Taliban* in 2017, a book that provides insights into the history of Islam in Afghanistan as well as the socio-legal developments under different dynasties which emerged and disappeared in Afghanistan. Green identifies the dearth of historical investigations in regard to Afghanistan as follows:

Afghanistan's Islam has attracted little sustained study. Beyond a few monographs devoted to a particular movement or movements (predominantly *mujāhedīn* and Taliban), there exists no survey of the developmental trajectories of Afghan religiosity across the course of history. The scholarship becomes particularly patchy for the period before the Soviet invasion of 1979, making it difficult to position the fundamentalist movements from the 1980s onward in relation to earlier patterns of religious activity, whether local or transnational.⁶⁰

Jonathan L. Lee has published a historical book that investigates 850 years of Afghanistan's history from Genghis Khan's conquests to the twenty-first century. Lee's book, titled *Afghanistan: A History from 1260 to the Present*, was printed in 2018. This book contains rich historical information. The historical accounts described here do not discuss Afghanistan's legal history or legal culture. However, in these books there are historical events that mirror Afghanistan's people, society, government and rulers from past to present.

⁶⁰ Green, *Afghanistan's Islam*, xiii.

There are a large number of ethnographic, historical as well as legal books written in Dari-Farsi and Pashto languages on all aspects of Islamic law and Afghanistan's customary law and formal laws. Most of these books have been printed from the 1990s to the present day.

There are large number of reports, reviews, commentaries, articles, academic journals, books and book chapters that discuss Afghanistan's society, its formal and informal institutions and governments, as well as its pluralistic legal traditions. Approximately ninety percent of these literature have been produced between 2001 and 2021. At the start of this thesis in 2014, there were fewer resources to work on. However, within just over six years, hundreds of journal articles, books and book chapters have emerged and most are in print, can be found in bookshops and university libraries or can be accessed in the public domain. Most of the said literature deals with Afghanistan's affairs, including its law. There is also a growing number of dissertations at graduate and postgraduate levels completed by students from different universities around the world. This thesis benefits from the findings of several theses written on Afghanistan.

3.3 Islamic Legal Developments in Afghanistan

In his doctoral thesis, "Rule of Law Experts in Afghanistan: A Socio-Legal History of the First Afghan Constitution and the Indo-Ottoman Nexus in Kabul, 1860-1923," completed at the University of California, Berkeley in 2013, Faiz Ahmed uses archival research accessed in Turkey, India, Afghanistan, Pakistan, England and the United States. The bulk of Ahmed's research is drawn from archival data. Ahmed argues that legal developments

in Islamic societies developed due to the attempts of Muslim rulers and the *ulemā* (religious authority), who in the context of Afghanistan instigated an Indo-Afghan and Kabul Nexus in order to write Afghanistan's first constitution in 1923.

Ahmed's thesis discounts the involvement of Western legal codes and constitutions that built the backbone of the Afghan, Iranian, Indian and Turkish constitutions as well as other laws. He downplays the important roles of the French and British legalities. This makes Ahmed's doctoral thesis a document based on *ex post facto* historiography. Muslim legalists, leaders and academics initially based, and to date continue to base, their legal reforms and modernisation on Western models. Ahmed further claims that the *fāṭawā-ye ālamgiri* (Alamgiri *Fatwās*) of the Mughal Empire (1675) and the Ottoman *Mujallah* (1869-1876) were codified Islamic legal texts, and pre-dated the era of the worldwide legal progression of the nineteenth to the twentieth centuries. Historical evidence negate Ahmed's arguments, as in all Islamic countries, constitutional models, criminal, family and civil codes were transplanted from Western models.

3.4 Constitutions

Shamshad Pasaraly completed his doctoral thesis, "Making the 2004 Constitution: A History and Analysis Through the Lens of Coordination and Deferral Theory," at the University of Washington in 2016. Pasarlay uses primary and secondary literature for the quantitative part of his research. The primary quantitative data are records of the Constitutional Committee that drafted Constitution 2004 for Afghanistan. As for the qualitative data,

Pasarlay interviewed thirty-five members of the Constitutional Review Committee and two members from the Constitutional Drafting Commission who were not part of the Constitutional Review Committee.

Pasarlay assesses the successes and failures of Afghanistan's constitutions using coordination theory and deferral theory. Although Pasarlay's research focuses on Constitution 2004, he also compares previous constitutions of Afghanistan using the constitutional theories: coordination and deferral. Pasarlay's thesis is useful and enriches my research in assessing the constitutions of Afghanistan. There is a gap in Pasaraly's research. He does not mention the governments' inaction on the constitutional deferrals or assess the impact of such inactions. This issue shall be addressed in this thesis.

Zoe Bernadette Sherman wrote her thesis "Afghanistan's Constitutions: A comparative study and their implications for Afghan democratic development" at the Naval Postgraduate School in Monterey, California, in 2006. In her study, Sherman brings together history, cultural anthropology, political science and constitutional law theories. She focuses on past and recent academic literature that identifies the fragmentation of Afghanistan's society and investigates the tribal life of a substantial proportion of its population. Sherman states that *jirga* (assembly of elders) has been incorporated into the national political system of Afghanistan. Sherman's assessment of Afghanistan's constitutions deal with issues such as ethnicity, tribes, fragmentation of society and legal and constitutional elements.

3.5 Primary Justice

Friedrike Stahlman edited “Exploring Primary Justice in Afghanistan” a report prepared for the Universitet Leiden and Cordaid, in 2016. Stahlman drew his research from eight case studies in the Behsud district of Nangarhar Province and the Istalif district of Kabul Province. The report relies on qualitative data and investigates land dispute claims in which claimants had to explore a number of customary law mechanisms as well as formal institutions like the *hoqūq* department and the government courts.

Stahlman asserts that women who actually addressed state institutions, whether it was the courts or the police, faced a set of risks. Even though their chances to gain access to rights denied to them under customary law (such as that of inheritance) should be better protected by state institutions, though the question remains if women actually stand a chance to procure them.⁶¹ The many accounts of verbal and physical abuse by members of the police and justice personnel show that this environment is easily hostile to women and their interests.⁶²

3.6 Informal Justice

Ali Wardak’s famous essay, “Building a Post-War Justice System in Afghanistan,” written in 2004 offers the overarching hypothesis that the traditional customary laws of Afghanistan have not received adequate importance in the process of rebuilding or fixing Afghanistan’s judiciary.⁶³ Wardak argues that in order to empower the rule of law in Afghanistan, there must be a bottom-up approach whereby statutory and codified laws form the

⁶¹ Stahlman, “Primary Justice in Afghanistan,” 79.

⁶² Stahlman, 79.

⁶³ Wardak, “Building a Post-War Justice,” 319-41.

guiding principles of a quasi-traditional and quasi-official court system. He concludes that the marriage of the two is likely to serve the best interests of justice in Afghanistan. Wardak's research fails to include the problematic self-rule at village and district level, which erodes the advancements of state legal developments.

In a report produced for Leiden University in 2016 titled "A Decade and Half of Rebuilding Afghanistan's Justice System: An Overview", Wardak argues that customary laws and *Pashtūnwāli* code are quite important for Afghanistan. His views on justice and law in the context of Afghanistan are in favour of tribal laws.⁶⁴ Taking into account that my research does not support customary and tribal laws due to contradictory standards and arbitrariness of outcomes, Wardak's work does not help my research. Stahlman's research demonstrates that customary law does not serve justice – a position supported in this thesis.

3.7 Legal Pluralism

Legal Pluralism can be understood as the application of different legal sources to identical cases.⁶⁵ Sally Engle Merry classifies legal pluralism that stands at the intersections of indigenous and European law as *classic legal pluralism*, and legal pluralism in advanced industrial countries of Europe and the United States of America as *new legal pluralism*.⁶⁶ This classification makes it easier for the researchers of legal pluralism to assess this concept in less developed

⁶⁴ Wardak, "A Decade and a Half," 1-26.

⁶⁵ Vanderlinden, "Le Pluralisme Juridique," 19-56.

⁶⁶ Merry, "Legal Pluralism" 872.

countries with more ease. In the context of Afghanistan, the applicable archetype of classic legal pluralism.

Mustafa Yayali (undated) has completed his master's thesis "Beyond the Law of the Nation-State: An Inquiry into the Theory of Legal Pluralism and Societal Law" at the LUISS Guido Carli University. He provides a detailed theoretical account of legal pluralism and uses Afghanistan as a case study. Using Bronislaw Malinowski's theory of *deep legal pluralism*, Yayali describes norms, logic, values, individual, community and the formation of legal pluralistic cultures. He analyses legal pluralism's conceptual disputes between the two prominent scholars of this subject, John Griffith and Brian Tamanaha. Yayali tests his research questions against numerous Western political theories.

Yayali highlights that relations between the legal and the social in legal pluralism are highly ambiguous and almost paradoxical: separate but intertwined, autonomous but interdependent, closed but open.⁶⁷ Yayali argues that this so-called doubled-faced character is just part and parcel of the underdevelopment of the concept of legal pluralism and an exemplification of an *anomaly* of another concept, namely that of modern state law.⁶⁸ He identifies Afghanistan's troubled mosaic of legal pluralism and suggests decentralisation and social-federalism as a solution for Afghanistan.⁶⁹ Yayali draws a grim picture of constitutions of Afghanistan, claiming all constitutions of Afghanistan failed, as they were drawn on the pre-modern

⁶⁷ Yayali, "Legal Pluralism and Societal Law," 15.

⁶⁸ Yayali, 16.

⁶⁹ Yayali, 102-5.

nature of the country by weak governments which did not promote a constitutional culture. Yayali pays cursory attention to the constitutions of Afghanistan, failing to note that some constitutional elements worked while some others did not.

The International Council on Human Rights Policy published a report in 2009 on legal pluralism titled “When Legal Worlds Overlap: Human Rights, and Non-State Law.” This report describes legal orders and legal plurality in different countries, under various cultural, ethnic and tribal settings. The report is indispensable for assessing legal pluralism in any society.

Geoffrey J. Swenson completed his DPhil thesis “Addressing Crises of Order: Judicial State-building in the Wake of Conflict” at Pembroke College in 2015. His thesis provides theoretical information on legal pluralism under various settings. The focus of the thesis is Afghanistan and Timor-Leste. Swenson maintains that his research “aims to offer an understanding of legal pluralism’s implications for post-conflict state-building and the influence of policymakers’ responses, and domestic and international judicial state-building efforts in Afghanistan and Timor-Leste, which serve as case studies.”⁷⁰ He uses case study as his methodology, in which the questions “How?” and “Why?” regarding a contemporary set of events can be answered.

Swenson adopts John Gerring’s definition of an in-depth study of a single unit and process tracing technique which requires extensive data. He uses a mix

⁷⁰ Swenson, “Addressing Crises of Order,” 24.

of primary and secondary sources relating to state-building and legal pluralism in general, and efforts made in Afghanistan in particular. The completion of the thesis involved interviewing key stakeholders related to post-conflict judicial state-building and legal pluralism in Kabul in January and February 2014. Swenson's research is a comprehensive piece of academic literature on Afghanistan's legal pluralism and judicial state-building. It concludes that legal pluralism has not been successful in Afghanistan, and a number of failures have led to the transition of the *competitive* legal pluralism archetype into *combative*, rather than *cooperative*. Swenson's findings on legal pluralism in Afghanistan will strengthen this research.

3.8 Legal Transplants

Alan Watson describes legal transplants as the moving of a rule or a system of law from one country to another, or from one people to another.⁷¹ The first doctoral thesis written on legal transplants in Afghanistan was completed by John Jupp, titled "Legal transplants: Appropriate tools for the reform of Afghanistan's criminal law framework? An evaluation of the Interim Criminal Procedure Code 2004 and the Counter Narcotics Law" at the University of Sussex in 2011. Jupp's research benefits this thesis on legal transplants. However, the author shall assess legal transplants over a longer period of time.

⁷¹ Watson, *Legal Transplants*, 21.

3.9 Law in Action

Antonio De Lauri, a cultural anthropologist and an academic, has observed Afghan judges during court sessions (trials) and has interviewed legal professionals in Kabul. He has produced several papers, two famous ones being “Legal Reconstruction in Afghanistan’s rule of law, Injustice, and Judicial Mediation,” and “Law in Afghanistan: A Critique of Post-2001 Reconstruction.” De Lauri assesses legal behaviour in formal adjudications and informal mediations through the lens of an Afghan judge. He voices some degree of criticism for certain aspects of foreign-led rule of law projects for Afghanistan. De Lauri observes Afghanistan’s state of legal affairs from a judge’s perspective to explore why judges use mediation, arbitration and peace-making between litigants rather than applying abstract laws to put criminals behind bars and compensate the victims.

In 2018, Siavash Rahbari, coordinator at the International Development Law Organisation (IDLO) in Afghanistan, wrote that armed conflict and corruption are fundamental challenges to the rule of law.⁷² This thesis agrees with this part of Rahbari’s findings. However, his research overlooks the deep-rooted problems of law and legal institutions of Afghanistan by not addressing challenges such as growing religious radicalisation in the state education system; the existence of traditional political mechanisms such as *jirga*, *Shūrā* and *Loya Jirga* and the incoherence of legal pluralism in Afghanistan.

⁷² Rahbari, “From Normative Pluralism,” 289-290.

Rahbari justifies serious challenges of the constitutionally mandated relationship between state law, international obligations, Islamic principles and customary norms as a product of the bifurcated legal education system of *law* and *Shariá* tracks⁷³ and asserts that courts have become more likely to use the law and are more pragmatic and organised.⁷⁴ Rahbari further identifies that Afghanistan’s fractured plural legal system shows some signs of cohesion and coherence⁷⁵ and that the parliament of Afghanistan cannot fulfil its constitutional mandate leaving the legislative prerogative of law-making to the presidents of Afghanistan.⁷⁶ These are Rahbari’s broad statements which cannot be proven by the available evidence on Afghanistan. Rahbari’s research fails to describe the institutional problems, limitations to women’s rights and their access to justice; it does not tackle virginity testing or the abuse of law for political purposes, the selective adjudication of corruption cases, and the unfounded accusations of apostasy and blasphemy. This thesis notes the progress in the context of law, judiciary, judgeship and the dispensation of justice as well as in institution building, but does not agree with Rahbari’s broad and unjustified conclusions.

3.10 Education

Fayez Amiri wrote a master’s thesis titled “Curriculum Matters: An Analysis of Primary Schools’ National Curriculum in Afghanistan Post 9/11” completed at the Lehigh University in 2016. Amiri studies nine text books from grades one, two and three of the primary school curriculum of

⁷³ Rahbari, 290.

⁷⁴ Rahbari, 290.

⁷⁵ Rahbari, 289.

⁷⁶ Rahbari, 292.

Afghanistan. The subjects he assesses are Dari (language), maths and life skills. The schoolbooks under study were published between 2011 and 2012. Using critical discourse analysis theory, Amiri looks into Afghanistan's undertakings in delivering primary education to its citizens. The main focus of his study includes how the new curriculum and textbooks tackle the teaching of tradition, religion, moral values, and gender issues. Amiri's study aims to understand how political ideas are contemplated in primary school textbooks.

The findings of his study show that in primary school books representation of women generally reflect patriarchal and religious traditions as well as stereotypes.⁷⁷ Women are portrayed as passive and silent, while men are actively involved in various important activities.⁷⁸ Amiri discusses overt and covert messages delivered by the curriculum. He elaborates that covertly, the curriculum aims for children to be raised in the Islamic faith and the absence of lessons on other religions means that none of the children realise that other religions are practised in the world.⁷⁹ Amiri concludes that a range of religious and political indoctrinations, the appeal to nationalism and excessive focus on moral teachings lead to exclusivity, repression, conflict, unequal gender portrayals and lastly, overlooking democracy.⁸⁰

Rohullah Azizi and Charles A. Erickson wrote an article in 2015 titled "Legal Education Reform in Afghanistan." This joint study investigates legal education at the law schools and *Shari'a* schools of public universities in

⁷⁷ Amiri, "Curriculum Matters: An Analysis," 79.

⁷⁸ Amiri, 59.

⁷⁹ Amiri, 61.

Afghanistan. This was a qualitative study using discussions with informal focus groups of academics and students through interviewing educators and members of the legal community as well as using quantitative data from organisations which support legal education in Afghanistan. The researchers investigate the duality of the faculty of law and the faculty of *Shari'a*, which produce inconsistent outcomes. They highlight the lack of coordination of legal education between the Ministry of Higher Education, judicial institutions, the Afghanistan Independent Bar Association (AIBA), law schools and *Shari'a* schools.

3.11 Society and Government

Senzil Nawid completed her doctoral thesis “Aman-Allah and the Afghan ‘Ulama’: Reaction to Reforms, 1919-29” at the University of Arizona in 1987. For completion of her thesis, Nawid used primary sources, personal interviews and official publications by the Afghanistan government, periodicals, newspapers, reports on parliamentary debates, British and Afghan archival materials and data supplied by Afghan and Western historians. Nawid’s thesis is important to this research in many ways. It is the first comprehensive doctoral thesis that pays special attention to the *ulemā*’s role in society and government from 1747 until the thesis’s cut-off year: 1929.

Although for the periods 1919 to 1929 and later years there are several books like those of Leon Poullada, *Reform and Rebellion in Afghanistan, 1919-1929* (1973); Tally Stewart Rhea, *Fire in Afghanistan, 1914-1929* (2000); Vartan Gregorian, *The Emergence of Modern Afghanistan* (1969); Amin Saikal, *Modern Afghanistan: A History of Struggle and Survival* (2012); and

Mohammad Nazif Shahrani, *Modern Afghanistan: The impact of 40 years of war* (2018), these books do not adequately investigate the *ulemā's* role in society and politics in the preceding decades. Nawid's thesis is helpful in assessing the state-*ulemā* nexus at a time when political leaders attempted to institutionalise justice that was the *ulemā's* domain.

In his book *Afghanistan: A Cultural and Political History* published in 2010, Thomas Jefferson Barfield offers anthropological insights into Afghanistan's ethnic groups, society and its kinship-based political system. There are invaluable sociological and anthropological insights in Barfield's book and research articles on Afghanistan.

Timur Sharan completed a doctoral thesis titled "The Network Politics of International Statebuilding: Intervention and Statehood in Post-2001 Afghanistan" at the University of Exeter in 2013. Sharan employs ethnography, including participatory observation and in-depth interviews. His fieldwork was a mix of covert and overt ethnographic studies. Observations in the Lower House of Parliament for candidate campaign headquarters during the 2009 presidential election involved covert fieldwork. Sharan's research provides good insights into understanding Afghanistan's history of statehood and how *networked politics* in Afghanistan affect the creation of a popular and representative government.

Mohammad Attar Abkenār completed his doctoral thesis titled "Resistance to the Government in Afghanistan's Modern History: A Case Study Approach" at the Università degli Studi di Ferrara in Italy in 2015. Abkenār uses methodical case studies of two governments of Afghanistan. He scrutinizes

historical contexts of two selected cases: the conceptual model for state-making and reform-making. Abkenār investigates the semi-totalitarian regime of King Amanullah Khan (r. 1919-1929) and the People's Democratic Party of Afghanistan's government under the Soviet hegemony (1978-1979). His rationale for selecting these two different regimes is for their differences – spanning a monarchy and a period of democratic rule.

Barnet Rubin, an American political analyst, academic, researcher and expatriate legal expert involved in the drafting of Constitution 2004, authored *The Fragmentation of Afghanistan* in 2002. This book provides a vivid account of Afghanistan's political events in recent decades. Rubin discusses the political implications for Afghanistan, leading to various coups, and the causes of internally and externally driven conflicts in Afghanistan.

3.12 War, Insurgency and Para-State Institutions

Rebecca Young Greven completed her doctoral thesis “An Analysis of State Building: The Relationship between Pashtun ‘Para-State’ Institutions and Political Instability in Afghanistan” at the University of South Florida in 2014. In her research, Greven describes the relationship between para-state institutions (armed networks or institutions which challenge the state) and political instability. She undertook to investigate the lacunae between the Afghan state and its population. Greven draws her research on quantitative data for state-building and, as methodology she uses the case-study of para-state groups during the communist regime from 1979 to 1989 and the Taliban regime from 1994 to 2001.

Danny Singh completed a thesis for the degree of Master of Philosophy “An Investigation of Corruption and Clientelism in Afghanistan Hindering Law Enforcement: With a Specific Case Study in the Afghan National Police” at the University of York in 2012. Singh conducted field visits to Kabul and Bamiyan in May and June 2010 and, using semi-structured interviews and a focus group as well as a snowball-sampling network. He interviewed seventy individuals – mainly elites in the security and justice sector. Singh’s main focus is the study of corruption as one of the most egregious problems of failing states, in the context of Afghanistan’s government. This dissertation, as well as Singh’s article “Explaining varieties of corruption in the Afghan Justice Sector,” will inform the author’s understanding of corruption and political economy in Afghanistan.

In many ways, Greven’s, Sharan’s and Singh’s doctoral theses offer useful scholarly insight on different aspects of society, state and political system, and illustrate the less-known long *durée* (length of time) underlying causes of state fragility and state collapse in Afghanistan. These are indispensable scholarly works highlighting state fragility from international relations and development perspectives. This thesis does not view the donors’ assistance and INGOs help in isolation from the bigger picture of legal developments in Afghanistan. The distribution of aid and the intellectual support (training, logistics, infrastructure) offered by the international community complements the instituting of legal frameworks, including the formation of elements of *legal culture* in Afghanistan. This view is also supported by the forty questionnaire respondents, all of whom stated that without international

support, Afghanistan's government would not have been able to develop its legal institutions.

3.13 Ethnographic Research on Tribal Life

“The Socioeconomic and Legal-Political Processes in a Pashtūn Village, South Eastern Afghanistan” is a DPhil thesis completed by Alef Shah Zadrān in 1974. In order to complete his thesis, Zadrān conducted formal and informal interviews and collected genealogical data. He used Arabic, English, Persian and Pashto sources relevant to his study. The study used traditional ethnography that presented details of kinship, descent, marriage and nomenclature systems of the people of Almara village, as well as describing the technology, economic and market system, and their system of ideology and values.

Zadrān uses structural-functional analysis and case study method. His work is an extensive study of Pashtūns' life in the 1970s. It details *Pashtūnwāli* norms and customs being practised in a Pashtūn-populated village. Numerous academics, anthropologists, writers and researchers quote Zadrān's work. Taken that developmental work of the past governments of Afghanistan mainly focused on the urban centres, and rural areas were neglected, the cases cited by Zadrān still hold relevance to Afghanistan in 2021, as modernisation and development have not left a noticeable imprint on the rural parts of Afghanistan.

3.14 Literature on non-Islamic Religious Monitories

The search at the British Library for books on the religions of Afghanistan was not fruitful. There were a couple of titles written in the Hebrew language

which I could not read or use. There are, however, two useful books on the life of Jewish Afghans. *From Kabul to Queens: The Jews of Afghanistan and their move to the United States* written by Sara Aharon in 2011. The second book, *A Political and Economic History of the Jews of Afghanistan*, was authored by Sara Koplik in 2015. These books provide the everyday life conditions of Afghanistan's Jewish population from before the two world wars until their flight to Europe, Israel and the United States in the 1950s and later years. There is a book in Farsi which dedicates a chapter to the Jews of Afghanistan, written by Sayed Tayeb Jawad, the ambassador of the Islamic Republic of Afghanistan in Russia. The book is titled *Be the Provider of Relief, Not an Inquisitor of Belief*, printed in 2016. Jawad describes the everyday struggles of the Jews of Afghanistan and identifies research limitations in historical literature on Afghanistan's Jewish people.

Ester Frogel from Afghan Jewish parents has examined the acculturation experiences of Afghan Jewish immigrants living in the United States. In her PhD thesis titled "Afghan Jews and their children: In a qualitative study exploring the lived experiences and psychological impact of acculturation on first and second-generation traditional Afghan Jewish immigrants" completed at the Northeastern University in Boston, Massachusetts in May 2015, Frogel uses qualitative research, adopting a phenomenological approach to examine the experiences of six male and female first-generation, and six male and female second-generation Afghan Jewish immigrants residing in the United States of America. Frogel uses semi-structured interviews. The research method model to complete her psychology thesis was thematic analysis, a qualitative research method suited for identifying, analysing, and reporting

patterns within data. Frogel's thesis will empower mine in the section relevant to the lives of the Afghan Jews.

To this present day, there have only been two books written on Afghanistan's Hindus and Sikhs. The first one, in Farsi, was written by the Germany-based Ichawar Dass: *We the old dwellers of this land*, in 2003. The second book was written by Inderjeet Singh: *Afghan Hindus and Sikhs: History of a Thousand Years*, in 2019. Dass and Singh highlight the Hindus' bravery in defending Afghanistan against the Arab invaders and focus on their historical roots that go back to before the Islamisation of Afghanistan in the ninth century. The most recent ethnographic research on the lives of the Hindus and Sikhs of Afghanistan is an undergraduate dissertation by Nadia Salihi, completed in Farsi language at Shaheed Professor Rabbani Educational University in Kabul in 2019. This dissertation is titled "Hindus and Sikhs People's Background." Salihi's thesis is drawn from quantitative data.

Hafizullah Emadi has written two research papers describing the plight of Sikh and Hindu women. Fabrizio Foschini from the Afghanistan Analyst Network wrote an article, "The Other Fold of the Turban: Afghanistan's Hindus and Sikhs," in 2013. Afghanistan-based Porsesh Research & Studies Organisation produced a brief research paper (eighteen pages) in 2010. The same organisation produced *Survey of the Afghan Hindus and Sikhs* in February 2019. This research is available in Dari, Pashto and English.

3.15 Women and Gender Injustices

Torunn Wimpelmann completed her doctoral thesis titled "The Price of Protection: Gender, violence and power in Afghanistan" at SOAS University

of London in March 2013. Through an ethnographic lens, Wimpelmann examines shifting demarcations of domains, notions of gender, personhood and obligations, rights and entitlements as articulated in specific instances of contestation over gender violence. In order to complete her thesis, Wimpelmann carried out field research in Afghanistan in the summers of 2009 and 2010. She uses ethnographic and comparative feminist scholarship to discuss gender issues and the plight of Afghan women in their struggle for recognition and protection. Her thesis records interviews with one hundred and forty-five individuals and organisations – including interviews and conversations with members of the foreign aid and diplomatic community in Kabul and beyond.⁸¹

Wimpelmann uses the extended case study method that sits well with feminist methodology and is inseparable from ontological and epidemiologic perspectives as well as rejecting a dualistic distinction between actor and structure, object and subject.⁸² She uses two local researchers to conduct some interviews. In her case, the government institutions and courts were not helpful and did not provide the information needed.⁸³ Wimpelmann's research looks at the development of the Elimination of Violence Against Women (EVAW) law in different stages, where she personally attended conferences and parliamentary debates. Wimpelmann wrote *The Pitfalls of Protection: Gender, Violence, and Power in Afghanistan* in 2017, a book that was drawn from research conducted in Afghanistan from 2009 to 2015.

⁸¹ Wimpelmann, "The Price of Protection," 10.

⁸² Wimpelmann, 39-40.

⁸³ Wimpelmann, 45.

3.16 Honour and Patriarchy Affecting Women

Sonia Ahsan authored a doctoral thesis titled “States of Honor: Sexual Ethics and the Politics of Promiscuity in Afghanistan” at the Columbia University in 2015. Ahsan carried out field-work at a *khane-aman* (women’s shelter) in Kabul in 2011 and 2012. Ahsan described the *khane-aman* as a unique space for adulterous women waiting for their deaths or to be circulated back into the honour system of *Pakhtūnwāli* and *Shari’a*.⁸⁴ *Pakhtūnwāli* is a spelling variation of *Pashtūnwāli*, mainly pronounced by Pakistani Pashtūns.

Ahsan conducted ethnographic fieldwork through participant observation at the *khane-aman* in Kabul where she documented and observed conversations with women undergoing trials for adultery, fornication and promiscuity. Ethnographic study of honour and promiscuity through investigating *Pashtūnwāli* and *Shari’a* and highlighting the experiences of a group of Afghan women illustrates the wider patterns of societal discrimination, marginalisation and excessive punishments exercised against women who stand accused of transgressing moral boundaries. Ahsan’s and Wimpelmann’s research are complementary and useful for understanding the sufferings of Afghanistan’s women in private spaces, society, and seldom in the government settings.

3.17 Diversity in the Choice of Literature

This thesis shall mainly be using primary and secondary sources– some of which was written more than one hundred and fifty years ago. It also uses recent publications. On certain topics, different scholars and historians who

⁸⁴ Ahsan, “*States of Honor*,” 3.

have produced secondary or tertiary literature are so much opposed to each other that it is perfectly essential to quote both old and new literature in order to appraise how much they have changed. On the extensive subject of the legal history and the legal culture of Afghanistan over two hundred and seventy-three years, the author does not limit his work to literature produced in any particular historical period.

In some parts of this thesis, some scholars' works have been serially quoted. Examples are Mohammad Hashim Kamali, Alef Shah Zadrān and Nile Green. Kamali has followed Afghanistan's legal progression from the 1960s to the present day. Whilst there are many great legal experts around, as for the expertise on Afghanistan's legal studies, there are few scholars such as Kamali who have obtained knowledge and experience specifically of Afghanistan's laws for a continuous and sustained period of time. The author is aware that many books are written on Afghanistan. Most are the personal accounts of their writers, are mainly fictional or use novel writing methods which create fascinating reading; however, these books are not suitable or relevant for this thesis.

3.18 Political Economy Analysis theory

Political economy analysis (PEA), a field-research methodology that emerged in the 1990s as a tool used by donors to unpick how power, is used to manage resources and, as such, is especially valuable for exploring the role that political will has on enabling or undermining reform and progress.⁸⁵

⁸⁵ Cammack, "PEA Field Guide," 2.

Alejandro Foxley, the Chilean Minister of Finance, provides an in-depth description of political economy:

Economists must not only know their economic models, but also understand politics, interests, conflicts, passions – the essence of collective life. For a brief period of time you could make changes by decree; but to let them persist, you have to build coalitions and bring people around. You have to be a politician.⁸⁶

The Department of International Development (DFID) describes political Economy Analysis (PEA) as a powerful tool for improving the effectiveness of aid.⁸⁷ Bridging the traditional concerns of politics and economics, it focuses on how power and resources are distributed and contested in different contexts, and the implications for development outcomes. Furthermore, it gets beneath the formal structures to reveal the underlying interests, incentives and institutions that enable or frustrate change.⁸⁸ International donors make every attempt to deliver international aid effectively and use PEA⁸⁹ or the applied political economy analysis⁹⁰ as a benchmark of effectiveness. A PEA lens may consider different ways that wealth is being distributed to the beneficiaries and may involve corruption, abuse of official position and nepotism. In the context of Afghanistan, different ways of appropriation and misappropriation of aid money may be assessed through the PEA lens.

There are a number of studies of PEA in the context of Afghanistan. Sara Koplík highlights the 1930s state monopoly of trade through Bank-i Milli by

⁸⁶ Drazen, *Political Economy in Macroeconomics*, 3.

⁸⁷ DFID, “Political Economy Analysis,” 1.

⁸⁸ DFID, 1.

⁸⁹ DFID, 1-29.

⁹⁰ USAID, “Applied Political Economy Analysis,” 1-30.

then finance minister, Abdul Majid Khan Zabuli, whose discriminatory actions through the guise of economic development affected the Hindu, Sikh, Jewish and the Soviet refugees in the north of Afghanistan, minorities who were involved in mercantile activities and the export trade.⁹¹ Mohammad Najeeb Azizi and Shoji Haruna provide a brief history of development from 1890 to 1930s and scrutinise past economic practices, whilst focusing on historical and social changes, economic structures and strategies of Afghanistan with an account of (i) political vision, (ii) institutional reforms, (iii) economic agendas, and (iv) development progress.⁹²

Tom Ginsburg assesses the intellectual aspect of political economy, where he concludes in his study of “An economic interpretation of *Pashtūnwāli*, that through obtaining an education, private vengeance exercised under the *Pashtūnwāli* code may result in fewer disputes and conflicts, and that empowering individuals through education, in turn reduces crime rates.⁹³ In his study of the practical impacts of network politics in Afghanistan in 2013, Timur Sharan finds that political actions are reinforced through a series of different strategies including interfamilial marriage, gifts, partnerships and societal reciprocities based on identity-based divisions such as ethnicity, tribe, clan and kin.⁹⁴

The most recent study of PEA in the context of Afghanistan was conducted by Strand et al. in 2017.⁹⁵ The study assesses PEA in politics of the state;

⁹¹ Koplik, *Jews of Afghanistan*, 118.

⁹² Azizi and Haruna, “What, How and Why,” 1-19.

⁹³ Ginsburg, “An Economic Interpretation of the Pashtunwali,” 89-114.

⁹⁴ Sharan, “Intervention and Statehood,” 58.

⁹⁵ Strand, Borchgrevink, and Harpviken, “A Political Economy Analysis,” 1-51.

regional dimensions; the politics of economy; women's position, rights and gender equality; security and reforms; peace processes; the judiciary; human rights; development and humanitarian aid and the Afghan state.

3.19 Intersectionality theory

Truscan and Bourke argue that intersectionality theory is being adopted in international conventions.⁹⁶ The description of intersectionality by Kimberlé Crenshaw is as follows:

Intersectionality is what occurs when a woman from minority group [...] tries to navigate the main crossing in the city [...] The main highway is “racism road”. One cross street can be Colonialism, the Patriarchy Street [...] She has to deal not only with one form of oppression but with all forms, those named as road signs, which link together to make a double, triple, a many blanket of oppression.⁹⁷

Radhika Coomaraswamy, the special rapporteur to the UN Secretariat on violence against women, stated that the term *intersectionality* had become tremendously popular and is used in various UN and NGO forums.⁹⁸ On 23 April 2002, at the 58th session of the UN Commission on Human Rights, resolution E/CN.4/2002/L.59 on the human rights of women in its first paragraph “[...] recognised the importance of examining the intersection of multiple forms of discrimination, including their root causes from a gender perspective.”⁹⁹ The literature on intersectionality highlights the fact that, as a theory, intersectionality is becoming more prominent and widely used.

⁹⁶ Truscan and Bourke, “Intersectional Discrimination,” 124-5. The CEDAW Committee adopted intersectionality theory in its General Recommendation No. 28 in 2010, Recommendation No. 30 in 2013, Recommendation No. 33 in 2015 and Recommendation No. 34 in 2016.

⁹⁷ Yuval-Davies, “Intersectionality and Feminist Politics,” 196.

⁹⁸ Yuval-Davies, 194.

⁹⁹ Yuval-Davies, 194.

Intersectionality involves the study of the ways race, gender, disability, sexuality, class, age and other social categories are mutually shaped and interrelated through forces such as colonialism, neo-liberalism, geopolitics and cultural configurations to produce shifting relations of power and oppression.¹⁰⁰ Some scholars have translated intersectionality into a methodology¹⁰¹ that may be applied to a wide range of cases where multiple factors intersect, such as identity formation, nationalism, gender oppression as well as religious persecution. For example, in Afghanistan, a woman without a male guardian may encounter several levels of oppression such as societal discrimination and strict interpretations of the gender role when in need of state protection, or she may receive unfavourable outcomes if she files a lawsuit against a man. In such a case, there are multiple forms of injustices that a woman suffers. Rejecting to investigate an application by the police and potential patriarchal interpretations of a judge are two axes of injustice.

Feminist theories may not be used as widely as intersectionality in order to assess multiple forms of oppression intersecting at different junctures. For instance, a Shi'a Muslim of the Ismaili branch and from Hazāra ethnic group may face several levels of discriminatory encounters by members of other ethnic groups, by her co-religionists, the *Twelver* Shi'a Muslims whose religious doctrines differ. The government of Afghanistan does not recognise Ismaili jurisprudence or its legal doctrines. This limitation affects the Islamili people in the justice system. For a female Ismaili, more layers of hardship and

¹⁰⁰ Rice, Harrison, and Friedman, "Doing justice to intersectionality," 1.

¹⁰¹ Rice, Harrison, and Friedman, 4.

discrimination may amass, which may involve her marginalisation based on faith, ethnic group identity as well as gender. Issues such as these evoke several levels on the intersectional spectrum. Crenshaw's intersectionality theory – although initially framed as black feminist activism in the United States of America – in the context of weak states such as Afghanistan, is, in the author's opinion, a useful theory.

3.20 Case study and Process Tracing

Derek Beach and Rasmus Brun Pederson define process-tracing methods as tools to study causal mechanisms in a single-case research design.¹⁰² In process tracing there are three variants within social science: theory testing, theory building and explaining outcome.¹⁰³ The variant applicable to this thesis is explaining outcome. Case study and process tracing in mixed methods research requires case selection strategies in explaining-outcome process tracing driven by a strong interest in accounting for a particular outcome.¹⁰⁴ The outcome expected in this thesis is to test whether legal transplants have resulted in forming a culture of legality in Afghanistan. The focal point of the case study in the post-2001 period demonstrates the

¹⁰² Beach and Pederson, *Process-Tracing Methods: Foundations and Guidelines*, 2.

¹⁰³ Beach and Pederson, 3. Derek Beach and Rasmus Brun Pederson describe the three variants of process tracing: Theory-testing process tracing deduces a theory from the existing literature and then tests whether evidence shows that each part of a hypothesized causal mechanism is present in a given case, enabling within-case inferences about whether the mechanism functioned as expected in the case and whether the mechanism as a whole was present. No claims can be made, however, about whether the mechanism was the only cause of the outcome. Theory-building process tracing seeks to build a generalisable theoretical explanation from empirical evidence, inferring that a more general causal mechanism exists from the facts of a particular case. Although this type of process tracing is analytically useful, to our knowledge, the literature offers no guidelines about how to proceed with this approach. Explaining-outcome process tracing attempts to craft a minimally sufficient explanation of a puzzling outcome in a specific historical case. Here the aim is not to build or test more general theories but to craft a (minimally) sufficient explanation of the outcome of the case where the ambitions are more case centric than theory oriented.

¹⁰⁴ Beach and Pederson, 156.

instrumentalisation of legality, where the state often uses and disposes of legal frameworks when it is politically and economically expedient.

3.21 Conclusion

This chapter has shown a diverse body of research and analysis on Afghanistan, most of which strengthen my research. The literature assessed and listed contains information that supports my arguments throughout this thesis. In some instances, the available data may be influential and in other cases they may not be. The qualitative data gathered through questionnaires and interviews fill in some research gaps and lacunas.

With a view to observe the legal landscape in Afghanistan, it is imperative to look at the more ostensible sources of legal guidance, which is of course Islamic law, and the manners in which it has been promulgated and codified throughout the ages in Afghanistan – the context in which they came to being, and the way it has been interpreted and implemented is undoubtedly critical to gaining a key insight into the larger mosaic of Afghan legal culture. The next section provides an introduction to Islamic law.

CHAPTER 4: AN INTRODUCTION TO ISLAMIC LAW

4 Introduction

This chapter provides a brief history of Islamic law (*Shari'a*) with some explanations indispensable for understanding the genesis and its varied definitions and components. In the first part, historical roots of *Shari'a* will be explored. Then, the diversity and *Shari'a's* pluralistic forms will be described. A number of viewpoints will be presented focusing on scholarly opinions on *Shari'a* law and its status before concluding the chapter. The rationale for explaining Islamic law (*Shari'a*) concepts here is to provide the general context between the technicalities around *Shari'a*, and then demonstrate how it has been implemented in Afghanistan, which are explained in more detail in the subsequent chapters.

4.1 The Genesis of Shari'a

In Arabic, *Shari'a* means the clear, well-trodden “path to water”; in Islamic terminology, however, it is used to refer to matters that God has legislated for Muslims.¹⁰⁵ Abdullahi Ahmed An-Na'im, writer and lecturer at the Emory Law School in the United States of America, states that the primary sources of *Shari'a* are the Qur'an and the Sunna, understood in the context of early Muslim communities, initially in Medina – the town in western Arabia where the Prophet of Islam established a state in 622 C.E. – and subsequently throughout the region known now as the Middle East.¹⁰⁶

¹⁰⁵ Ahmed and Gouda, “Measuring Constitutional Islamisation,” 26.

¹⁰⁶ An-Naim, “Shari'a in the Secular State,” 324.

Other sources, subject to slight variations among the Sunni and Shi'a Muslims, regard consensus (*ijmā*), reasoning by analogy (*qiyās*), and relatively independent juridical reasoning (*ijtihād*) where there is no applicable text in the Qur'an and Sunna as part of *Shari'a*.¹⁰⁷ Hamid Khan states that in over fifty nations, Muslims form the majority religious community and number some 1.6 billion people worldwide, making Islam the world's second-largest religion, and as a consequence, one of the most subscribed legal systems in the world.¹⁰⁸

Fiqh is the jurisprudential corpus of Islamic law (*Shari'a*) that applies to all legal matters in an Islamic society that is ruled by *Shari'a*. The Schools of *fiqh* were formulated by the medieval jurists Ja'far Sādeq (700-765 C.E.), a descendant of the Prophet Mohammad, and his disciples, Abu Hanifa, Malik ibn Anas, Al-Shafi'i and Ahmad ibn Hanbal. Their schools of jurisprudence were named after them as *Ja'fari*, *Hanafī*, *Imam Azam*, *Shafi'i*, and *Hanbali*. Shi'a Islam's schools of jurisprudence are the Twelver, Ismaili and Zaidi. Fiqh, which is the jurisprudential application of *Shari'a* varies from society to society and from time to time.¹⁰⁹

According to Rudolph Peters, writer and lecturer at the University of Amsterdam, in the classical textbooks of *fiqh*, criminal law is not regarded as a single, unified branch of the law. It is discussed in three separate chapters: (1) provisions regarding offences against persons, i.e., homicide and wounding subdivided into (a) those regarding retaliation (*qisās*) and (b) those

¹⁰⁷ An-Naim, 324.

¹⁰⁸ Khan, "Practitioners Guide to Islamic Law," 11.

¹⁰⁹ Halper, "Legal Realism in Tehran," 45.

regarding financial compensation (*diyya*); (2) provisions regarding offences mentioned in the Qur'an and constituting violations of the claim of God (*huqūq Allah*), with mandatory fixed punishments (*hadd*, plural *hudūd*) for (a) theft, (b) banditry, (c) unlawful sexual intercourse, (d) the unfounded accusation of unlawful sexual intercourse (slander), (e) drinking alcohol, (f) apostasy (according to some schools of jurisprudence) and (g) provisions concerning discretionary punishment of sinful or forbidden behaviour or of acts endangering public order or state security (*ta'zir* and *siyāsa*).¹¹⁰ The restrictive components of *fiqh* may be regulations for the relationship between men and women in the family and in the society at large.

4.2 The Islamic Legal Authority

Here, I shall discuss Islamic legal authority which ascertains, interprets and develops and has a role in the enforcement of *Shari'a*. Ibn Taymiyya, the medieval Sunni scholar, regarded the *ulemā* as the heirs of the prophets.¹¹¹ This argument is used by the *ulemā* to assign to themselves the right to govern an Islamic society. This ruling as well as other prophetic *hadiths*, and some references in the Qur'an provide the foundations of the *ulemā*'s theory of Islamic governance. Mohammad Hashim Kamali argues that one of the salient principles of government prescribed in the Qur'an, *Shūrā* (consultation), requires the head of the state and government leaders to conduct community affairs through consultation with community members.¹¹²

¹¹⁰ Peters, *Crime and Punishment*, 7.

¹¹¹ Lambton, "State and Government in Medieval Islam," 139.

¹¹² Kamali, *Freedom, Equality and Justice*, 40.

Hamilton Gibbs comments that the Islamic theory of Government gives the citizen as such no place or function except as taxpayer and submissive subject.¹¹³ The *ulemā*, reading, interpreting and re-interpreting *Shari'a* from the Qur'an, *hadiths* of the Prophet Mohammad, rely on earlier *ulemā*'s consensus (*ijmā*) or build new formulations of their own and use their knowledge for analogy (*qiyās*). The *ulemā* create a body or a religious Canon, or *Shari'a* rulings called *fiqh*. Due to the centrality of the Islamic seminary education of the *ulemā*, regardless of which modern institutions of government regulate and enforce Islamic laws, the *ulemā* have a strong role in its theory and practice.

An institution in which members of the *ulemā* are known as jurist-consults,¹¹⁴ offers legal opinions on emerging legal situations called *fatwās*. There are different types of *fatwās* on different issues. For instance, Khaleej Times reports a *fatwā* issued in Dubai where the *ulemā* determined that using the Wi-Fi service of others without their consent is considered fraud and theft, making it prohibited in Islam.¹¹⁵ In Malaysia, the National Fatwā Council were asked to issue a *fatwā* as to whether Botox injections were permissible for Muslims.¹¹⁶ In countries where literacy is low and citizens have basic understanding of Islam, *fatwās* are sought much more than in literate and developed societies. For instance, in Afghanistan and Yemen there may be higher requests for *fatwās*, than there is in Iran, Morocco, Tunisia and Turkey.

¹¹³ Kamali, 17.

¹¹⁴ Masud, Messick, and Powers, "Muftis, Fatwas, and Islamic Legal Interpretation," 3.

¹¹⁵ Shaban, "Fatwa for using Wi-Fi without consent," last accessed 19 October 2020.

¹¹⁶ Aljazeera International, "Malaysia awaits Botox fatwa," last accessed 19 October 2020.

Due to the rationale used in *fatwā* formulations that is similar to other *Shari'a* matters (with the exception of *hadd* crimes and family *fiqh*), a *fatwā* highlights how the Islamic legal authority issues *opinio juris* verdicts and how it functions. A *fatwā* from late Sheikh Abdul Aziz Bin Bazz, the Mufti from the Kingdom of Saudi Arabia on photography, is as follows:

Response to a question about (*Taswir*) painting, drawing, sculptor, and photography. **Q:** Is it permissible for a person to photograph himself and send his photos to his family during the times of 'Eid and similar occasions? **A:** There are many *Hadiths* of Allah's Messenger (peace be upon him) that declare the prohibition of *Taswir* and curse those who do it, promising them severe punishment. Therefore, it is not permissible for a Muslim to take photos of himself or of any other being that has a soul except when necessary. For example, for passports, ID cards, etc. We ask Allah to set aright the affairs of all Muslims and to help our rulers adhere to His *Shari'ah* and keep away from all that is contrary to it. He is the best to ask for help. Allah is the One Who grants success.¹¹⁷

In a number of underdeveloped Islamic societies where the law and legal institutions are not strong and where the state or non-state forces do not enforce the law, the abuse of ill-conceived *fatwās* may lead to actions that are inhumane and degrading, such as punishments, beatings, torture and killing of individuals on cursory matters – often these behaviours are enmeshed in defence of honour or invoked to stop religious infractions.

4.3 The Sunna

Another component part of the Islamic Laws is the Sunna, also spelt as Sunnah or Sunnat. Translated as tradition, Sunna is the reported behaviour of Prophet Mohammad and his disciples, known as the *Sahāba*. Wael Hallaq, a

¹¹⁷ Ibn Bazz, "English Translations of *Majmoo'a-Fatawa*," 214.

Sunni scholar describes Sunna as an exemplary mode of conduct “setting or fashioning a code of conduct as an example for others to follow.”¹¹⁸ Rippin and Bernheimer posit that the Prophet Mohammad’s biography, *Sira* must be understood as a framework for the revelation of the Qur’an and it must be understood as a source for the normative example for Muslim behaviour, the Sunna of [Prophet] Mohammad.¹¹⁹ The followers of Sunna are referred to as Sunni. Devout Sunni Muslims may strictly follow the traditions reported to belong to the Prophet of Islam and his companions.

In order to follow Sunna, Muslims refer to the reported speeches of their prophet. These reported speeches, called *hadiths*, were collected and written after the death of Prophet Mohammad. The most reliable *hadiths* are believed to come from the companions of the prophet.¹²⁰ Hamilton Alexander Rosskeen indicates that al-Bukhari (d. A.D. 870, an early *hadith* collector) may have examined 200,000 *hadiths*, out of which he approved 7,300 (actually 2,762 if duplicates are eliminated).¹²¹ Hadith is narrated through a chain of *hadith* transformers.

4.4 Laws Concerning the Non-Muslims

An important element of *Shari’a* law is *dhimma* formulations. Dhimmi, means ‘engagements’, ‘obligation’, ‘responsibility’, and Muslims adhering to *dhimma* formulations undertake to safeguard the lives and property of the non-Muslims in question, who referred to as *dhimmis*. This treaty necessarily

¹¹⁸ Hallaq, *Introduction to Sunni usul-al-Fiqh*, 10.

¹¹⁹ Rippin and Bernheimer, *Muslims: their religious beliefs and practices*, 41.

¹²⁰ Dupree, *Afghanistan*, 100.

¹²¹ Dupree, 100.

provides for the responsibilities of the non-Muslim with all duties deriving from it, in particular the payment of tribute, i.e., the fixed poll tax (*jizja*) and the land tax (*kharāj*), the amount of which is determined from case to case.¹²² The process of being a *dhimma*, in the English language is called Dhimmitude. The Jewish and Christian communities living within territories controlled by Muslims are known as *ahl al-dhimma* or *dhimmis* and are not subject to the specific provisions of Islamic law because these laws apply to Muslims alone.¹²³

4.5 Shari'a According to Scholars

Louise Halper states that *Shari'a* is considered law in all times and all places and thus it must suit each time and place.¹²⁴ According to Joseph Schacht, *Shari'a* principles and *Shari'a* laws are social and religious realities for observant followers of Islam. As the Sunni religious authority describes, the sacred Law of Islam is an all-embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all its aspects; it comprises, on an equal footing, ordinances regarding worship and ritual, as well as political and, in the narrow sense, legal rules.¹²⁵

Abul A'lā Maududi, a radical Islamic scholar, argues that for an Islamic society *Shari'a* is quintessential and without *Shari'a*, in his view, a Muslim society cannot be regarded as Islamic.¹²⁶ Maududi further adds that "if an Islamic society consciously resolves not to accept the *Shari'a*, and decides to

¹²² Schacht, *Introduction to Islamic Law*, 130-31.

¹²³ Rippin and Bernheimer, *Muslims: their religious beliefs*, 95.

¹²⁴ Halper, "Legal Realism in Tehran," 45.

¹²⁵ Schacht, *Introduction to Islamic Law*, 1.

¹²⁶ Ahmed and Gouda, "Measuring Constitutional Islamisation," 29.

enact its own constitution and laws or borrow them from any other source in disregard of the *Shari'a*, such a society breaks its contract with God and forfeits its right to be called Islamic.¹²⁷ In the words of Alex Schank, *Shari'a* has a particular dynamism in the Islamic world that must be reckoned with and not ignored by assuming a “wholesale convergence toward what are perceived to be international standards of behaviour.”¹²⁸

In defending *Shari'a*, Hamid Khan argues that media accounts equate discrimination against women, forced marriages, honour killings and suicide bombings with Islamic law.¹²⁹ Khan further argues that the term “Islamic law” is often conflated with *Shari'a*, which itself has been turned into an ugly word, used to describe an irrational system of barbaric laws laid down in the distant past.¹³⁰

Islamic penology in a number of Islamic societies has remained unchanged for centuries. It comprises fixed punishments known as *hadd*, which involve flogging and amputation of limbs or execution. Islamic penology is a sensitive subject in international human rights regimes and discourses. In Muslim societies, the differentiation between what defines political opposition and theologically interpreted public law has not been pushed far enough, much less than in the Western states. Substantial segments of *Shari'a*-sanctioned corporal punishments lie between an intuitive understanding of interpreting

¹²⁷ Ahmed and Gouda, 29.

¹²⁸ Schank, “Constitutional Shari’a: Authoritarian Experiments,” 525.

¹²⁹ Khan, “Practitioner’s Guide to Islamic Law,” 11.

¹³⁰ Khan, 11.

the divine laws and the power that the executioner wields to follow those divine laws.

In a recent move by the Supreme Court of Saudi Arabia that intends to bring the kingdom into line with human rights norms against corporal punishment, flogging has been abolished. The Saudi Supreme Court says this decision is part of the reforms pushed through by King Salman and his son Crown Prince Mohammed Bin Salam.¹³¹ This decision is important for Islamic societies, as Sunni Muslims look up to Saudi Arabian Islamic leadership who are the guardians of the two holy Islamic sites, Mecca and *masjed al-aqsā* located in Saudi Arabia. Bin Salman is setting a precedent in banning flogging as a form of punishment. In another recent development, the political leadership in Sudan scraped apostasy law and lifted alcohol ban for non-Muslims and banned female genital mutilation.¹³² Justice Minister Nasredeen Abdulbari said, “We [will] drop all the laws violating the human rights in Sudan.”¹³³

4.6 Discourses on Shari’a Law

There are a number of Muslim writers who claim that *Shari’a* law is the divine law descended from God. Asifa Quraishi-Landes argues that “*Shari’a* is the idea of the way God is asking people to behave and live”.¹³⁴ Wael Hallaq, a renowned scholar of Islam, asserts in his paper “Qur’anic Magna Carta: On the Origins of the Rule of Law in Islamdom” that more powerful than the Magna Carta in the constitutional history of Islam was the Qur’an, the most

¹³¹ Aljazeera International, “Saudi Arabia abolishes flogging.” Last accessed 10 December 2020.

¹³² The BBC, “Sudan scraps apostasy law.” Last accessed 10 December 2020.

¹³³ The BBC, “Sudan scraps apostasy law.” Last accessed 10 December 2020.

¹³⁴ Quraishi-Landes, “Islamic law and Constitutionalism,” 164.

authoritative “voice” in the traditions, past and present.¹³⁵ Hallaq further states that the early *caliphs* and, later, the multitude of mighty *sultans* never made law, much less to have been in a sovereign political-legal position as to grant their subjects anything resembling a Magna Carta.¹³⁶

Dawood I. Ahmed, a Pakistani lawyer, and Moamen Gouda from Hankuk University of Foreign Studies claim that *Shari'a* is analogised as a sort of constitution, holding rulers accountable for transgressions and corruption to God's law.¹³⁷ These two scholars assert that Islamic constitutionalism can be traced back to fourteen centuries earlier, to the experience of the first Muslim constitution, established by the Prophet Mohammad in Medina in 622 C.E.¹³⁸

There are scholars who offer different perspectives in regards to *Shari'a*. Muhammad Shahrur, who trained as an engineer in Russia and is known for his modernist views on the history of Islamic legal developments, argues that there is a need to reinterpret ideas of religious authority and tradition, and to apply Islamic precepts to the contemporary societies.¹³⁹ Shahrur suggests a modernist view of the ways the Qur'an must be interpreted by Islamic religious authority. He writes as follows:

Qur'anic interpretation has been shackled for centuries by the conventions of medieval jurists, who mastered the craft of chaining authoritative commentaries to prior authoritative ones and of creating genealogies, or chains (*silsilas*), of traditions of authoritative learning.¹⁴⁰

¹³⁵ Hallaq, “Quranic Magna Carta,” 1.

¹³⁶ Hallaq, 2.

¹³⁷ Ahmed and Gouda, “Measuring Constitutional Islamisation,” 29.

¹³⁸ Ahmed and Gouda, 29.

¹³⁹ Christmann, *The Essential Muhammad Shahrur*, viii.

¹⁴⁰ Christmann, viii.

Shahrur proposes another view on the guardians of *Shari'a*. He states that the *ulemā* and *fuqahā* (the jurists) of Islam have betrayed the progressive, universal message of al-Islam in the following ways: by their obsession with the particular details of seventh century Arabia; by their imposition of the *hadith* onto the Qur'anic text, holding its meaning firmly locked in the distant past; by their fixation on the details of rituals; by their distrust of the human rational faculty; by their suppression of freethinking and by their neglect of the common good and what Islam shares with other religions in favour of particularistic, sectarian interests that advocate a sense of spiritual superiority.¹⁴¹

Rudolph Peters maintains that Islamic law does not conform to the notion of law as found, for example, in common law or civil law systems.¹⁴² Peters and Shahrur hold similar views of the historical *Shari'a*, to that of the classical *Shari'a* in particular. In a number of books and articles, Abdullahi Ahmed An-Na'im supports a secular legal order for the Islamic countries.¹⁴³

4.7 Conclusion

This chapter has highlighted a number of important takeaways on the definitions and status of *Shari'a*. Against the backdrop of varied interpretations, one may note that there are diverse views on *Shari'a*. In this chapter, I have argued that a number of Islamic societies subject to *Shari'a* law and led by the *ulemā* and jurist consuls have not developed Islamic theology or laws to the extent that personal interpretations of divine laws do

¹⁴¹ Christmann, xxxii.

¹⁴² Peters, *Crime and Punishment*, 1.

¹⁴³ Please see An-Naim's book, *Islam and the Secular State*.

not jar with the dispensation of justice based on the accepted norms enshrined in formal laws of an Islamic country.

By looking at the sources of *Shari'a*, the chapter has also identified that *Shari'a* remains broad, uncodified, informal and is prone to a number of interpretations by the people who claim to be the rightly guided ones, the *ulemā*. Having observed *Shari'a* law and the scope of its implementation across various socio-cultural milieus, it should only follow that the religious and cultural landscape in Afghanistan is observed in closer detail in order to situate these overlapping legal and ideological influences. In the next chapter, I will assess the religious and cultural influences in Afghanistan.

CHAPTER 5: RELIGIOUS AND CULTURAL INFLUENCES IN AFGHANISTAN

5 Introduction

There is not a great deal of written literature on the conditions of Afghanistan's legal institutions prior to Islam. This is due to the scarcity of old written records, and in part, owing to the high importance attributed to Islam in Afghanistan's historiography. Abdul Hai Habibi (1910-1984), historian, relies on the travel diaries of a Chinese pilgrim and writes that in the first millennium, circa 630 C.E., Hyun Tseung, a Chinese pilgrim, travelled to Afghanistan and described how the institutions of justice operated.¹⁴⁴ Habibi writes Tseung's eye-witness account as follows:

There were laws and fair trials and there was no corporal punishment if people disobeyed the orders of the government. If someone violated social rules and justice, or dealt with others with dishonesty, his or her punishment would have been cutting off his or her ear, nose, hand or foot. Sometimes the punishment for certain crimes was enforced exile. Petty crimes were resolved by a cash fine. If an accused person denied his or her guilt, there were four ways of investigation. The verdict would be issued after guilt was proven.¹⁴⁵

This account of pre-Islamic legal conditions may be used in describing the law in the first millennia. This chapter intends to answer the question: *how did the different religions of Afghanistan shape her legal conditions?* The

¹⁴⁴ Habibi, *Afghanistan after Islam*, 531. According to Abdul Hai Habibi, "There were laws and fair trials and there was no corporal punishment if people disobeyed the orders of the government. If someone violated social rules and justice, or dealt with others with dishonesty, his or her punishment would be cutting off his or her ear, nose, hand or foot. Sometimes the punishment for certain crimes was enforced exile. Petty crimes were resolved by a cash fine. If an accused person denied his or her guilt, there were four ways of investigation. The verdict would be issued after guilt was proven."

¹⁴⁵ Habibi, *Afghanistan after Islam*, 531.

peculiar issue in Afghanistan which has received inadequate attention from scholars are the diverse religious beliefs which determine the paths of legal developments in Afghanistan. Afghanistan has a strong oral culture and oral history. The orally narrated medieval and modern traditions, including legal traditions, offer clarity as to how the people of Afghanistan perceive law through the lens of their religious beliefs.

This chapter will use theories of oral history by Walter J. Ong and relies on theories by the political sociologist, James C. Scott. The historical work of Louis Dupree will offer insights on Afghanistan, its people and various communities until the 1970s. In the first part, I will describe the oral history in the context of Afghanistan with examples to illustrate its importance. The chapter will discuss the pre-Islamic religions, followed by the three Abrahamic faiths (Judaism, Christianity and Islam). Islam was discussed in detail in Chapter 4. In order to avoid repetition, this chapter will include the Bahà'i faith, an offshoot of Islamic faith and the *Sufi* order. The chapter intends to show the rich contributions of various religions, cults and sects, and their lasting legacies on the different communities of Afghanistan.

5.1 Oral Culture in Afghanistan

Anthropologists, sociologists and psychologists have reported on fieldwork in societies with oral traditions, and cultural historians have delved more and more into prehistory, that is, human existence before writing made verbalised records possible.¹⁴⁶ European archaeologists came to Afghanistan in the

¹⁴⁶ Ong, *Orality and Literacy*, 5.

1920s.¹⁴⁷ Research had to cease when in 1978, Afghanistan faced the Soviet occupation and the country was blighted by wars that continue to the present day.

In Afghanistan, religious instructions and the sayings of the saints are highly valued and holy books are recited and transferred from one generation to the next. Despite the country being known as having a large illiterate population (although no exact figures are available), people recite the Qur'an in Arabic as well as Persian and Pashto poetry on a daily basis. The works of the great poets like Hafiz and Sa'di of Shiraz, Jāmi and Bīdel, as well as Rumi and many others are recited by people yearning for love, tranquillity and spiritualism. Rumi's and Omar Khayyam's poems are used and admired by the Sufis in Afghanistan as in other parts of the world.

Walter J. Ong argues that the shift from orality to literacy and then onto electronic processing engages social, economic, political, religious and other structures.¹⁴⁸ The adoption of modern technologies such as telecommunication, Internet and the use of social media in Afghanistan has brought about a new form of oral culture where audio, video speech and texts (online contents) can be accessed from all corners of the globe. Therefore, those citizens who were comfortable with an oral verbal tradition now have access to millions of multimedia sources through their digital devices, through access to the Internet.

¹⁴⁷ Green, *Afghanistan's Islam*, 20.

¹⁴⁸ Ong, *Orality and Literacy*, 3.

James C. Scott, American political scientist and anthropologist, argues in favour of moving to an oral culture due to the manifest advantages of flexibility and adaption that an oral tradition has over a written tradition.¹⁴⁹

In sum, Afghanistan has not steadily progressed to a literate culture and has kept its oral culture intact, which may explain why individuals from different communities talk about 2,000 years ago as if they were eyewitnesses to the stories they narrate, as if they happened a couple of days ago. This strong and lively oral tradition helps us investigate the oral beliefs from multiple ancient religions of Afghanistan as well as Islam which shape her citizens' religious understanding of a legal culture.

5.2 The Ancient Religions of Afghanistan

Zoroastrianism

It was in Bactria (Balkh) where Zoroaster is believed by many scholars to have found a base for propagation of his dualistic philosophy. Vishtaspa, the ruler of the region, gave the Iranian prophet sanctuary.¹⁵⁰ Avestan sacred religious literature contains *widi* melodies, including religious laws, indicating the first suggestions of laws and judiciary as a spiritual heritage.¹⁵¹ Afghanistan, invariably presented as a Muslim country by its citizens and by foreign scholars, has in fact been home to various non-Muslim minorities.¹⁵²

¹⁴⁹ Scott, *The Art of Not Being Governed*, 226.

¹⁵⁰ Lee, *The 'Ancient Supremacy' Bukhara*, 8.

¹⁵¹ Habibi, *Afghanistan after Islam*, 531.

¹⁵² Green, *Afghanistan's Islam*, 29.

Zoroastrianism is one of Afghanistan's oldest religions. According to some historical accounts, Zoroastrianism was the religion of the Iranian tribes living in Central Asia before they moved south onto the Iranian Plateaus.¹⁵³ Written historical records show that followers of Zoroastrianism lived in Afghanistan until the 1880s. Rule 75 of *Asās al-Quddāt*, a bench guide written by Abdur Rahman Khan (r. 1880-1901), stipulates that the oath at the beginning of a court hearing for the Christians, Jews and Zoroastrians must be taken in accordance with their own religion.¹⁵⁴ However, in practice *Shari'a* rules were used in the trials of the non-Muslims.¹⁵⁵

Tamim Ansary, an Afghan-American writer describes the essential foundations of Zoroastrianism as follows:

In the Persian universe, Zoroastrianism held pride of place and Zoroaster saw the drama of the universe vested in two divinities, not one, not thousands. Ahūrā Mazdā embodied the principle of God, and *Ahrīman*, the principle of evil. Fire served as an iconic representation of *Ahūrā Mazdā* which has led some to characterise Zoroastrians as fire worshippers; they worshiped not fire but *Ahūrā Mazdā*.¹⁵⁶

The ancient Iranians imagined a world in which Order and Chaos constantly jostled for supremacy, and the partisans of Order were heavenly powers with *Ahūrā Mazdā*, the all-knowing Ruler, Growth and Life.¹⁵⁷ The use of the generic term, *ancient Iranians* also refers to the subjects who inhabited the lands that make up modern-day Afghanistan. Zoroastrians pray several times

¹⁵³ Skjærvø, "Introduction to Zoroastrianism," 1.

¹⁵⁴ Tarzi, "Islam, Shari'a, and State Building," 139.

¹⁵⁵ Tarzi, 139.

¹⁵⁶ Ansary, *Destiny Disrupted*, 9.

¹⁵⁷ Skjærvø, "Introduction to Zoroastrianism," 1.

a day and their holy book is called *Avestā*. They use fire as a symbol of the purity of God.¹⁵⁸

Nile Green posits that there is a lacunae in inter-group relations between the Muslims and non-Muslims of Afghanistan, including the Jews, Hindus, Sikhs and Armenian Christians.¹⁵⁹ The ethnographic research conducted by Mohmmad Homayoun Sidky on Malang, Sufis and Mystics¹⁶⁰ show how the practices and rituals of various polytheist cults and religions of Afghanistan influence and shape the religious beliefs of her citizens. There are numerous examples in this chapter of this fusion of inter-group (inter-religious) relations that are formed by Afghanistan's culture of orality.

According to the late American historian, anthropologist and ethnographer, Louis Dupree, one may note very close-knit inter-group interactions between the followers of various religions of Afghanistan. Dupree wrote in 1978 that, aside from faith in Allah and Mohmmad as the Messenger of Allah, most beliefs relate to localised, pre-Muslim customs.¹⁶¹ Zoroastrian beliefs to the present day influence the population of Afghanistan in many ways, including its philosophy of "Good Thoughts, Good Words and Good Deeds."

Buddhism

Buddhism had been practised in Afghanistan prior to Islam. There is a general consensus that in Afghanistan the Buddha statues were created between 300

¹⁵⁸ BBC, "Zoroastrianism at a glance."

¹⁵⁹ Green, *Afghanistan's Islam*, 29.

¹⁶⁰ Sidky, "Malang, Sufis, and Mystics," 275-301.

¹⁶¹ Dupree, *Afghanistan*, 104.

and 700 A.D.¹⁶² After Ashokā, militant Brahmanism ended the political force of Buddhism in India, but Mahayana Buddhism which gestated in Gandhārā spread along the commercial Silk Roads to Turkistan, Mongolia, China, Korea and ultimately Japan.¹⁶³ Ashokā was an Indian emperor of the Maurya Dynasty who ruled almost the entire Indian subcontinent from 268 to 232 B.C.E. Gandhārā was an ancient region in the Peshawar basin and the centre of the region was a confluence of the Kabul and Swat rivers, and Turkistan was the region of northern Afghanistan.

Buddhism has values and beliefs such as *sila* (virtue, good conduct and morality), *samadhi* (concentration, meditation, mental development) and *prajna* (discernment, wisdom and enlightenment). In Buddhism, the religion begins with *Siddhārtha Gautama*'s achievement of enlightenment under the *Bodhi* tree.¹⁶⁴ Buddhism survived in Afghanistan until the late tenth century, which would in turn suggest that popular Buddhist practices survived much later, while the region's pre-Islamic heritage also included Zoroastrian, Indic and other local cults that were the fruit of centuries of selective adoption from religious influences that ranged from India to Greece.¹⁶⁵

The most recent blow to Buddhist heritage in Afghanistan was the destruction of the giant Buddha statues in Bamiyan city in central Afghanistan in March 2001 by the Taliban.¹⁶⁶ Buddhism has left lasting effects on the beliefs, perceptions and practices of the people of Afghanistan. Buddhist beliefs up

¹⁶² Sumser, *A Land Without Time*, 136.

¹⁶³ Dupree, *Afghanistan*, 296.

¹⁶⁴ Ansary, *Destiny Disrupted*, 23.

¹⁶⁵ Green, *Afghanistan's Islam*, 4.

¹⁶⁶ Francioni and Lenzerini, "The Destruction of the Buddhas," 619-651.

to recent times may have been indirectly transferred to the wider population of Afghanistan by followers of the Indic faiths, the Hindus of Afghanistan. Evidence of these influences may be found in various oral and written legends.

The Cult of Zhun

The cult of Zhun is one of the indigenous religions of Afghanistan we know most about because it was described in some detail by the Chinese Buddhist pilgrim, Xuan Zang, who visited Afghanistan shortly before the Arab invasion.¹⁶⁷ The reference to the Arab invasion here is the Islamisation of Afghanistan by the Arabs between the seventh and ninth century A.D. Based on the worship of a golden idol with rubi eyes, the cult of Zhun (widespread throughout Zamindawar and Zabulistan) survived for two centuries after the arrival of Islam in Afghanistan.¹⁶⁸ The idol was housed in a temple, in front of which stood the vertebra of a giant reptile, locally believed to be that of a dragon.¹⁶⁹

The priests of Zhun seem to have possessed shaman-like abilities, for Xuan Zang describes them as having powers to control demons and other supernatural forces and being able to both heal and harm people.¹⁷⁰ The dragon (*luus*), or *azhdhār*, survived in Islamic Afghan cosmology through its association with Caliph Ali, celebrated in the country as the dragon slayer. Afghans identify a number of geological formations as the remains of the

¹⁶⁷ Bosworth, "The coming of Islam," 279.

¹⁶⁸ Sidky, "Malang, Sufis, and Mystics," 279.

¹⁶⁹ Sidky, 279.

¹⁷⁰ Bosworth, "The coming of Islam," 279-280.

dragon slain by the caliph and miraculously petrified by God.¹⁷¹ The most famous of these *azhdhār* is located near Bamiyan, the ancient Buddhist sanctuary complex.¹⁷² When a religion supplants another, it is not uncommon for the saints and culture-heroes of the new faith to be depicted as vanquishing those of the old religion. For Afghan Muslims, Caliph Ali, hero of the new Islamic faith, slays the pre-Islamic dragon god.¹⁷³

Hinduism

To the present day, among several international archives and bibliographic collections such as Afghanistan Analysis Network (2010, 2013 and 2019) and Arthur Paul Collection, which list up to a thousand pages of bibliographic entries in Dari-Farsi, Pashto and English, there are only five short research articles about the lives of the Hindus and Sikhs of Afghanistan.

Hindu presence in Afghanistan dates back to before her Islamisation in the ninth century.¹⁷⁴ Ichawar Dass, a Hindu writer of Afghanistan origin argues that it was the Brahman and Hindus of Kabulistan who resisted the Arab invasion.¹⁷⁵ Some historical accounts suggest that Kabulistan resisted the Arab invaders for two hundred years.¹⁷⁶ Eventually, the son of Mahmood of Ghazna, Sebūktigin, conquered Kabulistan after which time the population was converted to Islam.¹⁷⁷

¹⁷¹ Sidky, "Malang, Sufis, and Mystics," 280.

¹⁷² Sidky, 280.

¹⁷³ Sidky, 280-285.

¹⁷⁴ Dass, *We the old dwellers*, 4.

¹⁷⁵ Kabulistan is an ancient name for a large area that makes up the Afghanistan of today.

¹⁷⁶ This information is verbally quoted by numerous academics originating from Afghanistan.

¹⁷⁷ Dass, *We the old dwellers*, 3.

Hassan Kakar, historian, writes that in Abdur Rahman Khan's government (r. 1880-1901), many Brahman Hindus were given high positions in the bureaucracy. Naranjān Das was made an honorary brigadier, and a council of Hindu elders was set up to investigate all suits, claims of interest and questions relating to Hindu laws before they were to be submitted to Abdur Rahman Khan for his instruction.¹⁷⁸ Hindus were favoured over Sikhs, but both groups felt humiliated by being obliged to wear only yellow turbans and pay *jezya* tax.¹⁷⁹ As late as the 1980s, the Hindu cult statue *Murthi* was worshipped in Kabul's several Hindu temples.¹⁸⁰ For example, Dhavaikar noted that the sixth or seventh-century Ganesh statue found in Gardiz is presently worshiped by the Hindu residents of Kabul in Daragh Pir Rattan Nath near Cinema Pamir.¹⁸¹

There is written evidence that the Hindus of Afghanistan were involved in informal justice mechanisms. According to Gholam Vafai, the *Panchāt* or council of five elders which came into existence during the reign of Habibullah Khan (r. 1901-1919), had jurisdiction over disputes among merchants and traders and over most civil suits.¹⁸² Although *Panchāt* is an Indian community justice mechanism, in Afghanistan the Hindus and Sikhs only presided over this institution for a short while. Mohammad Hashim Kamali notes:

The non-Muslim religious communities especially Hindus and Jews have historically played an important role in the trade, as merchants, money lenders, and officers of government treasury. This created a

¹⁷⁸ Kakar, *Government and Society in Afghanistan*, 149.

¹⁷⁹ Kakar, 149.

¹⁸⁰ Green, *Afghanistan's Islam*, 29.

¹⁸¹ Rafiq, "The Afghan Martyrs," 29.

¹⁸² Vafai, *Afghanistan: A Country Law Study*, 11.

demand for the establishment of commercial jurisdictions outside *Shari'a* courts. A board of commerce named *Panchāt Bāshi* was created in Kabul in the nineteenth century. The president of the board of *Panchāt* held an honorary post and was not paid a wage. The *Panchāt* was elected by Kabul's merchants themselves, and often Hindus were elected for this post. The *ulemā* saw *Panchāt* arbitration as a threat to their authority and demonstrated fierce disagreements to *Panchāt* courts. The *ulemā* held Afghanistan's legal system under full control prior to the legal reforms of the 1920s.¹⁸³

The Sikhs of Afghanistan resolve personal disputes in their *Gurdwārā* (a place of assembly and worship). In resolving disputes, the Sikh elders use intellect, not the religious texts.¹⁸⁴ As far as historical accounts show, apart from the short-lived role given to the Hindus in *Panchāt* councils and their ceremonial participation in a number of *Loya Jirgas*, there are no other legal roles assigned to them.

One the sad realities of life for the Sikhs and Hindus of Afghanistan has been the decline of their population. In the twentieth century, the population of the non-Muslim ethnic groups of Afghanistan decreased due to war, insecurity, barriers to trade and restrictions on their religious freedom. Between the 1920s and the 1960s, the Hindus and Sikhs of Afghanistan numbered up to a quarter of a million.¹⁸⁵ Inderjeet Singh estimates that their number dropped to sixty thousand in the early 1990s.¹⁸⁶ The United States Commission on International Religious Freedom (USCIRF) states that in 2020, the Hindu and Sikh population was just around one thousand.¹⁸⁷ This shows a substantial depopulation for these two minority religious groups.

¹⁸³ Kamali, *Law in Afghanistan*, 220.

¹⁸⁴ Questionnaire for Hindus and Sikhs completed by Harpal Singh on 09 February 2020.

¹⁸⁵ Ballard, "Afghanistan's Hindu and Sikh Population," 2.

¹⁸⁶ Singh, *Afghan Hindus and Sikhs*, 19-20.

¹⁸⁷ USCIRF, "International Religious Freedom," 40.

Despite the fact that Hindus have lived in Afghanistan for many centuries, they are ignored by the political leaders. Atwar Singh Khalsa, the president of the National Committee of Hindus and Sikhs of Afghanistan, who served as the Sikh representative to the *Loya Jirga* from Pakitya Province and who was appointed as a senior senator in 2004 for a five-year term, states that the government has never protected the rights of the Hindus and Sikhs in Afghanistan.¹⁸⁸ In the public sphere, Hindus and Sikhs continue to suffer suppression and are threatened with violence.¹⁸⁹

The socialist governments of Afghanistan (1978-1992) empowered the Sikhs and Hindus and assigned to them certain political roles. The following is an account given by Harpal Singh, an Afghan Sikh now residing in Britain:

If there is peace and safety in Afghanistan, I will return there. I spent my youth in Shorbazar. I joined the People's Democratic Party of Afghanistan (PDPA) at a very young age. At year 7 of high school, a strong patriotic feeling grew in me. I became a teacher and worked with a very slim wage. I wanted to serve the people. I was willing to give my life for my country. I was happy to be a member of the PDPA. I know that life in Afghanistan is very different to life in the United Kingdom. However, if peace is established in Afghanistan, I will go back. I spent my youth in Shorbazar streets, went to school and passed through the streets; all of these give me reminiscence. After the Saur revolution, I had a very good life. There have been sincere comradery between the PDPA members for 35-40 years.¹⁹⁰

Ichawar Dass, a writer based in Germany and who manages a couple of websites with a focus on Afghanistan writes:

Everything for the Muslim minorities and non-Muslim minorities were discriminatory. During Amanullah Khan's reign the name Hindu was used. Afghanistan was a Hindu and Buddhist country and Hindus resisted and fought against the Arabs for 250 years. We the Hindus of

¹⁸⁸ Armanshahr Publishing, "38 Unveiled Voices from Afghanistan," 18.

¹⁸⁹ Shayegan and Ammaar, "Ignored Identities," 11.

¹⁹⁰ Questionnaire for Hindus and Sikhs completed by Harpal Singh on 09 February 2020.

Afghanistan are those who did not convert to Islam. The history of Afghan citizens before Islam is recorded very briefly and except Ahmad Ali Kohzād, other historians have written very brief history of the non-Muslims. When I wrote the book, *We the old dwellers of this land*, I looked for sources, but could not find accurate information.¹⁹¹

The Hindus of Afghanistan have lived in their country for over two millennia.

Afghan citizens orally narrate a number of Indic myths and legends.

The Kāfirs

Kāfirs were one of the oldest non-Muslims population of Afghanistan. The term *Kāfir* translates as *infidel* in Indo-Iranian languages and also in Arabic. The word *Kāfir* or *Kāfiristan* must be used when referring exclusively to the elements of pre-Islamic culture, for it is resented as an insult by devout Muslims.¹⁹² Kāfir is a term that Islamic religious text equates to a person who questions the validity of the Islamic faith. The *Kāfirs* inhabited a region known in Western literature as *Kāfiristan*. Vartan Gregorian, historian, reports that “Before the Nuris (people inhabiting Nuristan) accepted Islam, they were referred to as *Kāfirs* by the Muslims of Afghanistan.”¹⁹³ They were the major pagan groups inside Afghanistan.¹⁹⁴

Until the early parts of the twentieth century, the valleys of Nuristan in eastern Afghanistan were inhabited by *Kāfiri*-speaking tribes, a third of which are of an Indo-Iranian branch, while the neighbouring valleys of northern Pakistan are inhabited by various Dardic-speaking Muslim populations.¹⁹⁵ Only the larger portion of the *Kalāsha* population living in three of the western valleys

¹⁹¹ Author’s interview with Ichawar Dass on 24 March 2020.

¹⁹² Degener, “Hunters’ Lore in Nuristan,” 330.

¹⁹³ Gregorian, *Emergence of Modern Afghanistan*, 37.

¹⁹⁴ Gregorian, 37.

¹⁹⁵ Witzel, “The Rigvedic Religion System,” 591-631.

of Chitrāl have retained their old pre-Islamic religion and rituals, while the rest of the Nuristani and Dardic-speaking people have retained, as Muslims, only vestiges of their former beliefs, and the isolated *Kalāsha* people have received strong religious influences from pre-Islamic Nuristan.¹⁹⁶

The main tribe of the *Kāfiristan* people were the *Kām Kalāsh* who followed ancient Hinduism. The people of *Kāfiristan* were forcibly converted to Islam by Abdur Rahman Khan (r. 1880-1901) and then by his son Habibullah Khan (r. 1901-1919), in the nineteenth and twentieth centuries. According to Barnet Rubin, Nuristanis maintained their ancient polytheism until 1986.¹⁹⁷

Gregorian describes the *Kalāsh Kāfirs* as follows:

This group are also referred to as the Nuris or *Kāfirs*, one of the Indo-Aryan people of the Hindukush, an ethnic group of Afghanistan whose history is obscure. Some think that they are the descendants of aborigines of central Afghanistan; others believe they are of Greek ancestry. The *Kāfirs*' physical features are suggestive of the Oriental, Dinaric and Nordic races, but of the five main *Kāfir* languages *Kati*, *Ashkūn*, *Waigal*, *Parūni* and *Wamai*, four are Dardic languages.¹⁹⁸

The *Kāfirs* present interesting lifestyles, rich traditions and fascinating myths and legends. Karl Jettmar claims that the German ethnologists called the *Kāfirs* a megalithic people (megalithvolk) or *Kāfiristan* a megalithic centre, and the culture of *Kāfirs* was considered a phenomenon strictly separated from the great civilisations of Western Asia.¹⁹⁹ Writing in 1969, Vartan Gregorian estimated the population of Nuristan Province to be between forty

¹⁹⁶ Witzel, 591-631.

¹⁹⁷ Rubin, *The Fragmentation of Afghanistan*, 31.

¹⁹⁸ Gregorian, *Emergence of Modern Afghanistan*, 37.

¹⁹⁹ Jettmar, "Iranian Influence," 39.

thousand and one hundred thousand.²⁰⁰ G.W. Leitner states that persons sent on special expeditions often pass by the most interesting inscriptions, of which they merely report that “the characters of the [*Kāfirs*] are neither Greek nor Persian.”²⁰¹

In the absence of literature on *Kāfirs*’ legal traditions, I shall rely on the primary ethnographical and historical sources written by the British colonial agents, explorers and adventurers, which are still precious to anthropologists, linguists and historians.²⁰² The literature to be used here describes the *Kāfirs*’ lives, rituals, polytheistic religious characteristics, beliefs and practices as well as their mythologies.

The *Kāfirs* came from different clans and tribes, the most famous ones being *Kam*, *Siāhpūsh*, *Sefīdpūsh*, *Wai* and *Utzen*. In his journey to *Kāfiristan*, Sir Scott Robertson writes:

The *Kāfir* tribesmen inhabited the upper part of the Bashgul Valley. Kam and Wai tribes were amongst the fiercest tribes according to the Chitrālis. The *Kalāsha Kāfirs* are slaves to the *Mehtar* of Chitrāl and living within his border. Utzen tribesmen differed from all other *Kalāsha* people in having a strong infusion of Bashgul Valley blood in their veins. The village possessed a shrine to *Gīsh*, the great war-god of the *Kāfirs*. Torag Merak, a *Kāfir* brought up two of his sons as Muslim, and it seems by this, he intended to be on the right side, whatever might happen. If Umra Khan or any other Muslim power managed to conquer *Kāfiristan*, then Torag would be safe through the influence of his sons; as for the latter, they were naturally friends with their co-religionists, while the neighbouring *Kāfirs*, although disliked having the Muslim colony in their midst, dare not interfere, for the whole of Torag’s clan would avenge the death of any one of its members, whether he was a *Kāfir* or had embraced Islam.²⁰³

²⁰⁰ Gregorian, *Emergence of Modern Afghanistan*, 37.

²⁰¹ Leitner, *Bashgul Kāfirs and their language*, 4.

²⁰² Caccopardo, “A World In-between,” 246.

²⁰³ Robertson, *The Kāfirs of the Hindu-Kush*, 1-14.

Georg Buddruss, Professor Emeritus at the University of Mainz, Germany, highlights significant correspondences between Vedic cosmology and the cosmology expressed in the mythology of the *Kāfirs* of Prasūn Valley, held to be the religious centre of *Kāfiristan*.²⁰⁴ The book of Persian fairy tales, *One Thousand and One Nights*, also known in the West as *The Arabian Nights*, contains a large selection of stories in which fairies are central characters.²⁰⁵ In Persian mythology, the *Peri* are one of a large group of beautiful, fairy-like beings represented as descended from fallen angels and excluded from paradise until their penance is accomplished.²⁰⁶

In the *Kalāsha* ritual, a fire is constructed out of superimposed, crossing twigs much like a Vedic one, and a goat, especially its heart, is offered into the fire.²⁰⁷ Ancestors impersonated by young boys are worshiped and are offered bread. The men must be divided into two parties: the pure ones to sing well-honoured songs of the past, but the impure ones to sing wild, passionate and obscene songs with an altogether different rhythm.²⁰⁸ Many mythical stories of the *Kāfirs* contain the element that the sun and the moon were in the hands of giants and had to be set free by the force and cant of the gods.²⁰⁹

In his study of the *Kāfirs*, Max Klimberg deals with the sacrifice, rituals and religious authority of the *Kāfirs*. In peaceful times many pilgrims, bringing

²⁰⁴ Caccopardo, "A World In-between," 248.

²⁰⁵ There are controversies surrounding the origins of *One Thousand and One Nights*. The main characters and names mentioned are Persian and there are numerous volumes of similar literature, epics, myths and other fairy tales that originate from the Persian lands and the Persianate people. However, some opine that *One Thousand and One Nights* comes from Arab literature.

²⁰⁶ DICTIONARY.COM, "Peri," last accessed 29 November 2020.

²⁰⁷ Witzel, "The Rigvedic Religion System," 591-631.

²⁰⁸ Witzel, 591-631.

²⁰⁹ Jettmar, "Iranian Influence," 40.

with them mainly oxen and rams as sacrificial animals, must have come from all the *Kāfir* regions to pray for help or to attend the great annual ceremonies.²¹⁰ Living in six small villages in the Parun Valley located between the areas of the more militant and competitive *Kati*, *Waigal* and *Ashkun Kāfirs*, they had established a sacred notion about their religions and culture. The valley was dotted with temples and village-based clan-houses, *amel*, where a great number of deities were worshipped.²¹¹ Klimberg describes *amel* as the place of worship and the religious hierarchy of the *münd* as below:

The *amel* were clan-owned, inhabited only temporarily by the clan-priest, *münd*, and his family unless there were established hereditary rights. The position of a *münd* was highly coveted. As a rule a meritorious man could fill its position only for a certain time, depending on a number of circumstances such as good fortune and the like. In case the clan was dissatisfied by its *münd*'s performances or by his failure to secure enough assistance from the clan deity, or if somebody else had won over the clan, the *münd* had to leave the *amel* and return to his house. The procedure of the take-over was simple, as it was enough to enter the *amel* with torch lights, to throw them into the *amel*'s fireplace and to request the resident *münd* to leave. He had to leave the premises by the following morning.²¹²

There have been attempts to convert the *Kāfirs* to Christianity. Feisal Hussain Naqvi writes that the Jesuits of Agra obtained permission in the 1670s to undertake a mission in *Kāfiristan*.²¹³ Father Gregorio Roiz sent a report to Rome that concluded in respect of the *Kāfirs*, "I did not find dispositions in them for receiving the Faith, nor did I discover any indications that, as the Armenians had told us, they had been Christians at one time."²¹⁴

²¹⁰ Klimberg, "Kāfiristan's Sacred Valley," 58.

²¹¹ Klimberg, 50.

²¹² Klimberg, 64.

²¹³ Naqvi, "People's Rights or Victim's Rights," 679.

²¹⁴ Naqvi, 679.

Kāfirs' beliefs in animism, fairies, *jinns* and legends, influence nearly all communities of Afghanistan. In fact, the majority of these oral beliefs are beliefs in the strong sense of the word *belief*. This means belief in the sense that they are true. This shows a fascinating characteristic of Afghan society, most of whom may re-tell the story of Iliad, Homer, Zeus or even Skyla and Charybdis in their localised versions and varieties. The localisation of many foreign legends, myths and fairy tales among different groups of Afghanistan makes their strong oral culture second to none.

Over the period of the seventh to the ninth centuries, most of the inhabitants of Afghanistan converted to Sunni Islam. Islam gradually replaced Buddhism, Hinduism, and Zoroastrianism and all other indigenous religions of the previous empires.²¹⁵ Owing to the supplanting of old faiths by the new ones, one may argue that certain pre-Islamic beliefs, in part inform Afghanistan's Muslims' cultural knowledge and their perceptions and sense of religiously-inspired notions of justice.

Shamanism

Mohammad Homayoun Sidky states that shamanism is an essential component of the religious beliefs of the Afghan people.²¹⁶ Originating from the Turkic people of Central Asia, shamanism is prevalent among the Kazakhs, Mongols, Uzbeks and Turkmen, and is based on a number of beliefs and practices such as *Tanggri*, the heaven or sky deity, along with the

²¹⁵ Nyrop and Seekins, "Afghanistan: A Country Study" 9.

²¹⁶ Sidky, "Malang, Sufis, and Mystics," 277.

shamanistic beliefs that were brought to Central Asia by Hsiun-Nu.²¹⁷ The Turkmen had many shamanistic beliefs, several of which persist in Afghan Turkestan.²¹⁸ Among the Kirghiz and Uighur, shamans are known as *Bakhshi*.²¹⁹ For each Turkic group, *Bakhshi* means a different person doing different things. Among the Kazakh, a *Bakhshi* is primarily a healer and an exorcist.²²⁰ For the Uzbek, according to Castagné, *Bakhshi* means a shaman, a doctor savant, sage or scholar who may use a *qobuz* (horsehair fiddle) to perform actions when in a trance.²²¹ For the Turkmen, a *Bakhshi* is known as an epic or folk singer, lacks magical powers and uses *dūtār* (a musical instrument) rather than *qobuz*.²²² Jarring and Slobin note that *Bakhshi* is a musician among the peoples of the oases of Afghan Turkestan.²²³

The present-day Afghan ascetics, although Muslims, are undoubtedly the spiritual heirs of the shamans of the past.²²⁴ They use ecstatic techniques, communicate with spirits and foretell the future while in a trance state.²²⁵ When a famous ascetic dies, his grave may become a *ziārat* (shrine), believed to be endowed with mystical potency, as were the ancient cult-centres of the past.²²⁶ In practice (but not in theory) Islam loosely accepts *saints*, and the cults of saints, although forbidden, it abound throughout the Muslim world; almost any stone thrown in Afghanistan will hit a *ziārat* of a *pir*, *khwājah*, or

²¹⁷ Sidky, 275-276.

²¹⁸ Sidky, 277.

²¹⁹ Sidky, 277.

²²⁰ Radlof, "Proben der Volkliteratur der turkischen Stämme Süd-Sibiriens," 160.

²²¹ Castagne, "Magie et exorcisme chez les Kazak-Kirghizes et autres peuples turks oreintaux," 160.

²²² Kurger, "The Turkic Peoples," 161.

²²³ Slobin, "A Muslim Shaman," 161.

²²⁴ Sidky, "Malang, Sufis, and Mystics," 285.

²²⁵ Sidky, 285.

²²⁶ Sidky, 285.

other name-saint.²²⁷ Writing in 1973 and then in 1978, Louis Dupree describes Afghan people's belief in saints as follows:

Pilgrims flock to *ziārat* to ask for intercession of the particular saint with Allah for specific favours. In Afghanistan, for example, a saint's tomb near Jalalabad specialises in curing insanity; another near Charikar cures mad-dog bites; and in the valley of Paiminar, just north of Kabul, are forty-odd shrines, all dedicated to fertility. Women desiring children visit Paiminar to buy amulets (*ta 'wiz*) from the *ziarat* caretaker, each guaranteeing a son or daughter as the case may be. The caretaker of the various shrines throughout Afghanistan sell *ta 'wiz* for practically anything a man or woman might desire: control over a loved one; increased sexual prowess; protection from bullets in a feud; general good luck; protection from the evil eye, and others. Many *ta 'wiz* consist simply of magical formulas or verses copied from the Quran, which are folded and sealed in a cloth, leather, or metal triangular or square packet, and then sewn to the clothing of the purchaser. Supplicants use several devices to remind the saint of their request. Usually an object is left behind: a lighted candle, a piece of cloth tied to a pole, a ball of clay to harden in the sun. At the Āshukān and Ārefān shrine in Kabul, believers drive nails into the threshold. Driving nails into selected trees scattered throughout Afghanistan (the shrine of Khawāja Ansari near Herat, for instance, and another near Chahārdeh-Ghorband) can achieve cure for toothaches. Often women will leave small toy *chārpāyi* (string beds) or construct small hammocks at fertility shrines to remind the saint to intercede. In addition to purchasing *ta 'wiz*, pilgrims leave money with the caretaker to help support the shrine.²²⁸

The practice of visiting *ziārats* (shrines) continues to the present day. In August 2020, Deutsche Welle Dari language news reported that people in Ghazni Province visit shrines, pay alms to the shrine keepers and believe that shrines, including those of Sultan Mahmud of Ghazna, Hakim Sanai, Abu Raihan al-Biruni, Bohlūl or Shams cure diseases, including complex mental

²²⁷ Dupree, *Afghanistan*, 104-105.

²²⁸ Dupree, 105.

health illnesses.²²⁹ This practice is not limited to Ghazni, and there are people in all provinces of Afghanistan who believe that shrines cure illnesses.

Slobin lists shamans in general categories as fortune-tellers: the term *fālbīn* (seer) applies to all those who employ divination; *tāla'bin* is one who predicts the future in a more restricted sense by observing the ripples in a basin of water; the *ramal* or *ramalbāz* operates with dice, which are joined together by a metal shank and which, after manipulation, form combinations of numbers that are interpreted according to the book of divination; it is sometimes difficult to distinguish between healers and exorcists; the *duaxān* (prayer reader) sells formulas which are believed to have a protective value, e.g., against toothache or sterility; then there are *sayyids* (people who claim to be related to Prophet Mohammad), the *darvish*, *malang* and *qalandar*; and there is the *mārgir* (snake charmer) who also works with a set of *mantar* (a sage's writing) compiled as a *risāla* (treatise).²³⁰

Sidky describes the practice of Muslim mystics and mendicants of modern Afghanistan, some of whom are referred to as *malang*, others as *dervish* and Sufi, as a variety of ecstatic techniques which have clear affiliations with shamanism.²³¹ Research conducted by Louis Dupree, Homayoun Sidky and Mark Slobin in 1971, 1973, 1978 and 1990 are supported by recent objective reports and documentaries by Afghanistan's media (TV and radio) many of which class the above as superstition – wrong beliefs, falsely accepted as Islamic beliefs. These media sources aim to stop people falling victim to

²²⁹ Mahdavi, "Do Ziarats in Ghazni cure patients?" last accessed 22 August 2020.

²³⁰ Slobin, "A Muslim Shaman," 163.

²³¹ Sidky, "Malang, Sufis, and Mystics," 289.

fraudsters. Despite these attempts at raising awareness, the payers of fees to the *ziārat* keepers believe these individuals have supernatural powers.

Taking a wider look at shamanism, its practices extend to different continents, and regardless of whether some practices came to Afghanistan from the Indian sub-continent, Central Asia or another place, beliefs in these practices are strongly held by many who may not be able to distinguish between superstition, non-Islamic and Islamic belief as far as shamanistic beliefs and practices are concerned.

The beliefs and practices related to shamanism are shared by Afghans from all ethnic and religious groups. Only those with a modest education and who have adequately travelled may not hold such beliefs, which numerically are a very slim minority. This section of the thesis has shown that pre-Islamic oral culture and orally transmitted beliefs from different religions, cults or spiritual orders exist among the Afghans today. These beliefs are held by many men and women residing in the rural, urban, civic as well as in cosmopolitan provinces of Afghanistan.

5.3 The Abrahamic Faiths

Judaism

The first-hand account the author received about Judaism in Afghanistan comes from an Afghan-American interviewee and questionnaire respondent, Jack Abraham who left Afghanistan years ago and lives in the United States of America. Jack states that ever since the Jewish people were exiled from their lands 2,600 years ago, they have lived in Persia and surrounding regions

like Afghanistan and Central Asia.²³² In his first telephone conversation with the author, Jack stated:

If you are going to interview other Jewish people, please contact me about the information they give you as some people may have prejudices against Afghanistan. If someone tells you information about Afghanistan which is untrue, I will make sure it is factually correct.²³³

There is no accurate date to show how long the Jewish people of Afghanistan have lived there. Historical and archaeological investigations have led to the discovery of Hebrew writings on tombstones dating back several thousand years.²³⁴ Jewish and Muslim texts written between the eighth and thirteenth centuries show that Jews were present in Afghanistan since the medieval times.²³⁵ Worldwide Jewish organisations claim that Jews settled in Afghanistan in the eighth century.²³⁶ Discoveries of Hebrew writings on artefacts and tombstones in different provinces show that the Jewish subjects of Afghanistan inhabited the land for centuries.²³⁷

Mark Silinsky argues that partly legend and partly documented history indicate that the Jews of Afghanistan traced their roots to the Assyrian and Babylonian empires of 720 B.C.E. and 560 B.C.E.²³⁸ Sara Koplik states that the Jewish history of Afghanistan can only be documented with some

²³² Author's interview with Jack Abraham on 08 December 2019.

²³³ These were the words of Jack Abraham in November 2019, when he first contacted me through Sara Aharon in order to help my research on Afghanistan's Jewish issues.

²³⁴ Aharon, *From Kabul to Queens*, 9-26.

²³⁵ Aharon, 17.

²³⁶ Kamali, *Law in Afghanistan*, 220.

²³⁷ Jacobivici, "Quest for the lost tribes." last viewed 16 April 2018.

²³⁸ Silinsky, "Jews in Afghan Eyes," 672.

certainty from the 1740s, but traces of older, unique influences were preserved in the religious culture of the Jewish community.²³⁹

There are varied theories in regards to the Jewish and Pashtūn connection. There is a fascinating oral history that the Pashtūns believed for centuries to be of Jewish extraction. Some declare that Afghānā, who gave his name to the Afghans, was lineally descended from Abraham and Hagar through Ishmael, and affirm that he was the grandson of Saul.²⁴⁰ A Jew, by the name of Khaled, whom he converted [to Islam], wrote to his brethren in Gour [Ghor] to give notice of this happy event and induce them to embrace the new faith; but before adopting Islamism, they sent several of their chiefs to the Prophet.²⁴¹ Amongst these was Keis who pretended to be descended in direct line from Saul through forty-seven generations and Abraham through sixty-five, and [Prophet] Mohammed loaded him and his companions with favours and gave him the title *Malek Abd-ul-Reshid*, a rank to which he was entitled as a descendant of the Jewish king.²⁴²

Quoting Mr Wheeler, Khan Sultan Mir Munshi the chief secretary of Abdur Rahman Khan offers the following account on the Pashtūns' Jewish roots:

The origins of the Afghans is disputed by many authors. Mr Wheeler, who wrote in 1895, the life of Amir Abdurrahman, says: "The true Afghans, according to their own traditions, trace their descent from Afghānā, the son of Jeremiah, the son of Saul. Afghānā, it is said, was Solomon's commander in-chief. They were transported from Syria to Persia by Nebuchadnezzar, and thence emigrated to the mountain of Ghor, and what is now the country of the Hazara. They were converted

²³⁹ Koplík, *Jews of Afghanistan*, 16-17.

²⁴⁰ Ferrier and Jesses, *History of the Afghans*, 3.

²⁴¹ Ferrier and Jesses, 4.

²⁴² Ferrier and Jesses, 4.

to Islam by a party of their own tribe who had gone to Arabia, under a leader named Wais, and had fought for the Prophet Mohammad.²⁴³

In recent times, the Pashtūns and the Jewish people reject the theory that Pashtūns were Jews. There is no correlation between them and there are no DNA tests to prove claims of common ancestry. Simcha Jacobovici, an Israeli Canadian anthropologist, claims that the sense of justice according to *Pashtūnwāli* and its practical steps in delivering retributive justice is rooted in the Jewish Torah, or in the Christian Old Testament.²⁴⁴ Based on Jacobovici's views, there are similarities between *Pashtūnwāli* and Jewish practices in regard to maintaining order and justice.

Walter J. Ong's and James C. Scott's strong positions on the durability of oral culture and cultures of orality, explains the existence of claims, some of which may not be proven. These claims have interwoven the Jews and Muslims of Afghanistan for centuries. Judaism has held a respectable position among the Muslims of Afghanistan, as many religious and non-religious persons revere the prophets and holy books of the Jews who are also the prophets of Muslims. This commonality has led to the freedom of ideas of spirituality and the sense of justice to flow among the Jewish and Muslim people of Afghanistan, and more so within the Pashtūns' communities.

Esther Frogel, a second-generation Jewish citizen from Afghan Jewish parents conducted her doctoral thesis on the experience of the psychological impact of acculturation on the first and second-generation traditional Afghan

²⁴³ Khan, *Constitution and Laws of Afghanistan*, 1.

²⁴⁴ Jacobovici, "Quest for the lost tribes." last viewed 16 April 2018.

Jewish immigrants in the United States. She reports that in Islamic lands where Sephardic Judaism existed, as indicated by the experiences of Jews in Afghanistan, there was less segregation between the Jews and non-Jews.²⁴⁵ The Sephardic Jewish culture was influenced not only by Jewish tradition but also by Arabic and Greek philosophy and science.²⁴⁶

One of Esther's Afghan Jew interviewees, using the name Daniella, who came from a rich and privileged first-generation immigrant family in the United States describes her life in Afghanistan as follows:

Life in Afghanistan, was different, we were free. We had chauffeurs, there were different maids. We were wealthy. Most of the Jews were like that, not all but mostly all. Also everyone was Shomer Shabbat there. Only one person in the community was not...In Afghanistan everyone was the same. Everyone ate Kosher, was Shomer Shabbat, and went to Mikva. Everyone was the same...When I grew up, I was very educated. I learnt in the American consulate, and I was into being in the consulate. I was free, I had my own car and so did my sisters. I learnt how to drive when I was 12. And to think I failed my tests when I came here. I was princess there, I had everything I needed. We had everything there. We had vacation homes in summer. We went upstate to the mountains. We had beautiful parks. We had waiters that would serve us dinners, and we had musicians come to sing to us.²⁴⁷

Erich Brauer wrote an account of Afghanistan's Jewish religious and customary laws in the early 1940s as follows:

In Herat province, the 2,500 Jews are divided into twenty families. The leaders of the ten most influential families formed the *hevra*, an internal Jewish body that governed the community's private affairs. Hevra judged disputes in criminal and civil cases, using 'fines and corporal punishments' to settle matters such as inheritance. Hevra exercised complete autonomy over the inner workings of their community, as many Jews avoided the Muslim civil courts. The *hevra* also punished transgressions of the *Sabbath* and other religious precepts. For matters regarding marriage and divorce, the Jews went

²⁴⁵ Frogel, "Afghan Jews and their children," 40.

²⁴⁶ Frogel, 40.

²⁴⁷ Frogel, 77.

to *beit din*, or to the rabbinic court. Members of *hevra* were responsible for burying the dead and helping the poor. Additionally, the *hevra* elected *kolantar*, a representative of the Jews to the government.²⁴⁸

The Jewish internal communal affairs were organised by a *hevra*, a group composed of the heads of important families. They were responsible for educating the boys, assisting the poor, burying the dead, enforcing religious laws and resolving conflicts.²⁴⁹ The community was led by the head rabbi, and in Herat, who came from the Garji (Gharji) family. In contrast to the dispute resolution of the Muslim majority, disagreements were never brought before governmental officials or judges and instead, both sides were forced to accept the finality of the rabbi's ruling.²⁵⁰ This could include fines and harsh physical punishments like the use of *fallaq* or *bastinado*, which would be hit against the offender's feet.²⁵¹

Afghanistan's Jews observed Judaism strictly and there were almost no known intermarriages or significant deviations from traditional Jewish practices.²⁵² They observed *Nikur*, *Shabbat*, *Passover*, and *Kosher*.²⁵³ Jewish life was especially marked by the absorption of parochial values from the surrounding Muslim culture, and the Jewish community was organised by clans – similar to the tribal system of the Muslim population.²⁵⁴

²⁴⁸ Aharon, *From Kabul to Queens*, 33-34.

²⁴⁹ Zohar and Yaniv, "Synagogue and the Jewish Home," 37.

²⁵⁰ Koplik, *Jews of Afghanistan*, 37.

²⁵¹ Koplik, 37.

²⁵² Aharon, *From Kabul to Queens*, 29.

²⁵³ Aharon, 32.

²⁵⁴ Aharon, 33.

There are no accurate statistics on the numbers of Jewish people of Afghanistan. The Jewish population in the twentieth century was estimated to be five thousand.²⁵⁵ Groups of Sephardic Jews left Afghanistan for their holy land upon the foundation of Israel. Some moved to the United States, leaving behind them rich and fascinating religious values. In 2005, the BBC reported that Zubulon Zimentov was the only remaining Jew in Kabul who had refused to leave Afghanistan.²⁵⁶ In 2011, Haaretz reported that Zubulon had opened a cafe in Kabul's only Synagogue.²⁵⁷ On 29 October 2019, Emran Feroz wrote in the Foreign Policy that Zubulon, "the Last Jew Gets Ready for the Taliban Again."²⁵⁸ This report relates to the agreement signed between the United States of America on 28 February 2020.

Although the contributions of non-Muslims' cultural values have not received sustained studies, these values meshed with Islamic values and traditions due to the mutual respect and shared doctrines and beliefs – in turn form the foundations of Afghanistan's socio-religious legal order that is strongly rooted in the Abrahamic traditions.

Christianity

Before the Mongol onslaught in the thirteenth century, Afghanistan was a crossroad for many of the world's religions, including Nestorian Christianity.²⁵⁹ Vartan Gregorian reports that there was once a small Christian

²⁵⁵ Aharon, 9-26.

²⁵⁶ The BBC, "Only one Jew," last accessed 10 September 2020.

²⁵⁷ HAARETZ, "The Last Jew in Kabul," last accessed 10 September 2020

²⁵⁸ Feroz, "Afghanistan's Last Jew," last accessed 11 September 2020.

²⁵⁹ Koplik, *Jews of Afghanistan*, 15.

²⁵⁹ Aharon, *From Kabul to Queens*, 29.

community of Armenians, established as a colony by Nadir Shah, but it had dwindled to only a few families before its expulsion in 1896.²⁶⁰ Christianity never gained the status of Judaism in Afghanistan. Muslims believe that Allah does not beget and is not begotten. Muslims see Jesus as a prophet of God with a holy book and revere him as one of the holy prophets named in the Qur'an. The most contentious disagreement between the Muslims and Christians is the doctrine of Trinity.

The only Catholic chapel established in the Italian embassy in 1935 remained a place of worship and was ministered by Christians until the 1960s.²⁶¹ As of 2021, Our Lady of Divine Providence Chapel is the Catholic church based inside the Italian embassy in Kabul, where the expatriate Christians worship. Rula Ghani, President Ashraf Ghani's wife is a Marmonite Christian from Lebanon.

Bahà'i faith

The formal homepage of the Bahà'i faith describes its beliefs as: "Bahà'i beliefs address such essential themes as the oneness of God and religion, the oneness of humanity and freedom from prejudice, the inherent nobility of the human being, the progressive revelation of religious truth, the development of spiritual qualities, the integration of worship and service, the fundamental equality of sexes, the harmony between religion and science, the centrality of justice to all human endeavours, the importance of education, and the dynamics of the relationships that are to bind together individuals,

²⁶⁰ Gregorian, *Emergence of Modern Afghanistan*, 38.

²⁶¹ Ambassade de France en Afghanistan, "Une ambassade a Kaboul," 30.

communities, and institutions as humanity advances towards its collective maturity.”²⁶²

In regard to Afghanistan’s Bahà’is, there is a dearth of information. This religious minority group is often mentioned in the human rights report or in the United States Commission on International Religious Freedom (USCIRF) reports. In its 2020 report, the USCIRF stated that that small community of religious minorities – including Hindus, Sikhs, Christians, Ahmadi Muslims, and Bahà’is remain endangered without the ability to observe their faith publicly for fear of violent reprisal by terrorist groups or society at large.²⁶³ The Directorate of Fatwās is a department of the Ulemā Council. In May 2007, Afghanistan’s General Directorate of Fatwās ruled that the Bahà’i faith was blasphemous and since this ruling, members of the Bahà’i community have lived in secret.²⁶⁴ The Ulemā Council deals with nationwide religious matters and issues *fatwās*.

A ruling from Dar-Al-Ifta Al-Missriyyah indicates that the Sunni religious authorities believe that Bahà’i is a fabricated religion.²⁶⁵ It provides the following *fatwā* on the Bahà’i faith:

Bahaism is a fabricated faith; it includes elements from Buddhism, Brahmanism, idolatry, Judaism, Christianity, Islam and beliefs from the Baatni school of thought. Bahà’is do not believe in the afterlife, Paradise or Hellfire. The first Bahà’i leader claimed in his interpretation of Surat Yusuf that he is better than Prophet Mohammad and his book Al-Bayān is better than the Qur’an.²⁶⁶

²⁶² Bahai.org “What Baha’is Believe,” last accessed 17 January 2021.

²⁶³ USCIRF, “International Religious Freedom, 2020” 48.

²⁶⁴ USCIRF, 49.

²⁶⁵ Dar Al-Ifta is the Sunni religious source that issues Fatwas.

²⁶⁶ Dar Al-Ifta Al-Missriyyah, “What is Bahaism,” last accessed 17 January 2021.

The above *fatwā* concludes that “Muslims have unanimously agreed that Bahatism is not an Islamic doctrine and that whoever believes in it, is not a Muslim but an apostate from Islam; an apostate is a person who abandons Islam for another faith.”²⁶⁷ Afghanistan’s *ulemā*’s 2007 ruling about the Baha’i faith concords with the rest of Sunni religious authority in other countries.

²⁶⁷ Dar Al-Ifta Al-Missriyyah, last accessed 17 January 2021.

Sufism

There are a number of mystical orders in Islam, the most important one being: the Sufi or *Tassawuf*. These mystical orders did not pretend to replace orthodoxy, but offered ways to seek the Supreme Being through personal experience (*ma'rifat*) and to achieve momentary union with God, thus in general, rejecting knowledge (*ilm*), rational and theoretical.²⁶⁸ Sufi seekers often sound superficially like agnostics, or, with their emphasis on personal experience, like existentialists.²⁶⁹ They are different, however, in that they not only seek but find God, and Sufism embodies only a few ideas: the unity of mankind, predestination and the possibility of a momentary union of men with God.²⁷⁰

The Naqshbandi Sufi order led by Pir Saif ur-Rahman, traces its origin, as do all Sufi orders, through an initiatic chain that reaches back to Islam's founder, Prophet Mohammad.²⁷¹ Gujduwani, the co-founder of Naqshbandi suggests mystic practices later embraced by the Naqshbandi Sufis as follows:

Yād kard (remembrance, both oral and mental): repeating always *dhiker* imparted to you, so that the aspirant may attain the beatific vision.

Bāz gasht (restraint): when engaging in the heart-repetition of the *dhiker*, interspersing it with such a phrase as "My God, thou are my Goal and Thy satisfaction is my aim" to help keep one's thoughts from straying. Other masters have said that *bāz gasht* means "return," that is, return to God by way of contrition.

Nigah dāsht (watchfulness): being watchful over wandering, passing, or evil thoughts when in contemplation.

²⁶⁸ Dupree, *Afghanistan*, 78.

²⁶⁹ Dupree, 78.

²⁷⁰ Dupree, 78.

²⁷¹ Lizzio, *Embattled Saints*, 15.

Yād dāsh (recollection): concentrating upon the divine presence in a condition of forestate of enlightenment and intuitively anticipating or perceiving the divine presence.

Hush dar dam (awareness in breathing): inhaling and exhaling mindfully; every breath should hold the divine presence in awareness.

Safar dar watan (journeying to one's homeland): making the inner journey of consciousness from blameworthy or human to praiseworthy or divine.

Nazar dar qadam (watching over one's steps): maintaining vigilance during one's journey, whatever the type of country through which the spiritual traveller is passing, so that he does not let his gaze be distracted from the goal of his journey, the divine presence.

Khalwat dar anjuman (solitude in a crowd): knowing always that the journey of the Sufi, though outwardly in the world, inwardly is with God.²⁷²

Sufi orders are popular in the Islamic world and in places like Afghanistan, Turkey and other countries, Sufis read the poems of Maulana Jamaluddin Balkhi – in the West known as Rumi. Famous Sufi poets of Afghanistan are Khawāja Abdullah Ansāri of Herat (11th Century), Hakim Sanāyi of Ghazni (12th Century), Jalaluddin Balkhi Rumi of Balkh (13th Century), Abdul Rahman Jāmi of Herat (15th Century), Pir Roshan Bayāzid Ansāri of Waziristan (16th Century), Shah Arzāni (16th Century), Rahman Bābā of Peshawar (17th Century) and Ahmad Shah Abdāli of Kandahar (18th century).²⁷³

²⁷² Lizzio, 34-35.

²⁷³ Azami, "Sufism returns to Afghanistan," last accessed 19 December 2020.

5.4 Religious Persecutions

Strong societal or institutional discrimination amounting to the persecution of different religious minority groups in Afghanistan has a long history. Discriminatory practices have varied in scope and form in different governments. Religious discrimination may be a major reason why different religious groups of Afghanistan remain severely under-studied. Moreover, discrimination and marginalisation of minority religious and ethnic groups has forced them to remain in the margins of society and evade the state and its institutions.

In analysing the contents of *Sirāj al-Akhhbār*, the second newspaper of Afghanistan, May Schinasi writes that Shi'a Muslims were appointed to government posts such as *dabir*, *monshi* and *sar-daftar* (manager, secretary and headman), and were expected to live amicably with the Sunnis without conflict or apparent antagonism, but when they were guilty of some crime, they received terrible punishments.²⁷⁴

Abdur Rahman Khan (r. 1880-1901) and his son Habibullah Khan (r. 1901-1919), executed several Qadiyani preachers (also known as the Ahmadiyya) who entered Afghanistan.²⁷⁵ Followers of Ahmadiyya believe that their founder, Mirza Gholam Ahmad of Qadiyān was a prophet, which contradicts the Muslims' belief that Prophet Mohammad was the last prophet of God.²⁷⁶ During the five years of Amanullah Khan's rule, some Qadiyāni *mullahs* entered Afghanistan and remained there, but on 6 September 1924,

²⁷⁴ Schinasi, "Beginning of the twentieth century," 94-95.

²⁷⁵ Nawid, "Religious Response to Change," 121.

²⁷⁶ Nawid, 120.

Ne'matullah, a Qadiyāni missionary, was executed; some thirty Qadiyānis were arrested and two other Qadiyāni *mullahs* were stoned to death later that month.²⁷⁷

In a number of research papers, Hafizullah Emadi, an Afghan scholar, investigates the repression of Hindus and Sikhs.²⁷⁸ Sara Koplik writes that Shi'a Muslims, especially Hazāras and poor Badakhshanis were extremely vulnerable to capture as slaves, as they were viewed as non-believers and heretics.²⁷⁹ The Turkmen would seize those traveling on the caravan routes between Khorasan and Bukhara, and rulers would obtain extra income through ransoming captives or selling them as slaves.²⁸⁰

Inderjeet Singh writes that in Afghanistan, the Hazāra Shi'as are at the bottom of the class hierarchy.²⁸¹ To the present day, Hazāra Shi'a Muslims get persecuted in society, in government circles and also by terrorist groups. Due to the practice of either engaging in or tolerating violations of religious freedom pursuant to the International Religious Freedom Act (IRFA), in its 2020 report, the USCIRF recommends that Afghanistan remains on the United States State Department's Special Watch List.²⁸²

In responses to the research questionnaire, out of forty respondents, twenty-seven stated that the Buddhists, Christians, *Kāfiristan* people, Jewish, Hindu and Sikhs of Afghanistan must be included in research on Afghanistan and

²⁷⁷ Nawid, 121.

²⁷⁸ Emadi, "Minorities and marginality," 307-320; "Repression and endurance," 628-645.

²⁷⁹ Koplik, *Jews of Afghanistan*, 52.

²⁸⁰ Koplik, 52.

²⁸¹ Singh, *Afghan Hindus and Sikhs*, 25.

²⁸² USCIRF, "International Religious Freedom," 48.

only two respondents disagreed. Twelve respondents were aware of the Jewish people's customary justice and twenty-eight were not. Twenty-five agreed that non-Muslims must be judged under their own religious laws and fifteen disagreed. Thirty respondents believed that Afghan and international researchers have ignored the non-Muslims of Afghanistan, four disagreed and six refrained from answering the question.

5.5 Conclusion

This chapter has offered insights into Afghanistan's different religions, cults and spiritual orders. It has highlighted the types of contributions these cults, orders and religions have made to Afghanistan and its people. Although these contributions have not been given the credit they deserve, their value is strongly felt today, given that the exclusion of religious and ethnic minority groups is not acceptable practice in contemporary human rights discourses. The old religious influences have such a large impact on Afghanistan's less literate society that no one can say which cluster of beliefs belong to which faiths, Islam included.

The chapter has tried to show different ways citizens of Afghanistan understand and relate to the religious and cultural influences as well as non-religious beliefs (myths, shamanism, *ziārat* healing) which informs elements of their understanding of a *legal culture*, rooted in religion. As demonstrated, the religions, philosophies or spiritual orders and belief systems are intertwined. The chapter has also highlighted the power of oral culture and oral histories in Afghanistan. In the next chapter, I shall discuss the procedural and substantive justice based on *Pashtūnwāli* tribal code.

CHAPTER 6: PROCEDURAL AND SUBSTANTIVE JUSTICE BASED ON PASHTŪNWĀLI TRIBAL CODE

6 Introduction

This chapter starts with a theoretical introduction to tribalism and how it manifests itself in Afghanistan's society and government, and then it discusses how tribalism affects social and political change. The definition of tribalism adopted in this chapter is that of Andrew Heywood, who defines tribalism as "group behaviour characterised by insularity and exclusivity, typically fuelled by hostility towards rival groups".²⁸³ In the context of Afghanistan this definition is particularly applicable, given that since the inception of the Afghan state in 1800s, the central state based in Kabul has undertaken various policies of inclusion and exclusion of members of different ethnic groups in what it alludes to be forming a *national identity*.²⁸⁴

The first part of this chapter introduces the institutions of *Pashtūnwāli* – an unwritten code of conduct attributed to the Pashtūns. Understanding *Pashtūnwāli* helps us note how this tribal code impacts the advancement of modern legal concepts in Afghanistan, and how the country's legal culture progresses or regresses.

The second part of the chapter highlights the procedural and substantive justice matters based on the *Pashtūnwāli* code with actual cases as examples.

The chapter will seek to demonstrate that cultural relativist approaches have

²⁸³ Heywood, *Politics*, 459.

²⁸⁴ These issues have received sustained research interests by Louis Dupree, Thomas Barfield, Mohammad Nazif Shahrani, Sayed Askar Mousavi, Ofran Badakhshani, Nasir Mehrin and a number of other researchers, historians and students of Afghanistan's affairs.

seldom looked at the detrimental implications of tribal identities and their appropriation of religious legal codes, which have ultimately made the authorities malleable to the point where it is often circumvented.

At the end of the chapter, the findings of Roland Martin Kraml, who investigated changes to *Pashtūnwāli* between 1978 and 2012 in his master's thesis, will be discussed. Kraml's findings are important in defining the scope of *Pashtūnwāli* in contemporary Afghanistan and how it has changed or reformulated itself in different forms. A few recent cases and decisions based on tribal customs such as the levirate marriage, bride-price and tribal punishment will be shown.

6.1 Theoretical Description of Tribalism

Tribalism is an issue of interest for different types of scholars. The two definitions of tribalism by the Oxford dictionary are 1) behaviour, attitudes, etc. that are based on supporting and being loyal to a tribe or other social group and 2) the state of being organised in a tribe or tribes.²⁸⁵ However, dictionary descriptions are formal and simplistic. Elena Vismara, quoting Paul James, postulates that there is currently an impasse when discussing tribal societies because of the supposed separation between structures referable to traditional tribalism and structures ascribable to modernism and post-modernism.²⁸⁶ Describing anthropology as a self-critical discipline, Vismara elaborates that the concept of tribes and tribal identities has been

²⁸⁵ Oxford Learner's Dictionary, "tribalism," last accessed 18 July 2020.

²⁸⁶ Vismara, "The Contemporary Nature of Tribalism," 3.

criticised by many social anthropologists because of its evolutionary connotation.²⁸⁷

In the context of Afghanistan, Nivi Manchanda from Queen Mary University proposes a strong case against the use of the term *tribe* by the colonialists.²⁸⁸

Manchanda's writing relates to the British colonialists' use of the *tribe* tag for Afghanistan. She questions the validity of history writing through the use of travelogues. In her book, *Imagining Afghanistan: The History and the Politics of Imperial Knowledge*, Manchanda criticises Western scholars and statesmen of the nineteenth to the twenty-first centuries who in the context of Afghanistan have projected the term 'tribe' in variety of ways.²⁸⁹ She concludes that the notion of 'tribe', not unlike those of 'race', 'caste, and 'ethnicity' found elsewhere in the colonies, has been mined and instrumentalised in the service of empire with far-reaching implications for Afghanistan.²⁹⁰

A number of scholars have paid attention to the instrumentalisation of *tribal identity* and its political use by Afghanistan's governments which has created *divided identities* and *divided loyalties* in modern Afghanistan. Louis Dupree refers to Amir Abdur Rahman Khan's spread of power beyond Kabul as internal colonialism.²⁹¹ Mohammad Nazif Shahrani, writer and university lecturer based in the United States, argues that person-centric politics – the cornerstone of the kin-based mode of Pashtūn tribal social and political

²⁸⁷ Vismara, 2.

²⁸⁸ Manchanda, "Imperial Sociology of 'Tribe' in Afghanistan," 165 –189.

²⁸⁹ Manchanda, *Imagining Afghanistan*, 105-142.

²⁹⁰ Manchanda, 140.

²⁹¹ Dupree, *Afghanistan*, 417.

organisation – have been the defining attribute of Afghan politics since the creation of the Pashtūn-dominated centralised polity in the mid-eighteenth century by a charismatic Abdali Pashtūn chief, Ahmad Shah Durrani (r. 1747-1773).²⁹² Shahrani contends that the rise of the Taliban movement during the post-jihad crises of succession, with their Islamic extremism of Talibanism, is the inevitable culmination of the legacies of a long history of internal colonialism and a person-centred, Pashtūn-dominated, Afghan political culture.²⁹³

The internal element of colonialism leading to kin-based rule commenced when in the 1880s, the Durrani Pashtūn leaders killed their political rivals, the Ghilzai Pashtūns, the Hazāras and many of the *Kāfirs*. Referring back to Manchanda’s critical views, Afghanistan presents a unique tribal system in which power, religion, politics, localism and globalism are intertwined and is steered by the ethno-tribal leaders of Afghanistan – in a tribal political system that breeds hostility and internal colonialism. Furthermore, tackling the British colonial use of the word *tribe* head-on, but failing to note how the Kabul-centric political system consumes internal colonialism and tribal identity, indicates that Manchanda’s research lacks accuracy and relevance in the context of Afghanistan. Theoretically, and in practice, one cannot overlook or ignore the Pashtūns’ internal presentation of their *tribal* identity or the central government’s internal colonialist version of tribal identity in former and present times. Contrary to Manchanda’s view, for Afghanistan

²⁹² Shahrani, “Resisting the Talibanism,” 2.

²⁹³ Shahrani, 6.

and for many parts of the Islamic world, history writing through travelogues are very important.²⁹⁴

The assessment of tribalism in Afghanistan is essential, as it helps researchers understand its negative bearing on a *universal* rule of law and legal culture, encouraged by the international community that seek to grant equal rights to all citizens of a country: men, women and to the people who profess different faiths or those with no faiths.

6.2 The Institutions of Pashtūnwāli

The Pashtūn population of Afghanistan are known for their strong customary traditions of *Pashtūnwāli*, an honour-based unwritten tribal code concerned with preserving honour by the protection of land, wealth and family. Pashtūnwāli is an ethno-centric concept, based on the idea that Pashtūns are distinct from other ethnic groups due to their Pashto language, culture and history.²⁹⁵ Mike Martin argues that Pashtūn society can be succinctly described through a trinity of lenses: those of tribal power, state power and religious power, *tribe*, *state* and *mosque*, and these power centres are represented at all levels of society and government.²⁹⁶ Palwasha Kakar, an Afghan-American scholar, states that “Pashtūnwāli, the way to be a Pashtūn is integral to Pashtūn identity”.²⁹⁷

²⁹⁴ Popular examples of travelogues are the diaries of the Chinese Buddhist pilgrims, the Moroccan scholar, ibn Battuta. Western historical works through travelogues are the works of Mountstuart Elphinstone, *An Account of The Kingdom of Caubul and Its Dependencies*, printed in 1815; Marjorie Jewett Bell, *An American Engineer in Afghanistan*, printed in 1948; Jason Eliot, *An Unexpected Light: Travels in Afghanistan*, printed in 1999; and Rory Stewart, *The Places in Between*, printed in 2014.

²⁹⁵ Rzehak, “Doing Pashto,” 3; Barfield, *A Cultural and Political History*, 25.

²⁹⁶ Martin, *An Intimate War*, 5.

²⁹⁷ Kakar, “Tribal Law of Pashtunwali,” 3.

Synoptically writing, the institutions of *Pashtūnwāli* are *badal* (revenge), *baramta* (usurping belongings in litigations), *melmastīā* (hospitality), *nanwati* (sanctuary), *nang* (honour), *sharm* (shame), *peghore* (satire), *turah* (bravery), *sabat* (loyalty), *ghayrat* (chivalry), *nāmūs* (protection of women) and *pardah* (women's veiling).²⁹⁸ These are indivisible institutions which define how a Pashtūn individual must live his or her life. The *Pashtūnwāli* code is also dominant amongst Pashtūns of Pakistan. Kakar argues that publicly enacting norms that fulfil the precepts of *Pashtūnwāli*, such as honour, hospitality, gender boundaries and the institution of *jirga*, are a tool by which Pashtūns maintain specific social order and sustain a religious-ethnic identity.²⁹⁹

Nāmūs is an important institution for maintaining a gender segregated order of society, which is often linked to *pardah* (veil), the veil of a curtain being the boundary between men's and women's physical space: a control not by men on women but instead, in the words of Kakar, a border stopping both from entering into each other's spaces.³⁰⁰

The behaviours set out by the *Pashtūnwāli* code may not always be linked to Islam. Senzil Nawid makes this distinction, stating in the context of Afghanistan that "legitimacy of authority depended in considerable degree on the ruler's acceptance and approval of values and behaviour that conformed to the Islamic precepts and to a lesser degree, to the mores of *Pashtūnwāli*".³⁰¹

²⁹⁸ Zahid, "Understanding Taliban," 2; Eliaz, "Pashtunwali and Torah," last accessed 16 August 2020.

²⁹⁹ Kakar, "Tribal Law of Pashtunwali," 2.

³⁰⁰ Kakar, 4.

³⁰¹ Nawid, "Aman-Allah and the Afghan 'Ulama'," 188.

Ashraf Ghani also argues that Islam and *Pashtūnwāli* are separate.³⁰² Islamic interpretations concerning the segregation of men and women are in harmony with tribal concepts of *nāmūs* and *pardah*. For this reason, in areas where tribe, tradition and orthodox Islamic interpretations are strongly observed, women are hidden from public life – hidden under a *burqa* and are compelled to comply with the demands of tribal headmen and *mullahs*.

Badal means *in return* and is the institution of exacting revenge. Badal may be exercised for the defence of institutions such as *nang*, *sharm*, *peghore* and *ghayrat*. Thomas Barfield contends, “In an aristocratic society where honour is the highest ideal, willingness to die to preserve it strikes observers as noble; in a commercial society where money takes precedence, such behaviour is considered lunacy.”³⁰³ In this comparative text, Barfield identifies aristocratic society as Afghanistan’s society, and commercial society as Western and capitalist society. Badal affects and endangers the lives of urban dwellers, including members of the Pashtūn population who do not live a tribal life.

Badal in Pashtūn society is connected to preserving retributive justice at all costs.³⁰⁴ In most *badal* cases, innocent people are likely to be harmed, both physically and emotionally. A person who refrains from exacting *badal* is highly likely to experience rejection from his tribe or members of his kinship circle. According to Lutz Rzehak, a person who upholds honour is called

³⁰² Ghani, “Islam and State-Building in Tribal Society,” 269.

³⁰³ Barfield, *A Cultural and Political History*, 17.

³⁰⁴ In numerous tribal conflicts where *badal* killings have taken place, each clan or tribe involved in the conflict may lose several members. After several people are killed from both sides, tribal elders seek peace through an elaborate ceremony which involves putting a copy of the Qur’an on the head, after which a feast is held for the elders and guests.

nangyālay (honourable) and he will be viewed with high esteem; heroic courage and bravery are in demand only when there is no alternative.³⁰⁵ Late historian, Hasan Kakar, regards *badal* killing as revenge to be a destructive component of *Pashtūnwāli*.³⁰⁶

Customs amongst tribal Afghans [Pashtūns] dictate that victims' family members are honour-bound to retaliate or seek to reconcile.³⁰⁷ It is often killing or exacting harm in retaliation that constitutes *badal*. Revenge killing is a source of conflict between community members.³⁰⁸ Despite the fact that some individuals use tribal institutions to exact revenge, there are peaceful avenues for reconciliation, including latitude for forgiveness of the perpetrator. One option to avoid killing is for the victim's *wāli* (guardian) to receive financial compensation. A key aspect of criminal cases in Afghan society is reconciling the victims and perpetrators, and their families or clans, and providing compensation.³⁰⁹ The compensation is known as *diyyāt*, in *Shari'a* formulations and *ozrāna* (apology) in *Pashtūnwāli*.

Pashtūnwāli may also include the custom of giving girls into marriage as compensation, known as *baad* (marriage). *Baad* is the practice through which women are used as compensation for criminal acts or as restitution for personal injury suffered by another family member.³¹⁰ Women get involved in inter-tribal *peace-making* processes when it involves *baad* marriages. Noah

³⁰⁵ Rzehak, "Doing Pashto," 11.

³⁰⁶ Kakar, *The Reign of Amir Abd al-Rahman Khan*, 65.

³⁰⁷ USIP "The Clash of Two Goods, State and Non-State Dispute Resolution in Afghanistan," 16.

³⁰⁸ USIP, 16.

³⁰⁹ USIP, 27.

³¹⁰ Gaston, Sarwari and Strand, "Lessons Learnt," 40.

Coburn and John Dempsey state that girls are forcibly exchanged to settle blood feuds, debts and other disputes given in *baad* exchanges – a practice that is against Afghanistan’s law, international law and contrary to Islamic law principles.³¹¹

Baad marriages often take place when murder is committed, and such marriages serve as a form of bribery and, in the context of the rule of law, it is used to avert the prosecution of the culprits. The practice of *baad* marriages shows that certain elements of the *Pashtūnwāli* tribal code can easily circumvent state and international law, because the political leaders of Afghanistan claim to promote the formal laws, but in practice, undermine those very laws by overlooking the parallel tribal/customary institutions. Parallel institutions such as these undermine the state legal system in many ways. For instance, groups of people in rural parts of Afghanistan do not see themselves bound to follow the state law like the urban dwellers. There is an obvious ethno-tribal bias in Afghanistan’s political system. Examples of parallel institutions are *jirga* that negatively impact and undermine the courts of law; *Loya Jirga* that affects the operations of a parliament and *Arbaki* (tribal) militia-style police that affect the operations of a national police force.

Melmastiā and *Nanwatai* are two other institutions of *Pashtūnwāli*. These institutions deal with hospitality and the protection of Pashtūn people. Protecting people in times of trouble is a revered quality of the Pashtūns. In cases where an offence of *malum in se* such as an immoral act is being

³¹¹ Coburn and Dempsey, “Informal Dispute Resolution,” 6.

committed, one cannot not expect to receive a hospitable reception or protection under *Melmastiā*. For instance, a man who has committed fornication and escapes revenge from the girl's tribe cannot seek protection under *Nanwatai*. Strange enough, for murder one can ask for protection under *Nanwatai*. Kenneth P. Lizzio describes *Nanwatai* as follows:

Criminals seeking to get beyond the reach of the law often take advantage of a Pashtūn custom, *Nanwatai*, which requires a host to grant asylum to anyone who requests it, except in the case of rape. Once inside the agency, fugitives customarily enter into a client-patron relationship with their host such as that extended by the Taliban government in Afghanistan, who refused to turn Osama bin Ladan over to the Americans in 2001.³¹²

The institutions of *Pashtūnwāli* are interwoven in a complex web, where adherents of the code are expected to respect and follow certain obligations. The code forms binary communal relations between the *kashr* (youths) and the *mashr* (elders), a hierarchy based on social inertia. This may involve supporting group interests, some of which may involve taking part in combat, paying financial contributions in the name of Islamic taxation, offering free services or adhering to certain religious orthodoxies.

³¹² Lizzio, *Embattled Saints*, 90.

6.3 Customary Laws

The national governments in Kabul have sought to impose centralised, code-based judicial institutions upon local communities that have historically had non-state traditional institutions for regulating behaviour and resolving problems.³¹³ Despite these attempts, customary practices based on *Pashtūnwāli* are popular in cities and districts but are not so strongly practised in the civic regions of the five cosmopolitan cities of Herat, Kabul, Kandahar, Mazar-e-Sharif and Nangarhar.

In Afghanistan, inhabitants of the economically and geographically peripheral areas in the mountains, deserts and steppes have remained beyond the bounds of state control and therefore run their own affairs.³¹⁴ It is the author's view that this diarchy system, between the Kabul-based central power and the local traditional structures, which runs in parallel but disharmoniously, affects the empowerment of the rule of law. The following section gives a few examples of cases resolved by the *Pashtūnwāli* code.

6.4 Procedural and Substantive Justice

Blood Feuds

Amongst the tribesmen murder is a serious crime. In tribal parts of Afghanistan, murder often leads to blood feuds and consequently to a spree of revenge killings. Members often seek revenge rather than enforcing criminal punishments on the perpetrators. Afghanistan's media outlets and government sources call these types of revenge killings *doshmani shakhsi*,

³¹³ Barfield, "Afghan Customary Law," 1.

³¹⁴ Barfield, 3.

which translates as *personal enmity*. Afghanistan's administrations refrain from using the terms *blood feud* or *inter-tribal killings*.

In rural Afghanistan, non-legal customary law institutions are unable to try people for their crimes and set punishments accordingly. Traditionally, the injured party would be expected to take revenge by murdering the killer or someone from the killer's family. According to Pashtūnwāli practices, revenge-taking must take place face-to-face, and one must not target women or children. According to *tsali* (practices), the murder of an innocent man puts all of his own agnatic relatives at risk as targets of revenge.³¹⁵

In 1941 a group of men went hunting partridges in the mountains. Two men, one from the village of Ismaelkhel and the other from the village of Almara, quarrelled over who should get to keep an exhausted bird that had fallen to the ground. A fight ensued in which one of the Almara men was beaten with a stick and badly injured. The other men broke up the fight and the injured man's brothers attempted to take him to a hospital in Pakistan but he died along the way. The brothers then decided to kill the murderer and went to his home in Ismaelkhel to ambush him the next morning. They shot and killed him on his way to dawn prayers. The brothers then fled to Almara hotly pursued by armed men from Ismaelkhel. Although the men of Ismaelkhel were eager for revenge, they relented when the elders of Almara informed them that the victim himself had killed one of their men the day before. An influential man of Ismaelkhel, whose servant was the victim of the dawn attack, put a holy Qur'an on his head to signal his willingness to act as mediator. After talking to both sides, he determined that the revenge killing was equivalent in type and asked that the armed men on both sides return to their respective homes to bury the victims properly. Because both sides had suffered equal losses, the incident was considered resolved.³¹⁶

³¹⁵ Barfield, 14.

³¹⁶ Zadrān, "Socioeconomic and Legal Political Processes," 119-120.

Marriage Disputes

Customary laws are not just about forcing *baad* marriages and enforcing restitution or revenge that affect the family members of a criminal. Dispute resolution based on common sense forms the crux of the following case decided by customary practice:

In 1962 'A' wished to marry his son to the daughter of 'B'. He therefore sent his wife to talk with 'B's' wife about the possibility. 'B's' wife knew that 'A' was a rich and famous man, so she was in favour of marrying her daughter to his son. She therefore brought out some khone (a type of sugar cone used in order to signify the initial acceptance of a marriage arrangement) and gave it to 'A's' wife. A few days later 'C' sent his wife to B's wife for the same purpose. B's wife promised her daughter to 'C's' wife too. 'B' and 'C' were both informed of this agreement. 'C' and his relatives then went to B's house to confirm the engagement publicly with the exchange of khone and the receipt of a handkerchief embroidered by the girl herself. Several days later 'A' complained about this to the government and four members of 'C's' family were jailed. However, the government court said that the dispute should be handled by Pashtūn tsali (practices) and so a *maraka*³¹⁷ was convened. The *marakachian*³¹⁸ refused to hear the case until 'C's' relatives were released from jail so 'A' was obligated to ask the government to do so. Since such a request indicated his willingness to be bound by the arbitration, they freed the men. Each side then presented their case. 'A' claimed that the initial exchange of khone bound 'B's' daughter to an engagement with his son. It was, he claimed, as if he had left a deposit of grain at a mill to stake his claim to be first in line. 'C' argued that 'A' was simply using his wealth and power to override 'C's' rights. Using an equally domestic metaphor to match 'A's' claim, he said that making an engagement was like buying cloth from a merchant: once the cloth is cut the buyer owns it. He noted that the formal exchange of sweets and handkerchief involving the men as well as the women had made the engagement official. The judges decided that according to Pashtūn marriage practices, 'B's' case was more solid. They declared that 'B' had the greater right and thus the case was resolved with 'A's' loss.³¹⁹

³¹⁷ Setting up an elders' community gathering for dispute resolution.

³¹⁸ The people who solve disputes in a *maraka* setting.

³¹⁹ Zadrān, "Socioeconomic and Legal-political Processes," 317-319.

Theft

According to customary laws, when a thief is brought before the elders in a *jirga* for their decision, the main approach taken is restitution. The stolen items must be returned to their owner. The thief may also have to pay a fine to the victim whose property has been stolen, as by stealing, the thief has violated the victim's honour.

In 1954 a labourer working for a landlord from another tribe stole his rifle and fled back to his home village. Because the thief came from a powerful tribe, the landlord wished to avoid using tribal arbitration and instead reported the crime to the police. The thief was arrested and sentenced to three years of imprisonment. While in prison he died of an illness. His relatives then demanded revenge or compensation from the landlord on the grounds that he would not have died had he not been jailed.³²⁰

Trial by Ordeal

There are different informal traditions to ascertain the truth. Trial by ordeal may not be practiced any longer. In a trial by order, people in a *maraka* (customary *jirga* litigation) may demand that the accused takes an oath or undergoes an ordeal.³²¹ In Pashtūnwāli, undergoing an ordeal in order to establish the truth is called *towda*.

Among some Pashtūn groups an ordeal is required in addition to taking the oath, particularly in cases of theft. Trial by ordeal is based on the belief that an innocent person will suffer no ill effects from the ordeal, whereas the guilty will. Among the Zadrān Pashtūns the ordeal consists of having a red-hot piece of iron placed on the accused person's right hand protected only by seven pieces of paper. The accused must then walk seven marked paces before throwing the iron away, after which his hand is bandaged. He spends the night under guard and then the hand is examined to see if it has blistered. If it has, he is guilty; if not, he is innocent and entitled to receive an indemnity for the false accusation and the accuser must apologise. The Tani

³²⁰ Zadrān, 312-313.

³²¹ Barfield, "Afghan Customary Law," 12.

Pashtūns have a similar ordeal, but one that involves the accused picking three stones out of a pot of boiling water without suffering blisters. Zadrān observed that the popularity of the ordeal as a means to determining the truth was declining in favour of the oath alone, even by the mid-1970s. This was because many people had lost faith in its efficacy and because swearing oaths had a justification in Islamic law while ordeals did not. In cases of theft it was being widely replaced by an additional swearing, in which an innocent relative of the accused was asked to take an oath that he had no knowledge of the items stolen and that the accused was innocent.³²²

Moral Transgression

According to *Pashtūnwāli*, if a person is murdered for getting involved in a dishonourable act such as stealing, adultery or sodomy, then his or her death would not invoke revenge or punishments for his or her murderer. If two people are found to be in bed engaged in adultery, fornication or sodomy, their immediate killing is permissible, and such action will not lead to punishment for the perpetrators. This practice is the same in rural districts as it is in the cities.

Until 2018, when the old legal code was updated, Article 398 of the Afghan Penal Code of 1976 stated that if a man were to find his female kin (a related female such as a wife, daughter, sister, aunt or cousin) in bed with another man, then killing both persons as a form of punishment would not be classed as murder or manslaughter.

Article 398 of the Penal Code: A man who sees his wife, or another close family member, in the act of committing adultery or sharing a bed with another individual is exempted from punishment if he immediately kills or injures his spouse and the third party. Though the defendant would be exempted from regular murder and laceration

³²² Zadrān, "Socio-Economic and Legal Political Processes," 243.

punishments, he would still be subject to a short term of imprisonment, two years or less, as a form of ‘ta’zir’³²³ punishment.³²⁴

Due to the overtone of moral and religious disapproval of adultery, *Shari’a*-inspired judges favour lenient punishments for someone murdering adulterous persons. In cases where personal moral judgements outweigh an official code, often the surviving victims are not protected or afforded respect or protection. In the formal legal system of Afghanistan, in cases of adultery, short term imprisonments based on *ta’zir* (discretionary punishment) are applied. In Article 398 of the Penal Code 1976 the wording of the *sentence* is vague and *less than two years* may mean anything from one day to just under twenty-four months. This means until recent years, a person would have received minimal and lenient punishments, or the killer could even walk free if he had killed someone accused of having committed adultery. In the courts of law, the vague and inconsistent gap between a day and twenty-four months makes the exchange of bribes quite appealing.

Marriage as Compensation

Crime is the personal responsibility of its perpetrator.³²⁵ In modern legal systems, this is a non-negotiable principle. In some authoritarian regimes, punishing the relatives of an offender in order to put pressure on the perpetrator to come forward may be practised. In the customary laws of Afghanistan, as for example in rape cases, the dignity and honour of a family,

³²³ Kamali, *Law in Afghanistan*, 46. Mohammad Hashim Kamali describes *Ta’zir* as a doctrine which in *Hanafi* law grants the *qādi* wide discretion to order punishment in accordance with the individual circumstances of the case.

³²⁴ ALEP, “Criminal Law of Afghanistan,” 108.

³²⁵ CONSTITUTION 2004, art. XXVI.

clan or tribe is involved. In certain cases, punishment for a rapist has resulted in his innocent family members getting punished instead. In some other cases, in order to atone for the crime, the rapist would have to get his sisters or daughters married to men from the victim's family.

In Pashtūnwāli, this action is called *sharm* (apology) which is a form of restitution. The girls are sacrificed because one of their family members has committed a dishonourable action such as murder or rape or cannot pay off his debts. *Baad* marriage is the penance (restitution) and the type of *sharm* (apology) payment for the violated honour. Family members from both sides involved in *baad* marriages may have longstanding problems even after their girls are married based on Pashtūnwāli customs.

If a couple involved in sexual acts are unmarried, according to traditions that have gained religious backing as well, the couple have to marry. Despite the fact that some couples marry after being involved in sexual intercourse, they both may be forbidden to enter their parents' or in-laws' houses because of the shame they have brought on the families.³²⁶

Land Disputes

Disputes can arise when land is to be bought or sold. For instance, several brothers in a family distribute family-inherited land amongst themselves. Blood feuds may be caused between families, clans and tribes over land ownership. The central government in Kabul is unable to register land titles. In recent years, Arāzi, a land registry institution has been established by the

³²⁶ Even if there is mutual consent for intimate relations and sexual intercourse outside wedlock, in Islamic law these relations are regarded as sins, *zinā* (adultery).

state to register lands in Afghanistan. However, most lands remain un-surveyed and un-registered. The following is an example of land dispute.

In 1952 two tribes disputed ownership of a piece of wasteland that was located between their respective villages. A *maraka* was held but was unsuccessful, so the parties moved the dispute to a local government court. The judge, using Pashtūn *tsali* (practices) rather than Islamic law, decided that the case could be resolved if the elders of the village 'A' were willing to take a special oath asserting the rightfulness of their claim that the land was theirs. Qur'an in hand they walked over the land in question and swore that it was theirs. They were then awarded the land by the judge. However, because one of the oath takers later became deaf, many people from village 'B' thought this was a punishment for swearing a false oath.³²⁷

Inheritance

Islam allots women half the share of an inheritance bequeathed to men who have the same degree of relation to the testator. Inheritance rules regarding women depend on their status, such as having children or having re-married. I shall give a general overview of inheritance here. People are free to donate their wealth and property to whomever they please; this can happen during one's lifetime or it can be done through a will.

In customary laws, men often exclude married women from inheriting from their father's or mother's land, depriving them of their share of the inherited assets. The inheritance for widows and unmarried girls/women will be allocated to them according to *Shari'a* instructions. Depriving women of inherited land is common in rural parts of Afghanistan. This action, a *faux pas* and *malum in se*, does not appear to attract the attention of Afghanistan's religious authority. The *ulemā* do not condemn it or issue a *fatwā* (opinio

³²⁷ Zadrān, "Socio-Economic and Legal Political Processes," 248.

juris) to ban this un-Islamic practice – indicating that the *ulemā* are willing to disregard religious law where they see fit.

6.5 Changes to Pashtūnwāli Since 1978

Roland Martin Kraml completed his Magister der Philosophie (master's thesis) at the Universität Wien, titled “Changes in Pashtun tribal structures since 1978: the influence of war, foreign militaries and militant political Islam.” Kraml's research investigates ethnic boundaries, foreign interventions, migration, exile and militant political Islam as well as Soviet and US-NATO military interventions. Roland finds that Pashtūn tribal organisation has been subject to profound changes over the last four decades, but local diverse circumstances mean that this conclusion cannot be generalised.³²⁸

In Kraml's opinion, a crisis of tribal leadership, social stratification, crime, drugs and availability of weapons and foreign funding have pushed traditional structures to the side-line.³²⁹ Telecommunication technology has reduced the rural-urban gap, but still, kinship ties through marriage bonds are exceedingly important.³³⁰ Despite the vital importance Kraml's findings add to this area of research, the word of caution he exercises concerning local *diverse circumstances* show that on the ground, tribalism manifests itself in Afghanistan's society, where Pashtūn politicians at the helm *consume* tribalism for their political interests.

³²⁸ Kraml, “Changes to Pashtun tribal structures,”135.

³²⁹ Kraml, 136.

³³⁰ Kraml, 136.

6.6 Recent Pashtūnwāli cases

Levirate Marriage

Although Afghanistan's governments have tried to promote the issue of women's free choice in marriage from the times of Abdur Rahman Khan to the present government (1880-2020), levirate marriages based on preserving honour, *nang* and *namus* keeps women and girls chained to the family which claims to defend its honour after the marriage is solemnised. Taking into account that marriages are very expensive in Afghanistan, the economic element may also play a role.³³¹

Khadija, an eighteen-year old was widowed twice; her dreams were shattered as she was passed down through a family deep in Taliban territory.³³² One husband was a Taliban insurgent killed fighting American marines; one was a policeman killed in fighting the Taliban and one was an interpreter for the marines who is now hunted by the Taliban who have threatened to kill him and his infant son.³³³ Even before Khadija was born she was engaged to her first cousin, Zia Ul Haq; their fathers were brothers and farmers who lived near one another in Marja, Helmand.³³⁴ A major reason behind levirate marriages in Afghanistan is avoiding the hefty marriage costs. A woman's deceased husband's family keep her in their family, because her marriage to another family member will not incur any further costs.

³³¹ A woman who marries another agnate of her deceased husband does not receive a new bride price or dowry and there is no lavish spending on luxury weddings. This is economically viable for poorer families.

³³² Nordland, "Khadija, 18, has married three brothers" 1-7.

³³³ Nordland, 1-7

³³⁴ Nordland, 1-7

Extensive legal codes that came about over one hundred and forty years ago and the attempts by the numerous political leaders of Afghanistan to regulate family affairs based on a code of law failed to give this most basic right of choice in marriage to the tribal and non-tribal women of Afghanistan.

The Bride-price

Bride-price is another cultural practice which the law and the political leaders of Afghanistan intended to change and regulate³³⁵ but did not succeed. Bride-price is a strongly adhered to phenomenon which tribes perceive as an economic gain for the clan's and the tribe's power. Based on tradition, bride-price is money paid to the bride's parents – an action contrary to Islamic law that assigns *mahr* (dowry) to be paid to the bride.³³⁶

Bride-price is a tribal phenomenon practised among the Turko-Mongol tribes,³³⁷ the Bedouin tribes³³⁸ and a number of tribes from the different ethnic groups of Afghanistan.³³⁹ Bride-price is not restricted to the Pashtūns. The majority of marriages in Afghanistan involve the exchange of some amount of bride-price. According to Radio Free Europe, an Afghan man has married his fiancée after twelve years paying the bride price.

Sayed Wali is finally a married man. His wife's family had demanded a big bride price, payments by the groom to the bride's family are commonplace in Afghanistan. Wali: "I got engaged for \$2,800. I paid part of it over 10 years, but during the last two years, I haven't been able to pay off the remaining \$300." Wali runs this small shop and

³³⁵ Kamali, *Law in Afghanistan*, 12; Nawid, "Aman-Allah and the Afghan 'Ulama'," 95.

³³⁶ Muzhary, "The Bride Price," 1-6.

³³⁷ Greaves, "Women in the Early Empires," 12-13.

³³⁸ Jabbur and Conrad, *The Bedouins and the Desert*, 295.

³³⁹ Muzhary, "The Bride Price," 1-6. Bride-prices from different parts of Afghanistan are Maidan Wardak (\$1450-\$11,800), Nangarhar (\$1450 to \$7,245), Loya Paktia (Khost, Paktia and Paktika) (\$14,500 to \$17,390), Farah (\$11,800 to \$21,733), Faryab \$10,000 to \$20,000), Kandahar and Helmand (\$14,590 to \$43,468).

makes little money. After his plight was shared in an RFE/RL report, activists and charities stepped in. Wali: “They helped me a lot. I got the money for the bride price, and I got everything I needed for my house.” His mother, Salma, is overjoyed. She says “I am extremely happy. I have never been so happy in my whole life.” Activists are urging families not to demand large payments. Jawed Khpalwak, Civil Society Activist: “The biggest problem we have is that the bride prices are so high, young people go to Iran to work [to raise the money], where they get addicted to drugs. When they stay here, they must work hard to earn the money.” High bride prices can leave grooms and their families in debt. And can lead to early or unsuitable marriages for women.³⁴⁰

Afghans connect bride-price to the family’s prestige and honour. This means that a girl whose parents do not charge a bride-price may be viewed as less valuable by her future husband and in-laws. However, the Shi’a urban dwellers of the five cosmopolitan cities are the ones who stopped the practice and instead exchange mutual gifts now, not bride-price.³⁴¹

Tribal Punishment

The next example is the burning of the house of suspected murderers based on the *Pashtūnwāli* code. This incident happened in the Khost province of Afghanistan.

After seven members of a family were killed, a number of tribal elders from Manduzai district of Khost province ordered that the house of five suspect killers must be burnt down.³⁴² The BBC reports that no one was hurt, as the suspects were taken away and this incident took place in a government-controlled district and was based on local customs where the locals see it just to burn an oppressor’s house as a form of tribally-sanctioned punishment.³⁴³

³⁴⁰ Sharifa, “After 12 Years Paying Bride Price,” last accessed 07 July 2020.

³⁴¹ Conversation with members of the Civil Society Organisations based in Kabul, Afghanistan on 15 June 2020.

³⁴² BBC Farsi, “Houses of five suspects,” last accessed 14 July 2020; Alokhel, “Tribe Burns Down Houses,” last accessed 14 July 2020.

³⁴³ BBC Farsi, “Houses of five suspects,” last accessed 14 July 2020; Alokhel, “Tribe Burns Down Houses,” last accessed 14 July 2020.

The government of Afghanistan has been ruled by Pashtūn political leaders from 1747 to 2020, most of whom supported *Pashtūnwāli* in the royal clans and in the leaders' inner circles. Despite slight changes in the way *Pashtūnwāli* is understood and practised by the Pashtūns in rural and civic spaces in Afghanistan, the code has not been reformed and harmful traditions³⁴⁴ affect members of society and causes intolerable injustices. Customary laws based on *Pashtūnwāli* violate Islamic law as well as universal human rights laws that are enshrined in various conventions, protocols, treaties and declarations that the state of Afghanistan has accepted, ascended to or has ratified.³⁴⁵ The widespread practice of *Pashtūnwāli* in Afghanistan is a sign of state failure and the manifestation of the marginal tribalism of its political leaders.

³⁴⁴ Due to cultural relativity and the implementation of human rights conferred on the political will of a sovereign ruler, the human rights organisations exercise due care and use the term *harmful traditions* for what otherwise is known as the “violation of human rights”.

³⁴⁵ Afghanistan has undertaken to comply with these international conventions: International Covenant on Civil and Political Rights (CCPR) (Ascension date 24 January 1983); International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (Ascension date 06 July 1983); International Covenant on Economic, Social and Cultural Rights (CESCR) (Ascension date 06 January 1983); Convention Against Torture and Other Cruel Inhumane or Degrading Treatment or Punishment (CAT) (01 April 1987); Convention on the Rights of the Child (CRC) (28 March 1994); Optional Protocol to the Convention on the Rights of the Child on the sale of child prostitution and child pornography (CRC-OP-SC) (Ascension 19 September 2002); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (05 March 2003); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW-OP) (Ascension 23 June 2003); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CRC-OP-AC) (Ascension date 24 September 2003); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) (Ascension date 05 June 2007); Optional Protocol to the International Covenant on Civil and Political Rights (CCPR-OP1) (Ascension date 04 October 2007); Second Optional Protocol to the International Covenant on Civil and Political Rights aiming for the abolition of the death penalty (CCPR-OP2-DP) (Ascension date 17 October 2007); United Nations Convention against Corruption (UNCAC) (Ratification date 25 August 2008); Convention on the Rights of Persons with Disabilities (CRPD) (Ascended on 18 September 2012); Optional Protocol to the Convention on the Rights of Persons with Disabilities (CRPD-OP) (Ascension date 18 September 2012); Optional Protocol of the Convention against Torture (CAT-OP) (Ascended on 17 April 2018).

6.7 Conclusion

This chapter has clarified that tribalism, a term shunned by social anthropology and post-colonial scholarship in the West, in fact plays a big role in Afghanistan's parallel (modern and traditional) ways of governing her people. This chapter departs from the conventional arguments that colonial writers belittle other societies by attaching the tribal tag to them.

The chapter has also clarified the different axes of oppression by the internal colonisers on the colonised subjects (often the tribal people), whereas in the context of Afghanistan, the term *tribe* must not be rejected or ignored due to its importance in understanding internal colonialism in Afghanistan.

This chapter has shown actual cases from the 1970s up to 2020 as well as the findings of Roland Martin Kraml in regard to changes in Pashtūns' customs since 1978. The chapter illustrated three recent cases where customs and practices of tribal politics are still relevant to Afghanistan. Given that there are plural legal institutions and practices in Afghanistan – it is only fitting to look further into notions of legal plurality. The next chapter will focus on this aspect and discusses legal pluralism in Afghanistan.

CHAPTER 7: LEGAL PLURALISM IN AFGHANISTAN

7 Introduction

This chapter deals with legal pluralism in Afghanistan. First, it builds on theoretical literature on legal pluralism, and then highlights the informal mechanisms (customary laws) for four population groups of Afghanistan. Due to the overlaps between common use of some customary justice institutions by different ethnic groups of Afghanistan, in order, they will be listed as: Pashtūns for their use of *jirga*, Turkic People (Kirghiz, Turkmen and Uzbek) for *āqsaqāl*, followed by the Hazāras and Tajiks for they use *Shūrā*; which may also be used by members of the first two ethnic groups. In order to understand Afghanistan's plural informal justice mechanisms, it is essential to provide introductory information for each ethnic group, followed by the type of informal justice mechanism that they use.

In the next part of this chapter, the customary law dispensed by the insurgent groups and international non-governmental organisations (INGOs) will be discussed. At the end, the status of formal and customary laws will be discussed vis-à-vis the existing scholarship in the field.

Legal pluralism is a set of uncoordinated, coexisting or overlapping bodies of law that make competing claims of authority; they may impose conflicting demands or norms and may have different styles and orientations.³⁴⁶ Brian Tamanaha pays particular attention to the rich legal pluralism that characterised the medieval period and how this pluralism was reduced in the

³⁴⁶ Tamanaha, "Understanding Legal Pluralism," 375.

course of the consolidation of state power.³⁴⁷ In the words of Geoffrey Swenson, Afghanistan's pluralist bodies of customary law – particularly the insurgents' justice system – is an archetype of combative legal pluralism³⁴⁸, which competes with the weak and inconsistent formal law of Afghanistan. Marc Galanter, using a neologism for legal pluralism as “justice in many rooms,” observes:

Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. People experience justice and injustice not only (or usually) in forums sponsored by the state but the primary institutional locations of their activity-home, neighbourhood, workplace, business deal and son.³⁴⁹

Although Galanter wrote his article in the context of the United States, his logic applies to various societies and states. In the context of Afghanistan, the application of Galanter's *justice in many rooms*, may be assessed in light of injustices due to the state weaknesses resulting in the formation of a combative *legal pluralist systems* in Afghanistan's formal and informal justice institutions. In May 2017, Craig Charney uses the term *a welter of legal systems*³⁵⁰ for Afghanistan's plural systems of formal and customary law when assessing the progress and problems in advancing the rule of law in Afghanistan for the JSSP and United States Department's Bureau of International Narcotics and Law Enforcement (INL).³⁵¹

³⁴⁷ Tamanaha, 2.

³⁴⁸ Swenson, “Legal pluralism in theory and practice,” 1.

³⁴⁹ Galanter, “Justice In Many Rooms,” 17.

³⁵⁰ Charney, “A Survey of Progress in Building the Rule of Law in Afghanistan,” 14.

³⁵¹ Charney, 1.

John Griffith advocates the ideology of legal centralism as a claim that “law is and should be the law of the state, uniform for all persons and administered by a single set of state organs.”³⁵² Brian Tamanaha on the other hand, believes in the power of plurality of law, with varying degrees of authority and standards, and that the state of conflict between plural bodies of law creates opportunities for individuals and groups within society.³⁵³ In order to narrow down these theories in the context of Afghanistan, one may note that there are good and not so good quality customary law systems in use. In the not so good customary law system, the level of justice and injustice depends on local perceptions and on the quality of justice dispensers’ knowledge, power and what they make of justice.

The customary laws in Afghanistan for over two centuries have shown a number of practices; whereas in one area of the country, a girl and a boy who elope are unharmed, receive the support of their families and marry, in another area of the country both will be stoned to death, albeit killers commit their crimes with impunity. In the next section, this chapter details the four major ethnic groups: Pashtūns, Turkic groups, Hazāras, Tajiks followed by the type of informal justice institutions they use.

7.1 The Pashtūnwali customary laws

Pashtūns are one of the major ethnic group of Afghanistan who constitute about forty percent of Afghanistan’s population.³⁵⁴ Pashtūns form many tribes and are urban and rural dwellers. Pashtūn nomadic people are known

³⁵² Griffith, “What is Legal Pluralism?” 3.

³⁵³ Tamanaha, “Understanding Legal Pluralism,” 375.

³⁵⁴ Barfield, *A Cultural and Political History*, 24.

as the *Kuchis*. Latif Yaad, a Pashtūn scholar, names one hundred and fifty-three Pashtūn tribes in his book titled *Pakhtāna wo pezhane* [Know the Pashtūn Tribes].³⁵⁵

Barnet Rubin argues that Afghanistan has a patrilineal society, in which membership in family and lineage, as well as property, is inherited only by agnatic kin, and clusters of agnatic kin form alliances to defend or expand the patrimony, which also risk splitting into antagonistic factions over its management or division.³⁵⁶ He states that the old regime in Afghanistan firmly used certain state recognised tribal institutions and leaders as a means of control, and in the *atrāf* (rural areas), the district administration interacted with the population indirectly, through officially appointed representations called *malik* or *arbāb*, of units called *qawm*.³⁵⁷ Rubin argues that even after the apparent destruction of tribalism by a state, it might re-emerge during a period of state weakness or state collapse.³⁵⁸ The issue of Pashtūns' tribalism has received the sustained attention of Afghan and foreign scholars.

As for the rise to political power, Amy Romano posits that in 1709, Mir Wais Khan Hotaki, a Pashtūn of the Ghilzai tribe from outside of Kandahar, waged a successful uprising that defeated Persian forces.³⁵⁹ Thirty years after Hotaki liberated Kandahar, his successors were overthrown by a Turkic warrior, Nadir Shah, from Khorasan.³⁶⁰ The next page in the Pashtūns' rise to power was turned after the assassination of Nadir Shah in 1747. Pashtūns have co-

³⁵⁵ Yaad, *Know the Pashtun Tribes*, 1-350.

³⁵⁶ Rubin, *Fragmentation of Afghanistan*, 23.

³⁵⁷ Rubin, 25.

³⁵⁸ Rubin, 10.

³⁵⁹ Romano, *Historical Atlas of Afghanistan*, 29.

³⁶⁰ Romano, 29-30.

ethnics in Pakistan. The following section will address a key aspect of the *Pashtūnwali* code, namely the institution of *jirga* used by the Pashtūns to dispense justice through customary law mechanisms.

7.2 The Jirga

Jirga, also spelt as *jerga* or *jarga* attributed to the Pashtūns, has common characteristics with the Turkic institutions of pre-Islamic Kangāsh and Kurultai. In understanding the correlations between these institutions, Abdullah Habibi and Habibullah Rafi state that *white beard*, a term used in Pashto as *spin gir*, is taken from the *aqsaqāl* which has Turkic origin.³⁶¹ Noah Coburn surmises that *jirga* is a Pashto word, deriving from the Turkic word for circle, and typically denotes gatherings in which parties are represented by members of their patrilineal kin, who deliberate on the issue.³⁶²

Regardless of its commonality with other similar institutions, *jirga* is an institution of customary law based on the *Pashtūnwāli* code. Jirga is an open discussion forum, held at village level and is comprised of elders: men deemed knowledgeable and respectable.³⁶³ In a *jirga* gathering, elders reach what *they* perceive as just in a particular case. Jirga plays a vital role for *peace-making* between feuding clans and tribes. It has become embedded in Pashtūn communities, and in the absence of effective institutions of formal justice, it is convened to deal with all types of criminal offences.³⁶⁴

³⁶¹ Aqsaqāl questionnaire filled in by Aziz Rafiee dated 02 June 2020.

³⁶² Coburn, "Informal justice and international community," 13.

³⁶³ LAND INFO Country of Origin Information Centre, "Afghanistan: Blood feuds, traditional law," 12.

³⁶⁴ Jupp, "Legal transplants," 69.

The *jirgas*' collective decision-making mechanism is exclusively dominated by men. *Jirgas*' *prikra* (decisions) are binding on the parties, where the *marakachian* (elders) reach collective decisions based on local interpretations of *Shari'a* and the unwritten customary codes.³⁶⁵ In *jirga* proceedings, *machilgha* (cash or property) is collected [as bond money] from parties, and failure to adhere to a verbal judgment may result in a range of punishments such as imposing cash fines, burning down the house of the guilty party, and in most serious cases, one's expulsion from the tribe.³⁶⁶

As detailed in Chapter 6, ignoring *jirga* decisions may lead to banishment, burning of property or other penalties. Segments of the civil society, the Afghanistan Independent Human Right Commission (AIHRC), and institutions of formal justice system, the Supreme Court, the Attorney General's Office, and the Ministry of Justice have opposed working with informal mechanisms.³⁶⁷ Noah Coburn surmises that in Afghanistan, the informal system is preponderant, while the formal system seeks preponderance but remains secondary.³⁶⁸

One of the major criticisms of the *jirga* system is the violation of human rights of the people who avail themselves of a *jirga* or, in some areas of Afghanistan, have no other choice but to use the *jirga* system. The AIHRC states that informal justice has no legal basis in Afghanistan and relies on Article 27 of Constitution 2004 that stipulates, "no person can be punished but in

³⁶⁵ Jupp, 69.

³⁶⁶ Jupp, 70-71.

³⁶⁷ Coburn, "Informal justice and international community," 84.

³⁶⁸ Coburn, 13.

accordance with the decision of an authorised court and in conformity with the law adopted before the date of the offence.”³⁶⁹ The AIHRC documented one hundred and ninety-six incidences over nine years from March 2010 until February 2019 including one hundred and seven cases of dissatisfaction with *jirga* and *shūrā* decisions and eighty-nine cases of infringement of decisions by either side of the parties after the decision was accepted.³⁷⁰ Despite the mentioned problems, the state of Afghanistan does not reform and improve the *jirga* system and does not expand its formal judicial services to all parts of Afghanistan. Prior to discussing the informal legal system used by the Turkic people of Afghanistan, it would be conducive to provide a demographic insight into the diversity of groups identified as the Turkic community. The mosaic of the Turkic people will demonstrate the various ways in which justice is dispensed through its informal body known more broadly as *aqsaqāl*.

7.3 The Aqsaqāl customary laws

The Kirghiz, Turkmen and Uzbek form the Turkic population of Afghanistan. Members of these three ethnic groups are also identified as Turks. The Turks of Afghanistan like other Turks trace their origin to a common ancestry. Based on legend, the Turks trace their genealogy to an apical ancestor named Oghuz Khan. Oghuz is an ethnonym of a Turkic tribe that played an important role in the history of Central Asia and the Middle East from the tenth century onwards. In Turkish sources, Oghuz tribes are referred to as *Toquz Oghuz*,

³⁶⁹ AIHRC, “Consequences of Informal Justice and Tribal Jirgas,” 5-6.

³⁷⁰ AIHRC, 8.

meaning nine Oghuz tribes.³⁷¹ The Oghuz Khan narratives, sometimes called *Oghuz-nāma*, provided the narrative framework for cultivating a universalist ideology and legitimising political power along the unity of the legendary past.³⁷²

In Afghanistan, and in the neighbouring countries, both the Pashtūns and the Turks take pride in their ancestral connection to Islam. The Semitic connection of the Oghuz tribe resonated in the Ottoman mystic, Vani Mehmet (Mohammad) Efendi's commentary on the Qur'an (Arā'es al-Qo'ran, Surah IX [al-Tawba], 38-39), where he says that the Turks are *qowm* (predicted people) who God would send if believers were to turn to the pleasures of the world, arguing that Oghuz Khan, the ancestor of the Turks and a contemporary of Abraham, was married to the daughter of Isaac; hence the Ottomans had a prophetic lineage back to Isaac via the maternal line.³⁷³ The Pashtūns make similar claims to their ancestral links to Abraham.

Louis Dupree states that the different ethnic groups of Afghanistan have distinct legends of origin and development, but many tales overlap and often spread far beyond the boundaries of Afghanistan. The Turkic-speakers in the north of Afghanistan usually have the variation of *Geser*, the epic of the Mongols; the Uzbeks relive their days of greatness in several epics, which tell the story of the Golden Horde and the Central Asian Khanates as reflected by the lives of their great leaders: Alpamysh, Koblady, Yer-Targyn and

³⁷¹ Binbaş, "Oghuz, Turkish Tribe." 4.

³⁷² Flemming, "Political Genealogies in the Sixteenth Century," 123-137.

³⁷³ Efendi; in: Binbaş "Ogūz Khan Narratives," 5.

Yedigü.³⁷⁴ The Kirghiz epic, *Manas*, greatly influenced later Islamic historical folklore with its emphasis on the horse-cavalry complex.³⁷⁵

The European scholar who studied the Turks of Afghanistan in the 1930s is the Swedish diplomat and philologist, Gunnar Jarring (1907-2002), who donated a collection of five hundred and sixty manuscripts from Eastern Turkistan to the university library in Lund – mainly books in the Uighur, Uzbek and Chaghatai languages from Eastern Turkistan and the *Divan* by the Chaghatai poet and cultural patron, Mir ‘Ali Shir Navai’ (1441-1501).³⁷⁶

The Turks of Afghanistan express great pride in their political leaders Amir Timur (1336-1405), Mahmud of Ghazna (971-1030), Zahir ud-Din Mohammad Babur (1483-1530) and poet and scholar, Ali Shir Nawa’i (1441-1501). The above information is stated in an 1TV interview with Marshal Abdul Rashid Dostum and is written on the Cultural Federation of the Turks of Afghanistan webpage.³⁷⁷ The Turks who ruled Afghanistan or kept it as their tributary before the eighteenth century, by far have left behind the greatest amount of artwork, statues, miniatures, paintings, decorated mosques and minarets with unique tilework.³⁷⁸ Kamaledin Behzad (1450-1535) has produced the best paintings in the Islamic world.³⁷⁹ In the court of Mahmud of Ghazna, there were a total of nine hundred scholars, four hundred poets

³⁷⁴ Dupree, *Afghanistan*, 119.

³⁷⁵ Dupree, 120.

³⁷⁶ Törnvall, “From Khotan and Kashghar,” 1, 5; Lund University Library, “The Jarring Collection,” last accessed 04 January 2021.

³⁷⁷ Please see CULTURAL FEDERATION OF THE TURKS OF AFGHANISTAN, (FFTA): available from: <https://turklar.com/english/?cat=6> (last accessed 07 July 2020); 1TV, “Exclusive interview with Marshall Abdul Rashid Dostum,” 23 July 2020, last viewed 25 July 2020.

³⁷⁸ Barry, “The Canticle of the Birds,” last viewed 13 March 2019.

³⁷⁹ Barry, last viewed 13 March 2019.

and, the greatest one Abul Qasim Ferdausi with *Shāh Nāma* the Book of the Kings of Persia, had sixty thousand couplets.³⁸⁰

The Kirghiz of Afghanistan are a group of Turkic-speaking people who, in 1972-74 consisted of three hundred and thirty households numbering just over one thousand, eight hundred persons, who occupied the extreme northern and southern tip of the Wakhan Corridor – the high-altitude mountain valley areas of the Pamirs of Afghanistan.³⁸¹ The origin of the Kirghiz people is still subject to speculation and suggestions include Mongol, Uralic, or independent origin.³⁸² In 2010, Thomas Barfield recorded the number of Kirghiz to be less than a thousand people.³⁸³

According to Mohammad Nazif Shahrani, the Kirghiz recognise three types of leadership statuses; in ascending order of importance these are: *be*, *āqsaqāl* and *khan*. *Be* refers to the head of an encampment where a number of families, often agnatic or affinal kinsmen, camp together and cooperate in herding and other matters of local concern.³⁸⁴ An *āqsaqāl* is head of an agnatic descent group known as *oruq*, whose members often live in contiguous areas and the office of *khan* is the vehicle through which the unity of the Kirghiz community is expressed.³⁸⁵

³⁸⁰ Dupree, *Afghanistan*, 77.

³⁸¹ Shahrani, *The Kirghiz and Wakhi of Afghanistan*, xxxvii.

³⁸² Shahrani, 46.

³⁸³ Barfield, *A Cultural and Political History*, 31.

³⁸⁴ Shahrani, "The Kirghiz Khans," 009.

³⁸⁵ Shahrani, 009.

The Uzbeks and the Turkmen became politically dominant in the region [Afghanistan and beyond] from about A.D. 950.³⁸⁶ The Turkmen play an important economic role because they produce Afghanistan's famed carpets and karakul sheepskins, both of which are major export earners.³⁸⁷ Sara Koplik uses the term *entrepreneurial communities* for the Jews and Hindus of Afghanistan,³⁸⁸ a term that equally applies to the Turkmen people as well.

The ethnonym Uzbek refers to any member of a Central Asian people that inhabit chiefly Uzbekistan and the Northern Provinces of Afghanistan, as well as other parts of Central Asia. The word *Uzbek* today is conventionally used in two senses, firstly to refer to the political system of the *khans* of Transoxiana of the sixteenth to eighteenth centuries, and secondly to refer to the tribal groups who provided the amirial power for these ruling khans.³⁸⁹ The designation of Uzbek is thought to refer to Öz Beg, the Mongol khan under whom the Golden Horde attained its greatest power.³⁹⁰

Barnet Rubin claims that based on the Soviet model, *Uzbek* was used for people who spoke variants of Chaghatai Turkic languages, although the Afghan state never made an official ethnic classification of Turkic speaking groups.³⁹¹ The Uzbek people make up ten percent of the population of Afghanistan, are Sunni Muslims and communicate in Uzbeki and Farsi.³⁹² In

³⁸⁶ Barfield, *A Cultural and Political History*, 27.

³⁸⁷ Barfield, 27.

³⁸⁸ Koplik, *The Jews of Afghanistan*, 3, 115.

³⁸⁹ O'Kane, "The Uzbek Architecture of Afghanistan," 123.

³⁹⁰ Encyclopaedia Britannica, "The Uzbek people." 1.

³⁹¹ Rubin, *The Fragmentation of Afghanistan*, 30.

³⁹² Katzman, "Politics, Elections, and Government Performance," 4.

areas of Afghanistan where speakers of a minority language form a majority, pursuant to Article 16 of Constitution 2004, their mother language will be the third official language and speakers can obtain an education in their indigenous language.³⁹³ The two superpowers who elevated the status of minority languages to national level were the Soviets and the United States and its European allies. A number of the Turkic population of Afghanistan are known for living a tribal lifestyle. As this sub-section has documented the demographic diversity of the Turkic people, the following section explores the institutions of *aqsaqāl* which is attributed to the Turkic communities.

7.4 The Institutions of Āqsaqāl

There is limited quantitative data on the institution of *āqsaqāl* (also spelt as *aksakal*). Ole Olufsen in “Through the unknown Pamirs; the second Danish Pamir expedition, 1898-99” produced in 1904, conducted ethnographic research and gathered information partly by autopsy and partly by questioning the intelligent natives, such as *Kasis* (judges), and *aksakals* (*āqsaqāl*) whom he calls the superintends of town.³⁹⁴ Another author, Munshi Abdul Rahim describes the roles *āqsaqāls* played in Badakhshan in his book titled *Journey to Badakhshan, with report on Badakhshan and Wakhan*, a work ordered by John Biddulph in 1879-80.³⁹⁵ Rahim states that when two people fight

³⁹³ Article 16 of Constitution 2004 stipulates that in areas where the majority of the population speak in any one of the Uzbeki, Turkmani, Pachaie, Nuristani, Baluchi or Pamiri languages, any of the aforementioned languages, in addition to Pashto and Dari shall be the third official language, the usage of which shall be regulated by law. The state shall design and apply effective programs to foster and develop all the languages of Afghanistan. Usage of all current languages in the country shall be free in press publications and mass media. Academic and national administrative terminology and usage in the country shall be preserved.

³⁹⁴ Olufsen, *Through the unknown Pamirs*,” xvi.

³⁹⁵ Rahim, *Journey to Badakhshan, with report on Badakhshan and Wakhan*.

amongst themselves, *aksakals* make peace between them, but if a serious disturbance takes place, which the *aksakals* cannot settle, the matter goes before the *Mir*.³⁹⁶ In a number of varied roles. Listed by Rahim, the *aksakals* were aides of the *Mir* who governed a region.³⁹⁷

In order to gather qualitative information on *āqsaqāls* and investigate their role in informal justice mechanism used by the Turkic people of Afghanistan, the author contacted a number of academics in Afghanistan, Turkey and the United States. My attempts at data collection regarding *āqsaqāl*, proved useful. From four people contacted, two researchers, writers and academics, Aziz Rafiee and Mohammad Nazif Shahrani filled in the research gap on *āqsaqāls*.

Aziz Rafiee, head of the Afghan Civil Society Forum Organisation (ACSFO) based in Afghanistan stated the following:

Among the Mongols and Turks, in Ottoman and Khwarazm, there were three methods for dispute resolution. Before the advent of Islam, *kangāsh* system was in place which in Persian language changed to *kankāsh* (meaning search for truth), the first *kangāsh* was held during the Great Kanishka (78-144 A.D.), over decisions on Buddhist faiths in Gandhārā region, in Beig area of Pakistan, where the biggest Buddhist temple was built. In this *kangāsh* among seventy-five Buddhist faiths, only two were recognised. The second system is the Mongol *kurultai* (assembly). Genghis Khan used *kurultai* as biggest assembly of his empire. Among the Ottoman Turks, assembly is different; it is called *jalgāh*, or *jalga* which in Farsi it changed to *jerga*. For *jalgāh*, there was a headman and two *shah-bālā* (mediators), one of them acted when there were dead-ends, the other when there were serious familial disagreements with the king. In *kangāsh*, *kurultai* and *jalgah* systems, three votes are important; that of the headman, the mediator and the *āqsaqāl*, which here it means (consultant) and in all three systems he plays the same role.³⁹⁸

³⁹⁶ Rahim, 13.

³⁹⁷ Rahim 43-44.

³⁹⁸ Aqsaqāl questionnaire filled in by Aziz Rafiee, dated 02 June 2020

The translation of *āqsaqāl* is *white beard*, but this meaning is never used; instead in different Turkic languages *āqsaqāl* conveys the meaning of *charitable person*. The Turks created the ethos that the *āqsaqāl*'s respect is compulsory, but he does not hold responsibility for errors in decisions.³⁹⁹ An *āqsaqāl* could deal with the following issues:

- a) To resolve disagreements among families, like the bride, groom and the in-laws. An *āqsaqāl* was a close assistant of the *jārchī* (announcer). When someone died or an order was issued, then the *khan* would order the *jārchī* to stand on a high place and spread the news with a loud voice. There was another person called a *tawārchī* who worked under the *āqsaqāl*. *Tawārchī* spread the news on marriages, deaths or funerals. The *khawāja ain* were wealthy persons, whose main job was to keep money and worked as treasurers. The *khawāja ain* used the money for trade and when the land ownership system collapsed in Afghanistan, their power increased. During the reign of Abdur Rahman Khan (r. 1880-1901), and under the leadership of Prime Minister Hashim Khan (in office 1929-1946), the *khawāja ain* held the greatest power in the provinces. The *āqsaqāl* ascertained the places where *khawāja ain* had to conduct their trade, like the location of a shop. The *khawāja ain* had to ask the *khan*'s permission as to where to invest money and taxes were paid to the *khan*. The *āqsaqāl* collected farmers for the *arbābs* (landowner, master) from among poor families in the provinces and handed them over in return for a bounty. The *āqsaqāl* facilitated communication between the *arbābs* and *khawāja ain*. The *āqsaqāl* reported people's collective decisions on an issue to the *khan*. Since the time of Habibullah Khan (r. 1901-1919), the *āqsaqāl* have stopped reporting to the king, as the *arbāb*, *khawāja ain* were dismantled.
- b) In the past, during powerful governments and after the *khawāja ain* and *arbāb* systems were formed in the villages and hamlets, problems increased, especially in areas inhabited by the Turkmens. The sub-district governors appointed two *āqsaqāl* to solve these problems and involved the *khan* and the *arbāb* too. This custom lasted until the time of Zahir Shah (r. 1933-1973). When an *āqsaqāl*'s arbitration was not accepted, the disputants were referred to the government. The final duty of the *āqsaqāl* was acting as witnesses in marriage ceremonies, reading the marriage vows like a *mullah* does, and acting as witnesses during the purchase of land and overseeing land measurements and its distribution. The most powerful person the *āqsaqāl* reported to was the chief of the tribe who in rank was below the *khan*. The *khan* was

³⁹⁹ Aqsaqāl questionnaire filled in by Aziz Rafiee, dated 02 June 2020.

the general head of the tribe. Each *khan* had ten *arbābs*, each *arbāb* had ten *khawāja ain*, each *khawāja ain* and each *arbāb* could have ten *dawak* (gophers). *Dawak*'s job was to run around in order to spread the news from one village to another.

- c) For an *āqsaqāl* old age was not always a strict requirement, there were young *āqsaqāls* as well. The *āqsaqāls* must have gained the trust of the *khan*. An *āqsaqāl*'s words always carried fortitude, but the implementation of his advice was not compulsory. The *arbāb* and the *khan* could reject his advice. The *arbāb* had no influence on the *āqsaqāls*, although he could ask them for help. The *āqsaqāl* were in contact with the *khan*, chief of the tribe or with the king.

Mohammad Nazif Shahrani describes the *āqsaqāl* institution as follows:

“The role of *āqsaqāl* and local dispute resolution had become embedded in Turkic communities due to *reshwat* (bribery), and other forms of local abuses that pushed people to avoid going to the government. The *āqsaqāl* accepted cases for mediation, could carry out his own investigations and call witnesses from both sides of a dispute to testify. The *āqsaqāl* acted as shields between the government and the local community. The *āqsaqāl* held the lowest rank based on territory, though an *āqsaqāl* could be head of lineage and a respected member of the group. The *āqsaqāl* did not initiate anything, rather, disputants came to them. Then the *āqsaqāl* would decide who to invite in order to resolve the disputes. If people did not like an *āqsaqāl*'s decisions, they could go to the *beg* and *khan* at a higher community level; or likewise they could go to the government court if they wished. The institution of *āqsaqāl* has not received adequate attention, and particularly since the forty years of Zahir Shah's reign, community-state relations through the institution of *āqsaqāl* with the Turks of Afghanistan and the central government institutions had been severed.”⁴⁰⁰

Dispensing of informal justice can not only be characterised on ethnic lines, but as the following section demonstrates how the Hazara community of Afghanistan is heavily influenced by a denominational component of its group identity in which bodies such as *shūrā* are applied through Shi'a religious interpretations.

⁴⁰⁰ Aqsaqāl questionnaire filled in by Mohammad Nazif Shahrani on 16 May 2020.

7.5 The Shūrā customary laws

The Hazāra people of Afghanistan are chiefly Shi'a Muslims and form one of Afghanistan's major ethnic groups. The theory of the native origin of the Hazāras was proposed by the French scholar J.P. Ferrier, who travelled in parts of Hazārajāt (the land of the Hazāras in central Afghanistan) during the first half of the nineteenth century and he believed that the Hazāras had inhabited this area since the time of Alexander the Great.⁴⁰¹

Sayed Askar Mousavi, a Cambridge educated Hazāra scholar, writes that the Hazāras are the oldest inhabitants of Afghanistan; they are a mixture of races and ethnic groups, of which Genghis Khan and Amir Timur's Mongol soldiers are, but one and relatively recent development is that Hazāra tribal and linguistic structures have been much influenced by Arabs who have influenced their religion and the Farsi language that has influenced their culture.⁴⁰²

The Hazāra massif in central Afghanistan is the home to Hazāras who speak a type of Hazāragi and Persian and are predominantly Shi'a Muslims.⁴⁰³ Until conquests by Abdur Rahman Khan (r. 1880-1901), the Hazāras had a typically hierarchical Mongol tribal structure, presided over by chiefs called *mirs* or *sultāns* who exercised absolute power.⁴⁰⁴ Hazāra people reside in all parts of Afghanistan. They speak the Persian language, but their language also

⁴⁰¹ Ferrier, *Caravan Journeys and Wanderings*, 221.

⁴⁰² Mousavi, *The Hazaras Of Afghanistan*, 43.

⁴⁰³ Rubin, *The Fragmentation of Afghanistan*, 31.

⁴⁰⁴ Rubin, 31.

includes many Turkic and Mongolian words.⁴⁰⁵ The mix of Turkic and Mongolian terms with Persian creates the Hazāragi dialect of Persian.

In Afghanistan, the radical Sunni *ulemā* and foreign-backed insurgents regard the Hazāra people as non-conformist, hostile, and heretical.⁴⁰⁶ In over two centuries, the Hazāras of Afghanistan have experienced extreme levels of ethnic and religious discrimination. The Minority Rights Group International describes the fate of Hazāra people as follows:

In 1880 the Hazāra community constituted of landed nobility, peasants and artisans. The social class was that of the ruling and the ruled classes, which itself was based on ownership of the means of production (animals, land and water). The gradual descent of the standing of the Hazāras has seen them plunge to the very depths of the social hierarchy in modern Afghanistan. Their engagement mainly in providing the unskilled labour required by society has resulted in further stigmatisation, with a good indicator of this being the low rate of inter-ethnic marriages with the Hazāra. Perhaps as a consequence of this, the Hazāras have been relatively isolated from the influence of other ethnic cultures of Afghanistan, and their identity has remained relatively static. The majority of Hazāras are reported to have nuclear families with the husband considered the head of the family except in the case of husband's death, when the woman becomes the head. In the latter case, the older wife in polygamous marriages succeeds the deceased husband until the eldest son reaches maturity. At national level, the Hazāra people tend to be more progressive concerning women's rights to education and public activities. Educated Hazāra women, in particular the ones who returned from exile in Iran are as active as men in civic and political arenas. Hazāra families are eager to educate their daughters.⁴⁰⁷

In certain parts of Afghanistan, and only in the absence of formal legal institutions, some criminal cases may be referred to the Hazāra community for their collective decisions. In this case, an assembly of notable community

⁴⁰⁵ Gregorian, *The Emergence of Modern Afghanistan*, 34.

⁴⁰⁶ Gregorian, 34.

⁴⁰⁷ MRIG, "Minorities and Indigenous Peoples –Afghanistan: Hazaras." 1-2.

members, that may also include some women, get together and hold a meeting to resolve problems according to their religious school. This institution is called a *shūrā*.⁴⁰⁸

From the Hazāra community, Kamran Mir Hazar, Sayed Askar Mousavi and Ali Amiri are three scholars who write about the injustices experienced by the Hazāra people over the course of history. Lillias Hamilton's historical novel, *A Vizier's Daughter*, published in 1900 and the *Kite Runner* published by Khalid Hosseini in 2003 are two world-class novels which depict the brutalities and discrimination Hazāra people suffered during Abdur Rahman Khan's reign and continue to suffer to the present day. Central to Hosseini's post-modern novel is the division between the two factions of Afghan society: the politically and financially superior Sunni Pashtūns and the oppressed Shi'a Hazāras.⁴⁰⁹ In the novel, *The Kite Runner*, the two protagonists, Amir and Hassan, represent the two different ethnic groups and the different lives lived by those with and those without political power.⁴¹⁰ The school text books Amir reads barely mention the history of the Hazāras – showing how seriously they are marginalised and invisible to an extent.⁴¹¹

In the post-2001 order, for the first time in the history of Afghanistan's statehood since 1880, Hazāras are able to exercise their rights, participate in different levels of government and attain an education. Despite some positive achievements, the Hazāra people remain severely discriminated against and marginalised. The Hazāra people have co-ethnics in Iran and Pakistan. Like

⁴⁰⁸ Shūrā means consultation and is an Islamic legal term.

⁴⁰⁹ AQA, "Text overview – The Kite Runner," 1-4.

⁴¹⁰ AQA, 1.

⁴¹¹ AQA, 1.

the Hazara community, Tajiks also dispense informal justice through their own religiously interpretive model of the *shūrā* based on the Sunni *Hanafī* jurisprudence.

Members of the Tajik ethnic group form the second largest ethnic group of Afghanistan. The vast majority are Sunni Muslims, but there are Shi'a Tajiks too. Tajiks are one of the oldest sedentary farmers and inhabitants of Afghanistan and have been so for over two thousand years.⁴¹² Tajiks are frequently called *Farsiwān* (Farsi speakers) and constitute a numerous and widely spread portion of the inhabitants of Afghanistan, from whom they differ in language, perception, values and customs.⁴¹³

H.W. Bellow claims that Tajiks are representatives of ancient Persian, whilst the Afghāns (Pashtūns) are of ancient Indian inhabitants.⁴¹⁴ A minority of Shi'a Tajiks are followers of *Ja'fari* and *Ismaili* Shi'ism and are scattered across Afghanistan. Tajiks make up a substantial number of the population or are in the majority in Badakhshan, Badghis, Balkh, Herat, Ghazni, Kabul, Mazar-e-Sharif, Panjshir and Parwan. Barfield estimates that Tajiks form thirty percent of Afghanistan's population.⁴¹⁵

In the context of Afghanistan, there are oral historical accounts about the origin of the name *Tajik* and how it became a name to identify not one but dozens of the ethnic groups of Afghanistan. Tajik is a collective name given to members of numerous ethnic groups who speak the Persian language as

⁴¹² Apāresina, *Rebirth of Tajik Identity and Authority*, 5.

⁴¹³ Bellow, *The Races of Afghanistan*, 108.

⁴¹⁴ Bellow, 108.

⁴¹⁵ Barfield, *A Cultural and Political History*, 26.

their mother tongue. According to Major H.W. Bellow, the term *Tajik* is said to be derived from ancient Persian.⁴¹⁶ The Tajiks of Afghanistan have co-ethnics in different countries in Asia and beyond. The largest majority of Tajiks reside in Afghanistan, Tajikistan and Uzbekistan.

Due to their common Farsi language with the people of Iran, the Tajiks of Afghanistan have been able to access thousands of Farsi books authored or translated in Iran. Farsi-Dari is the *lingua franca* of all the ethnic groups of Afghanistan and the language of everyday use for the overwhelming majority of her population.⁴¹⁷ The majority of Afghanistan's population speak Dari-Farsi as their mother language, as a habitual language or as a *lingua franca*. Thomas Barfield records that the Tajiks' literacy in Persian – along the regional language of government administration, high culture and foreign relations – gave them a powerful role, no matter who was ruling the country.⁴¹⁸ The majority of the Tajiks live in cities and cosmopolitan provinces and have no identifiable tribal customs. In the absence of state legal institutions in remote districts and villages, the Tajiks use the *Shūrā* institution to resolve disputes.

7.6 The Institutions of Shūrā

Shūrā is a mechanism of informal dispute resolution or informal justice with widespread acceptance for its Islamic characteristic. Although in Afghanistan there are a number of *Shūrā* set-ups for different purposes, *Shūrā* used here

⁴¹⁶ Bellow, *The Races of Afghanistan*, 109.

⁴¹⁷ The Central Intelligence Agency's World Factbook 2018-2019, "Afghanistan," 103.

⁴¹⁸ Barfield, *A Cultural and Political History*, 26.

is the institution of informal justice used mainly used by the Hazāra, Tajik and also all by other ethnic groups of Afghanistan.

Ahmad Al-Raysuni argues that the Islamic concept *Al-Shūrā* or consultation is a tool for reconstruction and reform, mentioned in the Qur'an and suggested as being part of the practices of the Prophet Mohammad.⁴¹⁹ There are explicit commandments in the Qur'an for Muslims to consult amongst one another; the famous command is the *Shūrā* Verse 38.⁴²⁰ The Qur'an and the *hadiths* (reported speeches of the Prophet Mohammad) put high emphasis on resolving disputes through amicable solutions that need to be just.⁴²¹ In *Al-Hujurat* Verse 9, the Qur'an commands, "[...] And if two parties among the Believers fall into a quarrel, make ye peace between them: but if one of them transgresses beyond bounds against the other, then fight ye, (all) against the one that transgresses until it complies with the command of Allah, but if it complies then make peace between them with justice, and be fair: for Allah loves those who are fair."⁴²²

In a *Shūrā*, the headman calls an assembly in order to solve disputes. In most of the villages of Afghanistan, a *Shūrā* is composed of traditional elites, like the *khans*, *maliks*, *arbābs*, *mullahs* and the local commanders.⁴²³ The *Shūrā* is used for solving disagreements such as the neighbours' disputes, irrigation and environmental issues as well as settling personal differences. The *Shūrā*

⁴¹⁹ Al-Raysuni, "Al-Shūrā the Qur'anic Principle of Consultation," 1.

⁴²⁰ And those who answer the Call of their Lord [i.e., to believe that He is the only One Lord (Allah), and to worship none but Him Alone] and perform the prayers, and who conduct their affairs by mutual consultation, and who spend what we have bestowed to them.

⁴²¹ UNAMA, "Justice through the Eyes of Afghan Women," 13.

⁴²² The Qur'an, Al-Hujurat, Verse 9.

⁴²³ Saltmarshe and Medhi, "Local Governance in Afghanistan," 4.

institution does not deal with criminal matters or the punishment of moral transgression, religious offences, blood feuds or revenge killings. The decision of the *Shūrā* is often advisory and there are no consequences for ignoring it. On this note, the next section shall depart from viewing informal legal mechanisms through the communal context to a focus on formally recognised legislation, namely the government and its respective legal apparatus.

7.7 Government of Afghanistan and Customary Law

Over the past nineteen years, the governments of Afghanistan have demonstrated a number of shortcomings in the delivery of justice. The next chapter will deal with some inconsistencies leading to the short-changing of justice. There are a number of irregularities in the way government institutions operate, their ill-performance, corruption and an ongoing war. A major problem related to the ill-management of the institutions of justice is the creation of temporary commissions and multiple departments doing the same jobs in different ministries, whose authority and jurisdictions often overlap.

The formal courts of Afghanistan are managed by the Supreme Court as is mandated by Constitution 2004. There are several departments in other ministries, such as the Family Resolution Units (FRUs) in the police force; and the *Hoqūq* Department within the Ministry of Justice⁴²⁴, a type of civil court, but not under the jurisdiction of the Supreme Court. The Supreme Court

⁴²⁴ Huber and Zupancic, “Stronger Women, Stronger Afghanistan,” 39.

is the highest judicial organ of the Islamic Republic of Afghanistan.⁴²⁵ The police whose duty it is to investigate crimes and collect evidence are given the power to arbitrate in the FRUs and the Ministry of Justice, which has the power and jurisdiction to draft laws deals with the resolution of actual cases, some of which may overlap between family, civil and criminal.

The International Legal Foundation claims that in Afghanistan there has been a bifurcation of the legal system into an official and an unofficial law, forming the hallmark of Afghan legal history ever since attempts were made to introduce statutory laws.⁴²⁶ In the 1960s, judicial and law enforcement organs had a choice to permit alternative dispute resolutions, tribal *jirga* or out-of-court solutions. Radio Free Europe reported that an unidentified twenty-year-old man received eighty lashes by a government judge according to *Shari'a* law in in the province of Baghlan.⁴²⁷ Amnesty International reported that in 2015, Afghan government officials were involved in flogging a man and a woman for adultery in Ghor Province.⁴²⁸ The problem of trials and jurisdictions between the tribal and state law overlap and often the same judges are highly likely to preside over a formal court and whip a person based on informal *Shari'a* interpretations – a problem that seriously affects

⁴²⁵ CONSTITUTION 2004, art. CXVI.

⁴²⁶ International Legal Foundation, “The Customary Laws of Afghanistan,” 4.

⁴²⁷ Bezhan, “Afghan Lashing Highlights Use of Shari’a Law,” last accessed 21 November 2020.

⁴²⁸ Amnesty International, “Flogging of Couple for Adultery.” Amnesty International states, “The public flogging of a man and a woman by local officials in western Ghor Province in Afghanistan for adultery is abhorrent and the Afghan authorities must hold to account those responsible. The couple were illegally sentenced to one hundred lashes by a primary court in Cheghcheran town in Ghor. One of the court’s judges later carried out the punishment in public in the presence of police and other officials on Sunday, and it was later broadcast on Afghan television bringing it to wider public attention. Corporal punishments constitute cruel, inhuman and degrading treatment. Such punishment is prohibited under international law. This is far from an isolated example of cruel and unlawful punishments being handed down and carried out in Afghanistan, which is particularly common in the informal justice system that still exists in many parts of the country.”

the quality of justice in rural and civic spaces. With this in mind, another expedient lens to address this topic is by investigating the role of civil society within the debate on legality and more specifically, the implications of the ways in which INGOs have functioned in their perceptions of legality and the subsequent communal response.

7.8 International Non-Governmental Organisation (INGOs)

Over the past nineteen years, a number of international organisations have played an active role in the delivery of dispute resolution, as a result of state failure. As early as 2006, the Norwegian Refugee Council (NRC) ran Information and Legal Aid Centres (ILACs) in eight centres across seven provinces: Jalalabad, Kabul, Bamiyan, Pul-e-Khumri, Mazar-e-Sharif, Maimana and Herat.⁴²⁹ At these centres the NRC legal counsellors assisted Afghan returnees to pursue their claims through the formal and informal dispute resolution mechanisms available in Afghanistan.⁴³⁰

In Afghanistan, there is a high demand for out-of-court arbitrations, and different types of Alternative Dispute Resolution (ADR) tribunals have been set up to assist litigants in informal justice mechanisms. For instance, ADR tribunals have taken place to try to resolve land disputes in the South-Eastern province of Khost. The Liaison Office describes the Commission on Conflict Mediation in tribal parts of Khost as follows:

In Khost, this set up was named Commission on Conflict Mediation (CCM), and has been akin to western out-of-court arbitration for resolving resource and land-based conflicts. CCM teams have worked jointly with the provincial government and received some level of

⁴²⁹ Gang, "Observations on NRC Client Choices," 3.

⁴³⁰ Gang, 12.

international community's oversight. Tribal jurisdiction agreements, a set of old mechanisms in place in the 1980s, have been tried in recent years due to fledgling weakness at sub-national government level. These agreements serve the purpose of establishing binding rules between tribes and have sought to attract support of the international community, including its military.⁴³¹

Small-scale family mediations and Community Based Dispute Resolutions (CBDR) have been attempted in Kabul and other provinces. Small-scale family mediation set-ups protect one's privacy, reputation and the appearance of family or *qawm* (solidarity group). Rebecca Gang postulates that CBDR process is rapid and inexpensive which marks its popularity.⁴³² Setting up temporary, project-based informal tribunals of this nature has been attempted throughout the past nineteen years. According to UNAMA, the use of mediation to address cases of violence against women remains a highly contested issue.⁴³³ Taken that resolving cases of violence against women may require judicial scrutiny and must pass through legal tests, the use of mediation is not recommended, for it deprives women of justice enshrined in the constitution and other laws.

One of the main advantages of the INGOs involvement in dispute resolution and mediations is observing of the international standards of mediation. International standards of mediation have an implicit set of general principles such as preparedness, consent, impartiality, inclusivity, a normative framework, coherence, coordination and complementarities of mediation efforts as well as the quality of agreements.⁴³⁴ These standards are not

⁴³¹ The Liaison Office, "Between the Jirga and the Judge," 1-8.

⁴³² Gang, "Community-Based Dispute Resolution in Kabul," 21.

⁴³³ UNAMA, "Justice through the Eyes of Afghan Women," 10.

⁴³⁴ UNAMA, 10.

observed in many areas of mediation due to the insecurity and safety risks for independent auditors who are unable to go to most parts of Afghanistan. In the majority of disputes involving women, they do not have a number of good options to explore but have to seek help from family mediation teams in which local actors are the same persons who form a *Shūrā* or *jirga*. Separate to the aforementioned discussions of informal legal mechanisms in different ethnic communities of Afghanistan, similarly, it is also imperative to speak to the role of insurgent's enacting of their own legislation which for contextual purposes are located in areas/jurisdictions solely controlled by these groups. A unique point of departure therefore is the complete disregard of state-instituted legislation, where in the prior cases they may be acknowledged in some remit or capacity.

7.9 Justice Dispensed by the Insurgents

The terms *insurgents*, *anti-government elements* (AGEs), *non-state actors* and *warlords* are names used interchangeably for the armed groups that allegedly oppose the government and international forces in Afghanistan.⁴³⁵

The Taliban are the main insurgent group in Afghanistan. Adam Baczko finds judicial disorder and civil war's dislocation of state from the rural areas of Afghanistan a precursor to the growth of the Taliban's justice system.⁴³⁶

Ashley Jackson and Florian Weigand note the popularity and growth of Taliban courts, but raise questions in light of the ongoing intra-Afghan

⁴³⁵ These names appear in reports provided by various international groups such as Amnesty International, Human Rights Watch, UNAMA, UNDP, UNHCR, the United States Department of State, the Foreign & Commonwealth Organisation and the Home Office in the United Kingdom.

⁴³⁶ Baczko, "Judging in the Midst of Civil War," 25-46.

negotiations with the Taliban as to the fate of women, government supporters and members of ethnic minorities under the Taliban court system.⁴³⁷

In order to understand why Taliban courts have become prevalent, Jackson and Weigand focus on the struggle to develop a functional state justice system in Afghanistan after 2001.⁴³⁸ Over the past twenty-six years of their existence, the Taliban have used a mix of tribal and Islamic rules for dispensing justice. Their methods of punishment are reported to be at odds with international legal norms. In some of the Taliban's recorded cases, *Solomonic judgments* have been used, where the reaction of one party to the decision of a judge is taken as further evidence to reach a final decision.⁴³⁹

From at least 2008 onwards, in an environment of growing and rampant distrust, many Afghans – including those not sympathetic to the Taliban – have reportedly said that the Taliban's Islamic Emirate was successful from 1996 to 2001 and was the first state in Afghanistan to bring some kind of homogenous, state-enforced justice to every corner of the country, using *Shari'a* and customary justice and supervised by the *ulemā* and state officials.⁴⁴⁰ By arbitrating disputes amongst people and pursuing criminals, the Taliban have attempted to strengthen their claim to have a legitimate right over the state of Afghanistan.⁴⁴¹ The Taliban claim that their central court receives up to twenty-five appeal cases per day.⁴⁴²

⁴³⁷ Jackson and Weigand, "Rebel Rule of Law," 1.

⁴³⁸ Jackson and Weigand, 2.

⁴³⁹ Giustozzi, Franco and Baczko, "Shadow Justice," 23.

⁴⁴⁰ Giustozzi, Franco and Baczko, 8.

⁴⁴¹ Giustozzi, Franco and Baczko, 13.

⁴⁴² Giustozzi, Franco and Baczko, 14.

Joel Migdal identifies four functions of a government: it has to penetrate society, regulate social relationship, extract resources and apply those resources to identified group ends.⁴⁴³ These functions are relevant to any form of government, including a non-state governance system like tribes or clans, and of course the functions are independent of structure.⁴⁴⁴ The Taliban dispense justice and an some Pashtūns may prefer their decisions.

Sir Sherard Cowper-Cole, a British diplomat formerly based in Afghanistan, mentioned in his address to the House of Commons in 2012 that “many Pashtūns in the South of Afghanistan view the Taliban as harsher but fairer than a predatory narco-mafia government.”⁴⁴⁵ The Taliban have established an ombudsman to prosecute their commanders who ill-treat civilians and have put in place *Lāyeha*, a military and criminal code of conduct for their members.⁴⁴⁶

Taliban tax assessors, associated with their local governors, are appointed for each village and district to assess people’s property and crops in order to levy taxes around ten percent in a firm but generally equitable manner.⁴⁴⁷ Civilians who speak out against anti-government elements or in favour of government, face the risk of being subjected to summary trials in parallel and illegal judicial procedures operated by anti-government elements, some of which are the Taliban.⁴⁴⁸ The Taliban govern most parts of rural Afghanistan.

⁴⁴³ Mason, *The Rule of Law in Afghanistan*, 46.

⁴⁴⁴ Mason, 46.

⁴⁴⁵ U.K. Parliament, “Approach to Afghanistan and Pakistan,” 6.

⁴⁴⁶ U.K. Parliament, 46-47.

⁴⁴⁷ Mason, *The Rule of Law in Afghanistan*, 46.

⁴⁴⁸ Home Office, “Afghanistan: persons supporting or perceived to support,” 38-39.

Robert Lamb and Brook Shawn call the Taliban government an illicit government, a government which works by the rule of patronage, cartels and smugglers.⁴⁴⁹ Mohammad Nazif Shahrani, however, argues that many non-Pashtūn communities in the north see the war not between the Afghan government and armed opposition, but between *included* Pashtūns and *excluded* non-Pashtūns – an extension of the Pashtūn-led project of *Afghanisation* to centralise power in Kabul.⁴⁵⁰

In sum, as for the plurality of legal, para-legal and pseudo-legal institutions, up to the present day, the state of Afghanistan has not succeeded in adopting Brian Griffith's legal centralism; instead, the chaos of disharmonious legal *pluralisms* has led to a wide range of injustices. Using Marc Galanter's metaphorical term "Justice in Many Rooms",⁴⁵¹ one may conclude that Afghanistan's incoherent and chaotic legal pluralism is tantamount to injustices in many rooms with windows of abuse. The centralist state of Afghanistan strongly opposes any forms of federalism. It would not entertain Mustafa Yayali's suggestion of social federalism modelled on Althusius's theory. It is the author's view that legal pluralism has not served justice in Afghanistan, nor has it offered the benefit of better accessible justice for litigants. Legal pluralism has opened more windows of abuse for the most impoverished, economically weak litigants, women, children and members of ethnic and religious minority groups.

7.10 Conclusion

⁴⁴⁹ Lamb and Shawn, "Political Governance and Strategy in Afghanistan," 11.

⁴⁵⁰ Larson and Ramsbotham, "Incremental peace for Afghanistan," 14.

⁴⁵¹ Sharafi, "Justice in Many Rooms Since Gallanter," 139-146.

This chapter has clarified that legal pluralism or parallel systems in Afghanistan have a number of drawbacks, as the state law with its pluralist systems and its departments undertaking overlapping activities often creates confusion and inconsistencies for litigants.

The chapter concluded that the institutions of informal justice vary from one ethnic group to another, are divided into further variations within each ethnic group; i.e. the Pashtūns' *jirga* alone may have dozens of different varieties and *Shari'a* is divided into a number of schools (*madhabs*) with plural interpretations in each single school. This welter of systems simply makes it impractical to establish a centralised legal system across the country because of the various informal legal frameworks operating concurrently whilst in isolation of one another. The next chapter deals with legal transplants in Afghanistan.

CHAPTER 8: LEGAL TRANSPLANTS IN AFGHANISTAN

8 Introduction

Alan Watson, the Scottish-American legal scholar, coined the term *legal transplants* in the 1970s. Watson describes the idea of legal transplants as borrowing the most fruitful source of legal change.⁴⁵² Watson posits that legal transplants are the source for most global legal developments because the majority of changes in legal systems are the result of borrowing.⁴⁵³ In Watson's view, very often law develops through legal borrowing instead of through the consciousness of the nation.⁴⁵⁴ Afghanistan's legal history has several examples of borrowing that worked well when Afghanistan's political leaders of the first half of the twentieth century borrowed foreign laws and provided the necessary support through institutions of the government. However, in regard to borrowing (transplanting) laws, the post-1978 era extending to the present day has not been as successful as the earlier stages.

Legal transplantation is significant for the development of different countries. Legal transplantation has been one of the most common ways of legal change in human history since the times of the Roman Empire.⁴⁵⁵ The history of Afghanistan is replete with the borrowing and transplantation of many legal ideas and codes of law from different parts of the world – examples of which are shown in the table at the end of this chapter.

⁴⁵² Watson, *Legal Transplants*, 95.

⁴⁵³ Alshorbagy, "The Case of Egyptian Takeover Law," 1.

⁴⁵⁴ Kviatek, "Explaining Legal Transplants," 52.

⁴⁵⁵ Kviatek, 31.

By comparing national laws, the scholar, judge and student realise that the rules of their own legal system are not necessarily the best or most efficient ones.⁴⁵⁶ Otto Kahn-Freud notes three purposes for the use of foreign legal sources in reforming law: (1) transplantation for international unification of the law, (2) giving adequate legal effect to a social change shared by the foreign country with one's own country and (3) with the objective of promoting at home social changes which foreign law is designed either to express or to produce.⁴⁵⁷ In this chapter, I argue that for the most parts, legal transplants in Afghanistan has not worked well.

This chapter begins with a description of hypothesis operationalisation, giving clarity about the dependent and independent variables used for testing the hypothesis. It also shows how points are assigned to each variable. Then, the chapter offers a brief history of colonial influences on the organisation and codification of Islamic law, where Western ideas and legal norms positively impacted the modernisation of Islamic law and expedited legal change in the Islamic world – changes that could not be instituted by the Muslim political leadership or the *ulemā*. These colonial influences on classical Islamic law beset a departure from *Shari'a* norms in the nineteenth century, which until then had remained unchanged from the early Muslim community, fourteen hundred years ago.

In this chapter, the case study method is used for assessing the legal borrowing or legal transplants from 1747 to 2020. The case study will assess

⁴⁵⁶ Ferreri and DiMatteo, "Dangers of Superficial Transplantations," 50.

⁴⁵⁷ Otto, "Uses and Misuses of Comparative Law," 50.

legal transplants by those governments of Afghanistan that borrowed foreign norms, codes and laws and incorporated them into Afghanistan's legal system. Legal transplants will be examined under two conditions: (1) when the state of Afghanistan adopted legal transplants to improve its writ of government through law and (2) when legal transplants were imports of aid conditionality and foreign political pressures.

John Jupp wrote his doctoral thesis, "Legal transplants as tools for the reform of Afghanistan's criminal law framework. An evaluation of the Interim Criminal Procedure Code 2004 and the Counter Narcotics Law 2005." Jupp looks at the transplantation of readily available law for the development of post-intervention criminal law reform in Afghanistan. However, his research does not differentiate legal transplants under the above two dissimilar conditions. Assessing the success or failure of legal transplants under these conditions requires a range of different investigations.

As for legal transplants since 2001, I argue that the state of Afghanistan has shown a reluctance to accept the legitimacy or the necessity of Western legal transplants. There are three issues to be noted in this period: (1) legal behaviours based on Westerners' expectations, (2) results and data for the sake of filling in tick boxes for international aid, (3) Western legal ideas such as accountability and checks and balances which restrict an Afghan leader who is used to reigning supreme, forming the *rule of man* as opposed to allowing the institutions of government to operate smoothly. I would argue that the leaders of Afghanistan do not see a point in accepting foreign legal rules that reduce their traditional unchecked arbitrary power. Abdur Rahman

Khan once said to the British, “A telescope would interest me only if it could shoot bullets.”⁴⁵⁸ The same goes for Hamid Karzai and Ashraf Ghani Ahmadzai, who have demonstrated great abilities in using the law as a tool to consolidate their arbitrary rule.

8.1 Operationalisation of the Variables

In this thesis, two sets of five indicators are assigned to measure the dependant variable *legal transplants* and independent variable *culture of legality* respectively. The term *culture of legality* is simply another way to mean the observation of the *rule of law*.

If the indicator for each variable meets the criteria, it is assigned a positive score of 1, for a total of 2 possible scores. A score of 2, the maximum for a positive score, is only assigned to an exemplary and innovative approach, i.e., instigating reforms and drafting a constitution that builds the foundation of future reforms. If an indicator does not meet the defined criteria, it receives a score of 0. For example, if the leader instigates legal transplants, then it will score 1 on the indicator *state-led transplants* of the dependent variable *culture of legality*. On the contrary, if a leader does not meet the criteria, it would score 0. This process of scoring applies to all indicators for both dependent and independent variables for all cases under examination.

Due to differences of the types of legal progression in each reign, there will be some inapplicable elements which will be identified with an *x*. There is a need to devise the comparative data points as precise as possible. This

⁴⁵⁸ Ansary, *Games Without Rules*, back cover of the book.

warranted the inclusion of *x* (non-applicability) as another data measuring point. Although on face value there appears to be a discrepancy between *x* marked sections and non-*x* marked sections, the resultant figures measure each reign in comparison to itself as opposed to offering a cross-comparison between reigns, i.e., they have been measured compared to their own applicable factors. Comparisons only comes into play where a variable matches the Independent Variable and the Dependent Variable. The researcher has tried to measure each single reign as to the consistency of its IV and DV, and only then compare the reigns' performance. Therefore, the *x* marked areas will not underscore the performance of any particular reign.

Dependent Variables

State-led: whether the state instigated legal transplants. Regimes that did, score 1 or 2, and those that did not, score 0.

Foreign led: whether external actors transplanted laws for aid or human rights purposes. Regimes for which foreign actors brought legal transplants score 0, those that did not score 1 or 2.

Professional support: whether the state provided the right financial and intellectual support for the legal transplants. Regimes that offered professional support score 1 or 2, and those that did not score 0.

Enforcement: whether the state was able and willing to enforce the transplanted laws. Regimes that enforced the transplanted laws score 1 or 2, those that did not score 0.

Receptive judiciary: whether members of the judiciary understood and were receptive of the legal transplants. The judiciary that was receptive score 1 or 2, those that were not score 0.

Independent Variable Measurement

The criteria for the independent variable *culture of legality* include the following five indicators. The point allocation for the independent variables is the as the dependent variables as detailed above.

The leader: how the leader of the country instigated the legal transplants. Examines who the leader was and whether he instigated legal transplants.

Foreign actors: how external actors transplanted the laws. Examines whether the state was dependent on a foreign power, whether it was out of goodwill or based on conditions attached to foreign aid. Foreign-led transplants indicate state weakness and trend negatively.

Judiciary organs: how the state facilitated logistics, intellectual and financial support so that the transplanted laws could be enforced. Examines the strengths of the government institutions, the requisite education and whether the newly transplanted laws could be understood by the judiciary.

Law enforcement organs: how the state enforced the transplanted laws. Examines government effectiveness and whether laws were arbitrary and/or there were law evasion and corruption.

Receptivity: how members of the judiciary reacted to the transplanted laws.

Examines whether members of the judiciary had the readiness, adequate staff, correct education and whether they accepted the transplanted laws as valid laws.

8.2 Colonial Influences on Legal Transplants

In times where modern governments did not exist, *Shari'a* law was composed of many variations and different versions were produced by individual scholars of different Sunni and Shi'a schools of jurisprudence. These diverse versions were not compiled into a clear canon; nor was there a precise hierarchy of authorities formulated – at least not in Sunni Islam.⁴⁵⁹ Rudolph Peters states that drastic law reform in the Muslim world in the nineteenth century was due to the Westernisation of state and society, which entailed the adoption of Western laws.⁴⁶⁰ M.K. Nawaz states that the modernisation of Islamic law is essentially a twentieth century phenomenon; earlier attempts to modernise Islamic law were limited in nature.⁴⁶¹

The Western colonial powers expanded the legal system of their colonies in different ways. An important element that escapes the notice of post-colonial scholars is that the codification and modernisation of classical Islamic law was instigated by Britain in colonised India. British judges presiding over courts in India did not set aside Islamic law and did not impose the British legal system on Muslim subjects; instead, they used both. Indian judges trained by the British as well as the British judges felt a need to compile a

⁴⁵⁹ Krawietz, "Justice as a Pervasive Principle," 38.

⁴⁶⁰ Peters, *Crime and Punishment*, 103.

⁴⁶¹ Nawaz, "Some Reflections of Islamic Law." 59. Last accessed 12 June 2020.

collection of Islamic legal norms and theories to be used in the colonial judicial system.⁴⁶²

The four major Islamic legal code books which the British colonial agents collected and translated from Arabic and Persian into English were *Hedaya* (The gifted) translated by Charles Hamilton; *Digest of Muhammadan Law* by Neil Baillie, *Mahommedan Law* by Syed Ameer Ali and *Principles of Mahomedan Law* by D. F. Mulla.⁴⁶³ This was the first stage of transplanting British legal ideas in organising Islamic law that may be classed as the preliminary move to modernising Islamic law. Rudolph Peters posits that the reform and eclipse of Islamic criminal law was a result of the Westernisation and modernisation of the Muslim world that took place in the late eighteenth century.⁴⁶⁴

For the colonial judges, legal certainty and the predictability of the outcome of legal proceedings was a major objective of law reform and its role was important in criminal law.⁴⁶⁵ The range of legal reforms brought about by the colonialists according to Peters related to the thought that *ta'zir* (discretionary punishment) and *siyāsa* (political punishments) lacked clear definitions of offences and there were no fixed relations between crimes and punishments.⁴⁶⁶ The next point of contention between the British colonialists and classical Islamic law related to the rules of evidence and *diya* (blood

⁴⁶² Cheema and Khan, "Genealogical Analysis of Islamic Law Books Relied on in the Court of Pakistan," 2.

⁴⁶³ Cheema and Khan, 2.

⁴⁶⁴ Peters, *Crime and Punishment*, 103.

⁴⁶⁵ Peters, 104.

⁴⁶⁶ Peters, 104.

money) that British legalists could not agree with.⁴⁶⁷ Therefore, the first stage of collecting, translating and modernising Islamic law was set in India by British and Muslim scholars.

8.3 Turkish Legal Transplants in Afghanistan

The genesis of Afghanistan's legal transplants was in the early stages of the creation of a political space that led to the formation of a nation-state later. For Afghanistan, the biggest influences on public law are those of Turkish origin. The word *Turkish* here does not simply mean Ottoman Turkey or the Republic of Turkey but a number of Turco-Mongolian dynasties, such as the Khwarazm Shahis (r. 1077-1231), the Ghaznavid (r. 977-1186), the Timurid (r. 1370-1507), the Afsharid Persians (r. 1688-1747), the Ottoman Empire and the Republic of Turkey. Political leadership and legal continuum for the Pashtūn leaders of Afghanistan from 1747 to the present day has been an extension of the Turco-Mongolian (Turkish) tribal dynastic system of government in Afghanistan.

The earliest transplantation of Islamic and secular public law was taken from Turkey. The initial Ottoman Turks' contact with the Afghan court commenced during the reign of Dost Mohammad Khan (r. 1863-1880) and support continued for the succeeding dynastic governments. Nile Green writes that there were concrete Ottoman connections with the reformist circles in Kabul between the 1870s and the 1910s.⁴⁶⁸ Turkey expanded its cordial ties with Amanullah Khan (r. 1919-1929) through sending Turkish officers

⁴⁶⁷ Peters, 105-119.

⁴⁶⁸ Green, *Afghanistan's Islam*, 20.

like Bedri Bey, Mahmud Sami, Ziya Bey and Cemal who provided linguistic, educational and military support and organised military conscription.⁴⁶⁹

In the process of legal reforms and the adoption of secular public laws, Ali Amiri, an Afghan writer, states that: “In Afghanistan, the first bylaws were set by a Turkish officer called Badri Bey during Amanullah Khan’s reforms.”⁴⁷⁰ The transplantation of laws from Turkey began in the 1880s and continued well into the 1980s. Turkey has played an important role in empowering education in the post-2001 period through the network of Afghan-Turk schools and also through offering bursaries to Afghan students to study in Turkish universities.

8.4 Indian Legal Transplants in Afghanistan

There has been a two-way flow of ideas and interactions between Afghanistan and India since medieval times. This took place either when the Mughal Indians ruled Afghanistan, or when the Afghan tribes captured parts of India and held Indian cities under control for a period of time. However, the relationship between Afghanistan and India under the British gave Afghanistan the choice of receiving financial aid. Faiz Ahmed surmises that Afghanistan was a British protectorate from 1880 until 1919.⁴⁷¹ Afghanistan gained her independence from Britain in 1919 after the third Anglo-Afghan war was over.

⁴⁶⁹ Ahmed, *Afghanistan Rising*, 171, 178-180.

⁴⁷⁰ Moradi, Nanquette, Hosseinipour, et. al., “Publishing in Persian,” 187.

⁴⁷¹ Ahmed, *Afghanistan Rising*, 163.

Abdul Rahman Khan (r. 1880-1901), who was appointed by the British, had to keep his loyalty to Britain a secret and show to his people that he did not like the British. Abdul Rahman wrote in his diaries, “If I showed any inclinations towards the English, my people would call me an infidel for joining hands with infidels, and they would proclaim a religious holy war against me.”⁴⁷² In Abdul Rahman’s administration, there was a combination of old customs and laws of Afghanistan with others introduced by him from India, or copied from the modern machinery of Western governments, and especially from the English constitution.⁴⁷³ Abdul Rahman could not openly reveal which Western political or legal ideas he transplanted from the British.

Faiz Ahmed dedicates his doctoral thesis “Rule of Law Experts in Afghanistan: A Socio-Legal History of the First Afghan Constitution and the Indo-Ottoman Nexus in Kabul, 1860-1923” and his book *Afghanistan Rising, Islamic Statecraft between the Ottoman and British Empires* to the history of legal developments in Afghanistan. He highlights the important roles Indian Muslims and Ottoman Turks played in shaping Afghanistan’s first constitution – the Constitution of 1923. The role of the British, Indians and the Ottoman Turks in preparing Afghanistan for her legal reforms cannot be overlooked. Contrary to the historical works by many scholars, Ahmed claims that Amanullah Khan’s (r. 1919-1929) legal reforms were due to an indigenous Islamic modernism movement, not a Kemalist mimicry.⁴⁷⁴ Senzil Nawid, an Afghan scholar and legal historian, postulates that Amanullah’s

⁴⁷² Adamec, *Afghanistan, 1900-1923*, 7.

⁴⁷³ Khan, *The Constitution and Laws of Afghanistan*, 47.

⁴⁷⁴ Ahmed, *Afghanistan Rising*, 239.

legislative movement was inspired by the nineteenth century Ottoman Turkey and the Turkish experience was a ready model for the Afghans.⁴⁷⁵

Simon Fuchs claims that Ahmed overstates Afghanistan's significance in the twentieth century and concludes that Afghanistan perhaps was not rising as high as Ahmed makes it out.⁴⁷⁶ Reading Ahmed's doctoral thesis and his book, one notes that in some areas, he creates his own version of history which cannot be confirmed independently – one such issue is referring to Sayed Jamal al-Din al-Afghani as the founder of *Salafism*.⁴⁷⁷ Sayed Jamal and Muhammad Abduh of Egypt felt that change in Islamic societies was necessary to remedy backwardness among Muslims and to enable them to meet the military and technological challenges of the West.⁴⁷⁸ Sayed Jamal was a modernist, looked into the future, not into the past as the *Salafi* ideology tends to return to the past.

Ahmed ignores the ten years of turbulent relationships between Amanullah Khan and the Deoband-trained *mullahs* of Afghanistan (not the state-trained *ulemā*), and his research disregards events leading to the abdication of the secular king. One other criticism that can be directed at Ahmed's self-claims is his evasion of the fact that Amanullah Khan's legal reforms and constitution were a result of the transplantation of the *Nizamnamas* (Kemalist bylaws) and the Turkish Constitution of 1876. Amin Tarzi, an Afghan

⁴⁷⁵ Nawid, "Aman-Allah and the Afghan Ulama," 102.

⁴⁷⁶ Fuchs, "Book Reviews: Faiz Ahmed, Afghanistan Rising," 99-102.

⁴⁷⁷ Ahmed, *Afghanistan Rising*, 15.

⁴⁷⁸ Nawid, *Religious Response to Change in Afghanistan*, xvii.

scholar, states that the 1923 constitution was greatly influenced by the king's French and Turkish constitutional and governmental law experts.⁴⁷⁹

The *magnus opus* of legalism in this era of elite-driven reforms was in part due to the flow of British, Indian, French and Turkish legal reformist ideas and the ready-made codified Islamic laws collected by British and Indian legal professionals. The Ottoman *Majullah* (codified commercial and civil law) was also used. Sediq Farhang, an Afghan historian, states that before Badri Bey of Turkey came to Afghanistan, there were no legal experts in the country.⁴⁸⁰ In the post-1919 era, the Afghan people and their political leaders did not wake up one day to see they had an exemplary laboratory for Islamic modernism and statecraft, as Ahmed claims.

8.5 Egyptian Legal Transplants in Afghanistan

Egypt was another Islamic country from which Afghanistan transplanted legal ideas and imported its ready-made legal codes. Legal transplants from Egypt took place in two historical stages. Stage one was during the rule of Abdur Rahman Khan (r. 1880-1901), when the Mamluk sultans' laws made inroads in all Islamic societies, including Afghanistan. In the fifteenth century, the Mamluks developed a judicial system for the pluralist schools of Sunni jurisprudence, which produced a handbook for judges called *mūgabāt al-ahkam wa-waqi al-ayyām*, written by the jurist, al-Qasim ibn Qutlūbuga (d. 879/1474).⁴⁸¹

⁴⁷⁹ Tarzi, "Islam and Constitutionalism in Afghanistan," 211.

⁴⁸⁰ Moradi, Nanquette, Hosseinipour, et. al., "Publishing in Persian language," 187.

⁴⁸¹ Talal Al-Azem, "A Mamluk Handbook for Judges," 205.

The Mamluks were Chaghatai Uzbeks who ruled Egypt and Syria from 1250 to 1517. The judicial handbook dealt with the doctrine of legal consequences and solved the conflict of laws in multi-*madhab* (multiple schools of law) jurisdictions.⁴⁸² Abdur Rahman Khan's judiciary produced a similar guidebook for judges, named *Asās al-Qudāt* [Principles for the Judges], by combining Western norms and parts of the Mamluk sultans' judicial handbook. Early Islamic judicial developments to resolve pluralism in judgments across different schools of Islamic jurisprudence are rooted in the works of the Egyptian and Syrian scholars.

Abraham Naum Polak an Israeli historian and Professor at Tel Aviv University states that, based on a statement from al-Magrizi, *Siyāsa*, the legal code of the Mamluks, was founded upon the Great Yasa of Chinggis Khan.⁴⁸³ The name *Siyāsa*, that literally means *politics* or *discretions* is the combination of Si + Yasā. Alan Cay Culler argues that Yasā laws were recorded and judges' decisions were documented – leading to a system of case-law that lasted for two hundred years.⁴⁸⁴ The Great Yasā was a written catalogue of traditional Mongol laws said to be dictated to scribes by Genghis Khan himself, along with maxims (*bilik*) of leadership and instructions for the maintenance and deployment of the Mongol armies.⁴⁸⁵

The Turko-Egyptian scholarly works to the present day influences Islamic legal systems around the world. In Afghanistan, the nepotistic distribution of

⁴⁸² Talal Al-Azem, 205.

⁴⁸³ Polak, "The Influence of Chingiz Khan's Yasa upon the General Organisation of the Mamluk State," 862-76; Ayalon, "The Great Yasa of Chinggis Khan," 105.

⁴⁸⁴ Culler, "Bilk and Yasa," 5.

⁴⁸⁵ Culler, 5.

power between *sirdars* (royal males), *khans* (rich men) and *mullahs* (religious officials) created a political culture that Afghans adopted from the Turko-Mongolians, a corrupt system which remains intact until now.

The second stage of the adoption of Egyptian legal transplants by Afghanistan’s judiciary was after bilateral diplomatic relations were set up. The first official contact between Afghanistan and Egypt occurred in late December 1927, when Amanullah Khan visited Egypt *en route* to Europe.⁴⁸⁶ A treaty of recognition and friendship was signed between the two countries in 1928; Mohmmad Seddiq Mojaddedi was appointed resident minister in Cairo and the Egyptian government opened legations in Kabul in 1937.⁴⁸⁷

Afghanistan’s choice of sending students to Al-Azhar University in Cairo and to transplant Egyptian laws were premised on Egypt being a Sunni and *Hanafi* country with a pluralist, multi-ethnic and tribal society. The first officials who received Islamic education in Egypt were from Zahir Shah’s and Daoud Khan’s governments (r. 1933-1978). The Civil Code 1977 was modelled on the Egyptian Civil Code of 1949, containing 2,416 articles that included family and inheritance laws. This civil code was influenced by the French Code.⁴⁸⁸

The following table shows the governments of Afghanistan that have used legal transplants.

Table 1: Governments of Afghanistan which instigated Legal Transplants

Leader	Type of government	Years of rule
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⁴⁸⁶ Adamec, “Egypt x. Relations with Afghanistan,” 266-276.

⁴⁸⁷ Adamec, 266-276.

⁴⁸⁸ Yassari and Saboory, “Shari’a and National Law,” 285.

Abdur Rahman Khan	Absolute monarchy	1880-1901
Habibullah Khan	Absolute monarchy	1901-1919
Amanullah Khan	Constitutional Monarchy	1919-1929
M. Zahir Khan	Constitutional Monarchy	1933-1973
M. Daoud Khan	Presidential Republic	1973-1978
Nur M. Taraki	Socialist Presidential	1978-1979
Hafizullah Amin	Socialist Presidential	1979
Babrak Karmal	Socialist Presidential	1979-1986
M. Najibullah Ahmadzai	Socialist Presidential	1986-1992
Hamid Karzai	Presidential Islamic	2001-2014
Ashraf Ghani Ahmadzai	Presidential Islamic	2014- to date

8.6 Ahmad Shah Durrani 1747-1772

A brief insight into the conditions of Afghanistan's legal system prior to the first government which used legal transplants (Abdur Rahman Khan), helps the readers understand the genesis of legal transplantation in the country.

Ahmad Shah Abdali (r. 1747-1772), a member of the Saduzai Pashtūn clan and the founder of the Durrani Empire, developed an elaborate justice department based on the Hanafi School of Law, along with a religious council headed by a *khan molla khan*, or *molla bashi* (supreme ecclesiastic judge) to advise him on important state affairs.⁴⁸⁹

The justice department was headed by chief magistrates and subordinate officials ranged from a chief legal tribunal official and a chief justice official to lower echelon legal officials, such as executives of bodily penalties, *qāzis* (religious judges), *moftis* (providers of legal opinion) and *mohtasibs* (supervisors of public morality).⁴⁹⁰ A number of state-sponsored clerical

⁴⁸⁹ Nawid, *Religious Response to Change in Afghanistan*, 7.

⁴⁹⁰ Fofalzai, *Dorrat-al-Zaman fi Tarikh-i-Shah Zamān* [History of Zaman Shah], 272-273; Fofalzai, "Dar al-Qaza-i-Hozori-i-Lame' al-Nur-i-Fakhera-i-Ahmad Shahi Waqe' dar Qandahar [The Luminous Ahmadshahi Justice Department in Qandahar], 9-27.

positions were created during the time of the Saduzai rulers,⁴⁹¹ including *khan-i-olūm*, *modarres-bāshi*, or *molla-bāshi* (different ranks for heads of ecclesiastical education); *imam* of the Grand Mosque in the capital; *mir wa 'ez* (head preacher) and *sadr-i-shahr* (head of the clerical groups in charge of religious endowments).⁴⁹²

Ahmad Shah expanded central authority by stressing the Islamic character of the state and, within the limits of *Shari'a*, he enacted regulations concerning everyday matters of the state.⁴⁹³ The body of *ordinary law* (*'orf*) was subject to modification. State laws were in the form of *farmāns* (royal proclamations) or *fatāwā* (plural for *fatwā*) – collected in a volume titled *Fatāwā-i-Ahmad-Shahi* [Ahmad Shah's *fatwās*] that was based on *Hanafī* law, and at times the tribal *Pashtūnwāli* norms for honour, hospitality, female chastity, vengeance and blood feud continued to exist, which overlapped with those of *Shari'a* and was a challenge for the central authority.⁴⁹⁴

8.7 Amir Dost Muhammed Khan 1826-1863

In the early years of his reign, Dost Muhammad Khan (r. 1826-1863) made up for his lack of education and was tutored under Naib Muhammad Akhundzada.⁴⁹⁵ The *amir* read a section of the Qur'an every day after morning prayer, followed by lessons on history and poetry.⁴⁹⁶ Dost Muhammad Khan spoke Persian, Pashto, Punjabi and Turkish.⁴⁹⁷ In the late

⁴⁹¹ Noelle, *State and Tribe in Nineteenth-Century Afghanistan*, 1. Sadozai's rule started in 1747 and according to Noelle Karimi, ended in 1826 when Dost Mohammed Khan's reign began unofficially in Kabul.

⁴⁹² Elphinstone, *An Account of the Kingdom of Caubul*, 277.

⁴⁹³ Nawid, *Religious Response to Change in Afghanistan*, 7.

⁴⁹⁴ Nawid, 7.

⁴⁹⁵ Noelle, *State and Tribe*, 19.

⁴⁹⁶ Noelle, 19.

⁴⁹⁷ Noelle, 19.

1820s, Dost Muhammad's reputation for justice had become so proverbial that the rhetorical question "Is Dost Muhammad dead, that there is no justice?" had become a common phrase among the inhabitants of Kabul.⁴⁹⁸

The early foreign legal ideas in Afghanistan were for the separation of power between the state and the *ulemā*. As pointed out by Senzil Nawid earlier, there was a problem for the central authority when *Shari'a* and tribal rules overlapped. This form of separation of power in the West is called the separation of the state from the church. The first break from the *ulemā*'s full dominance in criminal matters was reported to be during the rule of Dost Muhammad Khan, when he declared that serious crimes should be referred to him for deliberation, prior to which the *ulemā* had enjoyed unchecked control in the provision of *Shari'a* education and in the application of Islamic law in all religious courts.⁴⁹⁹ There are no written legal records from the times of Ahmad Shah's or Dost Muhammad Khan's rules.

⁴⁹⁸ Noelle, 19.

⁴⁹⁹ Vafai, *Afghanistan: A Country Law Study*, 11.

8.8 Amir Abdur Rahman Khan 1880-1901

Abdur Rahman Khan exercised secrecy in regard to adopting foreign ideas in his court or in the process of justice delivery. He was the first political leader to order that court activities must be recorded in a procedure called *Kitabchai'a Hukumati* (government record book)⁵⁰⁰ and formulated legal guidelines, *Asās al-Qudat* (Fundamental Rules for Judges), instructions on judges' conduct in public, different ways to curb corruption and ethical issues such as to how judges should deal with situations where a conflict of interest arises.⁵⁰¹ *Asās al-Qudāt*, judicial record-keeping and attempts to separate *Shari'a* law from *qanūn* (administrative law) and *Pashtūnwāli* (tribal laws), formed the most important legal transplants during Abdur Rahman's rule. Hereafter, scores for the independent and dependent variables – as described earlier – will be shown *italicised* and inside brackets.

Abdur Rahman's legal transplants were instigated by him and were completed in his court (*I*). Abdur Rahman maintained judicial impartiality at lower court only.⁵⁰² There is inadequate information about professional support, but primary historical records show that strict enforcements were in place for whatever constituted the law (*I*); or else, it would cost the disobedient persons their heads.

Table 2: Abdur Rahman's Regime 1880-1901

DV Legal Transplant Indicators	Scores
State led	1
Foreign led	x
Professional support	0
Enforcement	1

⁵⁰⁰ Vafai, Afghanistan, 11.

⁵⁰¹ Alkuzai, *Asas ul-Qudat* [Fundamental Rules for Judges], 1-40.

⁵⁰² Amin, *Judicial Independence in Afghanistan*, 81.

Receptive judiciary	0
Total scores	2

Abdur Rahman established a uniform administration of justice marked by the introduction of many reforms.⁵⁰³ He is known for his fierce resistance to the role of the *ulemā*. In the late nineteenth century, Abdur Rahman would issue proclamations embodying his commands on a range of issues – something legitimised by reference to divine inspiration.⁵⁰⁴ According to Asta Olsen, Abdur Rahman used Islam to consolidate a policy of establishing the hegemony of state-sanctioned interpretations of Islam through centralised support and brutal suppression of different *Sufīs* and *ulemā*.⁵⁰⁵ The most notorious example of this political deployment of Islam were his wars of conquest during the 1890s against the mountainous highlands of central and north-eastern Afghanistan, whose Hazāra and *Kāfir* population followed *Shi'i* Islam and their own indigenous religion.⁵⁰⁶ In 1896, Afghanistan's Islamic laws were codified for the first time.⁵⁰⁷ This followed demands for codification of Islamic law in colonial India and Turkey.

Abdur Rahman used a simple method of *Pashtūnwāli* to deal with highway robbery. If a man was robbed or killed, all villages within a radius of about ten miles of the place where the crime was perpetuated were fined from twenty to fifty thousand rupees, and if people failed to pay up promptly, two or three regiments of soldiers were sent and quartered on them until payment

⁵⁰³ Khan, *The Constitution And laws of Afghanistan*, 9.

⁵⁰⁴ Mason, *The Rule of Law in Afghanistan*, 67.

⁵⁰⁵ Green, *Afghanistan's Islam*, 15.

⁵⁰⁶ Green, 15.

⁵⁰⁷ Jupp, "Legal transplants: appropriate tools?" 79.

was effected.⁵⁰⁸ Taking into account the authoritarian nature of Abdur Rahman, the laws he drew up or supported with the record-keeping *Kitabchai'a Hukumati* for the promulgation of the laws indicates that in his government, the legal transplants served their purpose (1). It is difficult to assess the remaining independent variables, as rejections or barriers to Abdur Rahman's laws meant annihilation of people during his twenty-one-year rule.

Table 3: Abdur Rahman's Regime 1880-1901

IV Culture of Legality Indicators	Scores
The purpose	1
Foreigners' purpose for legal transplants	0
Judiciary readiness	0
Capacity to enforce transplanted laws	0
Barriers to receptivity of transplanted laws	0
Total scores	1

8.9 Amir Habibullah Khan 1901-1919

Under the rule of Habibullah Khan (r. 1901-1919), legal institutions were empowered. He was not known for steadfast reforms. Habibullah Khan did not follow his father's harsh stance in maintaining legal superiority, but during his rule there were other circumstances that shaped a slightly more organised legal system. In regard to demands for legal reform and social change, Sa'doddin Hashimi states the following:

After the death of Abdur Rahman, in the twentieth century, the Asian awakening process, together with the internal conditions of Afghanistan created a platform for political, social and cultural realisation. In order to change the brutal structure of the government, a group of intellectuals referred to as the "first wave of constitutionalists" was formed. This was the first constitutional movement in the history of Afghanistan.⁵⁰⁹

⁵⁰⁸ Martin, *Under the Absolute Amir*, 28.

⁵⁰⁹ Hashimi, *Jonbeshe-E- Mashrūtiyat Dar Afghanistan* [Constitutional Movement in Afghanistan], 235-7.

Mir Mohammad Ghubār, historian, reports that during Habibullah Khan's rule, the intellectuals of Kabul comprised three categories: (1) the liberals from within government circles who pushed for reforms in the government; (2) the intellectuals based in Habibia High School in Kabul who sought democracy and reforms and favoured a democratic government and (3) the intellectuals outside of government and outside of Habibia High School.⁵¹⁰ Sometimes, members of these groups held friendly political links with one another.⁵¹¹ This period also coincided with Persia's constitutional revolution that began in 1905 and lasted until 1911, suggesting that similar legal developments were underway in Persia, Afghanistan's neighbour. The birth of the Afghan constitutional movement can be traced back to Habibiya School and the influence of some of its foreign teachers.⁵¹²

According to the Ministry of Justice of the Islamic Republic of Afghanistan, during Habibullah Khan's rule, Afghanistan suffered serious lawlessness and disorder:

During Habibullah Khan's rule, the king was the creator of the laws and protector of the crown and kingdom. His power and authority was undefined with no rules to bind him. Habibullah Khan ruled the country by decree, and his opinions were instrumental in the creation of legal guides. Citizens were given harsh punishments without the presence of a competent judge in a court of law. Educated members of society sought to limit the king's power and there were demands for constitutionalism in line with international developments in other countries. The years 1905-1908 were important years of awakening in Asia where new ideas were spread in Central Asia, Turkey and Persia.⁵¹³

⁵¹⁰ Hashimi, 238.

⁵¹¹ Hashimi, 238.

⁵¹² Tarzi, "Islam and Constitutionalism in Afghanistan," 207.

⁵¹³ Ministry of Justice, "History of Judgement in Afghanistan," 41.

Habibullah Khan set a precedent for royals' involvement in cases in his court – an innovative legal idea which was later adopted by his son, Amanullah Khan. May Schinasi, a historian of Afghanistan, states that one of the strongest traditions influencing the lifestyle and governing practices of the Afghan sovereigns was the holding of audiences, and according to the *Siraj al-Akhbar* newspaper, the Sadozai kings held them with a ceremonial copied from Persia.⁵¹⁴ These audiences were public events like festivals, and working audiences, were known as *darbār-e kār*, that were assigned for petitions and replies, and were held several times a week or every day, according to their importance.⁵¹⁵ They were presided over by Habibullah Khan, his brother, Nasrullah Khan, or his sons, Enayatullah or Amanullah, to hear written or oral requests and legal proceedings.⁵¹⁶ This is a precedent that most Afghan leaders have followed to the present day, and face-to-face meetings are particularly held with Pashtūn tribal elders or religious leaders. This is an important part of Afghanistan's political culture that has survived for over a century.

Unlike his father, Habuibullah Khan supported and respected members of the Mojaddedi and Naqshbandi *Sufi* orders.⁵¹⁷ During World War I, Habibullah Khan aligned himself with the British.⁵¹⁸ For him, this was a dangerous decision because Afghanistan's population was strongly opposed to the British and their domination of their country.⁵¹⁹ Britain supported Abdur

⁵¹⁴ Schinasi, "Afghanistan at the beginning of the twentieth century," 117.

⁵¹⁵ Schinasi, 117.

⁵¹⁶ Schinasi, 118.

⁵¹⁷ Schinasi, 116.

⁵¹⁸ Otto, *Shari'a Incorporated*, 277.

⁵¹⁹ Otto, 277.

Rahman Khan and his son, Habibullah Khan, through the payment of subsidies and provision of weapons.

Another noteworthy legal transplant of this era was the adoption of *Panchāt*, a council of five elders which came into existence during the reign of Habibullah Khan.⁵²⁰ Panchāt is a village council presided over by five elders and is of Indian origin. The cumulative factors for reforms, the formation of *Panchāt* councils and holding audiences to solve the petitioners' problems in face-to-face meetings and in the presence of litigants by the royals formed the state-led legal transplants (1) and based on historical evidence, during Habibullah Khan's reign, laws were enforced (1). As law was directed by the king, professional support and receptivity of the judiciary cannot be assessed.

Table 4: Habibullah Khan (1901-1919)

DV Legal Transplant Indicators	Scores
State led	1
Foreign led	x
Professional support	0
Enforcement	1
Receptive judiciary	0
Total scores	2

Habibullah Khan produced legal guidance for judges, named *Sirāj al-Ahkām*, which delineated the duties and powers of the *qāzis* (judges), the *muftis* (legal religious advisors) and the *ulemā*.⁵²¹ Based on information from May Schinasi and other historians, holding audiences; helping petitioners; passing judgments and involving the Sufis and the *ulemā* in the court, and Habibullah Khan's legal transplants by co-opting religious figures into the state power indicate that legal transplants served their purpose (1). However,

⁵²⁰ Vafai, *Afghanistan: A Country Law Study*, 12.

⁵²¹ Nawid, "Aman-Allah and the Afghan Ulama," 101.

the king and his family members were the sole persons who set the laws and presided over legal issues. Therefore, the rest of the independent variables score (0).

Table 5: Habibullah Khan (1901-1919)

IV Culture of Legality Indicators	Scores
The purpose	1
Foreigners' purpose for legal transplants	x
Judiciary readiness	0
Capacity to enforce transplanted laws	0
Barriers to receptivity of transplanted laws	0
Total scores	1

8.10 Amanullah Khan 1919-1929

Amanullah Khan ruled Afghanistan from 1919 until 1929. In 1919, Afghanistan obtained its independence from Britain. This meant that Afghanistan could decide her internal affairs and foreign relations. Prior to sitting on the throne, Amanullah Khan presided over his father's *darbār* (audience) and had the experience of dealing with litigants.

The first constitution, *Nizāmnāma-e asāsi*, was promulgated in 1923.⁵²² Amanullah Khan's relations with religious leaders deteriorated as a result of such measures as the discontinuation of government allowances to religious leaders and the introduction of restrictions on the employment of *mullahs* (*ulemā*) in judicial posts.⁵²³ He attempted major social and legal reforms through a series of codes and decrees and based his vision of progress and modernisation on Kemal Ataturk's reforms that took place in Turkey during the late nineteenth century.⁵²⁴ Under Amanullah Khan's rule, Afghanistan

⁵²² Kamali. *Law in Afghanistan*, 35.

⁵²³ Kamali, 209.

⁵²⁴ Etling, "Afghan legal system, 1964-1979," 7.

experienced the biggest leap in transplanting Ottoman Turkish laws as well as legal ideas from other parts of the Islamic and non-Islamic world. The chief foreign advisor to the king, the Turkish Badri Bey, relied heavily on Turkish codes and, by association, on the Code Napoleon.⁵²⁵

From 1919 to 1923, a series of political, legal, and judicial reforms were made at Amanullah Khan's initiative aiming to resolve fractures in society.⁵²⁶ In his reign, Amanullah Khan abolished slavery, created campaigns of reconciliation against violent divisions between the Sunni and Shi'a branches of Islam and improved the status of non-Muslim minorities by abolishing the *jezya* (poll-tax) that was levied on non-Muslim subjects.⁵²⁷

An important part of Amanullah Khan's legal reforms was the empowering of state education. The textbooks for religious madrasas in 1923 consisted of *Fosul-i-Akhhāri*, *Kafīyya*, *Sharh-i-Molla*, *Kanz*, *Sharh-i-Waqqāya*, *Hedāyā*, the translated Qur'an, *Osul-i-Shahi*, *Nur al-Anwar*, *Seraj*, theology (*aqayyid*), Islamic history, the history of Afghanistan, geography, mathematics, *Akhlāq-i-Mohseni*, *Tamassok-Qozat*, Fundamental Law, *Nezāmnāma-i-Asāsi*, and the General Penal Code (*Nezāmnāma-i-Jazā-i-Omūmi*).⁵²⁸ This *madrassa* curriculum, compared to the current *madrassa* curricula, meant combining a university law degree with a degree of theology. It produced state-sponsored intellectuals, and the clergy who were running

⁵²⁵ Tarzi, "Islam and Constitutionalism in Afghanistan," 212.

⁵²⁶ Yassari and Saboory, "Shari'a and National Law," 277.

⁵²⁷ Yassari and Saboory, 277.

⁵²⁸ Nawid, *Religious Response to Change in Afghanistan*, 92-93.

Amanullah Khan's judiciary. The positive effects of this education system continued until 1978.

Afghanistan's Marriage Law was one of the most progressive ones in the Muslim World.⁵²⁹ The Soviets used Afghanistan's Marriage Law 1923 in the Central Asian states under their control.⁵³⁰ The first girls' school opened under Amanullah Khan's government in Kabul in 1919.⁵³¹ In 1928, there were eight hundred girls in schools.⁵³² However, the girls' schools closed under Nadir Shah, who ruled Afghanistan from 1929 to 1933.⁵³³ As aforementioned, Amanullah Khan tried to establish state control over religious *madrasas*, earning the hostility of the folk *mullahs*.⁵³⁴ As a consequence, in the 1920s, opposition to girls' education played an important role in stirring up opposition to Amanullah Khan's rule.⁵³⁵

Out of all the political leaders of Afghanistan since 1747, there has been no other royal to match Amanullah Khan's progressive plans for legal reforms and by far, he successfully transplanted the greatest number of codes from different countries. The king initiated legal reforms (2); professional support was present whereas since his grandfather's time, a new cadre of state-supported *ulemā* had been trained in the state-run *madrasas* and as cited earlier, the intellectuals and constitutionalists of Kabul received the required professional support (1); laws were enforced effectively (2) and, in view of

⁵²⁹ Nawid, 96.

⁵³⁰ Massel, "The Surrogate Proletariat," 219.

⁵³¹ Rahimi, "Status of Women: Afghanistan," 8.

⁵³² Ruttig, "Afghanistan's Early Reformists," 3.

⁵³³ Green, *Afghanistan's Islam*, 17.

⁵³⁴ Giustozzi, "Nation-Building Is Not for All," 4.

⁵³⁵ Giustozzi, 5.

the fact that the reforms matched the expectations of the intellectuals, the judiciary was receptive of these reforms (1).

Table 6: Amanullah Khan (1919-1929)

DV Legal Transplant Indicators	Scores
State led	2
Foreign led	0
Professional support	1
Enforcement	2
Receptive judiciary	1
Total scores	6

The ill-fortune of Amanullah Khan was not due to failures by the members of his court or those who ran legal and judicial organs but was linked to the tribal leaders and *sirdars* (male progenitors from the royal clans) who, in the eyes of Amanullah Khan, were an obstacle to a modern government. Amanullah Khan intended the Pashtūn tribes to adhere to a new criminal law, that ignored the customary practices of *Pashtūnwāli*.⁵³⁶ The transplanted laws served their purpose well (2); the judiciary was ready to embrace them (1); the state had the capacity to enforce the laws (2) and there were no major barriers in regard to their receptivity (1).

Table 7: Amanullah Khan (1919-1929)

IV Culture of Legality Indicators	Scores
The purpose	2
Foreigners' purpose for legal transplants	x
Judiciary readiness	1
Capacity to enforce transplanted laws	2
Barriers to receptivity of transplanted laws	1
Total scores	6

⁵³⁶ Nawid, *Religious Response to Change in Afghanistan*, 97.

The dynastic rule of this family of royals started with Dost Muhammad Khan (the grandfather of Abdur Rahman Khan), then Abdur Rahman Khan, followed by *his* son, Habibullah Khan, and his grandson, Amanullah Khan. All three *amirs* produced written judicial guidelines (*Asās al-Quzat*, *Sirāj al-Ahkām* and *Tamassok al-Qozāt*). Despite their notoriety and harsh ways of governance that are well-documented, these rulers were experienced politicians and problem solvers from the early stages of their lives. They were born to rule and understood their people and society very well.

8.11 Habibullah Kalakani (r. 1929) and Nadir Khan (r. 1929-1933)

During the reign of Habibullah Kalakani (r. 1929) and Nadir Khan (r. 1929-1933), there were no reported legal transplants. Nadir Khan created a new constitution and copied provisions of Amanullah Khan's with changes to please the *ulemā* and the Pashtūn tribal leaders.

8.12 Zahir Shah 1933-1973

In the next half century, Afghanistan was ruled by another family of experienced politicians, the Musahiban family, some of whom held important roles in Habibullah Khan's and Amanullah Khan's governments. The Musahiban brothers were Hashim Khan, Shah Wali Khan, Mohammad Aziz and Shah Mahmud; these were the uncles of the young king Zahir Shah. From 1923 to 1978, Afghanistan saw the greatest success in nation-building.⁵³⁷ Zahir Shah started to send students to Egypt, Europe and the United States for higher education. Between 1950 and 1952 seventy-five scholarships for

⁵³⁷ Green and Arbabzadah, *Afghanistan in Ink*, 5.

four-year courses in technology, science, public administration, economics, agriculture and law were given to Afghan students in study in the United States and Europe.⁵³⁸ Ministers of the government and a number of *ulemā* studied at Al-Azhar University in Cairo.

Zahir Shah's government promulgated Constitution 1964 and drafted numerous laws. The government under Zahir Shah was the first to pay legal aid fees to poor defendants. Sarah Han from Afghanistan's Analysts Network writes that defence lawyers and legal aid existed in Afghanistan during the reign of King Zahir Shah.⁵³⁹ The first statutory law for legal aid was enacted in 1965 and the laws governing defence lawyers and legal aid were passed in 1972, 1987 and 1997.⁵⁴⁰

Between 1933 and 1973, Afghanistan had access to a large body of literature on legal issues not only from Turkey, Egypt and India but also from France and other European countries. A French constitutional expert, Dr Louis Fauger, who had assisted in the drafting of the Moroccan constitution, was employed to assist with Afghanistan's constitution.⁵⁴¹ After the promulgation of Constitution 1964, a mixed pattern in legislation developed, which created confusion over the relationship of state law and *Shari'a* laws.⁵⁴² The confusion mainly related to the issue of jurisdiction and whether a case had to be decided by a *Shari'a* or a civil judge. The courts of law generally applied the Arabic manuals of *Hanafi* jurisprudence as well as translations of the

⁵³⁸ CIA, "Education in Afghanistan," 14.

⁵³⁹ Han, "Legal Aid in Afghanistan." 1.

⁵⁴⁰ Han, 1.

⁵⁴¹ Tarzi, "Islam and Constitutionalism in Afghanistan," 219.

⁵⁴² Yassari and Saboory, "Shari'a and National Law," 281.

Ottoman Mujallah: the codified version of *Hanafi* jurisprudence for civil transactions, excluding family law.⁵⁴³

According to Kristine Ziems from Touch Point, following the adoption of the 1964 constitution, in practice, if a statute law did not take jurisdiction away from *Shari'a* law, then *Shari'a* law applied.⁵⁴⁴ Ziems argues that statutory law is viewed as a codification of substantive *Shari'a* rules, not as a supreme law.⁵⁴⁵ The reference to secular laws in the context of Afghanistan are laws called *qanūn* (a Farsi word which literally means *law*) that cover state law or the *public law*.

The 1964 constitution paid particular attention to issues such as institution building, democratic structures and the structure of parliamentary democracy, and independence of the judiciary from the executive branch.⁵⁴⁶ The king was supposed to be a follower of the *Hanafi* school of Sunni Islam.⁵⁴⁷ The king was not accountable to anyone and had to be respected by everyone.⁵⁴⁸ Article 2 of the constitution declared that the sacred religion of Islam was the religion of Afghanistan. It further stated that all human beings were equal,⁵⁴⁹ coupled with provisions for the secrecy of people's communications.⁵⁵⁰ Freedom of expression was declared to be a fundamental right.⁵⁵¹

⁵⁴³ Yassari and Saboory, 281.

⁵⁴⁴ Touch Point, "A Primer for Practitioners: Legal Traditions and the Afghan Model," 12.

⁵⁴⁵ Touch Point, 12.

⁵⁴⁶ Yassari and Saboory, "Shari'a and National Law," 281.

⁵⁴⁷ CONSTITUTION 1964, arts. VI – VIII.

⁵⁴⁸ CONSTITUTION 1964, art. XV.

⁵⁴⁹ CONSTITUTION 1964, art. XXV.

⁵⁵⁰ CONSTITUTION 1964, art. XXX.

⁵⁵¹ CONSTITUTION 1964, art. XXXI.

Numerous scholars and historians report that the 1964 constitution was formulated in a relatively democratic fashion, where public consultation and meaningful debate played a major role in determining its contents. It is thought to be the most refined and coherent of the earlier constitutions of Afghanistan.⁵⁵² Over a period of forty years, a number of legislations and a new constitution were drafted (1); there were adequate numbers of professional lawyers and judges to deal with the legal demands of Afghanistan (1); the enforcement of laws in this era was effective⁵⁵³ (2) and the judiciary and parliament drafted the laws – both organs supported the laws they established (1).

Table 8: 1933-1973 Zahir Shah

DV Legal Transplant Indicators	Scores
State led	1
Foreign led	x
Professional support	1
Enforcement	2
Receptive judiciary	1
Total scores	5

The growing number of legislations and legal ideas adopted by the state served their intended purpose (1); the judiciary at this time operated effectively and was ready and capable to embrace the legal transplants (1); there was adequate capacity to enforce the transplanted laws (1) despite the existence of slight disagreements among the *ulemā* and tribal leaders, it did not disrupt legal processes (1). Due to the conservative nature of Zahir Shah’s rule, according to Harvey H. Smith et al., the tribal justice system existed in

⁵⁵² Kamali, *Law in Afghanistan*, 222-243.

⁵⁵³ ACSFO, “A First Step on a Long Journey,” 1-66.

a few areas where violators tried by family or tribal *jirga* based their adjudications on customary laws.⁵⁵⁴ The shortfall of 1 score in the independent variables is due to the slow pace of reforms and political change.

Table 9: 1933-1973 Zahir Shah

IV Culture of Legality Indicators	Scores
The purpose	1
Foreigners' purpose for legal transplants	x
Judiciary readiness	1
Capacity to enforce transplanted laws	1
Barriers to receptivity of transplanted laws	1
Total scores	4

8.13 Mohammad Daud Khan 1973-1978

Mohammad Daoud Khan served as the prime minister of Afghanistan from 1953 until 1963 under King Zahir Shah. Daud Khan thwarted the monarchy in a bloodless coup on the 17 July 1973, declared Afghanistan a republic and appointed himself president and prime minister.⁵⁵⁵ He abolished the monarchy, dismissed the parliament, suspended the constitution and took executive control over the judiciary.⁵⁵⁶ Nadjma Yassari and Hamid Saboory describe three of the challenges faced by president Daoud Khan's government: (1) Daoud Khan occupied the position of foreign minister and minister of defence; (2) the fourth constitution of Afghanistan was enacted under Daoud Khan in an unstable legal situation on the 24 February 1977 and (3) this constitution with one hundred and thirty-six articles was prepared in thirteen chapters, and as far as the text and language were concerned, it was one of the best drafted constitutions of its time – with highly ambitious

⁵⁵⁴ Smith et al., "Area Handbook for Afghanistan," viii.

⁵⁵⁵ Touch Point, "A Primer for Practitioners: Legal Traditions and the Afghan Model," 13.

⁵⁵⁶ Touch Point, 13.

provisions.⁵⁵⁷ On president Daoud Khan's constitutional provisions, Yassari and Saboory elaborate as follows:

Article 1 of the constitution relates to the defence of independence, national sovereignty, and territorial integrity. Article 2 stipulated that power must be exercised by the people, the majority of whom consist of farmers, workers, and intellectuals. Article 3 stipulated the strengthening of thoughts, actions and sought the involvement and participation of all people in the government. Article 4 advocated secure democracy based on social justice and the interest of people and Article 5 stresses respect for human liberty and dignity, and the elimination of all forms of torture and discrimination. Despite the elaborate and highly ambitious provisions in the constitution of 1977, the government was involved in countering a destructive insurgency which had internal and external elements.⁵⁵⁸

Daoud Khan's presidency witnessed the rise of numerous Arab-inspired Islamist groups linked to *Ikhwān-ul-Mūslemin* (The Muslim Brotherhood) based in Egypt.⁵⁵⁹ In 1974, the leader of the Muslim Brotherhood [in Afghanistan], Mohammad Niazi, was arrested along with two hundred followers.⁵⁶⁰ President Daoud Khan was to pave the way for the left to gain a necessary foothold in the Afghan bureaucracy and military ranks and, in due time, to take full control of the state.⁵⁶¹ According to Sediq Farhang, the leftists were also using Daoud Khan's leadership to eliminate their rivals from power – namely the Islamists and the nationalists.⁵⁶²

Kristine Ziems contends that despite the enactment of comprehensive legal codes during the 1960s and the 1970s, the role of the court as an independent

⁵⁵⁷ Yassari and Saboory, "Shari'a and National Law," 281-283.

⁵⁵⁸ Yassari and Saboory, 281-283.

⁵⁵⁹ Yassari and Saboory, 281-283.

⁵⁶⁰ Yassari and Saboory, 281-283.

⁵⁶¹ Tarzi, "Islam and Constitutionalism in Afghanistan," 223.

⁵⁶² Tarzi, 223.

body was to enforce state law, and the judiciary's role as a counterbalance to the executive never developed.⁵⁶³ Drafters of Constitution 1977 were able to incorporate principles of law for a modernising legal order and adopt some elements of democracy. These provisions have been magnified in various forms in the one hundred and thirty-six articles of Constitution 1977. Article 22 of this constitution designated Islam as the religion of the state, but without reference to the prominence of the Hanafi School of Law as had the previous constitution in 1964.⁵⁶⁴

Daoud Khan's government also enacted the Penal Code of 1976, a document that reflects Afghanistan's turbulent governance much better than its constitution does. This penal code consisted of five hundred and twenty-three articles and contained an extensive list of crimes including joint-enterprise, alliance in crime, penal responsibility, security measures, legal excuses, judicial extenuating conditions, aggravating conditions, bribery, embezzlement, misbehaviour of public officials, forgery, kidnapping, sabotage, terrorism, defamation, obscenities, commercial crimes, treason, espionage and other crimes. Daoud Khan's government also enacted the Civil Code 1977, which was modelled on the Egyptian Civil Code of 1949, containing 2,416 articles that included family and inheritance laws. This civil code was influenced by the French Civil Code.⁵⁶⁵

By 1973, Afghanistan had a cadre of legal experts, linguists, translators and legalists who could draw on legal ideas from different parts of the world.

⁵⁶³ Touch Point, "A Primer for Practitioners: Legal Traditions and the Afghan Model," 13.

⁵⁶⁴ Yassari and Saboory, "Shari'a and National Law," 285.

⁵⁶⁵ Yassari and Saboory, 281-283.

During this period, Egyptian and Western codes formed the major sources of legal transplants for Afghanistan. Daud Khan's government scores the same points as those of Zahir Shah, because for a quite long time, Daoud Khan and Zahir Shah ran the same government as prime minister and king. Their achievements from 1933 until 1973 were common, despite the fact that Daoud Khan promulgated the greatest number of legal codes during his short-term presidency.

Daoud Khan, a political leader with ten years' experience as prime minister, known for a strong nationalist agenda, grew up in a royal family involved in politics since the 1900s. He was efficient in instigating legal innovations through transplanting Egyptian codes that were based on French codes (2); professional support was strong enough (1); enforcement was brutal but effective (1) and the judiciary was receptive of the new laws that were formulated (1). The low scores for the dependent variables are due to Daoud Khan's autocratic leadership style and his ambitious laws – some of which could not be delivered.

Table 10: 1973-1978 Daoud Khan

DV Legal Transplant Indicators	Scores
State led	2
Foreign led	x
Professional support	1
Enforcement	1
Receptive judiciary	1
Total scores	5

Daoud Khan's laws, despite possessing good quality, contained far-fetched elements, and had he not been killed in a bloody coup in 1978, he may not have implemented them easily, as these laws were one hundred percent

copying legal provisions that worked well in modern states like Turkey, Iran and Egypt – whose *ulemā* and tribal elites did not pose big threats to the rule of their leaders. The legal transplants served their intended purpose – at least until Daoud Khan oversaw their enforcement personally (1); the judiciary was ready to accept and follow the new laws (1) and the state had the right capacity for their enforcement (1).

Table 11: 1973-1978 Daud Khan

IV Culture of Legality Indicators	Scores
The purpose	1
Foreigners' purpose for legal transplants	0
Judiciary's readiness	1
Capacity to enforce transplanted laws	1
Barriers to receptivity of transplanted laws	0
Total scores	3

8.14 The socialist governments, 1978-1992

Nur Mohammad Takaki (r. 1978-1979)

Hafizullah Amin (r. 1979)

Babrak Karmal (r. 1986)

Najibullah Ahmadzai (r. 1986-1992)

Najmuddin Kaviani states that under the socialist governments, before the drafting of new codes, the government provided translations of constitutions and legal codes from other countries to guide the drafters.⁵⁶⁶ These were Islamic and Western codes and various legal documents.⁵⁶⁷ In this section, the socialist governments of Afghanistan are assessed together because their main focus from 1978 to 1992 was to bring steadfast cultural change; support

⁵⁶⁶ Interview with Najmuddin Kaviani on 21 June 2020.

⁵⁶⁷ Interview with Najmuddin Kaviani on 21 June 2020.

to the toilers; adopt a modern lifestyle and promote the socialist form of modernity in villages and cities of Afghanistan.

The first two socialist presidents of Afghanistan, Nur Mohammad Taraki and Hafizullah Amin, mainly used presidential decrees rather than the law. In April 1980, President Babrak Karmal announced the adoption of a new constitution titled “Fundamental Principles of the Democratic Republic of Afghanistan” and in January 1987, Najibullah Ahmadzai hinted that a new constitution would be drafted which would recognise Islam as the religion of the state.⁵⁶⁸

The People’s Democratic Party of Afghanistan (PDPA), the main socialist ruling party, began promoting the cultures of different ethnic minority groups through the media and began educating children in their mother tongue.⁵⁶⁹ The PDPA recruited Sikhs as party members and promoted them in television programs in order to introduce their faith and culture to the people of Afghanistan.⁵⁷⁰ Harpal Singh, a Sikh from Afghanistan and a former member of the PDPA, confirms that the socialist governments raised awareness of Hindus’ and Sikhs’ lives through television programmes.⁵⁷¹ Singh believes that this was a good move by the government to support ethnic and religious minorities.

The dominant laws of the early socialist era (1978-1980) were mainly presidential decrees which were of a socialist nature. The *Parchamis*

⁵⁶⁸ Tarzi, “Islam and Constitutionalism in Afghanistan,” 227, 229.

⁵⁶⁹ Rasanayagam, *Afghanistan: A Modern History*, 99.

⁵⁷⁰ Interview with Harpal Singh on 09 February 2020.

⁵⁷¹ Harpal Singh interview on 09 February 2020.

(member of the socialist party, *Parcham*), and the regimes' Soviet advisors were opposed to Hafizullah Amin's (r. 1979) far-reaching changes brought about so rapidly in a country as socially conservative and economically underdeveloped as Afghanistan.⁵⁷² In a series of presidential edicts, Hafizullah Amin cancelled many types of rural debts and pursued some of Amanullah Khan's aims of limiting marriage payments and improving women's rights.⁵⁷³

Decree No. 6 aimed at the *liquidation of usury* in agricultural communities and the establishment of cooperatives, and Decree No. 7 imposed age restriction on marriage, curtailed polygamy and abolished *mahr* (dowry).⁵⁷⁴

Decree No. 8 dealt with large-scale land reforms based on the confiscation and redistribution of parcels of land in excess of thirty *jaribs* (a *jarib* is 2,000 square metres) and by mid-1979, some 250,000 hectares of land had been distributed among 296,000 of the poorest families but with each receiving land about the size of a large garden rather than a small farm – not enough space to provide food for an income.⁵⁷⁵

Writing in 1985, Mohammad Hashim Kamali argued that extravagant marriage ceremonies and the payment of a huge bride-price (*walwar*) and dowry (*mahr*) are issues which have remained unresolved despite legislative efforts over the last sixty years.⁵⁷⁶ The current government of Afghanistan

⁵⁷² Barfield, *A Cultural and Political History*, 229.

⁵⁷³ Barfield, 229.

⁵⁷⁴ Saikal, *History of Struggle and Survival*, 190.

⁵⁷⁵ Saikal, 190.

⁵⁷⁶ Kamali, *Law in Afghanistan*, 12.

grapples with the same issues, with no success in protecting the rights of women.

There were a number of legal innovations and a series of legal transplants between 1980 and 1992. These were politico-legal ideas that the socialist governments adopted. The PDPA government formed the thirty-member Revolutionary Council which later adopted the Soviet-style Politburo.⁵⁷⁷ In the early stages of the socialist rule, in which Hafizullah Amin ruled for one hundred days in 1979, several thousand innocent people were summarily executed. The Dutch prosecutor, Thijs Berger, has compiled a list of five thousand names of those who were executed in 1978 and 1979.⁵⁷⁸

Except for the summary killings –perpetrated by Nur Mohammad Taraki, Hafizullah Amin and their brutal officers – the latter socialist leaders did not exercise the same level of brutality. The legal transplants during the socialist governments were partly state led (1); there was professional support for the laws (1); enforcement was carried out (1); and the judiciary was receptive of the new transplanted laws (1).

Table 12: 1978-1992 The socialist governments

DV Legal Transplant Indicators	Scores
State led	1
Foreign led	0
Professional support	1
Enforcement	1
Receptive judiciary	1
Total scores	4

⁵⁷⁷ Rasanayagam, *Afghanistan: A Modern History*, 71; Interview with Najmuddin Kaviani on 21 June 2020.

⁵⁷⁸ Lyon, “The death list that names 5,000 victims,” last accessed 06 July 2020.

The transplanted laws served their intended purpose (1); the judiciary was ready to implement them (1) and the right professional capacity existed (1). The shortfall and difference of 1 point between the dependent and independent variables is because most (but not all) legal matters were executed through presidential decrees and the party's High Council's decrees rather than through the codes of law and by legal institutions.

Table 13: 1978-1992 The socialist governments

IV Culture of Legality Indicators	Scores
The purpose	1
Foreigners' purpose for legal transplants	0
Judiciary's readiness	1
Capacity to enforce transplanted laws	1
Barriers to receptivity of transplanted laws	0
Total scores	3

8.15 Hamid Karzai 2002-2014

The Karzai era (in office 2002-2014) was one of the biggest episodes of massive foreign-led legal transplants in the history of Afghanistan. From the formation of an interim government after the Bonn Conference in late 2001 to the drafting of roadmaps, strategies, legislations as well as operational plans, a bevy of international consultants, mainly Western experts, were involved in pushing through the foreign-led legal transplants.

Prior to assessing these legal transplants, it is necessary to discuss the status of Islamic laws on top of which foreign legal ideas were mounted. To the present day, Afghanistan's Islamic law remains in its classical conditions. Classical *Shari'a*, with limited scope to answer contemporary legal questions in a modern state, is limited to personal status matters, marriage, divorce, custody of children and inheritance. Anastasiya Hozyainova argues that

Islamic law (*Shari'a*) is a centuries-old legal system and adhered to by Muslims and Islamic governments worldwide.⁵⁷⁹ Although Islamic law is continuously evolving and is dynamic, its foundation lies in the interpretation of key principles and instructions laid out in the sources of Islam, most importantly, the Qur'an – the holy book for Muslims, and the *Sunna* – the examples and behaviours set by Prophet Mohammad during his lifetime.⁵⁸⁰

The genesis of modern government and rule of law since 1919 hints at the incompatibility of Western and Islamic laws in Afghanistan. According to Senzil Nawid, the *ulemā* felt offended by Amanullah Khan's (r. 1919-1929) *Nizamnamas*, as they believed these laws did not conform to *Hanafi* doctrine.⁵⁸¹ Attempts to codify Islamic criminal law produced the Islamic law book *Tamassok al-Qozāt*.⁵⁸² The *ulemā* of Afghanistan disagree with codifying Islamic law to the present day.

In 2013, scholars and judges from other Islamic countries reported in their research papers that Afghanistan's Islamic curriculum taught in the *madrasas* lagged behind other Islamic judiciaries by at least a hundred years.⁵⁸³ The books being studied in the *madrasas* of Afghanistan as of 2020 are: *Shrut Salat, Qoduri, Kanz ul-Sadeq, Noor ul-Izah, Sarf va Nahv, Mashkot, Fiqh Akbar, Al-Hedaya, Aqidāt al-Tahtāwi, Tafsir Jalalain* and *Sahih Bokhari*.⁵⁸⁴ This brief description of classical *Shari'a* and *madrassa* curriculum shows a

⁵⁷⁹ Hozyainova, "Sharia and Women's Rights in Afghanistan," 3.

⁵⁸⁰ Hozyainova, 3.

⁵⁸¹ Nawid, *Religious Response to Change in Afghanistan*, 107.

⁵⁸² Qandahari, *Tamassok al-Quzat al-Amaniyya* [Handbook for the Judges].

⁵⁸³ Naderi, "100 years behind other Islamic countries," last accessed 13 July 2018.

⁵⁸⁴ Technical questionnaire dated 04 March 2020.

reversal in Islamic education, compared with the *madrassa* curriculum between 1919-1929 and 1978.

Hanafi jurisprudence that is dominant in Afghanistan, allows for *local custom* to be used as a secondary source of law.⁵⁸⁵ The Civil Code 1977 at Articles 1(2) and 2, and Article 130 of Constitution 2004⁵⁸⁶ allow custom to be used as law.⁵⁸⁷ The rule of law invoked in numerous international documents involves a number of different issues. The rule of law in basic terms consists of rules that are according to law(s) that no one can be sentenced to or sanctioned by certain punishments without codified laws and criminal procedures.⁵⁸⁸ According to universal norms and standards, the rule of law refers to the full accountability of government and state institutions within international human rights standards, international humanitarian law (IHL) and maintaining the supremacy of law.⁵⁸⁹ The United Nations' conception of the rule of law contains four components: governance, procedural fairness, substantive law and the application of law.⁵⁹⁰

Legal transplants recommended by members of the international community from 2001 to the present day, has involved the building of new government

⁵⁸⁵ Marine Corps Intelligence Activity (MICA), "Cultural Islam in Afghanistan," 2.

⁵⁸⁶ Article 130 stipulates that in cases under consideration, the courts shall apply provisions of this Constitution [2004] as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner.

⁵⁸⁷ Article 1(2): In cases no provision of law exists, courts shall decide in accordance with general principles of Hanafi Jurisprudence of Islamic Sharia in order to secure justice in the best possible manner. Article 2: Where neither do provisions of law exist, nor any ruling is found among principles of Hanafi Jurisprudence of Islamic Sharia, courts shall decide according to common custom, provided that the custom does not contradict provisions of law or principles of justice.

⁵⁸⁸ Massaro, "New Word, Old Wounds," 2099-2127.

⁵⁸⁹ Singh, "An Investigation of Corruption and Clientelism," 16.

⁵⁹⁰ Annan, "Address to the General Assembly," 59.

institutions, updating old legal codes and drafting a new constitution which requires legal training at universities, higher education institutions, as well as seminars and workshops. Since 2002, Afghanistan has gained a reformed and updated corpus of civil, criminal and family laws. Major foreign-led legal transplants have led to the formulation of the Juvenile Code, the Interim Criminal Code for Court 2004, the Elimination of Violence Against Women (EVAW), the Counter Narcotics Law 2005 and anti-corruption laws and strategies.

In an interview with the Afghanistan Independent Human Rights Commission (AIHRC), the author investigated the inclusion of human rights lessons in the school curriculum. The main problems pointed out by the AIHRC in promoting human rights in government schools are low educational levels of teachers, low education of its personnel, overemphasis of political ideologies under the pretext of religious values by professionals of the Ministry of Education, and Article 3 of Constitution 2004 stands as a barrier and is used as a tool in favour of the conservatives – factors that hamper the promotion of human rights in government schools.⁵⁹¹

Fayez Amiri writes that religious, ideological and ethnic differences in Afghan society have influenced and sometimes disturbed the progress and function of the education system.⁵⁹² Primary school books' representation of women generally reflects patriarchal and religious traditions as well as stereotypes.⁵⁹³ Women are portrayed as passive and silent, while men are

⁵⁹¹ AIHRC Interview dated 29 January 2020.

⁵⁹² Amiri, "Curriculum Matters," 7.

⁵⁹³ Amiri, 79.

actively involved in various important activities.⁵⁹⁴ Reading through the history, religious and literature books printed from 2002 until 2020,⁵⁹⁵ and considering AIHRC's and Amiri's findings, the government schools teach misogynistic lessons and promote strong patriarchy.

Jerald Gort argues that no government, no societal institution, no business or even no transnational corporation can openly ignore human rights or deny them with impunity.⁵⁹⁶ In practice, politicians in different parts of the world easily derogate from basic international human rights principles under pretexts like culture, faith and political issues. In regard to plural legal orders, human rights standards leave important gaps in clarity and direction as the fragmented and uncoordinated development of standards create additional problems for indigenous and minority rights, gender equality and the right to culture.⁵⁹⁷

According to Rudolph Peters, *Siyāsa Shari'a* (discretion of the authority) is justified as part of classical *fiqh*-based criminal law with provisions concerning discretionary punishments for sinful or forbidden behaviour or acts endangering public order or state society (*ta'zir* and *Siyāsa*).⁵⁹⁸ Discretionary power is exercised by the executive force, the judiciary and their dependencies like the prosecution office and the police. In Afghanistan, there are a number of crimes in which defendants receive harsher and unjust

⁵⁹⁴ Amiri, 59.

⁵⁹⁵ Three sets of schoolbooks from Year 1-12 have been put in the public domain. These are books printed in 2009, 2012 and 2019. The books are available from download on the Ministry of Education of the Islamic Republic of Afghanistan website and on the Pashto website: Khyber.org.

⁵⁹⁶ Gort, "Christian Ecumenical Reception of Human Rights," 226.

⁵⁹⁷ ICHRP, "When Legal Worlds Overlap," 31.

⁵⁹⁸ Peters, *Crime and Punishment*, 7.

punishments based on *Siyāsa* that are not commensurate to the crime attributed to the accused.

Between 2002 and 2020 the majority of these crimes were moral transgressions: *lavāt*, *zinā*, eloping, girls fleeing forced marriages or domestic violence, and a category of crime known as *farār az manzel*, meaning girls running away from their homes, as well as apostasy and blasphemy. For some of these categories there are strict evidence requirements in Islam, and for most of them there are no legal justifications for punishment in Islamic law. Based on public data, Afghanistan’s judiciary severely punishes people for the above categories of Islamic crimes without obtaining the right evidence. The following anonymised court records published by the Supreme Court in its *Mizān* publication shows some examples.

Adultery crimes in Herat province					
No	Relevant	Type of Accusation	Number of Culprits	Date of Settlements	Judicial Decision
1	Penal division Appeal court Herat province	Adultery	Six person	19/4/2009	5 person 6-6 years imprisonment and one other 4 years imprisonment.
2	Penal division appeal court Herat province	Adultery	Two person	3/5/2009	10-10 years imprisonment

Figure 4: *Mizān* court statistics. Supreme Court of Afghanistan

pederasty crimes in Ghazni Province					
No	Relevant	Number of Culprits	Type of Accusations	Date of Settlements	Judicial Decision
1	Penal division appeal court Ghazni province.	One person	Pederasty	2/2/2009	1 year and 8 months penitentiary
2	"	One person	pederasty	16/2/2009	10 years imprisonment.

Figure 5: *Mizān* court statistics. Supreme Court of Afghanistan

Ghazi Hashmi, postulates that Afghan judges use Article 130 of Constitution 2004 in violation of the principles of legality set forth in Article 27, but also contradict international criminal law, including the principles of the Rome Statute of the International Criminal Court.⁵⁹⁹ Article 130 of Constitution 2004 establishes that in cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there are no provisions in the Constitution or other laws about a case, the courts shall, in pursuance of *Hanafi* jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner.

Hashimi reports that since 2004, in over one thousand cases, judges have used Article 130 to justify holding defendants criminally liable where no crime had been defined by an enacted statute.⁶⁰⁰ The following are sample of cases collated from the bi-monthly Supreme Court of Afghanistan’s *Mizān* publication from 2008 to 2020.⁶⁰¹

Charges	Number of cases
Abortion	16
Adultery	1,491
Alcoholic drinks	129
Escaping from home	31
Insulting sacred beliefs	2
Rape	522
Sodomy	680
Underage marriage	4

Figure 6: Selected cases from *Mizān* 2008-2020.

⁵⁹⁹ Hashimi, “Defining the Principle of Legality,” 186.

⁶⁰⁰ Hashimi, 188.

⁶⁰¹ *Mizān* publication clearly writes a *summary of cases*. These statistics may not reflect the actual number of cases for the period identified. These may be regarded as *show-case* statistics.

According to intersectionality theory, in order to discuss the social stratification and hierarchy stemming from the presence of various identity axes, some identity axes are perceived by the prevailing social construction as axes of oppression, whereas others are seen as axes of domination.⁶⁰² Those located on the axes of oppression are the defendants whose punishments are not based on facts or evidence and punishments are not commensurate with the alleged crimes. On the domination axes are Islamic legal professionals (judges, *muftis*, prosecutors) using state power, who suspend the divine laws and exercise their man-made *Siyāsa* in order to wreak terror in the defendants' hearts and in society at large, for alleged crimes such as apostasy and blasphemy – for which there are no punishments in the Qur'an – and *farār az manzel* (running away from home), which is not a crime, but in all criminal matters, girls and women have to undergo virginity checks and are sent to prisons. This affects the women and girls severely, violates their rights, deprives them of societal respect, tarnishes their social standing and the takes away their chances of choosing a husband and setting up a family.

According to the AIHRC's findings, in 119 cases, 92.3% of virginity exams were conducted without the consent of the accused girls and women and there were no court orders based on Article 640 of the Penal Code.⁶⁰³ From the above 119 cases, 60 persons were accused of adultery, 31 accused of escaping home, 23 accused of murder, 6 were examined for evidence of rape, 3 were accused of theft, 3 were accused of smuggling, 2 were accused of false

⁶⁰² Dancig-Rosenberg and Yosef, "Crime, Victimhood and Intersectionality," 88-89.

⁶⁰³ AIHRC, "Forced Gynaecological Examination in Afghanistan," 1.

reporting and one was accused of escaping home and conducting *lavāt* (buggery).⁶⁰⁴

Based on the multiple intersecting sufferings for women accused of moral crimes, their punishment may be regarded manifold compared to that of men. The defendants (male or female) would become a victim of domestic and societal aggression if they were accused of moral transgression and would be punished for bringing dishonour to the family, clan or tribe.

Hamid Karzai and his government did not instigate legal transplants (0); as a president, he was reluctant to support human rights laws and was pushed to do so by foreigners (0); professional support existed during Karzai’s rule where Afghans and international experts aided the institutions of government (2); law enforcement was often politicised and not strongly enforced (1) and the judiciary did not embrace Western legal norms, but superficially agreed to them in order to receive aid money (0). Arne Strand et al. argue that in Afghanistan, Western normative ideals are neither legitimate nor effective.⁶⁰⁵

Table 14: Hamid Karzai 2002-2014

DV Legal Transplant Indicators	Scores
State led	0
Foreign led	0
Professional support	2
Enforcement	1
Receptive judiciary	0
Total scores	3

⁶⁰⁴ AIHRC, 1.

⁶⁰⁵ Strand, Borchgrevink, and Harpviken, “Afghanistan: A Political Economy Analysis,” xii.

According to the Freedom in the World 2014 report, from 2005 to 2007, Afghanistan enjoyed *partly free* status. In areas such as political rights, civil liberties, rule of law and individual rights there were some positive gains.

Ten-Year Ratings Timeline For Year Under Review (Political Rights, Civil Liberties, Status)

Year Under Review Rating	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
	5,6,NF	5,5,PF	5,5,PF	5,5,PF	5,6,NF	6,6,NF	6,6,NF	6,6,NF	6,6,NF	6,6,NF

Figure 7: Freedom House, Freedom in the World 2014.

The foreign-led transplanted laws in Afghanistan serve their purpose but are often imposed through aid conditionality (1); foreigners transplant the laws (0); the judiciary is not ready or willing to embrace foreign laws that are based on Western norms (0); professional capacity exists for the enforcement of the laws (1) and there are multiple barriers to the foreign-led transplanted laws (0). The fourteen years of Hamid Karzai’s rule show abysmally low achievements for the rule of law because of the many problems that Afghan leaders and foreigners ignored or pretended they were not problems. Corruption has been the biggest barrier to the rule of law.

Table 15: Hamid Karzai 2002-2014

IV Culture of Legality Indicators	Scores
The purpose	1
Foreigners purpose for legal transplants	0
Judiciary’s readiness	0
Capacity to enforce transplanted laws	1
Barriers to receptivity of transplanted laws	0
Total scores	2

8.16 Ashraf Ghani Ahmadzai 2014 - to date

Ashraf Ghani Ahmadzai took power in a highly contested presidential election in 2014. For this election, more than twenty million voter registration cards were issued, despite the estimated number of voters being only twelve

million.⁶⁰⁶ Following the fraudulent presidential elections, a National Unity Government (NUG) was formed where presidential power was shared between Ashraf Ghani and Abdullah Abdullah.

The second presidential elections held in August 2019, was marred with widespread fraud, and election results were announced in March 2020. Abdullah Abdullah contested the results. Following international pressure from the United States and the European Union, both front-runners had to reach another power-sharing agreement on the 17 May 2020.⁶⁰⁷

In Ashraf Ghani's rule, excessive use of presidential legal decrees is a huge impediment to the empowerment of the rule of law, it affects two major institution of the government, the judiciary and the Parliament. According to Ariana News, the Parliamentary Legislation Commission complained that the president acts extra-constitutionally: from the beginning to the end of his first term (2014-2018), Ashraf Ghani ran most of the ministries without obtaining the approval of the parliament.⁶⁰⁸ The president issues legal decrees which violate the constitution and usurps the parliament's legal powers, and the report adds; twice in one day the president issued fourteen – and on another day sixteen – legal decrees that were not in accordance with the law.⁶⁰⁹

⁶⁰⁶ Puddington, "Freedom in the World 2014," 21.

⁶⁰⁷ Mashal, "Afghan Rivals Sign Power-Sharing Deal," last accessed 06 July 2020.

⁶⁰⁸ Ariana News, "Ashraf Ghani violating the law," last accessed 02 July 2020.

⁶⁰⁹ Ariana News, last accessed 02 July 2020.

Since 2014, the Afghan and international press have reported similar complaints from different institutions of the government.⁶¹⁰ The lack of a legitimate space for dissent has been a persistent driver of violent resistance in Afghanistan where a predominant political culture has evolved of power concentrated centrally in a single ruler who sets policy and distributes resources, leaving no room for non-violent opposition.⁶¹¹

In 2016, following mounting Western pressure on Ashraf Ghani to curb corruption, the government established the Anti-Corruption Judicial Centre (ACJC). John Sopko, head of the U.S. Watchdog: Special Inspector General for Afghanistan Reconstruction (SIGAR), claims that the Anti-Corruption Judicial Centre and Major Crimes Task Force, which claim to prosecute high level corruption cases, lack the capacity, resources and security needed to perform their function.⁶¹² Afghanistan's law enforcement and judiciary often avoid investigating, prosecuting and punishing powerful individuals.⁶¹³

SIGAR expects the government to combat corruption by extradition of suspects from overseas; arrest, trial and imprisonment of powerful individuals engaging in corruption, and to give significant output from anti-corruption courts; recover stolen assets and use proper resourcing of anti-corruption institutions as well as transparency in contracting.⁶¹⁴ In the run up to Afghanistan Conference 2020 in Geneva 23-24 November 2020, the

⁶¹⁰ These media sources are Ariana News, TOLO News and Ava Press from Afghanistan, Deutsche Welle Aljazeera International, the BBC, Radio Free Europe and Voice of America, from the West.

⁶¹¹ Barfield, "Afghanistan's political history," 15.

⁶¹² SIGAR, "Problems Must be Addressed," 3.

⁶¹³ SIGAR," 3.

⁶¹⁴ Sopko, "Corruption: A Threat to the Rule of Law," 9-10.

government of Afghanistan established the Anti-Corruption Commission, and swore in the commissioners.⁶¹⁵

Under the banner of punishing corrupt officials, the ACJC has often been used as a political tool to remove political rivals from their posts. Two examples are the minister of telecommunications, Abdul Razzaq Wahidi – a Hazāra minister – and Abdul Ghaffar Dawi, a businessman. Wahidi was charged with corruption and was sent to Pul-E-Charkhi Prison. In the absence of evidence to prove guilt, Wahidi got released from prison on appeal. Shukria Barakzai, a former female lawmaker and former ambassador of Afghanistan to Norway, and ex-wife of businessman Dawi, stated in a TV interview that the government of Afghanistan ran an oligarchy and there was no transparency for imprisoning Dawi who, in Barakzai’s words, was an innocent man.⁶¹⁶ The web portal of the Attorney General’s Office displays ACJC’s court promulgations between one and three pages, which for serious crimes is inadequate information. Please see Appendix 14 for a translation of a sample promulgation.

Ashraf Ghani’s decrees are mainly issued for dismissals and appointments of state officials. Over the past couple of years, Ghani has fired and replaced many officials without offering explanations to the nation or to the relevant institutions. Political appointment of ministers and removing them with ignominy and at the president’s whim affects the growth of a political culture that institutions must serve the population of Afghanistan.

⁶¹⁵ BBC Farsi, “Afghanistan will form anti-corruption commission,” 12 November 2020. Last accessed 26 November 2020.

⁶¹⁶ 1TV Kabul, “Cactus Interview with Shukria Barakzai,” last accessed 02 July 2020.

Since 2014, most of the legal transplants are being eroded, weakened and reversed. There are no successful state-led legal transplants; the ACJC was established due to international community’s pressure for accountability and curbing corruption (0); there are other foreign-led legal transplants, like the EVAW law which remains weakly enforced. As of January 2021, the United Nations General Assembly expects the Afghan government to increase efforts to prevent, punish and eradicate all form of violence against women; guarantee that women and girl victims of violence are provided with immediate access to effective remedies, shelter, legal assistance, and reparations; provide funding for accessible shelters for women; implement without delay the recommendations of the Committee on the Elimination of Discrimination against women; and ensure that current legislation, notably the Penal Code, and new legislation, such as the draft family law, are not discriminatory towards women and meet international human rights standards⁶¹⁷ (0); professional support for the transplanted laws exists (1) and enforcement is often discriminatory, politicised and arbitrary (1).

Table 16: Ashraf Ghani Ahmadzai 2014- to date

DV Legal Transplant Indicators	Scores
State led	0
Foreign led	0
Professional support	1
Enforcement	1
Receptive judiciary	0
Total scores	2

⁶¹⁷ United Nations General Assembly, “Situation of human rights in Afghanistan” A/HRC/46/69, 13.

The autocratic rule suspends the law and stops institutions from serving their purpose (0); foreigners continue to transplant laws as the state is very weak (0); the judiciary is ready to accept new laws (1); the capacity for legal transplants is not present as the country is ruled partly by the Taliban who are connected to the weak central government officials through nepotism, blood and kinship ties (0) and there are old and new barriers as a result of illegitimate election results, extra-constitutional rule and the abuse of legal institutions for persecuting political rivals (0). Afghanistan is sliding back to pre-state conditions, despite partial achievements in some elements of the rule of law.

Table 17: Ashraf Ghani Ahmadzai 2014- to date

IV Culture of Legality Indicators	Scores
The purpose	0
Foreigners' purpose for legal transplants	0
Judiciary's readiness	1
Capacity to enforce transplanted laws	0
Barriers to receptivity of transplanted laws	0
Total scores	1

8.17 The Taxonomy of Legal Transplants

In order to classify legal transplants in Afghanistan, three distinct categories of law must be assessed: *Shari'a*, *Qanūn* and *Pashtūnwāli*. These pluralistic categories of law with inconsistent geographical variations have at times worked well together, or at other times worked against one another, or one of them filled in the gaps when the other/s were absent.

Table 18: Legal Transplantation Taxonomy in Afghanistan 1747-2020

Type	Definition	Examples in Afghanistan
Transplantation of Legal Traditions	The transfer of an entire body of law, along with techniques of legal reasoning and the role of law in society	Monotheistic: Zoroastrian, Mosaic and Islamic laws; Roman and Germanic law; Ottoman law; Egyptian law
Transplantation of National Law	A country adopts the substantive law of another country	Afghanistan adopted Turkish and Egyptian laws (family, criminal and civil) and <i>qanūn</i> laws
Transplantation of an Area of Law	A country or jurisdiction elects to create or retain a body of law in a given area	Constitutions were based on French models; commercial law on Ottoman (Ottoman from Swiss); reforms through judicial decisions were adopted from English law; Panchat Bashi, the Mamluk Sultans' judicial consistency, <i>Siyāsa</i> and <i>Janissary (gholām bacha)</i> ; eclectic use of <i>Shari'a</i> -based <i>qawāma</i> and <i>hūdūd</i> punishments
Particularised Transplantation (borrowing)	Transfer or adoption of specific legal concepts or rules	Codified Islamic laws by Britain; administrative law from English law; Ottoman <i>Mujallah</i> ; Islamic concepts of <i>bay'at</i> and <i>Shūrā</i> for informal justice; <i>Pashtūnwāli</i> penal rules from <i>Yāsā</i> ; Soviet Politburo's chain of command
Double Transplantation	A country transplants a specific area of law and then uses transplantation in the making of a broader law	Mix of <i>Yāsā</i> and <i>Pashtūnwāli</i> has formed a hybrid tribal system; Taliban use of <i>Yāsā</i> , <i>Pashtūnwāli</i> under the veneer of Islamic punishments (1994- to date)
Indirect Transplantation (influence)	A country's law, recognised as being advanced or modern, influences, or modern law influences the evolution of law in other countries	Mosaic law, Mongol law and Islamic law influence all forms of punishment; purdah and gender segregation laws from Achaemenid, Bedouin tribes of the Arab Peninsula
Superficial Transplantation	Adoption of foreign terminology	Italian Criminal Law 1988, CEDAW, UDHR, UNCAC, Counternarcotic Law 2005, human rights provisions that contradict <i>Pashtūnwāli</i> and the <i>ulemās'</i> interpretation of Islamic law concerning women, children and religious freedoms

8.18 Testing the Hypothesis

In the following score table, differences between the dependent indicator *legal transplants* and the independent indicator *culture of legality* transpired in four categories. The first one is (0) difference, which means the legal transplants formed a *culture of legality*. This is due to Amanullah Khan's legal reforms through legal transplants that were consistent with what the state required to embrace and sustain. To the present day, all the leaders of Afghanistan have followed some elements of Amanullah Khan's reforms and built on the legal foundations he set forth in Afghanistan.

The second category is the legal transplants where political leaders were involved in their operation. These were reforms that worked to some extent, but not all conditions necessary for their embracing and sustaining were present. These have a difference of 1. These were due to Abdur Rahman Khan and Habibullah Khan, Zahir Shah, and the socialist governments' efforts. These political systems worked well, but they could not bring about an irreversible *culture of legality*. The military coups and bloody conflicts led to most of the reversals.

The third category is the legal transplants brought to Afghanistan, following foreign interventions. These legal transplants were foreign led and were connected to aid conditionality, and were strongly needed due to state weakness. These have a difference of 1. The difference between this category and the earlier one is that in this era, the political leaders are likely to embrace legal transplants for financial gain. The best evidence to test this is that leaders do not follow the rules and achieving change may be a pyrrhic victory. These

are prone to quick reversals. A number of factors shown in the section for Hamid Karzai and Ashraf Ghani Ahmadzai explain why Afghanistan is backsliding, partly due to a welter of legal pluralisms, tribal power and religious authority as well as the modes of ethno-tribal governance that are reversing Afghanistan's gains to pre-Abdur Rahman's times.

The final category is the difference of 2, which is the highest in one hundred and twenty years of statehood. This belongs to Daoud Khan who ruled Afghanistan single-handedly, annulled Constitution 1964 and although he formulated the best-written laws in the history of Afghanistan, his government could not implement them.

Table 19: The Score Table

No.	Case	Transplants	Culture of Legality	Difference
1	Abdul Rahman Khan	2	1	1
2	Habibullah Khan	2	1	1
3	Amanullah Khan	6	6	0
4	Zahir Shah	5	4	1
5	Daoud Khan	5	3	2
6	Socialist governments	4	3	1
7	Hamid Karzai	3	2	1
8	Ashraf Ghani Ahmadzai	2	1	1

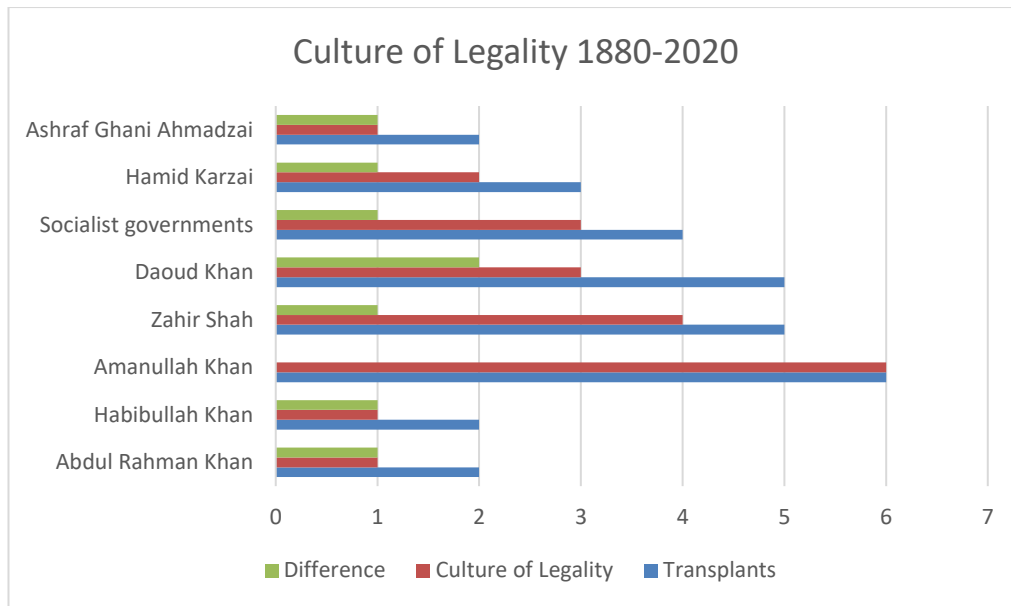


Figure 8: The Independent Variable Culture of Legality 1880-2020.

The legal transplants for a variety of reasons as demonstrated above did not resonate at local and communal level and were thus received with indifference to the point they were in large part disregarded. As for the state-led legal transplants of the past, in order to adopt *Hanafi* legal norms, Afghanistan’s judicial and legislative branches simply mimicked the Egyptian legal progress, possibly not for the sake of empowering the rule of law *per se*, but because laws imported from Egypt helped Afghanistan’s global image and classed it as a modernising state. This type of mimetic isomorphism in the area of importing legal texts garnered support for creating and expanding an *Islamic legal order* which this chapter identifies as weak and less developed. William Gourley describes mimetic isomorphism to be the copying of other organisations’ models that are perceived as being successful without understanding the basis of that success.⁶¹⁸

⁶¹⁸ Gourley, “Interface between English Further and Higher Education,” 149.

From the forty questionnaire respondents who participated in this research, more than fifty percent think that the legal transplants from Egypt, Turkey and Western countries between 1747 to 2001 were useful. As for the post-2001 era, a large number say that legal transplants have not been useful; some refrained from answering the question, and a few say they have been useful. It may be understood from the answers to other questions in the research questionnaire that some respondents believe there has been no law or a meaningful government in Afghanistan since 2001. Some negativity and frustration is noted in answers to questions concerning justice, law and order relating to the post-2001 period.

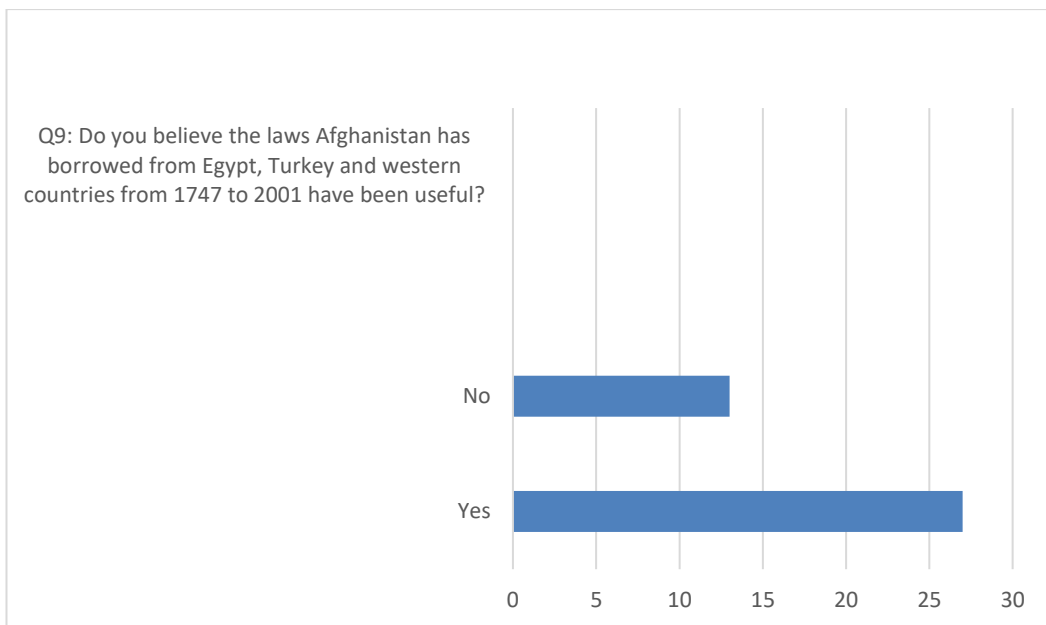


Figure 9: Research Questionnaire. Legal Transplants 1747-2001.

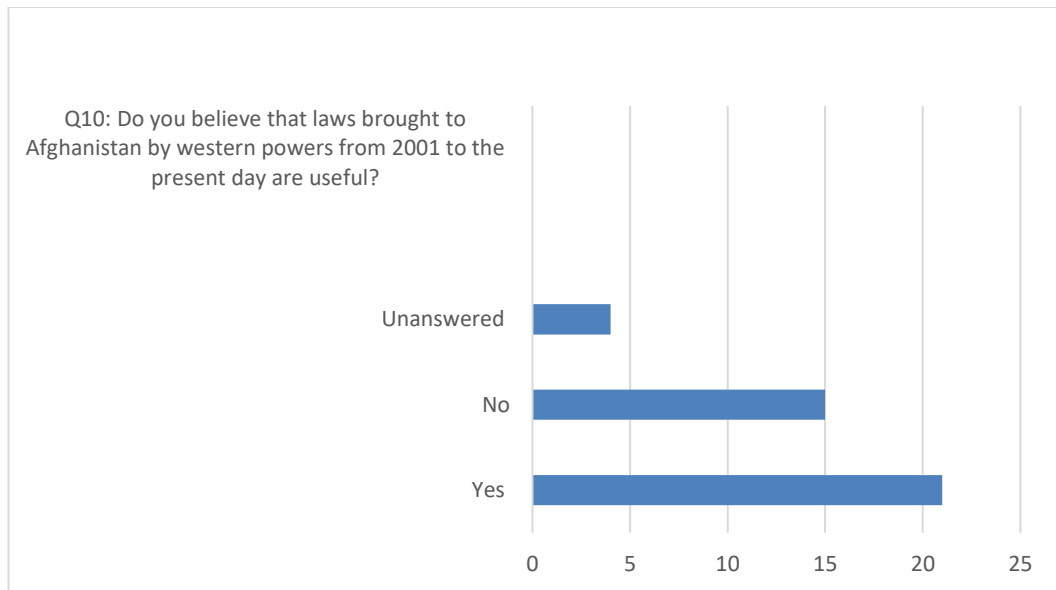


Figure 10: Research Questionnaire. Legal Transplants 2001-2020.

8.19 Conclusion

This chapter has shown the different stages of legal reforms in Afghanistan with a focus on legal transplants from 1880 to the present day. It has also offered a background to the legal conditions from 1747 to the 1880s. The chapter has highlighted different approaches taken by the political leaders of Afghanistan to instigate reforms and make those reforms work.

The chapter showed the stages where legal transplants were the demand of Afghanistan's political leaders and that the monarchs performed very well. The chapter further showed that the post-2001 governments of Afghanistan have displayed cursory changes and certain achievements, but their motives do not appear to be for the sake of expanding the rule of law but rather to receive international aid money. The chapter shows that foreign-led legal transplants are fragile, ineffective and prone to speedy reversals.

This chapter has tested the null hypothesis, the only hypothesis with the working assumption that *the state-sponsored legal transplants have not formed a culture of legality since the creation of a nation-state in Afghanistan*. Although Amanullah Khan's government is an exception, the chapter has identified that intervening factors such as *coups*, wars and under-development reversed the gains. This chapter has used case-study and process-tracing methods to test the hypothesis. The results of the hypothesis agree with the working assumption quoted above. The hypothesis is a robust one and lies between the *smoking gun* and *double decisive* results.

The next chapter will be dedicated to the development of constitutions of Afghanistan. By observing constitutions, this will enable us to assess which laws have been critical to the development and modernising of Afghanistan's legislation, as constitutions function as a form of legal transplants in their own right.

CHAPTER 9: THE CONSTITUTIONS OF AFGHANISTAN: 1923-2020

*A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.*⁶¹⁹

9 Introduction

A constitution is a body of basic laws and principles that describes the general organisation and operation of the state and contains fundamental principles and norms that underlie and guide government action.⁶²⁰ Given the fundamental nature of a constitution and its role in laying a groundwork to shape and support the state, a constitution is usually expected to be longstanding and somewhat difficult to change or undo.⁶²¹ The vast majority of contemporary constitutions describe the basic principles of the state, the structure and processes of government and the fundamental rights of citizens in higher law that cannot be unilaterally changed by an ordinary legislative act.⁶²² The content and nature of a particular constitution, how it relates to the rest of the legal and political order, varies considerably between countries, and there is no universal and uncontested definition of a constitution.⁶²³

The American constitutional expert, Walter F. Murphy, describes constitutionalism as respect for human worth and dignity as its central principle, and to protect that value, citizens must have a right to political

⁶¹⁹ Article 16 of the Declaration of the Rights of Man and of the Citizen.

⁶²⁰ Hedling, "The Fundamentals of a Constitution," 1.

⁶²¹ Hedling, 1.

⁶²² Bulmer, "What is a Constitution?" 5.

⁶²³ Bulmer, 5.

participation and their government must be hedged in by substantive limits on what it can do, even when perfectly mirroring the popular will.⁶²⁴ Constitutionalism, according to the Bar of Human Rights Committee of England and Wales, is limited government and includes the ideas of the rule of law and the separation of powers as a means of restricting and controlling government.⁶²⁵ The rule of law emphasises the importance of general rules as binding on citizens and government alike; it requires laws to reflect certain basic values derived from the nature of rules as guides of conduct.⁶²⁶

In assessing the constitutions of Afghanistan from 1923 to 2004, a number of researchers have expressed their views. Mustafa Yayali claims that all the constitutions of Afghanistan failed, as they were drawn on the pre-modern nature of Afghanistan by weak governments that failed to promote a constitutional culture, and Nighat Mehroze Chishti states that all the constitutions of Afghanistan failed to serve their purpose. In this chapter, I argue that these careless assessments of Afghanistan's constitutions lead to unqualified and generalised statements. In refuting these two claims, the chapter seeks to highlight the incrementalist nature of Afghanistan's constitutions, and observes the intervening factors such as conflicts and disruptions of the political processes, mainly due to regime changes. Constitutions enshrine different principles in different periods of history, and it may not be possible for governments to implement all of the constitutional provisions.

⁶²⁴ Murphy, "Constitutions, Constitutionalism, and Democracy," 3.

⁶²⁵ Bar Human Rights Committee of England and Wales, "Manual on Rule of Law Afghanistan," 20.

⁶²⁶ Bar Human Rights Committee of England and Wales, 20.

This chapter assesses the constitutions of Afghanistan – from the first one drafted in 1923 and the last in 2004 – for the promises these constitutions offered, against actions taken by the political leaders and government institutions, such as the legal system, in order to fulfil these promises. The chapter suggests *transformative constitutionalism* as a pathway to inclusivity and for future direction.

9.1 Demands for a Constitution in Afghanistan

In Afghanistan, the demand for written laws is closely linked to the reforms and legal developments in a wider geographical region that included Afghanistan's closest neighbours, India and Persia (Iran), and further afield, Egypt and Turkey.

In 1839, Mountstuart Elphinstone the Scottish statesman wrote, “The Durrani aristocracy does not have Statute Laws, except the laws of the Prophet Mohammad, and there are no public records of the proceedings of their government, so it is impossible that any regular constitution has grown among them.”⁶²⁷ In Afghanistan's then neighbour, India, legal and constitutional provisions were in place as British political agents and viceroys were involved in running India's legal and political affairs. In Afghanistan's other neighbour, Persia (renamed Iran in 1923), under the rule of the Qājārs, an intellectual and constitutional movement had taken shape that led to the creation of the first Iranian constitution in 1906. Sa'doddin Hashimi observes that:

⁶²⁷ Khan, *Constitution and Laws of Afghanistan*, 21.

In the global East, various societies and nation-states decided to import Western technology and culture in order to preserve their own cultural heritage and also be part of the Western concepts such as human rights, freedom, democracy, independence, and nationalism. National States took hold in the global East and gradually some people adopted certain ways of a Western life.⁶²⁸

In *The Constitution and Laws of Afghanistan* printed in 1900, Sultan Mohammad Khan refers to Ahmad Shah Durrani as the founder of the Durrani dynasty and the first elected constitutional sovereign of his time in Afghanistan.⁶²⁹ In the context of Afghanistan, Khan uses terms such as the *sovereign*, the *commonwealths* of Afghanistan and *constitutional order* and infers that the tribal selection process in appointing Ahmad Shah as king was congruent with a constitutional process.⁶³⁰

9.2 CONSTITUTION 1923

NIZAMNAMA-H-YE-ASASI- DAULAT-E-ALIYAH-E AFGHANISTAN, 20 HAMAL 1301 [Fundamental Principles of the Exalted State of Afghanistan, Constitution, 09 April 1923] was the first constitution of Afghanistan drafted under King Amanullah Khan (r. 1919-1929). This constitution was formed by seventy-three articles and in nine sections. Nizām-nāma is a term that emerged in the Middle East following the Tanzimāt period in nineteenth century Turkey.⁶³¹ According to Joseph Schwager, the Constitution of 1923 was in substance a judicially valid constitution, and its provisions for legislation were designed to lead an autonomous development of secular law-making and to show the way to the separation of secular from

⁶²⁸ Hashimi, *Constitutional Movement in Afghanistan*, 30.

⁶²⁹ Khan, *Constitution and Laws of Afghanistan*, 4.

⁶³⁰ Khan, 4.

⁶³¹ Nawid, "Aman-Allah and the Afghan 'Ulama,'" 76.

canonical jurisprudence.⁶³² The reference to canonical jurisprudence here is the *Shari'a* provisions.

According to the Afghan scholar and writer, Senzil Nawid, during Amanullah Khan's rule, the new regulations were intended to bring greater order to the administration of government; to regulate social relations; to promote human dignity; to ensure equality before the law without regard to ethnic origin or distinction of class, and promote general welfare and tranquillity, and in addition, Amanullah Khan intended these regulations to provide a foundation for modern education and economic reform.⁶³³ The second chapter of the constitution constituted the Afghan Bill of Individual Rights and Article 8 declared that all people residing in Afghanistan were Afghan citizens, regardless of their religion or creed.⁶³⁴ Articles 9 and 10 provided that no individual could be arrested or punished, except as provided in the law, and Article 16 recognised the equality of all citizens before the law.⁶³⁵

The legal transplants chapter identified that Amanullah Khan was the only king of Afghanistan whose government's legal transplants matched the capacity of his government's institutions. Amanullah Khan's government drafted many *Nizāmnāma* regulations for central government organisation, provisional administration, economics, military, citizenship and civil status, changes in the law, education, social and cultural affairs and public welfare.⁶³⁶

⁶³² Tarzi, "Islam and Constitutionalism in Afghanistan," 210.

⁶³³ Nawid, "Aman-Allah and the Afghan 'Ulama," 76.

⁶³⁴ Nawid, 79.

⁶³⁵ Nawid, 79-80.

⁶³⁶ Nawid, 218-220.

Nadjma Yassari and Hamid Saboory report that during Amanullah Khan's rule, Afghanistan was plagued by inter-ethnic divisions and tribal conflicts, and the population was taken hostage by corrupt religious fanaticism that opposed the existence of a modern government.⁶³⁷

Afghanistan's constitutional culture became well-grounded by her first constitution. The subsequent leaders used the provisions of the previous constitution/s as the main pillars of their new constitution/s. Gillian K. Hadfield and Barry R. Weingast argue that constitutional enforcement is important as most constitutions in the world fail.⁶³⁸ The fact that a country has several constitutions does not necessarily indicate weakness or failure. Another issue that must be considered in assessing constitutions is the addition of a bill of rights, amendments or the emergence of new constitutions by new governments. Radhika Coomaraswamy states that over three decades, India's constitution was amended fifty times.⁶³⁹

The Result of Constitutional Promises: Despite the ulemā's and tribal chiefs' disagreements to Amanullah Khan's steadfast modernisation programs, the king and his government fulfilled the promises enshrined in Afghanistan's first constitution. The constitution was supported by other legalisations. Amanullah Khan's constitution formed the backbone of all future constitutions of Afghanistan.

9.3 CONSTITUTION 1931

⁶³⁷ Yassari and Saboory, "Shari'a and National Law," 277.

⁶³⁸ Hadfield and Weingast, "Constitutions as Coordinating Devices," 1.

⁶³⁹ Coomaraswamy, "Uses and Usurpation of Constitutional Ideology," 160.

In 1931, Nadir Shah drafted the second constitution, generally in tune with the sensitivities of the majority of Sunni Afghans, where he stated: “Islam comes before any material needs, but that is no reason why we should not move forward, even on European manner” without shedding a single detail of his spiritual equipment.⁶⁴⁰ There is little information surrounding the circumstances leading to the promulgation of the 1931 constitution or who was involved in putting the document together.⁶⁴¹ The substance of the 1931 constitution clearly illustrates that traditional Sunni *ulemā* and tribal notables were either consulted or had a direct influence over the constitution drafting process and some such *ulemā* and representatives of tribes were appointed in important state offices.⁶⁴²

Louis Dupree surmises that the 1931 constitution embodied a hodgepodge of unworkable elements, extracted from the Turkish, Iranian and French constitutions and the 1923 constitution of Amanullah, plus many aspects of the local customs and *Hanafī Shari’a* of Sunni Islam.⁶⁴³ By allying himself with the conservative tribal *ulemā*, Nadir Shah inserted himself into power and obstructed reforms until the mid-1960s.⁶⁴⁴

Shamshad Pasaraly finds Nadir Shah’s constitution more effective than Amanullah Khan’s constitution, because in Pasarlay’s view, it identified key stakeholders who needed to be at the negotiation table, deferred on many of the controversial questions that the first constitution had tried to answer and

⁶⁴⁰ Tarzi, “Islam and Constitutionalism in Afghanistan,” 214.

⁶⁴¹ Pasarlay, “Making the 2004 Constitution,” 75.

⁶⁴² Pasarlay, 75-76.

⁶⁴³ Dupree, *Afghanistan*, 56.

⁶⁴⁴ Tarzi, “Transformative politics in 20th century Afghanistan,” 28.

was careful not to offend the stakeholders.⁶⁴⁵ Mohammad Hashim Kamali argues that this constitution overruled the spirit of reform upheld by Amanullah Khan's constitution.⁶⁴⁶ According to Vartan Gregorian, the 1931 constitution "institutionalised the power of the religious establishment" – a majority of which professed *Hanafī* jurisprudence, as Nadir Shah's main support and legitimacy came from these conservative *ulemā*, mostly from Pashtūn-dominated Eastern Afghanistan.⁶⁴⁷ The supremacy of *Hanafī* jurisprudence was established in Article 88 where the courts were mandated to address lawsuits in accordance with *Hanafī* jurisprudence.⁶⁴⁸ Nadir Shah abandoned sixty of Amanullah Khan's *Nizāmnāma* regulations.⁶⁴⁹ Ghizal Haress points out that Constitutions 1923 and 1931 did not recognise judicial independence and courts remained part of the executive branch under direct control of the king.⁶⁵⁰

The Result of Constitutional Promises: Taken that Nadir Shah did not make new promises that would enhance Amanullah Khan's modernist programs, and he revoked sixty of Amanullah Khan's laws, one may regard Constitution 1931 as regressive and unhelpful. The biggest reversal was that Nadir Shah privileged the *ulemā*, and as Mohammad Hashim Kamali concludes, his move served as a rapprochement towards the Eastern Pashtūns⁶⁵¹, whilst Amanullah

⁶⁴⁵ Pasarlay, "Making the 2004 Constitution," 77.

⁶⁴⁶ Kamali, *Law in Afghanistan*, 20.

⁶⁴⁷ Tarzi, "Islam and Constitutionalism in Afghanistan," 215.

⁶⁴⁸ Tarzi, 216.

⁶⁴⁹ Kamali, *Law in Afghanistan*, 20.

⁶⁵⁰ Haress, "Judicial Review in Afghanistan," 7.

⁶⁵¹ Tarzi, "Islam and Constitutionalism in Afghanistan," 215.

Khan saw all the inhabitants of Afghanistan as equal citizens. Constitution 1931 was not a useful constitution.

9.4 CONSTITUTION 1964

The 1931 constitution was in operation until the successor king, Zahir Shah, son of the assassinated Nadir Shah, decided in 1964 to draft a new constitution. The need for a new constitution in 1964 arose as a result of Afghanistan's opening and *reaching out* to the international community as, for the forty-five years leading up to 1964, Afghanistan had independently conducted her international relations with the East and the West. For this period of Afghanistan's history, Louis Dupree reports that one would meet Afghan officials who spoke Dari, Pashto, English, French, German and Urdu; French was the non-Afghan *lingua franca* among the intelligentsia before World War II, and then English dominated Afghanistan and the Russian language increased its importance.⁶⁵² This indicates the genesis of Afghanistan seeking close ties with different countries.

In this period, a mixed pattern in legislation developed which created confusion over the relationship between state law and *Shari'a* laws.⁶⁵³ The confusion related to the issue of jurisdiction and whether a case must be decided by a *Shari'a* or civil judge. The courts of law generally applied the Arabic manuals of *Hanafi* jurisprudence as well as the translations of the Ottoman *Mujallah*. The Ottoman *Mujallah* is a codified version of *Hanafi* jurisprudence for civil transactions, excluding family law.⁶⁵⁴

⁶⁵² Dupree, *Afghanistan*, 93.

⁶⁵³ Yassari and Saboory, "Shari'a and National Law," 281.

⁶⁵⁴ Yassari and Saboory, "Shari'a and National Law," 281.

Constitution 1964 was formed by eleven chapters and one hundred and twenty-eight articles. It paid particular attention to issues such as institution building, democratic structures, the structure of parliamentary democracy and the independence of the judiciary from the executive branch.⁶⁵⁵ This constitution excluded members of the royal family from taking political offices, but retained considerable powers for the king. As head of state, the king embodied national sovereignty, was the guarantor of the basic precepts of Islam and was the sole authority to decide on independence. The king was supposed to be a follower of the *Hanafi* school of Sunni Islam.⁶⁵⁶ The king was not accountable to anyone and had to be respected by everyone.⁶⁵⁷ Article 2 of the constitution declared that the sacred religion of Islam was the religion of Afghanistan. It further stated that all human beings were equal⁶⁵⁸ with provisions for the secrecy of people's communications.⁶⁵⁹ Freedom of expression was declared to be a fundamental right.⁶⁶⁰

Constitution 1964 was formulated in a relatively democratic fashion and is thought to be the most refined and coherent of the earlier constitutions of Afghanistan.⁶⁶¹ Zahir Shah changed the royal family's hold on political posts by forcing his cousin, Daoud Khan, to resign from his premiership post. Dr Mohammad Yusuf, a non-royal, replaced Prime Minister Daoud Khan in

⁶⁵⁵ Yassari and Saboory, 281.

⁶⁵⁶ CONSTITUTION 1964, arts. VI-VIII.

⁶⁵⁷ CONSTITUTION 1964, art. XV.

⁶⁵⁸ CONSTITUTION 1964, art. XXV.

⁶⁵⁹ CONSTITUTION 1964, art. XXX.

⁶⁶⁰ CONSTITUTION 1964, art. XXXI.

⁶⁶¹ Kamali, *Law in Afghanistan*, 222-243.

March 1963 and this ushered in a new era of limited representative democracy.⁶⁶²

According to Shamshad Pasarlay, Constitution 1964 used the strategy of constitutional deferral, coordinated *insiders* in constitutional negotiations and connected with democratic, liberal and forward-looking forces, but the document was a failure from the paradigm of coordination theory, for power brokers were unhappy with the way the legislative and executive powers were exercised.⁶⁶³ For the first time, this constitution gave the parliament the power to vote out a minister, prime minister or a government as a whole.⁶⁶⁴ Ghizal Haress posits that Constitutions 1923, 1931 and 1964 lacked mechanisms for reviewing statutory laws for compliance that would confirm the supremacy of the constitution.⁶⁶⁵

The Result of Constitutional Promises: The government of Zahir Shah legislated numerous laws which supported the Constitution of 1964. Zahir Shah's last ten years of rule is hailed as the decade of democracy in the country, and his forty-year rule marks the most stable and tranquil period in the history of Afghanistan since her statehood in 1880. The government of Zahir Shah delivered most of the promises stipulated in Constitution 1964 and marked it as the most progressive constitution.

9.5 CONSTITUTION 1977

⁶⁶² Tarzi, "Islam and Constitutionalism in Afghanistan," 218-219.

⁶⁶³ Pasarlay, "Making the 2004 Constitution," 91, 92, 98.

⁶⁶⁴ Pasarlay, 92.

⁶⁶⁵ Haress, "Judicial Review in Afghanistan," 8.

In 1973, former prime minister, a member of the royal family and cousin of King Zahir Shah, Mohammad Daoud Khan, organised a *coup* and toppled the monarchy. Daoud Khan declared Afghanistan a republic and appointed himself as the president and prime minister.⁶⁶⁶ He abolished the monarchy, dismissed the parliament, suspended the constitution and took executive control over the judiciary.⁶⁶⁷

The Constitution of 1977 differed from its predecessors in several ways. The document used constitutional principles from former constitutions and offered new promises. These were to shift power from the few to all the people (Article 2); to secure the full participation of the nation in the material and economic development of the country (Article 3); to strengthen the concept of democracy based on social justice, human dignity and liberty (Article 5); to consolidate a republican system (Article 6); to regulate the economy in a way that secured the interests of the majority of the people of Afghanistan (Article 7); to eliminate exploitation (Article 8); to ensure the rights of the workers (Article 9) and to provide free and compulsory education (Article 10).⁶⁶⁸

Article 12 of the constitution stipulated respect to the principles of the Charter of the United Nations and the Universal Declaration of Human Rights.⁶⁶⁹

According to Antonio De Lauri, this first official step to the recognition of human rights in Afghanistan remained just a simple archive record.⁶⁷⁰ Article

⁶⁶⁶ Touch Point, "A Primer for Practitioners: Legal Traditions and the Afghan Model," 13.

⁶⁶⁷ Touch Point, 13.

⁶⁶⁸ Chishti, *Constitutional Development in Afghanistan*, 134.

⁶⁶⁹ CONSTITUTION 1977, art. XXII.

⁶⁷⁰ De Lauri, "Inaccessible Normative Pluralism and Human Rights," 8.

22 designated Islam as the religion of the state without reference to the prominence of the Hanafi School of Law as had the previous constitution in 1964.⁶⁷¹ Despite the elaborate and highly ambitious provisions in Constitution 1977, Daoud Khan's rule had to counter a destructive insurgency which had both internal and external elements.⁶⁷² From 1973 to 1977 Daoud Khan governed the country as an absolute dictator and countered increasing Islamist challenges to his rule – relying on the Soviet Union.⁶⁷³

In order to support his constitutional promises, Daoud Khan's government drafted the Penal Code of 1976, which was primarily based on Islamic principles as well as European criminal codes. As quoted earlier in this thesis, Kristine Ziems contends that despite the enactment of comprehensive legal codes during the 1960s and the 1970s, the role of the court as an independent body was to enforce state law and the judiciary's role as a counterbalance to the executive never developed.⁶⁷⁴ This penal code consisted of five hundred and twenty-three articles. Daoud Khan's government also enacted the Civil Code of 1977 which was modelled on the Egyptian Civil Code of 1949, containing 2,416 articles, including family and inheritance laws. This civil code was also influenced by the French code.⁶⁷⁵ Daoud Khan promoted an authoritarian model of governance that provided for a presidential system of government within the framework of a single-party system.⁶⁷⁶ The hopes of political liberalisation foundered as independent newspapers appeared and

⁶⁷¹ Yassari and Saboory, "Shari'a and National Law," 285.

⁶⁷² Yassari and Saboory, 281-283.

⁶⁷³ Tarzi, "Islam and Constitutionalism in Afghanistan," 223.

⁶⁷⁴ Touch Point, "A Primer for Practitioners: Legal Traditions and the Afghan Model," 13.

⁶⁷⁵ Touch Point, 13.

⁶⁷⁶ Pasarlay, "Making the 2004 Constitution," 118.

were shut in quick succession and a cycle of conspiracies, arrests and executions set in.⁶⁷⁷ According to Pasarlay, this shortest-lived constitution of Afghanistan, lasting less than a year, showed the failure of the coordination device.⁶⁷⁸

The Result of Constitutional Promises: Daoud Khan's government could not adhere to the Universal Declaration of Human Rights (UDHR) principles due to intervening political events, including the looming Soviet invasion and ongoing internal conflict.⁶⁷⁹ Despite some economic progress and the drawing up of master plans to build modern cities – some of which are being implemented in present times – Daoud Khan could not deliver the promises enshrined in the Constitution of 1977. This was the first least successful constitution of Afghanistan.

9.6 CONSTITUTION 1980

Members of the People's Democratic Party of Afghanistan organised a bloody coup against Daoud Khan in 1978 and ended two hundred and thirty-one years of Sadozai/Mohammadzai dynastic rule. As part of President Babrak Karmal's appeasement policy directed towards the Islamic sentiments of the Afghan population, in April 1980 his administration announced the adoption of a new provisional constitution by the Revolutionary Council.⁶⁸⁰ This was the fifth of Afghanistan's constitutions. Constitution 1980 did not explicitly mention communism but pointed to the communist objectives,

⁶⁷⁷ Wahab and Youngerman, *A Brief History of Afghanistan*, 135.

⁶⁷⁸ Pasarlay, 118, 120.

⁶⁷⁹ De Lauri, "Inaccessible Normative Pluralism and Human Rights," 8.

⁶⁸⁰ Tarzi, "Islam and Constitutionalism in Afghanistan," 227; European Union, "Judicial process Under the Communist regime," 6.

views, policies, organisation and responsibilities of various institutions in the People's Democratic Party of Afghanistan (PDPA), the ruling party.⁶⁸¹

Mohammad Hashim Kamali points out that, unlike all preceding constitutions ratified by the *Loya Jirga* (Grand Assembly), the 1980 constitution was passed by the Revolutionary Council as “the mouthpiece of the ruling PDPA.”

⁶⁸² Article 29 of the constitution guaranteed full freedom in the practice of Islam; Article 56 allowed the settlement of cases through the application of *Shari'a* where laws of the Democratic Republic of Afghanistan were not clear. Despite these provisions, Constitution 1980 was seen as an un-Islamic document.⁶⁸³ The major laws from 1978 until the drafting of Constitution 1980 comprised eight presidential decrees – the most important documents for the reforms promised by the PDPA government.⁶⁸⁴

The Result of Constitutional Promises: Despite the fact that Constitution 1980 was seen as un-Islamic by some observers in Afghanistan, the PDPA

⁶⁸¹ Yassari and Saboory, “Shari'a and National Law,” 287.

⁶⁸² Tarzi, “Islam and Constitutionalism in Afghanistan,” 228.

⁶⁸³ Tarzi, 229.

⁶⁸⁴ Chishti, *Constitutional Development in Afghanistan*, 151-153. These were Decree No. 1 (30 April 1978): the decree announced the election of Nur Mohammad Taraki as chairman of the Revolutionary Council and prime minister of the Democratic Republic of Afghanistan. It also declared that the Democratic Republic of Afghanistan would be governed by decrees and regulations by the Revolutionary Council; Decree No. 2 (01 May 1978): this decree announced the name of the twenty-one cabinet members elected by the Revolutionary Council, eleven of whom were from the Khalq faction and ten of whom were from the Parcham faction; Decree No. 3 (14 May 1978): this decree abrogated Daoud Khan's 1977 constitution and established the legal procedures to be followed until a new constitution could be written. The existing legal system was retained but a military court was founded to try persons who had committed offences against the April Revolution. In July 1978, the Revolutionary Council issued two amendments to Decree No. 3 in order to speed up the judicial process at the lower level; Decree No. 4 (12 June 1978): this decree announced the design of the national flag and emblems; Decree No. 5 (12 June 1978): this decree withdrew citizenship from twenty-three members of the royal family, most living in exile in Italy and Iran; Decree No. 6 (12 July 1978): this decree made a noble attempt to eradicate usury in the countryside; Decree No. 7 (17 October 1978): this decree granted equal rights to women, regularised dowry and marriage expenses and prohibited forced marriages; Decree No. 8 (18 November 1978): this decree introduced cause reforms and emphasised individual ownership of land within established limits. It encouraged the formation of cooperatives to facilitate farmer credit and distribution of fertilisers, seed and agricultural inputs.

government empowered education programs; elevated minority languages to official language status and appointed non-Muslim officials in government positions – all of whom enjoyed better rights than in previous governments and could obtain political party membership. Constitution 1980 followed some secular aspirations of Amanullah Khan and was in large parts successful.

9.7 CONSTITUTION 1987

In 1987, President Najibullah Ahmadzai introduced a new constitution to Afghanistan within a socialist context. It consisted of thirteen chapters and one hundred and forty-nine articles. This constitution was not much different to the previous socialist constitution. In order to garner public support, President Ahmadzai added a new clause to make Islam the religion of Afghanistan, stating, “The sacred religion of Islam is the religion of Afghanistan. In the Republic of Afghanistan, no law shall run counter to the principles of the sacred religion of Islam and other values enshrined in this Constitution.”⁶⁸⁵ In Article 73, the president was required to be a Muslim and of Afghan parents, and Article 75 required any new president to take an oath and swear “In the name of Allah the Almighty, to protect the principles of the sacred religion of Islam.”⁶⁸⁶

This constitution provided for an eight-member constitutional council (*shūrā-e qānūn asāsi*), which mainly served as a political organ of the state.⁶⁸⁷

Mohammad Hashim Kamali argues that whilst constitutions of 1931, 1964

⁶⁸⁵ CONSTITUTION 1987, art. II.

⁶⁸⁶ Tarzi, “Islam and Constitutionalism in Afghanistan,” 230.

⁶⁸⁷ Kamali, “Afghanistan’s Constitution Ten Years On,” 5.

and 1977 were silent on the issue of interpreting laws for constitutionality, the Constitution of 1987 assigned an eight-member council to ascertain the constitutionality of laws, legal documents and international treaties, and to advise the president on issues pertaining to the constitution.⁶⁸⁸ According to Article 94, eight different government institutions were given the power to propose, introduce, amend or repeal laws.⁶⁸⁹ It also assigned the Constitutional Council of Afghanistan as a supreme institution of the country.⁶⁹⁰ President Ahmadzai's government may have drafted this constitution in order to gain the support of radical Islamist groups. This aspiration was not fulfilled.

The Result of Constitutional Promises: This constitution did not focus on democratic and socialist ethos very much but intended to attract members of the insurgent groups. It did not serve the purpose of co-opting the insurgents into the state system. Constitution 1987 had good provisions, but it was a weak constitution.

9.8 CONSTITUTION 1990

In 1990, President Ahmadzai called in a *Loya Jirga* to draft yet another constitution. The Constitution of the Republic of Afghanistan was issued in June 1990, formed by one hundred and forty-nine articles in thirteen chapters.

In the preamble it stipulated:

Our beloved homeland, Afghanistan is enriched, with heroic struggle of our brave people for independence national sovereignty, national unity, democracy and social progress; the present state, the State of

⁶⁸⁸ Kamali, 5.

⁶⁸⁹ Yassari and Saboory, "Shari'a and National Law," 289.

⁶⁹⁰ Yassari and Saboory, 289.

the Republic of Afghanistan actively carrying the policy of national reconciliation, relying upon the support of national, political and patriotic forces; keeping in mind the historic changes in the contemporary world, adhering the principles of sacred religion of Islam, abiding by the accepted Afghan traditions and rituals, relying upon realities of the country's history and culture, respecting the valuable heritages of the Constitutional Movement and in conformity with the Universal Declaration of Human Rights, and for the purpose of preserving the independence, defending the territorial integrity and strengthening the national sovereignty.”⁶⁹¹

In this constitution, issues such as Islam, proclaiming Afghanistan as an independent Islamic country, provisions for a multi-party system and establishing the private sector and private enterprises, as well as encouraging foreign investment in Afghanistan were provided in Articles 16, 20 and 25.⁶⁹² This constitution heralded important changes to Afghanistan's government and its legal system, and aimed to include all the groups and stakeholders who had been ignored in the past. The government also drafted another important legal document, the Civil Procedure Code 1990 on the 22 August 1990. This code contained five hundred and six articles.

The Result of Constitutional Promises: This constitution aimed to create National Reconciliation (*āshiti milli*) in order to share power with the insurgent groups. It failed to serve the aspirations of reconciliation, as the insurgent groups wanted to hold power and disagreed with power-sharing. However, the constitution achieved its other promises in a continuum of former socialist governments' efforts for change and reform in legal system and society. This was a much better constitution than the previous two socialist governments' constitutions.

⁶⁹¹ The Preamble of Constitution 1990.

⁶⁹² Yassari and Saboory, “Shari'a and National Law,” 289.

9.9 CONSTITUTION 2004

Following the tragic events of 9/11 in the United States, in late 2001 the American forces and their NATO allies invaded Afghanistan in order to punish Osama Bin Laden who had received sanctuary by the Taliban. The United States and NATO, together with the United Nations, sought to establish a post-Taliban government. Members of the international community, formed by representatives from the United States and its Western allied powers, the United Nations and a number of Afghan representatives, convened a conference in Bonn in December 2001. The conference was attended by the victors of the war against the Taliban, the Northern Alliance as well as members of diaspora groups known as the Rome Group, Cyrus Group and Iran Group.⁶⁹³

The Security Council of the United Nations was tasked to draft an agreement on provisional arrangements in Afghanistan pending the re-establishment of permanent government institutions that asked the then president of Afghanistan, Burhanuddin Rabbani, to transfer power to an interim authority – which would then form a fully representative government. The interim authority would be established upon the official transfer of power on the 22 December 2001, to form a Constitutional Loya Jirga (CLJ), planned to be convened within eighteen months of the establishment of the Transitional Authority.

The Agreement on Provisional Arrangements, a document drafted by the United Nations Security Council stipulated that: “Within two months of its

⁶⁹³ Pasarlay, “Making the 2004 Constitution,” 156-158.

establishment, the new authority with the assistance of the United Nations, would be tasked to establish a constitutional commission – provided that Constitution 1964 did not contradict the terms of the Bonn Agreement or the international legal obligations that Afghanistan was party to – with the exception of the king and legislature that would temporarily be the constitution of the Interim Authority.”⁶⁹⁴ The second stage of the Bonn process began on 27 January 2002, when President Hamid Karzai established a nineteen-member commission for an Emergency Loya Jirga (ELJ), to appoint a transitional government. The ELJ delegates elected Hamid Karzai as the president of the transitional administration with 1,295 votes out of 1,575 in favour.⁶⁹⁵

Constitution 2004 was formed by twelve chapters and one hundred and sixty-two articles. Article 3 of this constitution stipulates that “no law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan”. Article 7 stipulates that Afghanistan adheres to the Universal Declaration of Human Rights (UDHR). Articles 3 and 7 contradict each other, as there are many provisions in the UDHR which run counter to Islamic tenets. The constitution has not provided for a mechanism to clarify this important contradiction and ambiguity.

Article 121 of the constitution stipulates that at the request of the government, the Supreme Court shall review the laws, legislative decrees and international treaties as well as international covenants for their compliance with the

⁶⁹⁴ UNSC, “Agreement on Provisional Arrangements,” 1-12.

⁶⁹⁵ Pasarlay, “Making the 2004 Constitution,” 167.

constitution and their interpretation in accordance with the law.⁶⁹⁶ The Independent Commission of the Implementation of the Constitution (ICOIC), established by Article 157 of the Constitution is given an advisory role in examining the constitutionality of legal instruments in relation to Islam. The Supreme Court's opinions on the constitutionality of the laws are binding, and those of the ICOIC's are advisory.

Article 130 of Constitution 2004 provides that in cases under consideration, the courts shall apply provisions of this constitution as well as other laws. If there is no provision in the constitution or other laws about a case, in pursuance of *Hanafi* jurisprudence, and, within the limits set by this constitution, rule in a way that attains justice in the best manner.⁶⁹⁷

There are a number of criticisms of Constitution 2004. In the review of “10 years since the Afghan Constitution 2004”, Mohammad Hashim Kamali comments as follows:

The relatively slow pace of constitutional review in Afghanistan may partly be due to a certain tendency on the part of Afghan judges to have ready recourse to Islamic sources when statutory texts and available guidelines fall short of providing the needed guidance. This is reinforced by the fact that many of Afghanistan's constitutions explicitly instructed the judges to refer to Islamic or *Hanafi* jurisprudence regarding matters not regulated by statutory law, a position qualified under Article 130 of Afghanistan's Constitution of 2004. The important qualification of this article, namely that such a recourse should be guided by the spirit of “administering justice in the best possible way,” has unfortunately been frequently overlooked. Ready recourse to *Hanafi* jurisprudence had the effect of impeding the development of a lively discourse on constitutional interpretation. Instead of addressing a constitutional ambiguity on its own grounds,

⁶⁹⁶ CONSTITUTION 2004, art. CXXI.

⁶⁹⁷ In cases under consideration, the courts shall apply provisions of this constitution as well as other laws. If there is no provision in the constitution or other laws about a case, the courts shall, in pursuance of *Hanafi* jurisprudence, and, within the limits set by this constitution, rule in a way that attains justice in the best manner.

Afghan judges tend to refer to *Hanafi* sources partially because of their greater flexibility and scope. That said, one might add that Afghan judges have probably engaged more with statutory law, or *qānūn*, by way of clarifying and interpreting its provisions than they have with the constitution. There is of course, the absence of a constitutionalist tradition in Islam, and the all too obvious reference to the *Shari'a*.⁶⁹⁸

Said Arjomand, a scholar and writer who is critical of Afghanistan's Constitution 2004 drafting processes, identifies several problems. In Arjomand's view, the Constitutional Loya Jirga (CLJ), was less broadly representative, procedures were more irregular, less open, and many manipulations and behind the scene alterations were involved.⁶⁹⁹ Afghan women formed twenty percent of the *Loya Jirga*, a commission of five hundred and two members.⁷⁰⁰ The presence of women in such a large male majority commission in a strongly male-dominated setting raises the question as to what role women were allowed to play in the process, apart from their physical and ceremonial presence in the commission. Amin Tarzi states that "Constitution 2004 was drafted with little participation of the Afghan people".⁷⁰¹

The final version of Constitution 2004 was completed in mysterious circumstances. Hamid Karzai made last-minute changes and additions to articles under the guise of correcting typing errors. Ramazan Bashardost, a lawmaker nicknamed as the Gandhi of Afghanistan by Radio Free Europe,⁷⁰² states that Afghanistan's constitution is not the version that the *Loya Jirga*

⁶⁹⁸ Kamali, "Afghanistan's Constitution Ten Years On," 5.

⁶⁹⁹ Arjomand, "Constitutional Development in Afghanistan," 955.

⁷⁰⁰ Arjomand, 955.

⁷⁰¹ Tarzi, "Transformative politics in 20th century Afghanistan," 27.

⁷⁰² Siddique, "Afghan Gandhi?" last accessed 10 July 2020.

had finalised.⁷⁰³ An Afghan law student and political activist named Zakaria Osuli calls Constitution 2004 a fake constitution.⁷⁰⁴ He writes in his collection of articles that the main version of the constitution was fifty-five pages with one hundred and sixty-two articles and was marked by Sibghatullah Mojaddedi's signature on every page.⁷⁰⁵ Osuli reports that after the *Loya Jirga's* approval of the draft constitution, it was changed in seventy areas.⁷⁰⁶ Shamshad Pasarlay claims changes to the draft constitution were forty-eight minor orthographic changes.⁷⁰⁷

Ghizal Haress writes that an important deletion from the draft constitution was the provision for a constitutional court.⁷⁰⁸ The constitutional court would have had a wide range of powers aimed at ensuring the supremacy of the constitution and protecting fundamental rights; it would not have limited the parties that could refer cases to the court and would have allowed ordinary citizens as parties to litigation and the Human Rights Commission to challenge the constitutionality of those laws that breached fundamental rights.⁷⁰⁹ Haress adds that for the first time in the history of Afghanistan's constitutions, provisions for judicial review were stipulated in Constitution 2004,⁷¹⁰ though this prerogative is limited to the executive branch.⁷¹¹ Access to judicial review is denied to those parties that oppose the government.⁷¹²

⁷⁰³ Afghan News, "Afghanistan a Country with Three Constitutions," last accessed 12 July 2020.

⁷⁰⁴ Osuli, "Afghanistan's Constitution is Fake!" 8.

⁷⁰⁵ Osuli, 8.

⁷⁰⁶ Osuli, 8.

⁷⁰⁷ Pasarlay, "Making the 2004 Constitution," 258.

⁷⁰⁸ Haress, "Judicial Review in Afghanistan," 9.

⁷⁰⁹ Haress, 10.

⁷¹⁰ Haress, 10.

⁷¹¹ Haress, 22.

⁷¹² Grote, "Separation of Powers in the New Afghan Constitution," 911.

The post-2001 era is different to previous periods in Afghanistan's legal development. The international community brought to Afghanistan a bevy of international advisors, legalists and philanthropists. Since 2001, a substantial number of legalisations have been formulated to support the realisation of Afghanistan's rule of law commitments and support its constitution. Major laws that have been updated, amalgamated and expanded are the Interim Criminal Procedure Code of 2004, a redacted version of Afghanistan's Penal Code of 1976 and the Italian Criminal Code of 1988.⁷¹³ This law was in force until 2017 when the Penal Code of Afghanistan was updated. The United Kingdom helped Afghanistan draft the Counter Narcotic Law 2005.⁷¹⁴ The EVAW law was pushed for by international organisations,⁷¹⁵ leading to a presidential decree in 2009.

Shamshad Pasarlay does not state whether Constitution 2004 is a good constitution through the lens of coordination or deferral theories. Instead, he points out issues such as the need to amend the constitution and identifies problems with interpreting constitutional provisions and the constitutionality of the laws – citing the impasse between President Hamid Karzai and the parliament in 2010 forming a focal point.

The Result of Constitutional Promises: Constitution 2004 appears an excellent document on paper. It gives many promises that a centralist and a *one-man rule* cannot keep. Sir Sherard Cowper-Coles regards the

⁷¹³ The Penal Code of Afghanistan has been revised and updated a few times, the last one being in 2019. Some provisions of EVAW law, anti-torture provisions and the Rome Statute have also been added to the Penal Code.

⁷¹⁴ Jupp, "Legal transplants," 26.

⁷¹⁵ Wimpelmann, *The Pitfalls of Protection*, 2.

Constitution 2004 as unstable, highly centralised and unsustainable because it does not go with the grain of Afghan tradition.⁷¹⁶ In 2016, Freedom House Afghanistan reported that since 2004, the governments of Afghanistan have violated one hundred and sixty-one out of the one hundred and sixty-two articles of Constitution 2004, but at least left Article 21 intact – which stipulates that Kabul shall be the capital of Afghanistan.⁷¹⁷

Mehdi J. Hakimi, director of Afghanistan Legal Education Program (ALEP) at Stanford University, argues that the president of Afghanistan has actively compromised the parliament’s legislative, oversight, and representation functions through undue deployment of its emergency legislative competence; mocks the parliament’s constitutional oversight by not introducing ministers for parliamentary approval; attempted to transfer the Ministry of Finance’s function to the president’s office which was opposed by the United States’ State Department; and has convened *Loya Jirgas* with dubious legality, and the executive’s overreach has afflicted and buffeted the judiciary.⁷¹⁸ The executive branch of Afghanistan has disbanded the laws of Afghanistan and has sabotaged all institutions of government. Despite the contradictory articles which sign-posts high power to the *ulemā* and to the president, Constitution 2004 is a good constitution.

9.10 Future Constitutional Directions

⁷¹⁶ Cowper-Cole, “Foreign Affairs Committee,” 3.

⁷¹⁷ Freedom House Afghanistan, “Senior government officials and legislatures have violated the Constitution,” 08 May 2016; Euronews Farsi, “Freedom House Afghanistan reports of senior government officials and legislatures violating the constitution,” last accessed 29 July 2016.

⁷¹⁸ Hakimi, “The Rule of Law Crisis in Afghanistan,” 1-6.

Constitution 2004 is a copy of Constitution 1964, and as this chapter has clarified, there have been many last-minute changes, secretive agreements rather than consultations and deferrals and that the people of Afghanistan did not participate in transparent and effective constitution building processes. Instead, the drafting process was sabotaged by a few at the helm. Depending on the type of future government in Afghanistan, should the rule of law be empowered meaningfully and legitimate presidents come to power through free and fair elections; an ideal path for an inclusive and effective constitution for Afghanistan may adopt *transformative approaches* with provisions that cannot easily be abused by dictators.

Upendra Baxi describes *transformative constitutionalism* as a “historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all, ... irrespective of colour, race, class, belief or sex”.⁷¹⁹ Transformative constitutionalism is often applied in the context of South Africa, where its past injustices are similar to those of Afghanistan’s despotic regimes and their internal colonialism.

The metaphor of crossing the bridge is suggestive of movement from *where we stand today* – the geography of injustice created by institutionalised state racism.⁷²⁰ The future generations of Afghanistan must take lessons from the brutality of the past and use transformative constitutionalism to their

⁷¹⁹ Baxi, “Preliminary Notes on Transformative Constitutionalism,” 19; IDEA, “Performance of the South African Constitution,” 36.

⁷²⁰ Baxi, “Preliminary Notes on Transformative Constitutionalism,” 21.

advantage in opposing tyranny, terrorism and subjugation of the will of the nation by leaders brought to power by fraudulent elections.

9.11 Conclusion

This chapter has provided an assessment of the eight constitutions of Afghanistan from 1923 to 2004. It has clarified that despite the fact that some constitutions were short-lived and were inspired by different values and provisions including secular, Islamist and socialist, Afghanistan governments' constitutional experiences in view of conflicts and intervening factors have been stable. The chapter has highlighted the incrementalist nature of the constitutions ushered by Afghanistan's political leaders and her institutions which makes different constitution drafts as *continuity* rather than disjointedness. The chapter has also shown that each government of Afghanistan incorporated important constitutional provisions, upheld major provisions of previous constitutions, and, despite its turbulent history of statehood, Afghanistan has fared far better in its constitutional commitments than in shaping a *legal culture* through legal transplantation that would not reverse from one government to the next. Constitutions of Afghanistan, not being subject to casuistry interpretations of the judges in courts, and in part due to their paramount value, have worked better than other transplanted laws that were subject to change and re-interpretation.

This chapter has shown that the constitutions of Afghanistan have been carefully drafted and remained least affected by internal conflict, international military interventions and regime changes. Corruption in its multifaceted forms serves to undermine or abuse certain legal frameworks. The next

chapter highlights corruption in Afghanistan and how it affects Afghanistan's citizens and the ways in which it affects the delivery of justice.

CHAPTER 10: CORRUPTION IN AFGHANISTAN AND ITS IMPACT ON THE RULE OF LAW

“Happy families are all alike; every unhappy family is unhappy in its own way.”

Fyodor Dostoevsky, Anna Karenina

10 Introduction

Corruption is a problem that affects Afghanistan’s ongoing development, slows down reform, negatively affects all institutions of government, and in turn, has a precarious impact on all facets of Afghanistan’s legal culture. Corruption creates distrust, affects the social contract between the citizens and the state, and creates impunity which often affects the most impoverished citizens who suffer greatly, when in a corrupt government system, they find themselves at the intersections injustices, oppression and abuse. This chapter assesses corruption through the lens of political economy analysis (PEA) and political analysis of predation (PAP). PEA is concerned with the interaction of political and economic processes within a society: the distribution of power and wealth between different groups and individuals and the processes that create, sustain and transform these relationships over time.⁷²¹

Political economy is concerned with how political forces influence an economy and economic outcomes. In the context of Afghanistan, the PEA assessment in this chapter identifies who gains and who loses as a result of the distribution of benefits from political and economic activities. This will involve the activities connected to international aid and national extractive

⁷²¹ Collinson, “Power, livelihoods and conflict,” 3.

resources and revenues. The PAP involves the study of political decision making by a predatory state. According to Mehrdad Vahabi, a predatory state is a state that promotes the private interests of dominant groups within that state, such as politicians, the army and bureaucrats.⁷²² Alex Bavister-Gould argues that predatory regimes are seldom completely predatory.⁷²³ According to James Galbraith, a predatory state has a political system in which a narrow band of elites use policy instruments for their own benefit, while the rest of the population foots the bill.⁷²⁴

A predatory state is a national government whose politics, as observed in the construction of complex deals in the spheres of social welfare, public investment and regulation that have the effect of enriching specific private actors while passing along – perhaps – a diluted benefit to the broader public.⁷²⁵ This research does not regard the government of Afghanistan as purely predatory, but based on its dysfunctional ethno-tribal political system and despotism, it is partially predatory.

The first question to raise in assessing the political economy in the context of international aid is whether international aid is humanitarian or political. Claire McLoughlin surmises that donors are political actors, and whilst PEA should be undertaken to help identify the potential for pro-poor reform, there is less clarity regarding whether and how aid modalities are capable of adjusting political realities or the extent to which political analysis is

⁷²² Vahabi, “Symposium on Predatory State,” 233.

⁷²³ Bavister-Gould, “Predatory Rule and Predatory States,” 1.

⁷²⁴ Galbraith, “The Predator State,” 1.

⁷²⁵ Galbraith, “The Predator State,” 2.

changing donor behaviour.⁷²⁶ A comprehensive study of political economy in the context of Afghanistan requires the study of the donors' behaviour (how they use aid money), the behaviour of aid recipients (the political agents who receive donations), the distribution of donations, and lastly, how donations reach the intended beneficiaries (the people).

Prominent researches on political economy and corruption are produced by international organisations, using a variety of approaches. The Swedish SIDA Power Analysis aims to identify where real power in a society lies and how it is distributed; it looks for possible conflicts of interest and stipulates that PEA should primarily rely on local expertise.⁷²⁷ SIDA Power Analysis is based on the understanding that issues of power asymmetries, access to resources and influence over politics must be addressed if poverty is to be reduced.⁷²⁸

Norway's NORAD approach to PEA focuses on legitimacy of the state and provides a way of analysing governance and state-building, particularly in situations of fragility.⁷²⁹ According to NORAD, an analytical approach stressing the legitimacy of the state adds value to a standard PEA because it looks at what citizens expect from the state, on the one hand, and how those in control of the state can improve the standing of the state in the population, on the other.⁷³⁰

The World Bank's problem-driven framework is a platform that tries to bring together and to summarise for World Bank teams some practices, thinking

⁷²⁶ McLoughlin, "Guide on Political Economy Analysis," 10.

⁷²⁷ McLoughlin, 8.

⁷²⁸ Nash, Hudson and Luttrell "Mapping Political Context," 24.

⁷²⁹ McLoughlin, "Guide on Political Economy Analysis," 8.

⁷³⁰ NORAD, "Political economy analysis with a legitimacy twist," 11.

and lessons learned; SIDA Power Analysis and the Department for International Development (DFID) use the/a drivers of change approach which directs researchers to look at actors, institutions and structures that influence poverty and development policies at macro level.⁷³¹ Each donor country pays particular attention to this subject and there may be overlaps when several approaches are applied to the same situation without proper coordination. In some parts of this chapter, in the absence of objective information, participant observations will be used.

10.1 Definitions of Corruption

UNAMA defines corruption as an indicator of weak political institutionalisation.⁷³² According to DFID, the term *corruption* refers to the misuse of resources or power for private gain, and Transparency International defines corruption as “the abuse of entrusted power for private gain”.⁷³³ Inge Amundsen describes corruption as a disease – a cancer that eats into the cultural, political and economic fabric of society and destroys the functioning of vital organs.⁷³⁴ Syed Hussein Alatas, a Malaysian politician and scholar, defines corruption as the subordination of public interests to private aims involving a violation of the norms of duty and welfare, accompanied by secrecy, betrayal, deception and a callous disregard for any consequences suffered by the public.⁷³⁵

⁷³¹ McLoughlin, “Guide on Political Economy Analysis,” 8.

⁷³² UNAMA, “Crucial for Peace and Prosperity,” 7.

⁷³³ DFID, “Why Corruption Matters,” 12.

⁷³⁴ Amundsen, “Political Corruption,” 1.

⁷³⁵ Alatas, *The Problem of Corruption*, ix.

Classifying corruption into general categories may not reveal the full extent of corruption in a given society. There are universal characteristics of corruption, such as the different forms of abuse of power for private gain. The nature, causes and functions of corruption differ from country to country.⁷³⁶ In a study of corruption in Afghanistan completed in 2007, Integrity Watch Afghanistan (IWA) noted that the definition and scope of corruption in Afghanistan must be based on Afghans' perceptions, beliefs, values and attitudes in designing and implementing effective anti-corruption measures suited to Afghanistan.⁷³⁷ The phenomenon of corruption may be studied using sociological, case-study or ethnographic researches.

The assessment of societal perceptions and measuring the effectiveness of the legal institutions of the government may be carried out using a number of approaches. Integrity Watch Afghanistan, as an indigenous Afghan organisation, the Asia Foundation, Chr. Michelsen Institute (CHR) and Special Inspector General for Afghanistan Reconstruction (SIGAR) as international organisations, and Danny Singh, Jonathan Goodhand, Sarah Chayes and Arne Strand et al., as individual scholars offer invaluable researches on PEA and corruption in Afghanistan.⁷³⁸

In order to assess corruption in Afghanistan, it will be helpful to identify different categories of corruption in society and government. Historically,

⁷³⁶ Alatas, ix.

⁷³⁷ IWA, "Afghan's Experience of Corruption," 12-13.

⁷³⁸ Wheatland, "Afghanistan as a Driver of Conflict," 1-14; McDevitt, "Focus on Development Assistance," 1-16; Strand, Borchgrevink and Harpviken, "Afghanistan: A Political Economy Analysis," 1-51; Goodhand, "War Economy to Peace Economy?" 155-70; Singh, "Explaining varieties of corruption," 213-55; Singh, "Investigation of Corruption and Clientelism in the lower levels of the Afghan police," 621-650.

Afghanistan's governments have exercised strong censorship in society and in the political circles. In his book written in 1965, Arnold Fletcher attributed the term *hermit kingdom* to Afghanistan due to its isolation from the outside world.⁷³⁹ This form of isolation of Afghanistan, its political groups and members of society to the present day remains understudied, and the sense of barricading the state to outsiders resonates well into the twenty-first century, despite the fact that since 2001, Afghanistan has had open borders to the outside world. State officials pay lip service when speaking of the ills of corruption and do little to address it.

Syed Hussein Alatas, the sociologist of corruption, states that "sociological analysis of corruption will be confronted by a methodological problem; accepted and generally applied methods of social research such as interview, the questionnaire and statistical analysis cannot be applied as long as corruption is considered a shady transaction."⁷⁴⁰ He adds that the sociologist studying the phenomenon of corruption has to be fully conversant with the history, the culture, the language and the circumstances of at least one rich and complex instance from which he or she can derive his or her data and test the theories, and without background knowledge, it is hard to offer fruitful insights beyond that which is obvious.⁷⁴¹

This section offers a synopsis of Western and Islamic views on corruption with fifteen categories of corruption relevant to Afghanistan and attempts to show what aspects of corruption are under-reported and are not taken into

⁷³⁹ Arnold Fletcher, *Afghanistan: Highway of Conquest*, 1.

⁷⁴⁰ Alatas, *The Problem of Corruption*, 1.

⁷⁴¹ Alatas, 1.

account as much as they should be. The citizens of Afghanistan are fearful of reporting corruption and politicians conceal the rotten practices of corruption in order to continue their privileged positions as receivers of international aid. Over the past nineteen years, Afghanistan's media outlets have referred to corrupt officials as the *zoorwāk* (Pashto) or *zoormandān* (Farsi/Dari) – vague terms that translate as the *powerful ones*.

In the line of their duties, Afghan journalists face threats from all sides: government officials exploiting weak legal protections to intimidate reporters and editors to compel them not to cover controversial topics; the Taliban and other insurgent groups are using threats and violence to compel reporting they consider favourable, and police and justice officials are letting threats, assaults and even murders go uninvestigated and unprosecuted.⁷⁴² The media often reveal petty corruption and refrain from naming powerful officials. This chapter will list some of Afghanistan's major corruption cases.

10.2 International Political Actors

International political actors or *political decision makers*, mostly Western politicians, but not technical experts or international aid workers, are the subject of this assessment. Do the international political actors understand they are corrupt? The international design of a *prêt-a-porter* state⁷⁴³ for Afghanistan, starting from the Bonn Conference in late 2001, has been corrupt from the outset. Hamid Karzai was not chosen or voted for by Afghanistan's representatives in Bonn, Germany in 2001. The candidate

⁷⁴² Human Rights Watch, "Stop Reporting or We'll Kill Your Family," 1.

⁷⁴³ Berghof Research Centre for Constructive Conflict Management, "Prêt-a-Porter States," 67-79.

chosen to rule Afghanistan as an interim president was Abdul Sattar Sirat, an ethnic Uzbek close to the former king, Zahir Shah.⁷⁴⁴

The rationale for selecting an interim president from a weaker ethnic group was to avoid an autocratic presidency and to establish an order in which no ethnic group would be able to sabotage Afghanistan's nascent democracy under the guise of a questionable majoritarian representation. However, the United States wanted to install a Pashtūn head of state, and the choice fell on Hamid Karzai.⁷⁴⁵ Shamshad Pasarlay identifies that the Northern Alliance group formed by leaders representing the Hazāras, Tajiks and Uzbeks demanded a parliamentary system with a prime minister, but that request was rejected.⁷⁴⁶ The non-Pashtūns, that is, the Uzbeks, Hazāras and Tajiks wanted a parliamentary system with stronger checks on executive power and on central state power.⁷⁴⁷

Dawood Moradian from Afghan Institute of Strategic Studies (AISS), a think-tank from Afghanistan, argues that it is unfair to blame Afghans for corruption as it was the Americans who created the post-2001 structure in Afghanistan; formed the constitution and passed it in the *Loya Jirga*; imposed it on Afghans and empowered people like Ashraf Ghani.⁷⁴⁸ Moradian adds that since 2001, with their particular visions, Hamid Karzai, Ashraf Ghani and Zalmi Khalilzād have kept one ethnic group of Afghanistan, the

⁷⁴⁴ Gopal, *No Good Men Among the Living*, 45.

⁷⁴⁵ Wimpelmann, *The Pitfalls of Protection*, 41.

⁷⁴⁶ Pasarlay, "Making the 2004 Constitution," 1-476.

⁷⁴⁷ Wimpelmann, *The Pitfalls of Protection*, 43.

⁷⁴⁸ TOLO News, "FARAKHABAR INTERVIEW – Dawood Moradian," last viewed 24 March 2020.

Pashtūns, in control of Afghanistan through a strong presidential system, whilst the opposition parties believe that there should be a system that represents all political groups.⁷⁴⁹

Lee Ferran reports that the United States' government's pouring of billions of dollars into Afghanistan with inadequate oversight in many cases fuelled corruption at unprecedented levels and ultimately undermined America's mission.⁷⁵⁰ Ferran quotes John Sopko's remark that corruption is like corrosive acid that eats away the base of every pillar of Afghan reconstruction – including security and political stability.⁷⁵¹

In the context of corruption and fraud in international aid projects, Michael Kramer, a United States attorney and consultant, writes that bribe takers include project personnel, supervisory government and ministry officials, local and expatriate employees of international aid agencies, auditors, inspectors of all types and even the press and NGOs.⁷⁵² James Bovard argues that counting on foreign aid to reduce corruption is like expecting whisky to cure alcoholism, and that United States aid makes corrupt countries more corrupt.⁷⁵³ These assessments ring true in Afghanistan's development projects from a Taliban rule to a Western-allied state since 2001.

The people of Afghanistan view Westerners as highly corrupt and corrupting, and it is also their belief that Westerners are emptying Afghanistan's resources – transporting Afghanistan's heroine and uranium as well as its

⁷⁴⁹ TOLO News, last viewed 24 March 2020.

⁷⁵⁰ Ferran, "America's 'Ultimate Failure' in Afghanistan," 1-3.

⁷⁵¹ Ferran, 1-3.

⁷⁵² Michael Kramer, "Corruption and Fraud," 1.

⁷⁵³ Bovard, "U.S. Aid," 1-3.

precious stones in their cargo planes. Listening to social media broadcasts and reading through written information for over nineteen years, the above-written forms popular views held by many Afghans – starting from an asylum seeker who works in a butcher’s shop in London, an *imbiss* worker in Hamburg’s *Hauptbahnhof*, a taxi driver in Kabul to a migrant labourer in the Gulf states, who follow Afghanistan’s news on the radio, TV and internet, all brought to Afghanistan through Western aid.⁷⁵⁴ This is what many Afghans strongly believe, similar to how many of them unquestionably believe in legends and myths.

After nearly twenty years, and despite many human and financial sacrifices made, the people of Afghanistan do not trust foreigners. Criminality, corruption, insecurity and high numbers of civilian and military casualties further strengthen their distrust. The absence of trust between the donor nations and the beneficiaries of donations affect meaningful progress in developmental work.

The chapter on religions showed that Afghanistan’s people’s beliefs are traditional, and often, beliefs in legends, exoticism and shamanism may form complex religious and communal belief systems. This has also created a culture of putting the blame on others. Aulia Atrafi looks at persistent theories that the hand of the British is behind every evil in Afghanistan. He adds that in the Afghan psyche, the British are lurking in the shadows, spying on Afghans, plotting and [still] managing to manipulate Afghan affairs for the

⁷⁵⁴ Afghan citizens’ views expressed in the formal interviews, on social media and in internet websites, in spoken and written forms in Dari/Farsi, Pashto and English languages.

worse.⁷⁵⁵ This psyche extends to all foreigners involved in Afghanistan before and since 2001.

10.3 Categories of Corruption in Afghanistan

There are at least fifteen major sociological categories of corruption affecting Afghanistan. These categories are assessed using Syed Hussein Alatas's sociological method. These categories will be supported by objective sources, when such sources exist. The assessment of political economy in this chapter will consider a set of questions outlined in the Australian Government's Guidance Note for a country level PEA for the structures, institutions, actors and dynamic interactions.⁷⁵⁶ The categories of corruption in Afghanistan are as follows:

⁷⁵⁵ Atrafi, "The country where the British are blamed for everything," last accessed 21 September 2020.

⁷⁵⁶ Australian Government, Department of Foreign Affairs and Trade, "Political Economy Analysis," 7. These questions are: (Structures): What are the key 'embedded' political structures? How do they function, and in whose interests? What are the key constraints and intractable problems? (Institutions): How well aligned are formal and informal institutions? What are the overriding rules of the game? What are the incentives that shape the behaviour of the key players? (actors): Who are the key players driving and opposing reform? Is there momentum for reform? Are there coalitions for change? (dynamic interaction): Why is the institution as it is? How do decision-making processes actually work? What are the risks and opportunities for engagement? What are the gaps in our knowledge? What are the critical areas to be tracked?

One: Acceptable Corruption

People holding government jobs abuse their positions and expect that members of society serve them and pay them certain gifts. This form of corrupt practice in Afghanistan is called *chai pooli*, literally meaning *money for a drink of tea*. During the socialist governments of Afghanistan (1978-1992), an army soldier seeking extra leave – like extended weekends – would offer his superior a bottle of vodka or a bottle of *eau de cologne*.⁷⁵⁷ Chai pooli, commonly viewed as a form of gift, may also be regarded a form of petty bribery. Chai pooli may involve the use of a person’s skills, time and money. Integrity Watch Afghanistan (IWA) describes *chai pooli* as petty corruption that involves the exchange of small amounts of money and the granting of minor favours by those seeking preferential treatment.⁷⁵⁸

Syed Hussein Alatas identifies another aspect of petty bribery as *speed money*, where the bribe giver does not wish to get anything unlawfully, but wants to speed up the process of the movement of communications relating to decisions.⁷⁵⁹ Petty bribes are often given when the bribe giver expects favours and the speeding up of work processes that may otherwise take longer if bribes were not paid.

In practice, an office clerk will ensure the director endorses his instructions on an application speedily. A government official inspecting a doctor’s surgery may expect free consultancy as a form of bribery. If the doctor is

⁷⁵⁷ First-hand account narrated by soldiers in Afghanistan.

⁷⁵⁸ IWA, “Afghan’s Experience of Corruption,” 15.

⁷⁵⁹ Alatas, *Corruption and the Destiny of Asia*, 52-53.

involved in malpractice, the receiving of the bribe by the inspector will endanger lives.

Inspectors of chemist shops which operate under the city council (municipality) ask at the counter during their inspection, “Do you have amoxicillin?” These inspectors, who are known to the shop owners, falsely pretend they want to buy the medicines. The chemist shop owner understands that this is a signal for bribes.⁷⁶⁰ Once the medicine is offered to the inspector free of charge, then the inspection may not take place, or it may be quite an easy one. This little amount of bribe, costing a fraction of one US dollar is likely to endanger the lives of patients who could be buying expired or low-quality medicines from a chemist shop that has not been inspected properly. When the inspector repeats this request at many chemist shops, he will accumulate a substantial amount of medicines and may sell them on later.

Two: Blaming Others for Corruption

Afghanistan is a country with a highly divided society breeding distrust in which several micro-nations (Hazāra, Tajik, Pashtūn, Uzbek and other groups) live together. Until 1978, the Pashtūn Durrani ruling clan devised policies that all Afghans were brothers and sisters and talking about ethnic group rights or ethnic groups’ population could have dangerous consequences. Katherine Adeney posits that estimates for ethnicity numbers are contested because relative population strengths or weaknesses have political implications.⁷⁶¹

⁷⁶⁰ Author’s eye-witness account in Afghanistan in 1998.

⁷⁶¹ Adeney, “CONSTITUTIONAL DESIGN AND THE POLITICAL SALIENCE OF “COMMUNITY” IDENTITY IN AFGHANISTAN,” 538.

In the post-2001 period, certain people from different ethnic groups put the blame for corruption on groups towards whom they hold unsavoury attitudes. This form of blaming others for corruption is often used as a form of systematic official propaganda by the ruling neo-patrimonial corrupt politicians and their networks. In a neo-patrimonial system, there is no clear distinction between the public and the private domain.⁷⁶² Members of neo-patrimonial corrupt networks accumulate and appropriate as much public wealth as possible for their personal use. A famous Persian dictum says, “The pocket of corrupt officials has holes.” These pockets will never be filled.

The most divisive politics of blaming others for corruption in Afghanistan are spread through Facebook, Instagram and Tik Tok accounts, as well as blogs and news websites. The popular example to cite, which has received excessive attention by the supporters of the neo-patrimonial corrupt networks connected to the Presidential Palace (ARG) is blaming Dr Abdullah Abdullah for the expensive suits and ties he wears, whilst international observers report that billions of U.S. dollars are lost in international aid – stolen under wages and maintenance fees for non-existent *ghost* presidential advisors, *ghost* schools, *ghost* police officers, *ghost* army soldiers and funds are embezzled by several ministers who served under Hamid Karzai and continue to serve under Ashraf Ghani – are completely ignored.

As the chapter on legal transplants showed, Mr Wahidi, a minister of the government from the Hazāra ethnic group, was sent to the notorious Pol-e-

⁷⁶² Amundsen, “Political Corruption,” 9.

Charkhi prison despite the absence of evidence for his guilt. He was released in 2019 on appeal for his conviction. The negative effects of blaming others for corruption and not seeing the corruption of one's own ethnic group is a devastating form of societal and political corruption that affects the entire population of Afghanistan.

Embezzlement by the ruling elites, according to Inge Amundsen, involves the theft of public resources by public officials and as such, it is understood to be a form of misappropriation of public funds.⁷⁶³ Embezzlement is to steal, misdirect or misappropriate funds or assets placed in one's trust and under one's control.⁷⁶⁴ Individuals and government officials, faithful to each other through tribal, linguistic and ideological ties, are unlikely to perceive their own ethnic group as corrupt. They point fingers at others, and Afghanistan with a fragmented society suffers from this problem.

Three: Bribery

Bribery is the bestowing of a benefit in order to unduly influence an action or decision.⁷⁶⁵ In Afghanistan, bribery is known as *reshwat*. Bribery is the act of dishonestly persuading someone to act in one's favour by a payment or other inducements which can take the form of gifts, loans, fees, rewards or other advantages (taxes, services, donations, etc.).⁷⁶⁶

In Afghanistan, bribery is common and takes place in different situations. People accept that paying bribes will save them time and money. Payment of

⁷⁶³ Amundsen, 11.

⁷⁶⁴ DFID, "Why Corruption Matters," 12.

⁷⁶⁵ IWA, "Afghan's Experience of Corruption," 15.

⁷⁶⁶ DFID, "Why Corruption Matters," 12.

bribes at times requires connection to illegal networks like illegal commission workers who are connected to the bribe taker. For instance, during the Taliban rule (1995-2001), the passport office in Herat Province stopped issuing passports and the official in charge received hundreds of thousands of Afghans as bribes for each passport application submitted through his network of commission workers. Stopping the issuance of passports was a way to solicit bribes.⁷⁶⁷

A popular method to solicit bribes is delaying the processing of applications, where paying bribes is the only way to get things done quickly. Bureaucratic delay is a serious problem encouraging corruption.⁷⁶⁸ A case concerning bureaucratic delay is the issuance of passports at Afghanistan embassy branches in Germany. As of 2020, online appointments offered to Afghans applying for a passport at embassy branches in Bonn or Berlin involve two years waiting time.⁷⁶⁹

In July 2020, an Afghan diplomat working at the Berlin embassy was recorded on video when soliciting for bribes amounting between €7,000 to €1,000, for issuing a passport without the two-year waiting time. For a verbatim transcription and translation of this conversation please see Appendix 17. Afghan citizens distributed this video on social media and a number of demonstrations took place outside Afghan embassies in Bonn and Berlin in July 2020. On 09 September 2020, angry Afghan refugees aware of

⁷⁶⁷ First-hand knowledge of the author.

⁷⁶⁸ Alatas, *Corruption and the Destiny of Asia*, 87.

⁷⁶⁹ Conversation with passport applicants resident in Schleswig Holstein, Germany, in May 2020.

the red tape, deliberate bureaucratic delays and the widespread solicitation of bribery, pelted the Afghan embassy branch in Bonn with bricks and caused substantial damage to the building.⁷⁷⁰

Obtaining services through bribery requires special knowledge, communication skills and connections to illegal networks. The women of Afghanistan are not insulated from the overall political dynamics which are often shaped by relations of patronage and personal competition.⁷⁷¹ Taken that women are deprived of certain public services due to government weaknesses and societal inertia, they are also deprived of obtaining services through bribery. Women may have to rely on the trust of other men to act as middlemen in order to obtain goods or services on their behalf, which is risky and highly likely to increase costs and expose them to exploitation.

Four: Divisions in Society Empower Corruption

This is when members of weaker ethnic groups in society and in political circles are kept away from important decision-making roles and remain prone to exploitation. Afghanistan has too many examples of these divisions. At different periods in history, the Hazāra, *Ismaili*, *Wakhi*, Hindu, Jewish, Sikh and Shi'a Muslims have been deprived of meaningful political roles, and for over a century members from these groups were not appointed to high level government jobs – only as scribes, junior employees, porters or in low ranks in the police and army. With a few exceptions between 1933 and 1992,

⁷⁷⁰ Farahmand, “Two suspects accused of throwing stones at Afghanistan embassy in Bonn were arrested,” last accessed 11 September 2020.

⁷⁷¹ Sharan and Wimpelmann, “Women’s Rights and Political Representation,” 2.

members of these ethnic groups did not hold ministerial roles. This changed substantially in the post-2001 power-sharing arrangements.

This problem relates to favouritism – a mechanism of power abuse involving privatisation and a highly biased distribution of state resources.⁷⁷²

Favouritism, also known as *cronyism*, is the grant of offices or benefits to friends and relatives, regardless of merit.⁷⁷³ IWA describes favouritism as a form of abuse not governed by the self-interest of an official but by the interests of someone linked to him or her through kinship, political party, tribe, or religious group affiliation.⁷⁷⁴ In Afghanistan, corruption in the form of patronage networks exacerbates inequalities among social groups and political factions, fuelling tensions and the risk of social unrest.⁷⁷⁵ Abbas Azimi from Gawharshad Institute of Higher Education in Kabul writes that in Ashraf Ghani’s administration, Pashtūns have been treated as owners of the land and other ethnic groups as aliens.⁷⁷⁶

Five: Education is Corrupt

The U4 Anti-Corruption Resource Centre, a Norway-based institution that assists international development professionals in addressing corruption, indicates that education is particularly susceptible to corruption given that it is often the largest or second largest public expense in most countries.⁷⁷⁷ U4 identified more than twenty forms of corruption that can take place in the

⁷⁷² Amundsen, “Political Corruption,” 14.

⁷⁷³ Amundsen, 11.

⁷⁷⁴ IWA, “Afghan’s Experience of Corruption,” 15.

⁷⁷⁵ U4 Expert Answer, “Corruption as a Driver of Conflict,” 4-5.

⁷⁷⁶ Azimi, “President Ghani’s Ethno-Nationalist Polices,” last accessed 24 August 2020.

⁷⁷⁷ Hall, “Corruption & Afghanistan’s Education Sector,” 1.

education sector, including those related to bribery, embezzlement, favouritism and the exploitation of students and parents.⁷⁷⁸ Corruption in education creates distrust, hostility and divisions, and individuals obtain high positions in the government using fake qualifications. Due to high demands for educated cadres in the post-2001 period, some civil servants have bought fake certificates, bribed a university or used *madrassa* certificates to gain jobs in judiciary departments.

In 1995, teachers at the Herat Medical Faculty created a neologism for students who came to study medicine through the Taliban's written orders as *parachuted students*. Individuals connected to the Taliban governors and commanders came with a letter stating, "The bearer of this letter is one of our special Mujahedin brothers, he likes to enrol in year 2 of Medical Faculty." These were students who had basic/primary school education and neither did they complete the requisite Year 12, nor did they sit university entry exams. A graduate doctor who makes his way into a medical faculty through cronyism will kill patients and ruin the lives of people who seek his expertise. Antonio Giustozzi, an Afghanistan scholar, wrote in 2010 that the principal of a secondary school in Nangarhar said that half of all the teachers working in the province might have forged documents to get their jobs; students too were buying admission to higher grades to speed up and smooth their education.⁷⁷⁹

⁷⁷⁸ Hall, 1.

⁷⁷⁹ Giustozzi, "Nation-Building Is Not for All," 20.

The chapters on legal transplants and constitutionalism have identified that Afghanistan's education system promotes misogyny, gender discrimination and radicalism. This is *intellectual corruption* where the population is encouraged by its own government to advance radical agendas, hate women and use violence against people who think, believe and live differently. In essence, this behaviour of the government violates all its liberal undertakings manifested in the constitution and the statute books. It affects all citizens of Afghanistan.

Madhuvanthis Srinivasan investigates the university quota system in Afghanistan introduced by President Ashraf Ghani. The quota system allows Pashtūn students to enter higher education even if they do not have the requisite marks for entry. Ashraf Ghani's quota system came under the spotlight after the results of the Marshal Fahim Military University entrance test came out where, despite scoring 312 marks, a Hazāra student from Uruzgan Province did not get into the university while his Pashtūn counterpart got accepted into the same university with a score of 145.⁷⁸⁰

Srinivasan states that this quota system is misperceived and misused for two reasons: (1) the quota is used to increase the share of Pashtūns despite their community forming the largest ethnic group in the nation and being historically dominant in public institutions and (2) the quota system is used selectively to try and increase the share of Pashtūns in public institutions, where the community's presence has witnessed a decline after the fall of

⁷⁸⁰ Srinivasan, "Rethinking the Afghan Quota System," 1-3.

Najibullah's government in the 1990s.⁷⁸¹ Civil society activists have accused the Ghani-led government of discrimination and have called for the annulment of ethnicity-based quota systems and ending favouritism in all sectors.⁷⁸² Ashraf Ghani's quota makes the oppressed groups more oppressed and is a bad move for Afghanistan's future.

Six: Emulating Others for Corruption

Acculturation of corruption and perceiving it as acceptable is a way of promoting corruption in a society. People agree to pay bribes and empower corrupt officials through gifts, favours, and donations. This is when without getting involved in corrupt practices, there is no way to get things done. Alatas distinguishes between the partner and victim of corruption. He postulates that when a businessman willingly bribes a government official to accomplish a sale's transaction, he becomes a partner in corruption, but when a citizen has to use bribery to acquire a passport, he becomes a victim of corruption.⁷⁸³

When corruption grows through acculturation, the leader of the country steals billions, grants contracts to his friends and clan members; doctors sell medicines not needed for an illness; teachers expect bribes and favours from students who otherwise will fail; a police officer takes a bribe from a terrorist who blows himself up and kills scores of people. As described at the beginning of this chapter, international donors' errors may also increase corruption. This may be tolerating the bribing of terrorists for safe passage of

⁷⁸¹ Srinivasan, 1-3.

⁷⁸² Haidari, "Quota system fanning ethnic prejudice," last accessed 19 August 2020.

⁷⁸³ Alatas, *The Problem of Corruption*, 91.

the army or logistical convoys, prisoner release, establishing secret and informal pacts that endanger the safety of the populations.

Seven: Extortion

Extortion is perhaps the worst form of corruption in which public office is used for obtaining bribes. Alatas identifies extortion as demanding gifts or favours in the execution of public duties, regarded as corruption.⁷⁸⁴ In 2013, Transparency International interviewed people in Afghanistan, thirty-three percent of whom rated the police as highly corrupt and fifty-one percent of whom reported having paid a bribe to the police force in 2012.⁷⁸⁵ Extortion often takes place when a police officer is holding a detainee; a prosecutor is pressing charges against an accused; a judge who can forgive or order the execution of a person has the power and discretion to punish or forgive; and a teacher can fail or pass students. In all these situations, services, material and money may be expected. There is often a disproportionate power imbalance between civil servants and the powerless citizens, and to choose the lesser evil, bribery may be the only easy option for the citizens to achieve a favourable outcome.

According to Weeda Mehran, in Afghanistan, administration positions have become objects of transactions or resources that can be bought, sold, exchanged and doled out for political support.⁷⁸⁶ Government officials who may have bought their positions from the higher chain of their patrimonial network, according to Mancur Olson, act as roving bandits who see working

⁷⁸⁴ Alatas, *Corruption and the Destiny of Asia*, 6.

⁷⁸⁵ U4 Expert Answer, "Corruption as a Driver of Conflict," 5.

⁷⁸⁶ Mehran, "Neopatrimonialism in Afghanistan," 101.

for the government as an opportunity to extort bribes and position themselves as stationery roving bandits in which public goods are offered in the form of protection. This model treats the exchange as one between rulers and homogenous citizenry.⁷⁸⁷ Corrupt officials in most cases are not begging for bribes: they hold citizens captive to their power – giving citizens no choice but to heed to their illegal demands for bribes.

Eight: Abuse of Power

Transparency International divides corruption into three terms: *grand*, *petty* and *political*, depending on where it occurs and the amount of money that is lost.⁷⁸⁸ Grand corruption occurs at the highest levels of government that scramble policies or dysfunction state institutions, making it possible for leaders to take advantage at the expense of public goods.⁷⁸⁹ In Afghanistan, the highest level of power abuses involving grand corruption comes from its kings and presidents. The president holds the entire nation subservient to his personal whim, intrigues and powerful position. Mohammad Nazif Shahrani states that Ashraf Ghani has more powers than a king.⁷⁹⁰

Ahmad Ali Jalali argues that the absence of strong political parties and the prevalence of shifting political alliances foster the survival of patronage networks based on personnel-client relationships; the government wheeling and dealing with such a system hinders the development of state institutions and impedes the emergence of a viable and service-oriented administration;

⁷⁸⁷ Berg, “The Stationery Bandit.” 1.

⁷⁸⁸ Adel, “Understanding and Explaining Corruption: A case study of Afghanistan,” 5.

⁷⁸⁹ Adel, 5.

⁷⁹⁰ Shahrani, “Afghan president has more powers than a king,” last accessed 16 September 2020.

[whereas] the absence of a ruling party tends to make the president act as a *supreme khan*.⁷⁹¹ Authoritarian rulers are using the power capabilities of the state in the struggle for power to attain, retain and increase their powers and to accumulate resources from the ruled for their own private benefit.⁷⁹²

The Government Media and Information Centre (GMIC) reported that the president of Afghanistan has spent millions of US dollars that are not accounted for, and some of the money has been spent in areas that were not intended.⁷⁹³ Payam-e-Aftab, an Afghan news source, reports that Ashraf Ghani's [former] advisor, Hanif Atmar, recruited 900 ghost advisors.⁷⁹⁴ Civil servants from low to high levels, politicians, ministers and parliamentarians use public office to extort and embezzle billions of US dollars from aid money, from Afghanistan's tax revenues and licit (imports, services, energy) and illicit (opium, counterfeit and smuggled goods) economy. UNAMA reports that currently international donors provide about USD 8.5 billion in on-and-off-budget support to Afghanistan per year.⁷⁹⁵

Nine: Halal Corruption

Halal in Islam means *religiously permissible*. In the context of corruption, this religious norm is used by the devout Muslims to regard illegal money obtained through corrupt practices as licit money. A good example of this is when a devout Muslim cultivates, buys and sells opium and heroin.

⁷⁹¹ Fleschenberg, "Afghanistan's parliament in the making," 19.

⁷⁹² Amundsen, "Political Corruption," 8.

⁷⁹³ BBC Farsi, "Afghanistan's Budget," last accessed 10 September 2020.

⁷⁹⁴ Payam Aftab News, "Ghani's advisor: Hanif Atmar had recruited 900 ghost advisors," last accessed 16 September 2020.

⁷⁹⁵ UNAMA, "Crucial for Peace and Prosperity." 11.

Mohammad Hashim Kamali, an Afghan scholar who lectures at Malaysian universities, offers examples that officials in the early Islamic community kept in motion anti-corruption measures.⁷⁹⁶ Kamali's normative view may be influenced by Syed Hussein Alatas and similar scholars. Alatas, in two of his books on corruption, heavily relies on religious morality and offers examples of anti-corruption practices by Muslim leaders in the past.⁷⁹⁷ However, Kamali's and Alatas's view on Islamic morality as a deterrent to corruption is inapplicable in Afghanistan as corruption is widespread and entrenched.

Ten: Dishonesty as Corruption

There are many examples of dishonest practices in Afghanistan that breed corruption. Dishonesty in spreading false population data helps a political leader in his pursuit of jerrymandering – depriving certain individuals or groups of people from exercising their civil and political rights. Politicised and questionable population estimates in Afghanistan may constitute a predatory form of dishonest dealing, a category one may call *statistical corruption*.

Eleven: Legal Gaps for Corruption

UNAMA's 2020 anti-corruption report highlights shortcomings in the government's anti-corruption endeavours, but also views the current anti-corruption framework in Afghanistan as good.⁷⁹⁸ In his master's thesis on corruption in Afghanistan, Enayatullah Adel surmises that corruption in Afghanistan is endemic, occurs in all sectors of the government, and he

⁷⁹⁶ Kamali, "Government in Islam is a Trust," 1-3.

⁷⁹⁷ Alatas, *Corruption and the Destiny of Asia*, 119-122; Alatas, *The Problem of Corruption*.

⁷⁹⁸ UNAMA, "Crucial for Peace and Prosperity." 20.

concludes that Afghanistan's defective political structure, along with patronage and clientelist networks, and a state that rests on neopatrimonialism are the causes of corruption.⁷⁹⁹ Legal gaps in Afghanistan's government system stems mainly from the abuse of excessive power identified by Mohammad Nazif Shahrani, and grows in the defective political system highlighted by Enayatullah Adel.

Despite the anti-corruption strategies having been drafted and put into operation, in Afghanistan corrupt practices are top-down and often inaccurate information may be used to satisfy the international aid community. In 2019, judicial impartiality was impaired by bribery and pressure from public officials, tribal leaders, families of accused persons and individuals associated with the insurgency.⁸⁰⁰ According to prisoners and local non-governmental organisations (NGOs), in 2019, corruption was widespread across the justice system practically in connection with the prosecution of criminal cases and in arranging release from prison.⁸⁰¹ There were multiple reports that judges would not release prisoners who had served their sentences without receiving payment from family members.⁸⁰² In 2010, the International Crisis Group identified poor coordination between judges, prosecutors and police to act like a petri dish for corruption, allowing exponential growth of complex systems of graft run by rival networks.⁸⁰³

Twelve: Low Income

⁷⁹⁹ Adel, "Understanding and Explaining Corruption: A case study of Afghanistan," 1.

⁸⁰⁰ US Department of State, "Afghanistan 2019 Human Rights Practices," 9.

⁸⁰¹ US Department of State, 28.

⁸⁰² US Department of State, 28.

⁸⁰³ ICG, REFORMING AFGHANISTAN'S BROKEN JUDICIARY," 23.

In 2010, many Afghan judicial officials reported that low salaries are one of the primary factors perpetuating petty bribery.⁸⁰⁴ State officials receiving a low income may see corruption as a way to top up their wages. *Bakhshesh* (gift), *shirini* (sweets) and *chai pooli* (tea money) are three terms used for a small amount of money or gifts in kind offered in return for favours and services. Alatas views the *bakhshesh* system not as disruptive as it appears.⁸⁰⁵ *Bakhshesh* money are the smallest amounts of bribes known in Afghanistan society. *Bakhshesh* may constitute a pack of cigarettes, *shirini* may be anything from a cup of tea to a feast and *chai pooli* is similar to the other two. Through the payment of *bakhshesh*, a guard outside an embassy may let a person jump the queue, which costs the other visa applicants their time.

Paying *bakhshesh* bribes to a nutritionist who distributes BP5 biscuits to malnourished children will deprive certain beneficiaries of the much-needed nutritional biscuits. This type of bribery kills the malnourished children. Gifts may be offered for showing gratitude for someone's services as well. People who regularly visit an office may see it beneficial to offer a pack of sweets, a bottle of perfume or a small amount of money to a guard, to a registrar or receptionist – all of whom are able to speed up appointments, quickly deliver messages or take an application or petition to the higher officials in the organisation.

Thirteen: Nepotism

⁸⁰⁴ ICG, 25.

⁸⁰⁵ Alatas, *The Problem of Corruption*, 15.

The formal description of nepotism, combined with patronage and clientelism, according to Johnsen, is “patronage at its core that means the support given by a patron and in government, it refers to the practice of appointing people directly.”⁸⁰⁶ There is a deep-rooted historical dimension to nepotism in Afghanistan’s governments. When the Turco-Mongol dynasties declined in the early parts of the eighteenth century and political power was transferred to the Hotaki and Abdali-Durrani Pashtūn tribes, their military organisation strengthened through services provided to the Safavids of Persia, and subsequently these tribesmen later formed their own dynastic empire.⁸⁰⁷ In Afghanistan, nepotism is inherited from the Turco-Mongolian government systems which existed before the Pashtūns rose to power and prominence.

Thomas Barfield, an American anthropologist, writer and university lecturer, notes that Ahmad Shah Durrani retained many of the characteristics of Afghanistan’s Turco-Mongolian predecessors, particularly the tradition that restricted leadership of the kingdom to members of the royal clan, and from 1747 until 1838 Afghan rulers had only close relatives as rivals.⁸⁰⁸ Mohammad Nazif Shahrani argues that in Afghanistan, the system of governance from 1747 to 1880 was based primarily on the practices of the Afsharid court tradition in Iran and there was some borrowing from the Mughals in India.⁸⁰⁹ The Afsharid and the Mughals were both Turco-Mongolian empires.

⁸⁰⁶ DFID, “Why Corruption Matters,” 12.

⁸⁰⁷ Rubin, *The Fragmentation of Afghanistan*, 19.

⁸⁰⁸ Barfield, “Political Legitimacy in Afghanistan,” 1.

⁸⁰⁹ Research questionnaire filled in by Mohammad Nazif Shahrani on 16 January 2020.

The Musahiban brothers, occupying highest level political posts under Habuibullah Khan, Amanullah Khan, Nadir Shah, and Zahir Shah from 1901 until the 1970s, and who ruled Afghanistan from 1930 to 1978 used nepotism in sharing high political posts. In Afghanistan, nepotism is a tribal form of sharing the wealth and power of the government. Nepotism is also the lubricant of the post-2001 neopatrimonialism. In Afghanistan, a country formed by hundreds of *qawms* (solidarity groups), nepotism in political office affects dozens of ethnic groups whose members, based on arguments proposed by Dawood Moradian, Mohammad Nazif Shahrani, Ehsanullah Adel and Abbas Azimi, are often projected as aliens, enemy, with equal rights on paper but unequal in the allocation of political roles, distribution of wealth and decision-making.

Fourteen: Predation in Politics

In Afghanistan, predation is connected to continuous wars and continuity of illicit streams of political economy. Mehrdad Vahabi, a scholar for the study of Political Economy of Predation, defines armed conflict as a form of predatory behaviour and appropriation allocation mechanism.⁸¹⁰ When waging wars is more important than winning them, war enemies as economic beneficiaries of war might be implicit partners.⁸¹¹ David Keen's study of civil wars in different historical episodes in Sierra Leone, Sudan, Nigeria, Uganda, the Democratic Republic of Congo, the Philippines, Indonesia, Vietnam and today's Afghanistan furnishes cases of *useful enemies and useless allies*.⁸¹²

⁸¹⁰ Vahabi, *The Political Economy of Predation*, 9-10.

⁸¹¹ Vahabi, 10.

⁸¹² Vahabi, 10.

In Afghanistan's political history, there is long history of predation in which, through despotism and abuse of the public wealth, political leaders create internal colonialism and oppress their people. Illicit income, government revenues and donated funds are unfairly siphoned to the members of the ruling clan, and this deprives the vast majority of citizens from economic benefits and the common good expected of the economic system of the country. In his oral address to the House of Commons on 09 November 2010, Sir Sherrard Cowper-Cole, a British politician, stated that Afghanistan has a predatory narco-mafia state.⁸¹³

Fifteen: Tax Evasion and Discriminatory Taxation

The governments of Afghanistan are known for levying discriminatory taxation. In 2008, the state of Afghanistan, started to devolve several southern provinces of Afghanistan to the Taliban. The devolution of provinces means that millions of citizens living under Taliban rule do not pay taxes to the government. In varying degrees, since 1880, political leaders of Afghanistan have pursued ineffective, inconsistent and discriminatory tax systems.

Sarajuddin Isar, PhD Candidate from SOAS University of London, reports that Afghanistan has been an aid-dependent country for at least two centuries.⁸¹⁴ The Shah Shoja (r. 1809-1818), Dost Mohammad Khan (r. 1819-1839), Abdul Rahman Khan (1880-1901), Musahiban regimes (r. 1929-1978)⁸¹⁵ and the socialist governments (r. 1978-1992) as well as the post-2001 governments have received subsidies, loans and donations from Britain,

⁸¹³ UK Parliament. "Foreign Affairs Committee," 6.

⁸¹⁴ Isar, "A Blessing or a Curse?" 2.

⁸¹⁵ Isar, 2.

the United States, the Soviet Union, the European Union states and other countries.

Sayed Daud Fazli highlights six elements as contributors to poor revenue collection in Afghanistan. These are (1) political: most revenue collection procedures depend on government policies, many of which include exemptions for specific actors, (2) economic: changes in taxation, economic growth, interest rates and inflation can have a negative impact on the behaviour of taxpayers, (3) social: it is difficult to introduce a tax collection system after a prolonged period of war, particularity when instability persists, (4) technological: revenue collection officers often use paper-based systems, which limit the capacity to perform their duties effectively and in a timely manner, (5) environmental: the security situation and lack of a functioning infrastructure limits the mobility of taxpayers and tax collectors and (6) legal: the discriminatory nature of certain government policies favours particular communities and political groups and negatively impacts the tax collection process.⁸¹⁶

10.4 Major Corruption Cases 2001-2020

The biggest corruption case in which powerful individuals connected to the state of Afghanistan embezzled nearly one billions US dollars is the Kabul Bank fraud. The Washington Post exposed the Kabul Bank case in February 2010.⁸¹⁷ In the Kabul Bank case, what were termed as *loans* to the board members were in reality interest-free *grants* without a repayment schedule or

⁸¹⁶ Fazli, "Revenue Collection and Management," 2.

⁸¹⁷ Strand, in Tina Søreide, Williams, Corruption, Grabbing and Development: Real World Challenges 176.

any collateral.⁸¹⁸ Six years after Ashraf Ghani's claim in 2015 that his anti-graft policies "broke the aura of impunity that had surrounded high level maleficence", the Kabul Bank fiasco remains a glaring example of the prevailing culture of impunity in Afghanistan.⁸¹⁹ According to Ekram Afzali, the CEO of Integrity Watch Afghanistan, over the past six years, Ashraf Ghani's government has only recovered 30 million US dollars from the total 913 million stolen from Kabul Bank.⁸²⁰

Sputnik News reports that 769 million dollars was embezzled in ghost schools in Afghanistan between 2002 and 2013; over 3 billion US dollars has disappeared in the energy sector; over the past seventeen years, 154 million US dollars has been stolen from the fuel budget for Afghanistan's military and 23 employees from logistics and finance departments and the head of a private firm embezzled 600 million US dollars from the meat for army soldiers in 2019.⁸²¹ In the post 2001 period, Afghanistan suffers from an array of high level corrupt practices, including the formation of a highly corrupt political system and the empowerment of corrupt leaders – who have created a kleptocratic system in Afghanistan.

As explained in this chapter, *petty, grand or political corruption* negatively impact all facets of society and government. It is anathema to the rule of law. The examples cited show that citizens' rights, welfare, safety and dignity are

⁸¹⁸ Strand, in Tina Søreide, Aled Williams, 178.

⁸¹⁹ Mehdi J. Hakimi, "The Rule of Law Crisis in Afghanistan," 2.

⁸²⁰ Zahra Rahimi, "Kabul Bank Funds recovery," last accessed 17 September 2020.

⁸²¹ Sputnik News, "Despite many legal and political reforms, corruption is one of the obstacles for long-term development, peace and welfare," last accessed 10 September 2020.

compromised by corruption that starts from the president's office and extends to all echelons of political power and to all levels of society.

10.5 Conclusion

This chapter has shown that corruption in Afghanistan is entrenched and deep-rooted, and although the state of Afghanistan claims to be fighting corruption, in practice it does little to eradicate or minimise it. The chapter has identified that the government deals with corruption selectively and re-routes corruption instead of uprooting it, which in itself is a form of predatory political corruption.

This chapter has also shown a number of ethnographic and sociological categories of corruption in the context of Afghanistan and has offered reasons as to why civil servants receive bribes and how corruption affects different population groups of Afghanistan. The chapter has further demonstrated how Afghanistan's government, civil servants and politicians light-heartedly perceive the concept of corruption and are susceptible to the rhizomic fabric of corruption. In particular, this chapter finds the most egregious cases of corruption that have served to undermine and erode both the legal system and the perception of regard for legality to be the abuses of state power alongside predation in politics, both of which are contributing factors to the way nepotism functions and manifests within Afghanistan. These particular aspects of corruption inevitably lead the general public to circumvent and disregard the government and its legal institutions, albeit to various degrees, precisely because of the self-serving nature of nepotism and the implication it has for the wider society. In short, this systemic problem lends itself to a

public perception that in many cases, it simply does not benefit people to comply with the law. This has been evidenced with the examples illustrated in this chapter.

The next chapter will show different forms of corruption in the institutions of justice and how corruption undermines the quality of serving justice. The next chapter describes the history of legal developments and the legal institutions of the government of Afghanistan.

CHAPTER 11: AFGHANISTAN'S LEGAL DEVELOPMENT AND LEGAL INSTITUTIONS

*Law remains an important, if not the most important, element in the struggle which is being fought in Islam between traditionalism and modernism under the impact of Western Ideas.*⁸²²

Joseph Schacht

11 Introduction

The first part of this chapter deals with the four stages of legal development in Afghanistan where the law-making institutions drafted formal laws. The intervening factors mentioned in the legal transplants chapter have affected legal developments in Afghanistan. There is yet another type of disruption which I call *legal interregnum*. Legal interregnums take place when the executive branch of the government excessively overpowers the parliament, the Supreme Court and the Ministry of Justice and disrupts their smooth operations – in formulating and enforcing the law through the use of presidential decrees.

Moreover, the presidential hiring and firing of government officials who are not part of the president's inner circle are factors of legal interregnums. In the context of Afghanistan, legal interregnums have severely impacted the philosophy of *trias politica*⁸²³ or the separation of power during the socialist governments (1978-1992) and during Ashraf Ghani Ahmadzai's two terms in government (2014-ongoing).

⁸²² Schacht in: Matthew Lippmann, "Islamic Criminal Law and Procedure," 29.

⁸²³ Trias Politica is a philosophical term developed by the French enlightenment philosopher, Charles-Louis de Montesquieu, in his book "De l'esprit des lois" in 1748.

The second part of this chapter describes the legal institutions of the government and professional institutions which are independent of the government. This part will also observe the positive achievements and the weaknesses of these institutions.

I argue that in the legal interregnum caused during the first National Unity Government (2014-2019), followed by a second presidential term since May 2020, Afghanistan's institutions of the government have been severely impacted by a web of personal political networks through the individual decisions of President Ashraf Ghani Ahmadzai and his presidential palace team. This interregnum not only weakens the institutions of the government and revokes positive gains achieved since 2001, it also sets a bad precedent when the executive branch overpowers other institutions, which violates the concept of separation of powers set out in the Constitution 2004.

11.1 The Genesis of Legal Developments in the Realm of the State

From 1880 up to the present day, governments of Afghanistan have established different institutions which, over the centuries, allowed the state to formulate, transplant and develop modern laws such as the civil and criminal codes, family laws and constitutions. In this context, as history shows, progress has often been slow, incremental and at times disrupted due to regime changes, civil wars and international conflicts.

Afghanistan's legal developments were created in three stages: (1) instigation of indigenous legal reforms, (2) continual legal developments and (3) the process of expanding the writ of state power through law. The expansion of

the writ of the state through law demanded that old legislations be updated, replaced and reformed. The phases of Afghanistan's legal development are as follows:

Phase One: The Pre-Nizāmnāma Period

The term *Nizāmnāma* means the written regulations. Pre-Nizamnama is a period in which laws were not written down. In Afghanistan, the early spate of legal developments leading to the creation of formal government institutions took place under Dost Mohammad Khan (r. 1826-1863), who declared that serious crimes should be referred to him for deliberation.⁸²⁴ Prior to this time, the *ulemā* enjoyed unchecked authority over provisions of *Shari'a* education and the application of Islamic criminal law in religious courts.⁸²⁵ Afghanistan's early institutional and legal developments can be categorised as pre-*Nizāmnāma* developments, which refers to statutory enactments before 1919 and those following this date.⁸²⁶

This period in Afghanistan may be referred to as phase one of legal developments. During this phase, statutory regulations were formulated. In phase one, on the whole regulations were designed to form an integral part of *Shari'a* and no clear distinction was attempted between *Shari'a* and statutory enactments. From the 1880s, Abdur Rahman Khan and Habibullah Khan issued administrative regulations called *Asās al-quddāt*, a guide for judges on court proceedings, and *Sirāj al-ahkām*, a monumental work in four volumes, and on the whole, these regulations followed the Ottoman *Mujallah* model

⁸²⁴ Jupp, "Legal transplants," 79.

⁸²⁵ Jupp, "Legal transplants," 79.

⁸²⁶ Kamali, *Law in Afghanistan*, 35.

and consolidated *Hanafi* laws from Arabic sources into the Persian (Farsi) language.⁸²⁷ Phase one of legal developments was notable in the area of codification of the Islamic laws in Afghanistan.

Phase Two: The Nizāmnāma Period

Phase two of legal developments is the *Nizāmnāma* legislation period, which took place during the reign of King Amanullah Khan between 1919 and 1929, during which time the first constitution of Afghanistan entitled *Nizāmnāma-e asāsi* was promulgated in 1923.⁸²⁸ The government enactments were largely derived from classical *Hanafi* law and were aimed at making the laws easily accessible for practice in the courts.⁸²⁹ Mohammad Hashim Kamali argues that *Nizāmnāma* rules were in a subordinate position to those of *Shari'a* law.⁸³⁰ Kamali calls legal developments during Amanullah Khan's government, the "*Nizāmnāma* period." In her book, Senzil Nawid lists seventy-seven *Nizāmnāma* laws promulgated during Amanullah Khan.⁸³¹ Torunn Wimpelmann notes that during Amanullah Khan's rule, one-hundred and forty *Nizāmnāmas* were promulgated.⁸³² The codified criminal law, named *Tamasok al-Qozāt*, was also drafted.⁸³³

Reading through the three legal guide books, *Asās al-Quzāt*, *Sirāj-al-ahkām* and *Tamassok al-Quzāt*, one notes that great importance was given to judicial modernisation – a fact that shows Afghanistan advanced judicial

⁸²⁷ Kamali, 35.

⁸²⁸ Kamali, 35.

⁸²⁹ Kamali, 35.

⁸³⁰ Kamali, 36.

⁸³¹ Nawid, *Religious Response to Social Change*, 218-220.

⁸³² Wimpelmann, *The Pitfalls of Protection*, 31.

⁸³³ Nawid, *Religious Response to Social Change*, 79.

developments in line with those of the Mamluk Sultans, Ottoman Turkey and the legal regimes in the British India.⁸³⁴ Judicial modernisation in Afghanistan in the twentieth century sought to reduce the power of religious leaders in the judiciary and free the courts from executive domination and grant them independence.⁸³⁵

During *Nizāmnāma* period, the judiciary changed from a two-tier to a three-tier court system whilst before the *Nizāmnāma* period, a two-tiered structure of *Shari'a* courts – namely primary courts and appeal courts – existed in the country, but there were no regular tribunals for a second review.⁸³⁶ Phase two of legal developments marks the organisation of Islamic codified law and also the commencement of transplanting Western legal ideas and norms into Afghanistan's statutes.

Phase Three: The Usūlnāma Period

The third phase of legal developments is the phase of statutory law developments, called the *Usūlnāma* period. *Usūlnāma*, meaning “code of principles” began with the promulgation of Constitution 1931, the second constitution of Afghanistan; *Usūlnāmas* tried to downplay the role of statutory laws in comparison to that of *Shari'a*.⁸³⁷ During legal development phases one to three, Afghanistan's leaders from 1880s to the 1930s attempted to institutionalise Islamic laws and incorporate them into the quasi-secular administrative laws; a move that different Islamic states have followed in

⁸³⁴ These issues are discussed in the Legal Transplants chapter.

⁸³⁵ Kamali, *Law in Afghanistan*, 14.

⁸³⁶ Kamali, 208.

⁸³⁷ Kamali, 36.

order to create Western-inspired codified laws and constitutions – though with varying degrees of success.

The promulgated laws show that in these three stages, Afghanistan's rulers advocated a progressive vision for their country and assisted in the formation of laws which denounced polygamy, banned *baad* (exchange) marriages, child marriages and payment of bride-price, and set restrictions on the ownership of *Shari'a* adjudication. These laws also opposed the abuse of the *fatwā* (Islamic legal opinion) institution. The Constitution of 1923 and several *Nizāmnāma* regulations intended to modernise classical *Shari'a* provisions into modern codes of law. These efforts had already been attempted in Egypt, Iran and Turkey before they were attempted in Afghanistan.

The *Usūlnāma* period was a regressive era in which, through constitutional amendments, Nadir Shah brought back tribes and religious leaders into the most delicate and important justice institutions, partly reversing and partly halting fifty years of legal progress achieved in phases one and two.

Phase Four: The Qānūn Period I

Qānūn in Farsi and Arabic means *law*. In the middle of the twentieth century, this term was used for distinguishing between secular laws that encompassed administrative or public law, and *Shari'a* law. The term *qānūn* appeared in the Ottoman laws and the Iranian and Egyptian constitution development processes.⁸³⁸ This distinction, to the present day, serves the above-described purpose in Afghanistan. The *Qānūn* period is the fourth phase of legal

⁸³⁸ Khalil, "Early Modern Islamic and Near Eastern Law," 32-54.

developments for statutory laws, which began with the promulgation of the 1964 constitution, entitled *Qānūn-e asāsi*.⁸³⁹

Constitution 1964 recognised the freedom of association, the right to work, education and religious freedom for both sexes and for all the ethnic and religious minority groups of Afghanistan. Zahir Shah's government (r. 1933-1973) lived up to most provisions of this constitution. Due to traditional ways of life, in the forty years of Zahir Shah's monarchical rule, fewer women sought formal employment or an education. But those women who wanted to study or work had a chance to do so. In the *Qānūn* phase that span from 1964 to 1973, the government of Afghanistan drafted one constitution, family laws, criminal codes and other legislations.

11.2 The Legal Interregnum Stages

Legal interregnum here is used for the disruption of law-making institutions by the executive branch, where presidential decrees take over the law-making processes. Legal interregnums may also show indicators such as: law exists and institutions claim to follow them, but the operation of law only produces politicised, neo-patrimonial interests and botched justice.

In Afghanistan, at the end of the *Qānūn* phase, there were two legal interregnum stages in Afghanistan. The first president whose decrees overpowered the legislature and the judiciary was Daoud Khan (r. 1973-1978). Daoud Khan's government (r. 1973-1978) disbanded all political parties that were formed in the latter parts of the twentieth century and set up a one-party

⁸³⁹ Kamali, *Law in Afghanistan*, 36.

rule. Daud Khan's new constitution allowed only the *Ghorzang-e-Millie* (National Movement) party to operate.⁸⁴⁰

The second stage of legal interregnum took place under the leadership of Noor Mohammad Taraki (r. 1978-1979) and his successor, Hafizullah Amin (r. 1979): both of these socialist presidents issued decrees in the early years of usurping power through a bloody coup in 1978. Presidential decrees issued in these periods have been discussed in detail in the chapters on legal transplants and constitutions.⁸⁴¹ From 1980, the early years of socialist rule until 2001, there was no period of complete legal inactivity, but the number of laws promulgated during the said period were not substantial.

Phase Five: Post-2001 Qānūn Period II

Afghanistan's post-2001 legal developments must be assessed in an entirely different light. The Western rule of law projects brought large sums in donations to Afghanistan for which the cooperation of the Afghanistan government was needed. Legal developments prior to *Qānūn* period II were Afghan-led. Between the nineteenth and twentieth centuries, the governments of Afghanistan were able to formulate, draft, and expand a large corpus of codified laws.⁸⁴²

⁸⁴⁰ ASCFO, "A First Step on a Long Journey," 2.

⁸⁴¹ A number of Presidential decrees discussed in the UNAMA's Afghanistan's Fight Against Corruption Report of June 2020 at pages 20-22, 24, 31,33, 37, 44-45, 62, 64, 67, 69 and 71 are: Asset Declaration Law 05 September 2017; National Procurement Authority (NPA), November 2018; Access to Information Law 03 March 2018; Penal Code; Whistle Blower Protection Law; Anti-Corruption Law 5 December 2018; Anti-Corruption Amended Law 5 March 2019; Supreme Audit Office Law (SAO Law), 05 March 2020; Municipalities Law 05 September 2018; Decree for the Separation of MEC from HOOAC 2016; Formation of Ombudsman Office 12 May 2018.

⁸⁴² Some of the major laws promulgated until the 1990s are as follows: Afghan Penal Code 1925, *Asās-al Qudāt*, Basic Law of the State of Afghanistan, Civil Law 1977, Civil Procedure Code 1965, Civil Servants Law 1970, Commercial Code of 1955, Commercial Procedure

In theory and in practice, Afghanistan’s political leaders are expected by the international donor community to respect the rule of law and live up to Afghanistan’s international legal obligations. Over the past nineteen years, there have been seventeen major international conferences on Afghanistan.⁸⁴³ International conferences create provisos that require the drafting of new road maps, strategies and reporting mechanisms – most of which require the issuing of new laws as well. This process benefits Afghanistan’s legal institutions as they are expected to follow aid conditionality that brings expectations on the recipient nation, Afghanistan.

There has been an exponential growth of laws in Afghanistan since 2001. The Justice Sector Support Program (JSSP), an assistance programme managed

Code 1963, Constitution of 1923, Constitution of 1931, Constitution of 1964, Constitution of 1977, Constitution of 1980, Constitution of 1987, Constitution of 1990, Consultative Council Act 1957, Customs Law of Afghanistan, Education Law, Guiding Rules on Criminal Affairs 1971, Income Tax Law, Insurance Law, Law for Sale of Property from State Warehouse of Afghanistan, Law for Support of Commerce in Afghanistan, Law for the State Treasuries of Afghanistan, Law of Administration of the Courts of Justice, Law of Attendance and Leaves of Civil Servants, Law of Citizenship in Afghanistan, Law of Civil Aviation, Law of Civil Procedure 1957, Law of Commerce 1955, Law of Commercial Procedure 1963, Law of Court Administration 1956, Law of Crimes by Civil Servants and Public Security Offences 1962, Law of Criminal Proceedings 1965, Law of Customs, Law of Customs Exception of Baggage and Property of Foreign Diplomatic and Consular Agents in Afghanistan, Law of Income Tax, Law of Investment, Law of Judicial Authority and Organisations, Law of Marriage, Weddings and Circumcision, Law of Military Courts, Law of Mourning, Law of Personal Directorate in Afghanistan, Law of Prisons and Jails in Afghanistan, Law of Prosecutions, Law of Residence Visas of Foreign Subjects, Law of Resignation of Military and Civil Servants of Afghanistan, Law of Secretariat Office in Afghanistan, Law of the Archives Directorate in Afghanistan, Law on Organisation and Jurisdiction of Courts 1980, Livestock Tax Law, Marriage Law 1934, Marriage Law 1960, Marriage Law of 1971, Municipalities Law, *Nizāmnāma* Jezāye Askari, *Nizamnama* of Basic Organisations 1923, *Nizāmnāma* of Marriage 1921, *Nizāmnāma* of Marriage 1924, Opium Law, Parliamentary Elections Law, Penal Law 1977, Police Law, Postal Law, Press Law, Regulations for Examining of Witnesses 1957, Regulations for the Judicial Training Course 1972, Siraj al-Ahkām, Tamassok al-Qudāt *Amaniye*, The Civil Code of 1977, The Criminal Code of 1976.

⁸⁴³ The International Conferences held for aid for Afghanistan between 2001-2019 were: Bonn 05 December 2001, Tokyo 21 January 2002, Berlin 01 April 2004, London 31 Jan-1Feb 2006, Rome 2 July 2007, Paris 12 June 2008, Moscow 30 March 2009, The Hague 31 March 2009, London 28 January 2010, Kabul 19 July 2010, Bonn 05 December 2011, Chicago 20 May 2012, Tokyo 7 July 2012, Brussels 05 October 2016, Geneva 27-28 November 2018 and Geneva 23-24 November 2020.

by the United States Department of State's Bureau of International Narcotics and Law Enforcement Affairs (INL) has listed collections of Afghanistan laws in different categories. As of January 2018, the collection included administrative laws⁸⁴⁴, civil laws⁸⁴⁵ and criminal laws.⁸⁴⁶ As of 2019, the Justice Sector Support Program (JSSP) no longer exists and the USAID has offered JSSP's contract to Tetra Tech.

Since 2014, a large number of laws have been issued by presidential decrees. The Law on Declaration and Registration of Assets of State Officials and Employees was issued by the legislative decree of October 2017.⁸⁴⁷ The Anti-Harassment Law 2017 went into effect in January 2018; this law criminalises all forms of harassment of women and children, covering physical, verbal, psychological and sexual harassment.⁸⁴⁸ The amended Penal Code 2017, in 916 articles approved by presidential legislative decree on 04 March 2017

⁸⁴⁴ Administrative laws of Afghanistan are: Advocates Law, Civil Service Law, Election Law, Labour Law, Law on Gathering, Strikes and Demonstrations, Law on Government Employees, Law on Managing Land Affairs, Law on Mass Media, Law on Organisation and Jurisdiction of Courts, Law on Structure and Authority of the Attorney General's Office, Legal Aid Regulations.

⁸⁴⁵ Civil Laws of Afghanistan: Banking Law, Civil Code of 1976, Civil Procedure Code, Commercial Code, Commercial Procedure Code, Customs Law, International Covenant on Economic, Social and Cultural Rights, International Convention Against Corruption, International Convention, International Covenant on Civil and Political Rights, Convention on Elimination of All forms of Violence Against Women, International Convention on Elimination of All forms of Racial Discrimination, International Convention of the Rights of Children, Labour Law, Law on Citizenship, Law on Correctional Centres, Law on Mass Media, Law on Passport, Law on Private Investment, Law on Procedure for Obtaining Rights, Legal Aid Regulations, Road Traffic Law, Shi'ite Personal Status Law, Environmental Law, Income Tax Law, The Universal Declaration of Human Rights.

⁸⁴⁶ Criminal Law of Afghanistan: Afghanistan's Anti-Terrorism Law, Counter Abduction and Human Trafficking Law, Criminal Procedure Code 1965 (amendments), Civil Procedure Code 1965, Interim Criminal Procedure Code 2004, Criminal Code 2014, International Covenant on Civil and Political Rights, Law on Campaign Against Financing Terrorism, Law on Elimination of Violence Against Women, Law on Firearms Equipment and Explosive Materials, Law on Juvenile Correction Centre, Law on Prison and Detention Centres, Military Criminal Procedure Code, Military Penal Code.

⁸⁴⁷ USSD, "Afghanistan 2018 Human Rights Report," 28.

⁸⁴⁸ USSD, 31.

entered into force on 14 February 2018, combines ten former separate criminal laws and also brings together the penal provisions of thirty-three laws of other scopes.⁸⁴⁹ It criminalises international crimes listed in the ICC Statute, including war crimes, crimes against humanity, genocide and aggression, and sets forth criminal liability for civilian superiors or military commanders who fail to prevent or punish subordinates who commit these crimes and prevents an alleged perpetrator from invoking the defence of superior order for genocide, crimes against humanity, war crimes, aggression against the state and torture.⁸⁵⁰ The new penal code also criminalises *bacha bāzi* (sexual abuse of children) as a separate crime and builds on the 2017 Law on Combat Crimes of Trafficking in Persons and Smuggling in Migrants, which includes provisions on criminalising behaviours associated with the sexual exploitation of children.⁸⁵¹

Alongside the donor countries and international organisations, the United Nations issues resolutions that require the empowerment of legal bodies in Afghanistan. The United Nations Security Council issues various resolutions and press statements upon which Afghanistan's government has to take certain actions.⁸⁵² The United Nations Security Council Resolution

⁸⁴⁹ ICRC, "Afghanistan Penal Code, 2017." 1.

⁸⁵⁰ ICRC, "Afghanistan Penal Code, 2017." 1.

⁸⁵¹ USSD, "Afghanistan 2018 Human Rights Report," 28-29, 33.

⁸⁵² Some of the notable documents the United Nations has issued for Afghanistan from 2008-2017: International Narcotics Control Board 2007 Report (5 March 2008), Draft Press Statement (25 August 2008), Security Council Mission document S/2008/782 (12 December 2008), UN Working Group Conclusions (11 May 2016), S/AC.51/2016/1, ISAF report S/2011/364 (14 June 2011), ISAF report S/2013/558 (17 September 2013), ISAF report S/2014/678 (17 September 2014), Universal Periodic Review A/HRC/26/4 (04 April 2014), Office of High Commissioner queries on death penalty A/HRC/27/23 (30 June 2014), High Commissioner for Human Rights A/HRC/28/48 (8 January 2015), Quarterly debate on Afghanistan S/PV.7722 (21 June 2016), Quarterly debate on Afghanistan S/PV.7771 (14 September 2016), Quarterly debate on Afghanistan S/PV. 7844 (19 December 2016),

S/RES/2255 of 2015 refers to twenty-three previous resolutions issued for Afghanistan from 1999 through to 2015.⁸⁵³ Afghanistan deposited its instruments of ratification of the Rome Statute on 10th February 2003.⁸⁵⁴ The

Transmitted conclusion of Bonn Conference from Transition to Transformation Decade 2011, S/2011/762 (6 December 2001), Summary of Security Council's 2242 Informal Expert Group on Women, Peace and Security, S/2016/673 (29 July 2016), Report of Tripartite Review Commission on the UN in Afghanistan, S/2015/713 (15 September 2016), Seventh Report of the Monitoring Team assisting Committee on the situation in Afghanistan, S/2016/842 (04 October 2016), Removal of Gulbuddin Hekmatyar from ISIL and Al-Qaeda sanctions list, SC/12705, (03 February 2017), Press release on delisting one individual from Afghanistan, SC12721, (16 February 2017), Secretary General Report UNAMA, S/2016/532 (10 June 2016), Secretary General Report UNAMA, S/2016/768 (07 September 2016), Secretary General Report UNAMA, S/2016/1049 (13 December 2016), The presidential statement on Afghan elections, S/PRST/2014/11, (26 June 2014), Presidential statement on counter-narcotics, S/PRST/2014/12, (25 June 2014), Presidential statement ahead of Brussels Conference, S/PRST/2016/14 (14 September 2016), Security Council Resolution S/RES/2210 for renewing the mandate of UNAMA (16 March 2015), Security Council Resolution S/RES/2255 on regarding the 1988 Afghanistan sanction regime (21 December 2015), Security Council Resolution S/RES/2274 regarding the resolution and renewing UNAMA mandate (15 March 2016), Security Council Resolution S/RES/2460 (15 March 2019), Security Council Resolution S/RES/2489 (17 September 2019), regarding the mandate of UNAMA, Security Council Resolution S/RES/2513 (10 March 2020), Security Council Resolution S/RES/2543 (15 September 2020), Security Council Press Statement SC/14237 (25 June 2020), Security Council Situation in Afghanistan S/2020/891 (03 September 2020), Security Council Pres Statement SC/14338 (27 October 2020). (Sources: Security Council Report – Chronology of Events and UN Documents for Afghanistan).

⁸⁵³ The listed resolutions: 18 MAR 2017 [Security Council Resolution 2344 \(2017\)](#), 15 MAR 2016 [Security Council Resolution 2274 \(2016\)](#), 16 MAR 2015 [Security Council Resolution 2210 \(2015\)](#), 17 MAR 2014 [Security Council Resolution 2145 \(2014\)](#), 19 MAR 2013 [Security Council Resolution 2096 \(2013\)](#), 14 DEC 2012, [Security Council Resolution 2082 \(2012\)](#) and [2083 \(2012\)](#), 22 MAR 2012 [Security Council Resolution 2041 \(2012\)](#), 12 OCT 2011 [Security Council Resolution 2011 \(2011\)](#), 22 MAR 2011 [Security Council Resolution 1974 \(2011\)](#), 13 OCT 2010 [Security Council Resolution 1943 \(2010\)](#), 22 MAR 2010 [Security Council Resolution 1917 \(2010\)](#), 08 OCT 2009, [Security Council Resolution 1890 \(2009\)](#), 23 MAR 2009 [Security Council Resolution 1868 \(2009\)](#), 22 SEP 2008 [Security Council Resolution 1833 \(2008\)](#), 11 JUN 2008, [Security Council Resolution 1817 \(2008\)](#), 20 MAR 2008 [Security Council Resolution 1806 \(2008\)](#), 19 SEP 2007 [Security Council Resolution 1776 \(2007\)](#), 23 MAR 2007, [Security Council Resolution 1746 \(2007\)](#), 12 SEP 2006 [Security Council Resolution 1707 \(2006\)](#), 13 SEP 2005 [Security Council Resolution 1623 \(2005\)](#), 24 MAR 2005, [Security Council Resolution 1589 \(2005\)](#), 17 SEP 2004 [Security Council Resolution 1563 \(2004\)](#), 26 MAR 2004 [Security Council Resolution 1536 \(2004\)](#), 13 OCT 2003, [Security Council Resolution 1510 \(2003\)](#), 28 MAR 2003 [Security Council Resolution 1471 \(2003\)](#), 24 DEC 2002 [Security Council Resolution 1453 \(2002\)](#), 27 NOV 2002, [Security Council Resolution 1444 \(2002\)](#), 26 JUN 2002 [Security Council Resolution 1419 \(2002\)](#), 23 MAY 2002 [Security Council Resolution 1413 \(2002\)](#), 28 MAR 2002 [Security Council Resolution 1401 \(2002\)](#), 28 JAN 2002 [Security Council Resolution 1390 \(2002\)](#), 15 JAN 2002 [Security Council Resolution 1388 \(2002\)](#), 20 DEC 2001, [Security Council Resolution 1386 \(2001\)](#).

⁸⁵⁴ The Office of the Prosecutor International Criminal Court, "Report on Preliminary Examination Activities," 6.

international community expects that the Afghan government follow their recommendations.⁸⁵⁵

Legal Interregnum Stage II

The third legal interregnum in Afghanistan commenced in 2014 and continues to the present day. President Ashraf Ghani has issued countless presidential decrees, taken from trivial issues to issues of utmost importance for Afghanistan. Presidential decrees and presidential orders by Ashraf Ghani are issued mainly for the removal and appointment of government officials, distribution of cash to high level officials, promotions and commendations. Presidential decrees were discussed in the chapter on legal transplants in more detail.

In the fourth phase of legal developments, which encompasses *Qānūn* period II and legal interregnum period three, Afghanistan has received a substantial amount of aid from the international community in order to develop its legal affairs and empower the rule of law. Afghanistan has shown unprecedented progression in areas such as drafting laws, improving the physical infrastructure of courts, public reports, and improving the education of members of judiciary. Moreover, there is a visible presence of women in the judiciary and in other government organs. There are also improvements in institution building, local governance, finance, information and

⁸⁵⁵ The major policies and plans drafted for Afghanistan are Bonn Agreement 2001, Afghanistan Compact 2006, London Conference 2010, Bonn 2 Conference 2011, Paris Conference 2008, Kabul Conference, London Conference 2010, TMAF, RECCA, WTO Membership, EITI Membership, ANDS, ICPC Interim, Money Laundering Laws, Anti-Narcotics Law, Security Council Resolutions, UNCAC, NATO Resolute Support, BSA – USA-Afghanistan, International Criminal Court and the CEDAW.

communication technology, women's participation in the government, inclusion of marginalised ethnic and religious minority groups in low level government posts.

11.3 The Legal Institutions of Afghanistan

The Judiciary

The justice institutions of Afghanistan can be broadly defined to include different ministries and agencies including the Ministry of Justice, the Supreme Court, the Attorney General's Office, the Anti-Corruption Justice Centre (ACJC), the parliament and the Afghan police. Afghanistan's judiciary is committed to Islamic principles and bases all its actions including the implementation of the donor-led priorities on Islam. The judicial sector strategy for 2008 to 2013, in the section titled 'Guiding Islamic Values' states as follows:

Justice in Afghanistan is dispensed according to the laws of Allah and the traditions of the Prophet (S.A.W.) as enshrined in the provisions of the Constitution. Justice must be provided in the most remote parts of the country and must be dispensed by justice sector institutions. This strategy's core values are derived from higher goals of Islam, and the purposes for which Allah bestowed upon all men, women and children the sacred and undeniable rights and responsibilities in the Shari'a of equality before the law and access to justice for all. Achieving justice is therefore the main objective of the justice sector institutions. As the ninth century Islamic scholar Ibn Qutayba, wrote: There can be no government without an army, no army without money, no money without prosperity, and no prosperity without justice and good administration.⁸⁵⁶

⁸⁵⁶ Islamic Republic of Afghanistan, "NATIONAL JUSTICE SECTOR STRATEGY-2008-2013," 13-14.

The Ministry of Justice

In Afghanistan, the Ministry of Justice was established for the first time during the rule of Shah Mahmood (r. 1801-1803).⁸⁵⁷ The Ministry of Justice has been part of the executive branch of different governments. Its main duties are as follows:

1. Preparing drafts of laws and the president's decrees
2. Expressing opinions regarding the conformity of legal and international contracts, conventions and external foreign agreements with the laws of Afghanistan
3. Requesting and studying the views of ministers and administrations regarding the drafts of laws and regulations which are designed by them, and completion of these laws and regulations with the help of specialists in the relevant ministries and administrations
4. Providing legal advice to ministers and government offices
5. Defending the rights of government properties and if necessary, submitting petitions against government debtors.⁸⁵⁸

The document titled "Five Year Strategy 2014-2018", prepared by the government of Afghanistan, identifies duties of the Ministry of Justice as follows:

To provide best quality legal and judicial services to the people of Afghanistan by ratification, preparation of legal papers, printing, defence of movable and immovable government assets, provisions of free legal services to suspects and convicts, solving legal cases (before going to courts), providing legal awareness for all people, registration of social organisations and political parties and providing oversight of their activities, assisting the children in correctional facilities who are serving their sentence, coordination with the government organs in regards to the legal obligations, and oversight of the implementation

⁸⁵⁷ Ministry of Justice, "History of Judiciary in Afghanistan," 33.

⁸⁵⁸ Ministry of Justice of Islamic Republic of Afghanistan, "History of the Ministry of Justice," 1-10. Last accessed 10 May 2019.

of international human rights conventions within the government organs and also translation of government's legal documents.⁸⁵⁹

The services the Ministry of Justice provides are free legal aid, *Huqūq* (legal affairs), human rights, government cases, juvenile rehabilitation, registration of political parties and social organisations, government real estates, petition writers' affairs, *Taqnin* (drafting laws) and legislation, procedure of addressing petitions and handling complaints made by individuals.⁸⁶⁰

The directorates which form the Ministry of Justice are General Directorate of Legislative Drafting; General Directorate of *Huqūq*; General Directorate of State Lawsuits; General Directorate of Legal Aid; General Directorate of Policy and Planning; General Directorate of Internal Audits; General Directorate of Publication and Public Relations; General Directorate of Registration of Political Parties and Social Organisations; General Directorate of Administration and Finance; General Directorate of Human Resources; General Directorate of Foreign Relations; General Directorate of Human Rights Support; Gender Directorate and the Department of Procurement. The strategies and policies that the Ministry of Justice follows as of August 2020 are the Afghanistan National Development Strategy 2017; Combating Administrative Corruption Strategy 2008-2012; National Priority Program Five – JFA 2019-2023, and Public Legal Aid Unit Communication Strategy 2018-2022, as well as the policies of the Ministry of Justice.⁸⁶¹

⁸⁵⁹ Ministry of Justice, "Law and Justice Strategy 2014-2018," 5. last accessed 10 October 2020.

⁸⁶⁰ Ministry of Justice, 5. Last accessed 10 October 2020.

⁸⁶¹ The official web portal of the Ministry of Justice, "Strategies and Policies," last accessed 10 May 2019.

The official web portal of the Ministry of Justice includes a database of all the laws of Afghanistan, from the past to the present day. These laws date back to over a hundred years ago. The online database is available in the Dari (Farsi) and Pashto languages and can be accessed globally. Publications are in PDF format and are available for free downloading. This technical assistance is provided by USAID and other donors. This online database makes Afghanistan's laws and regulations accessible to anyone in any part of the world, which is of great help to Afghan citizens, to Afghanistan's government and to anyone interested in Afghanistan's laws. The Ministry of Justice issues *Jarida-e rasmi* (official gazette), legal periodicals called *Āgāhi hoqūqi* (legal awareness) and a magazine called *Adālat* (justice) and a newsletter.

The Supreme Court

According to Constitution 2004, the judiciary comprises the Supreme Court, courts of appeal and the primary courts, whose organisation and authority shall be regulated by law.⁸⁶² The Supreme Court is the highest judicial organ, heading the judicial power of the Islamic Republic of Afghanistan.⁸⁶³ The departments that form the Supreme Court are the Secretariat of the High Council; General Directorate of Scrutiny and Studies; Directorate of Judicial Audit; Judicial Education Directorate; Directorate of Correspondence; General Directorate of Human Resources; Directorate of Publications; General Directorate of Finance and Administrative Affairs; Directorate of

⁸⁶² CONSTITUTION 2004, art. CXVI.

⁸⁶³ CONSTITUTION 2004, art. CXVI.

Planning and Policy; Directorate of Capacity Building and Performance Appraisal and the Islamic Verdict & Vice and Virtue Department.⁸⁶⁴

As of 16 August 2020, the laws the Supreme Court uses for its operations are Constitution 2004, Organisation and Jurisdiction Law, Criminal Procedure Code, Civil Procedure Code, Commercial Procedure Code, bills, regulations and procedures and other laws.⁸⁶⁵ The Supreme Court consists of the Supreme Court chambers, appeal courts, primary courts and special courts.⁸⁶⁶ The Supreme Court ensures the compatibility of all laws with Article 3 of Constitution 2004, which states, “In Afghanistan, all laws must be in conformity with the tenets of Islam.” The Supreme Court’s main role in carrying out this task is defined within the ambit of Article 3 of Constitution 2004.⁸⁶⁷ The Supreme Court has been given powers, similar to constitutional courts in other countries, to issue binding legal opinions on the constitutionality of various legal issues.

The Supreme Court should comprise nine High Council members appointed by the president who must also receive parliamentary endorsement in the Upper House (House of the Elders), in observance of the provisions of clause three of Article 50 as well as Article 118 of Constitution 2004.⁸⁶⁸ As of August 2020, four High Council members are in their posts: Abdul Malik

⁸⁶⁴ Supreme Court of Afghanistan official web portal “Court Divisions,” last accessed 16 August 2020.

⁸⁶⁵ Supreme Court, last accessed 16 August 2020.

⁸⁶⁶ Supreme Court, last accessed 23 July 2020.

⁸⁶⁷ Article 3 of Constitution 2004 provides that ‘No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan’.

⁸⁶⁸ CONSTITUTION 2004, art. CXVII. Article 50 relates to the creation of a healthy administration, aiding legal reforms and citizens’ participation in the government and increasing their capacity to access justice without discrimination, and Article 118 relates to the qualifications set out for the Supreme Court in 6 sub-sections.

Kamawi, Barat Ali Mateen, Abdulqader Adalatkah and Mohammad Zaman Sangari.⁸⁶⁹ This indicates that at the time of writing, the Supreme Court does not have the right number of High Council members, and is not operating its full capacity according to Constitution 2004.

The publications of the Supreme Court are *Mizān* (The Scale), *Qazā* (Judgment), Bulletin (English only), judicial circulars, judicial and administrative seminars and conferences, reports and the definite decisions of courts. In October 2020, the Supreme Court of Afghanistan added a new format of anonymised court decisions which provides more information on the court procedures, laws and decisions of the judges. Although this is an improvement, it falls short of international standards for a court promulgation.

The ICOIC

The government of Afghanistan has set up a commission for assessing the constitutionality of various legal issues. This organ is known as the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC). The ICOIC issues non-binding and advisory opinions. The overlap of roles between the Supreme Court and the ICOIC has created constitutional conflicts. Ghizal Haress argues that clashes of authority and jurisdiction between the ICOIC and the Supreme Court creates flawed judicial review processes.⁸⁷⁰ The ICOIC's work is regulated by the principles and internal rules of the Independent Commission for Overseeing the Implementation of the Constitution comprising six sections and twenty-five

⁸⁶⁹ Supreme Court of Afghanistan official portal "Court Divisions," last accessed 23 July 2020.

⁸⁷⁰ Haress, "A Flawed Process," 1-58.

articles.⁸⁷¹ The ICOIC publishes numerous reports and a constitution magazine.

The Attorney General's Office

The Attorney General's Office, also known as the Prosecutor's Office, is the prosecutorial section of the judiciary. The 1964 constitution gave power to the Attorney General's Office to investigate and prosecute cases.⁸⁷² Since its establishment as an institution of the government, reporting to the executive branch, the Attorney General's Office has undergone structural changes. Martin Lau, lecturer at SOAS University of London, explains that the Constitution of 1977 in Article 106 located the Attorney General's Office within the Ministry of Justice, and in the Interim Constitution of 1980, it became answerable to the Revolutionary Council; in 1996 the Taliban abolished the Attorney General's Office, but it was reinstated by President Hamid Karzai in 2002.⁸⁷³

The Attorney General's Office operates based on Article 134 of the constitution and Article 4 of the law on the Attorney General's Office mandate and structure.⁸⁷⁴ According to Article 34 of Constitution 2004, the Attorney General has the authority to investigate, prosecute crimes and lodge cases against the accused in courts.⁸⁷⁵

⁸⁷¹ The ICOIC sections contain general provisions, electing the president, the vice-president and secretary, the authority and duties of the Commission, a description of ICOIC departments, and finally the duties of the chief secretariat.

⁸⁷² Wimpelmann, *The Pitfalls of Protection*, 34.

⁸⁷³ Lau, "Afghanistan's Legal System," 17.

⁸⁷⁴ The official portal of the Attorney General's Office, "Message from Attorney General Mohammad Farid Hamidi," 1.

⁸⁷⁵ The official portal of the Attorney General's Office, "The historical root of Prosecutors in Afghanistan," last accessed 22 February 2019.

The Attorney General's Office is formed by six deputies. These are the Deputy Attorney General's Office for Crimes Investigation; Deputy Attorney General's Office for Prosecution Cases; Deputy Attorney General's Office for Anti-Violence against Women and Juvenile Delinquency; Deputy Attorney General's Office for Financial and Administrative Affairs; Deputy Attorney General's Office for Military Affairs and the Deputy Attorney General's Office for Anti-Corruption Affairs. The Anti-Corruption Judicial Centre (ACJC) also operates under the Attorney General's Office. The Attorney General's Office publishes the *Sāranwāl* (Prosecutor), *Sāranwāl* (Prosecutor's Magazine), articles, as well as general and special reports.

The laws that the Attorney General's Office and prosecutors use for their operations are Constitution 2004, the Attorney General's Office formation and competencies, the penal code, criminal procedure law, law on the elimination of violence against women, law against drugs and alcoholic drinks and their control, and the police law. The procedures it uses are procedure for assessing prosecutors' operations; prosecution office's cadre and rank procedures; procedures for referring prosecutors to training centres at Kabul University; procedures for referring prosecutors to training centres at private universities; recruitment prosecutors and Internal Complaint Procedure Number 180.⁸⁷⁶

The Attorney General's Office currently works on 'Five Year Strategic Plan 2018-2021.'⁸⁷⁷ The Attorney General's Office has offices in 297 out of 387

⁸⁷⁶ Official portal of the Attorney General's Office, "Laws," last accessed 13 August 2020.

⁸⁷⁷ Attorney General's Office, "Laws," last accessed 13 August 2020.

districts and only 263 offices are operating in the district of their jurisdiction.⁸⁷⁸ In March 2020, the Attorney General's Office informed UNAMA that 3,533 prosecutors and administrative staff are in service, with 1,512 serving in Kabul and 2,011 in the provinces.⁸⁷⁹ More than a third of the Attorney General's Office's administrative staff are female and one-twelfth of the prosecutors are female.⁸⁸⁰ In 2019, the Attorney General's Office's control and monitoring department prosecuted twenty-two staff, including seventeen prosecutors, for corruption offences.⁸⁸¹ In a previous report released in 2019, UNAMA reported that as of 2018, there were 2,082 attorneys working for the Attorney General's Office, of which 622 were working in Kabul Province on average giving each attorney sixty-five cases to work on per year.⁸⁸²

On 22 April 2019, the Attorney General's Office reported it had resolved 41,658 cases in the year 2018.⁸⁸³ From these, 21,266 were civil cases, 14,139 were military cases, 2,855 were cases of crimes against internal and external security, 3,398 were drugs cases and 238 were cases of kidnapping. The Attorney General's Office reports that over the past ten years it carried out 75,957 prosecutions.⁸⁸⁴ The Attorney General's Office further reports that between 2015 and 2016, it investigated 32,667 criminal cases and referred them to the courts.⁸⁸⁵ Based on Article 134 of the constitution, these cases

⁸⁷⁸ UNAMA, "Crucial for Peace and Prosperity," 41.

⁸⁷⁹ UNAMA, 41.

⁸⁸⁰ UNAMA, 41-42.

⁸⁸¹ UNAMA, 42.

⁸⁸² UNAMA, "Groundwork for Peace and Prosperity," 32.

⁸⁸³ Attorney General's Office, "41,658 cases in 2018," last accessed 6 September 2020.

⁸⁸⁴ Attorney General's Office, "Performance and Achievements of the Attorney General's Office during 2010-2015," last accessed 6 September 2020.

⁸⁸⁵ Attorney General's Office last accessed 6 September 2020.

involved civil and military crimes as well as crimes against internal and external security.⁸⁸⁶ In 2014 and 2015, the Attorney General's Office investigated 22,528 criminal cases; in 2013-2014, it investigated 14,122 criminal cases; in 2012-2013, it investigated 15,510 criminal cases and in 2011-2012, a total of 29,966 cases were investigated.⁸⁸⁷

There is no correlation between the Attorney General's Office's statistics and those of other judiciary-linked organisations such as the Ministry of Justice and the Supreme Court. A substantial number of cases resolved by the Attorney General's Office are cases which do not go to the courts. Providing wholesale numbers such as the above without detailed, open, clear and verifiable information under the name 'resolved cases' undermines the credibility of the Attorney General's Office. In June 2020, UNAMA raised doubts on Afghanistan government's information in several areas, highlighting inconsistencies, anomalies and information that in reference to another source were deemed doubtful.⁸⁸⁸ Therefore, statistics from the Attorney General's Office cannot be independently confirmed and verified.

The Anti-Corruption Justice Centre (ACJC)

In 2016, the government of Afghanistan established the Anti-Corruption Justice Centre (ACJC). The centre includes specialist police, prosecution units and courts that are [believed to be] independent from political and other pressures in detecting, investigating and prosecuting corruption.⁸⁸⁹ Chad

⁸⁸⁶ Attorney General's Office, last accessed 6 September 2020.

⁸⁸⁷ Attorney General's Office, last accessed 6 September 2020.

⁸⁸⁸ UNAMA, "Crucial for Peace and Prosperity," 1-77.

⁸⁸⁹ UNAMA, "Anti-Corruption Justice Centre established," last accessed 13 September 2020.

Brooks and Craig Trebilcock view the establishment of the ACJC as a step in the right direction for attracting more support from the international community through which the government of Afghanistan could gain legitimacy in the eyes of Afghan citizens.⁸⁹⁰ However, Brooks and Trebilcock are sceptical of the ACJC's efficiency and posit that the government of Afghanistan established the centre as window dressing before the NATO donor conferences scheduled for June 2016 in Warsaw and October 2016 in Brussels.⁸⁹¹

Afghanistan's international obligations regarding the prevention and prosecution of corruption cases are derived primarily from the 2003 United Nations Convention Against Corruption (UNCAC), which Afghanistan signed on 20 February 2004 and ratified on 25 August 2008.⁸⁹² UNAMA argues that the ACJC is a secure work location where specialised divisions of judges and prosecutors, alongside investigative teams of the Major Crime Task Force (MCTF), address corruption offences of the highest value or involving public officials of senior rank.⁸⁹³

In June 2018, the United States Watchdog, SIGAR, tasked for Afghanistan's reconstruction, published a report that identified the limitations and constraints the ACJC faced. According to SIGAR, the challenges that limit the Afghanistan's government's ability to combat corruption are (1) key anti-corruption institutions such as the Anti-Corruption Judicial Centre (ACJC) and the Major Crimes Task Force (MCTF) lack the capacity, resources or

⁸⁹⁰ Brooks and Trebilcock, "Fighting for Legitimacy in Afghanistan," 113.

⁸⁹¹ Brooks and Trebilcock, 113.

⁸⁹² UNAMA, "Groundwork for Peace and Prosperity," 10.

⁸⁹³ UNAMA, 29.

security they need to perform their functions; (2) despite efforts by the Afghan government to clarify the law, Afghan officials have differing opinions about recurring conflicts between these organisations; (3) Afghanistan's law enforcement and judiciary often avoid investigating, prosecuting and punishing powerful individuals; (4) unqualified and potentially corrupt actors continue to operate in key anti-corruption institutions; (5) there are problems even in challenging corrupt officials, even if whistle-blowers expose them and finally (6) the United States, as well as international sources and Afghan officials express scepticism about the Afghan parliament's willingness to support anti-corruption reforms.⁸⁹⁴

The United States Department of State reports that according to UNAMA, from the Anti-Corruption Justice Centre's inception in 2016 to mid-May, the ACJC tried 223 defendants in fifty-seven cases before its trial chamber and 173 defendants in fifty-two cases before its appellant chamber.⁸⁹⁵ Of the brought cases against 117 accused, thirty-six were decided after appeal to the Supreme Court, 127 warrants and summonses were issued, of which only thirteen warrants and thirty-nine summonses could be executed to date, with only a single defendant tried as a result.⁸⁹⁶ As of March 2019, the outstanding arrest warrants and summonses were 255, and by March 2020, the Ministry of Interior converted summonses into warrants and reported that 171 were executed and eighty-four remained outstanding, including those against thirty-four fugitives outside Afghanistan.⁸⁹⁷

⁸⁹⁴ SIGAR, "Significant Problems Must be Addressed," 1-3.

⁸⁹⁵ US Department of State, "Afghanistan 2019 Human Rights Report," 28.

⁸⁹⁶ US Department of State, 28.

⁸⁹⁷ UNAMA, "Crucial for Peace and Prosperity," 12.

The Attorney General's Office publishes limited information on ACJC adjudications on ACJC Case Tracker. The data includes the position of the convicted officials, the offences as well as the fines and jail terms imposed on the convicted persons.⁸⁹⁸ For serious corruption cases, like those investigated by the ACJC, there must be adequate case information available in the public domain. Currently, brief information of up to two or three pages per case are included on the Attorney General's Office, which is very short and offers insignificant information. An ACJC case promulgations must be dozens of pages. Appendix 14 shows a very terse promulgation produced by the ACJC.

The Parliament

There are different views as to when the Parliament was formed in Afghanistan. Some scholars view Amanullah Khan's consultative assembly as the parliament. However, the first parliament may have been established during King Zahir Shah's rule. The 1964 constitution made the cabinet accountable to an elected parliament.⁸⁹⁹ Torunn Wimpelmann reports that in two parliamentary elections held in 1965 and 1969 voter participation was low and the intelligentsia could not compete with the traditional power holders who formed the majority.⁹⁰⁰ Most written records point to the fact that

⁸⁹⁸ As of February 2019, the official portal of the Attorney General's Office has begun recording the offences and legal provisions under which the ACJC tried offenders of serious corruption case and these were under Article 421 (false declaration of assets), Article 419 (illicit enrichment), Article 403 (abuse of function by a public official), Article 399 (abuse of influence), Article 396 (illegal ownership of money by a public official), Article 395 (gaining benefits from government revenue by a public official), Article 394, (gaining unlawful benefits), Article 391 (embezzlement by a public official), Article 379 (perpetrators that are members of elected bodies), Article 375 (judicial perpetrators), Article 372 (bribe-giving), Article 371 (bribe-taking), Article 268-274 (embezzlement), Article 254 and 260 (bribe-giving), Article 254, 258, 259, 261 (receiving/requesting bribes).

⁸⁹⁹ Wimpelmann, *The Pitfalls of Protection*, 34.

⁹⁰⁰ Wimpelmann, 34.

the Parliament was formed in the 1960s. Afghanistan had a functional parliament until 1992, when the last socialist government of Afghanistan fell to the Mujāhedīn groups. The Taliban used the legal opinion of their forty-member *ulemā* and did not operate a parliament from 1996 until 2001.

In the post-2001 order, Afghanistan's bicameral National Assembly (parliament) comprises of the Lower House (House of the People) with 250 seats and the Upper House (House of the Elders) with 102 seats. The House of the People, elected in 2018, comprises 181 men (72.4 percent) and sixty-nine women (27.6 percent).⁹⁰¹ Afghanistan's both houses of parliament issue publications that are downloadable from their official webpages. Both houses type the parliamentary debates and name their report, Hansard Report, a term that is copied from Westminster Parliament in England.

The last parliamentary elections were held on 20 and 21 October 2018 after a four-year delay by the National Unity Government. Approximately four million out of 8.8 million registered voters cast ballots, and although there was high voter turnout, the election was marred by irregularities, including fraudulent voter registration, voter intimidation, vote rigging – such as interference by the Independent Election Commission staff and police, and in some cases, polling stations forced to close due to local leaders.⁹⁰²

The Police Force

⁹⁰¹ UNAMA, “Crucial for Peace and Prosperity” 61.

⁹⁰² US Department of State, “Afghanistan 2018 Human Rights Report,” 23-24.

The Ministry of Interior Affairs of the Islamic Republic of Afghanistan states that in Afghanistan, police structure was established under the Police Training Centre for the first time in 1315 (1936).⁹⁰³ German instructors used to provide training in this centre which was established in Mahtāb Qala near Pol-e-Sokhta area of Kabul.⁹⁰⁴ Prior to this date, primary historical sources written by the British writers refer to traditional police called *kotwal*. The first reference to *kotwal* is made in literature about Abdur Rahman Khan (r. 1880-1901), and his rule in which British political agents had widespread presence and influence.

The Afghan National Police (ANP) forces are in charge of securing cities and government buildings. The Ten-Year Vision for the Afghan National Police 2013-2023 lists the main duties and achievements of the Afghan police as follows.

Within ten years the Afghan National Police (ANP) will become a unified, capable, and trustworthy civilian police service. Its primary responsibility will be to enforce the rule of law; maintain public order and security; detect and fight crimes; control borders; protect the rights, assets and freedoms of both Afghans and foreigners in Afghanistan according to national laws; and operate without ethnic, gender, language or religious discrimination. By pursuing the principles and objectives of the peace and reintegration program, which is based on the decisions of the 2-4 June 2010 Consultative Jirga, and creating a lawful society, the ANP will pave the way for sustainable peace and socio-economic development of Afghanistan. It will be a unified and flexible force allowing personnel in the different police pillars of the ANP to transfer from one to the other when necessary, and winning public confidence by the use of community policing approaches to deliver policing services to the people of Afghanistan.⁹⁰⁵

⁹⁰³ The official web portal of the Ministry of Interior Affairs, “Background & History,” last accessed 09 March 2019.

⁹⁰⁴ The official web portal of the Ministry of Interior Affairs, last accessed 09 March 2019.

⁹⁰⁵ The official web portal of the Ministry of Interior Affairs, “Vision and Mission,” last accessed 23 July 2020.

In tribal areas of Afghanistan, there is a local militia police called *arbakai*. The *arbakai* militias are recruited from within Pashtūn tribes and are given the duty of safeguarding rural villages. Afghanistan has had border police and special police forces. In November 2017, the border police merged with the Afghan National Army.

Legal documents that have regulated police operations over the past nineteen years are The Police Law 2009; The National Police Strategy 2011-2016; the National Police Plan 2013-2015 and the Ten-Year Vision for the Afghan National Police 2013-2023. There is a police code of conduct which police officers are expected to read, understand and follow. There is an official swearing-in ceremony where new cadets have to swear on the Qur'an that they will serve their homeland faithfully. In 2016, UNESCO reported that in Afghanistan, seventy percent of police officers were illiterate.⁹⁰⁶ In 2017, The Asia Foundation reported that apart from police forces, citizens of Afghanistan report a crime to *Shūrā*, *jirga*, tribal leaders, district governors, *mullahs*, provincial authorities, courts, family members, public prosecutors and *arbakai* (local militia). This indicates that the police are not the first or only point of contact for the citizens of Afghanistan. Media sources in Afghanistan also report that police officers are on the frontline of war against the Taliban – a role that belongs to the army.

⁹⁰⁶ TOLO News, “60,000 Afghan Police Illiterate,” last accessed 12 May 2018.

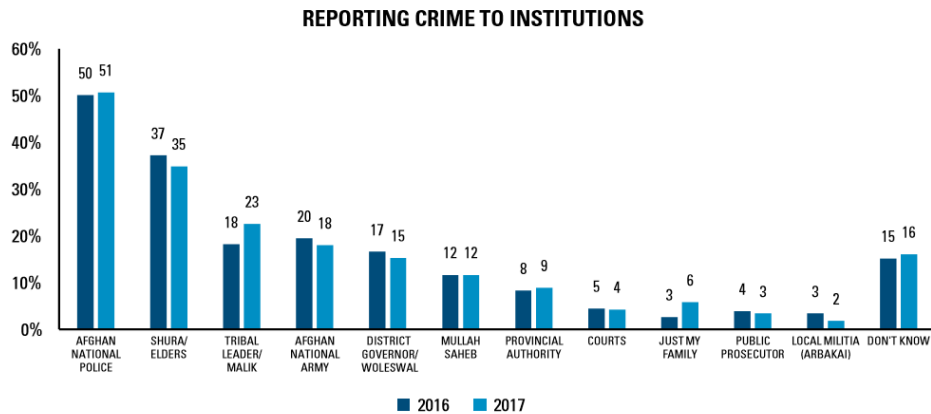


FIG. 2.8: Q-23. (If Q-22 answer is “yes.”) Who did you report the crime to?

Figure 11: “A Survey of the Afghan People: Afghanistan in 2017” The Asia Foundation.

11.4 Afghanistan Independent Bar Association (AIBA)

The Afghanistan Independent Bar Association (AIBA) was regulated by provisions of Constitution 2004. The International Bar Association considers that the establishing of AIBA has been carried out according to democratic rules, and many Afghan lawyers are now members of the Bar.⁹⁰⁷ AIBA was established under a grant from the Swedish Foreign Ministry, and the UK Foreign & Commonwealth Office pays for a placement of a legal specialist in Kabul.⁹⁰⁸

AIBA is an independent organisation that regulates the work of the advocates. The Advocates Law passed by Parliament in November 2007 provides for an independent, non-governmental Bar Association to lead and regulate all the activities of the advocates.⁹⁰⁹ AIBA was officially established in September 2008, following an assembly of 450 defence lawyers coming from all parts of

⁹⁰⁷ AIBA, “Afghan Independent Bar Association.” 1.

⁹⁰⁸ AIBA, 1.

⁹⁰⁹ AIBA, 1.

Afghanistan. During a four-day conference, the leadership of AIBA was elected and bylaws were debated and adopted.⁹¹⁰ The Advocates Law consists of forty-two articles and is based on Article 31 of Constitution 2004 in order to regulate the rights and duties as well as other responsibilities of the advocates.⁹¹¹

AIBA is a self-governing professional association of lawyers that represents the interests of lawyers; promotes their continuing legal education and training; regulates entry into the legal profession; upholds professional standards and ethics; protects the interests of the public and advocates for the rule of law and the independence of lawyers.⁹¹² The AIBA committees are the Family Rights Committee; Resolving Defence Lawyers' Problems Committee; Consultancy Committee; Legal Aiders Committee; Commercial Arbitration Committee; Women's Committee; International Relations Committee; Radio Committee; Training Committee; Fighting Corruption Committee; Public Awareness Committee and the Elections Committee.⁹¹³ AIBA issues *wekālat* (legal defence) monthly, and newsletters.⁹¹⁴

The number of AIBA members since its establishment in 2008 through to 2012 rose to 1,250, which include legal aid and private lawyers.⁹¹⁵ The number of AIBA registered members as of 2019 were 4,206: 980 women and 3,226 men.⁹¹⁶ In 2019, the AIBA held workshops for 1,971 lawyers, from

⁹¹⁰ AIBA, 1.

⁹¹¹ Article 1 of the Advocates Law of the Islamic Republic of Afghanistan.

⁹¹² AIBA, 1.

⁹¹³ AIBA webpage, "About AIBA," last accessed 23 July 2020.

⁹¹⁴ AIBA webpage, "Publications," last accessed 23 July 2020.

⁹¹⁵ Han, "Legal Aid in Afghanistan," 6.

⁹¹⁶ AIBA webpage, "AIBA Annual Report 2019," last accessed 23 July 2020.

which 724 were female.⁹¹⁷ The above data indicates that in twelve years of its operation, the AIBA has increased its role and attracted more professional cadres and lawyers. Criminal defence lawyers reported the judiciary increased respect and tolerance for the role of defence lawyers in criminal trials, but defendants' attorneys continued to experience abuse and threats from prosecutors and other law enforcement officials.⁹¹⁸ The AIBA may be regarded as a successful professional body, independent of the government.

11.5 Conclusion

This chapter has provided a historical account of legal developments from the 1880s to the present day. It has highlighted the stages of legal development, reversals of gains and the definition of legal interregnum and how legal interregnums happened. The chapter has further described the institutions of justice in Afghanistan. Where feasible, the chapter has given a longer historical perspective of legal institutions. The chapter highlighted the role of the political leadership and how throughout different periods, of Afghan-led and foreign-led stages, legal developments progressed, faced setbacks by interregnums or certain gains reversed.

The chapter has also described the history and foundations of legal institutions and the laws that regulate their operations. This extended to a non-governmental organisation such as AIBA. To follow the findings of this chapter and despite the problems highlighted, the next chapter investigates

⁹¹⁷ AIBA, "AIBA Annual Report 2019,"

⁹¹⁸ US Department of State, "Afghanistan 2018 Human Rights Report," 11.

the judicial quality in Afghanistan, which is an important element of modern governments and the expansion of the rule of law.

CHAPTER 12: JUDICIAL QUALITY IN AFGHANISTAN

12 Introduction

This chapter describes legal education, requirements for the tenure of judgeship and highlights the sizable growth of judgeship in the post-2001 period in Afghanistan. It also identifies a number of problems that affects the judges, court judgments and the independence of the judiciary.

The chapter focuses on the excessive politicisation, irregularities, flawed recruitment processes, and the casuistry application of the law by the judges that short-changes the quality of justice in Afghanistan and violate Afghan law and international standards.

12.1 Legal Education

In Afghanistan, until recent years, legal sources used for adjudications were eighteen books, in use in courts in twenty of the provinces of the country. Bokhdi News reports that in 2013, Islamic scholars and judges from other Islamic countries reported in their research papers that these legal sources were unknown to them, and that Afghanistan lagged behind other Islamic judiciaries by at least a hundred years.⁹¹⁹

As a direct result of the international community's humanitarian assistance in Afghanistan since 2001, there are now government-run universities in most provinces. There are hundreds of private universities, higher education institutions and vocational learning centres. In 2011, according to statistics

⁹¹⁹ Naderi, "100 years behind other Islamic countries," last accessed 4 April 2016.

from the Ministry of Higher Education of the Islamic Republic of Afghanistan, 8,902 students enrolled to study law at university.⁹²⁰

There are a number of problems in regard to legal education in Afghanistan. Writing in 2013, Rohullah Azizi and Charles Erickson argued that the objectives of legal education in Afghanistan were not well-defined.⁹²¹ The dominant style of *old school* of legalists in Afghanistan has acquired low levels of literacy in *madrasas*, and the use of rote learning of religious texts in their original Arabic. There is also an ongoing generational difference in perceptions of competency in the legal sphere concerning education and expertise, where elderly professionals find younger legalists less capable of using their legal expertise.

Some officials in the Supreme Court of Afghanistan have argued that students who join the legal profession do not have the requisite expertise and legal knowledge to start a successful career, and many organisations working with the judiciary have also raised similar concerns.⁹²² The differences in the legal curriculum, number and types of skills between that of *madrassa* rote learning and scholastic methods acquired by younger students is a problem the governments of Afghanistan have failed to address thorough the years.

There is a substantial growth in the *new style*, scholastic legal expertise in Afghanistan, where law is studied in modern universities. A survey carried out by the Rule of Law Stabilisation, conducted in May 2013, shows that there

⁹²⁰ Azizi and Erickson, *Legal Education in Afghanistan*, 4.

⁹²¹ Azizi and Erickson, 10.

⁹²² Azizi and Erickson, 16.

were seventeen universities or higher education institutes and approximately 13,462 students received training in law.⁹²³ There were 380 teachers of law at the law and *Shari'a* schools.⁹²⁴ The increase in the number of law students creates hopeful prospects for future legal developments.⁹²⁵ In October 2020, a report by 8 A.M. News showed that over 10,000 students enrolled for the judicial *stage* course.⁹²⁶ This indicates the biggest growth of legal education in the history of Afghanistan.

12.2 The Recruitment of the Judges

The requirements that a judge has to fulfil in order to occupy his or her position differs from one Islamic country to another. According to the Administration of Islamic Law Act in Malaysia, the appointment of *Shari'a* court judges does not expressly require a particular educational qualification for the judges, but in practice, the appointment of *Shari'a* judges is only open to those who have obtained at least a Bachelor of Arts degree.⁹²⁷ This is because judges are appointed from the ranks of the civil service, and the basic educational qualification required for the civil service is a degree, which

⁹²³ Azizi and Erickson, 16.

⁹²⁴ Azizi and Erickson, 16.

⁹²⁵ The United States government as well as the German and Italian governments have assisted Afghanistan's legal institutions. The University of Stanford has produced legal books in Dari (Farsi), Pashto and English. The Institute of Max Planck, the IDLO, the UNDP as well as other international non-governmental organisations have produced hundreds of legal textbooks and practitioners' guides for the Afghan police forces, judges and prosecutors as well as defence lawyers and other professionals. International organisations assisting Afghanistan since 2001 have preserved, archived, digitised and printed all types of legal and non-legal books on the laws of Afghanistan. The American University of Afghanistan, the University of Nebraska, Washington University and New York University as well as other Western universities have digitised thousands of books written about Afghanistan. The Arthur Paul Afghanistan Collection, part of the University of Nebraska, Lincoln, has digitised a number of historical literatures on Afghanistan.

⁹²⁶ Hussaini, "Do not stifle the applicants' voices," last accessed 30 October 2020.

⁹²⁷ Zin, "Islamic judges in Malaysia," 119.

applies to *Shari'a* judges as well.⁹²⁸ In Malaysia, a *Shari'a* judge is also required to complete a postgraduate or professional diploma.⁹²⁹ In Indonesia, the Religious Judicature Act 1989 sets out requirements for the appointment to the position of judgeship in the Islamic courts where the appointee must be a Muslim, at least twenty-five years of age, religiously observant, competent, honest, just, well-versed in Islamic law and loyal to the official state ideology of Pancasila and the 1945 Constitution.⁹³⁰ The appointee must hold a degree in either Islamic law or in civil law.⁹³¹

In Afghanistan, the law of the jurisdiction of courts, the Code of Conduct for judges and Constitution 2004 set out requirements for the appointment of judges, determine their training and age, as well as other requirements. According to the Law of Organisation and Authority of the Courts of the Islamic Republic of Afghanistan 2005, a judge must meet the following requirements:

Upon appointment as a judge, (1) the candidate must hold the citizenship of the Islamic Republic of Afghanistan for at least 10 years (2) not have been convicted of any crimes or intentional misdemeanour by absolute and final decision of an authorised court (3) holds a bachelor's degree from faculties of law or *Shari'a* or above, (4) holds a Diploma of Religious Studies from an officially recognised centre or equivalent (5) Not have any epidemic illness or disability which impedes a judge's performance of his duties (6) must have completed the age of 23 years upon appointment (7) Must have successfully passed a practical *Stage* judicial training course.⁹³²

⁹²⁸ Zin, 119.

⁹²⁹ Zin, 119.

⁹³⁰ Eus and Abdulrahman, "Islamic judges in Indonesia," 46.

⁹³¹ Eus and Abdulrahman, 46.

⁹³² Touch Point, "A Primer for Practitioners: Legal Education and Training in Afghanistan," 1-2.

The law of Civil Procedure 1957 in Article 2 defined the *qāzi* as “the ruler of *Shari’a* who is appointed by the sovereign or his regent, who settles disputes in accordance with the provisions of *Shari’a*”.⁹³³ According to this law, a *qāzi* must be knowledgeable about customs and be able to distinguish the people and their position and status in society. Despite the fact that there were two law colleges at Kabul University, this law required no further qualifications for the employment of a *qāzi*.⁹³⁴

The Law of Juridical Authority and Organisation of Courts 1967 set out certain conditions for admission into the judicial position, which included the possession of a bachelor’s degree obtained from the Faculty of Law or the Faculty of *Shari’a*, or a certificate from the official *madrasas* not below baccalaureate level.⁹³⁵ Baccalaureate level in Afghanistan is the completion of year twelve of school. The inconsistent and quite irregular educational requirements for judges have damaged the quality of judgeship in the entirety of Afghanistan. This may in part explain why the citizens of Afghanistan distrust the formal judicial institutions. A judge with a few years of memorising religious texts and a judge with a doctoral legal qualification do the same job in Afghanistan.

12.3 The Expansion of Judgeship

In Afghanistan, the development of legal training and establishing a cadre of judges has proved a tumultuous path for different governments. According to

⁹³³ Kamali, *Law in Afghanistan*, 229.

⁹³⁴ Kamali, 229.

⁹³⁵ Kamali, 229-230.

John Jupp, from 1923 until 2004, there were eleven regime changes in Afghanistan, eight of which took place from 1973 to 2001.⁹³⁶

According to Mohammad Hashim Kamali, by the late 1960s, a legal community upwards of 1,200 persons had emerged, which included 715 government-appointed judges, 170 prosecutors and 100 lawyers who were either graduates of Kabul University or religious *madrasas*, and in the 1960s, the judiciary recruited judges who had obtained a higher education.⁹³⁷ The United Nations Office on Drugs and Crime reported that in 2001 to 2002, the number of Afghanistan's judges were 1,920, allocating 7.04 judges for every one hundred thousand people in 2001 – and 6.86 judges for every one hundred thousand people in 2002.⁹³⁸ The number of lay magistrates was reported to be 1,032 of which 29 were female judges.⁹³⁹

In 2014, the Supreme Court of Afghanistan reported the number of judges to be 2,296 which included a total of 1,849 sitting judges.⁹⁴⁰ According to the Supreme Court of Afghanistan, in 2006, about one-third of the then 1,415 sitting judges met the higher education qualification requirement.⁹⁴¹ By 2019, 300 female judges serve in Afghanistan's judiciary.⁹⁴²

⁹³⁶ Jupp, "Legal transplants," 78.

⁹³⁷ Kamali, *Law in Afghanistan*, 207.

⁹³⁸ UNODC, "Eighth United Nations Survey," 137-150.

⁹³⁹ UNODC, 137-150.

⁹⁴⁰ Touch Point, "A Primer for Practitioners: Legal Education and Training in Afghanistan," 2.

⁹⁴¹ Touch Point, 2.

⁹⁴² UN Women, "In the words of Justice Anisa Rasooli," last accessed 18 February 2019.

12.4 Judgements

In this research, a number of documents issued by the judiciary such as the crime statistics, court decisions, case promulgations and the activities of the courts have been translated from Dari (Farsi) into English and are shown in the appendices. These documents indicate that some level of reporting is available which aids the researchers.

An important factor that short-changes justice in the judgments is the personal and intuitive influence of judges over what the *law* is and what the judge makes the law *to be*. This is not legal realism as to what may be possible legally in a certain situation. The courts in Afghanistan do not create judge-led laws, but laws in courts are judge-owned, which means the judges are highly likely to use their personal views and read their subjective understanding into written laws or into the Qur'an and *hadiths* instructions. John Jupp argues that Afghan judges use personal knowledge and intuition rather than the law.⁹⁴³ This problem is more pronounced in the *madrassa*-educated judges, most of whom buy their way into judiciary through nepotism, bribery and political connections.

In a comprehensive report called, '*Observing the conditions of courts operations and the Judicial System in Afghanistan*' written in 2012, the Afghanistan Independent Human Rights Commission identified key problems in the judiciary to have been lack of access to competent courts; lack of trust in the judiciary; judges and judicial staff not turning up for their

⁹⁴³ Jupp, "Legal transplants," 135-136.

duties, and at times the judges closing the court doors for days on end.⁹⁴⁴ The report adds:

The judges turned up late and left early and there was no control or oversight over their duties. In many areas, judges were not independent and in the areas where government had no control, judges were under the influence of warlords and insurgents. There were deliberate delays and a lack of consideration for the equality of the sexes in the courts of law. The judges also ignored cases of violence against women. Due to the lack of legal education and expertise, in certain areas, judges read out the prosecution's or investigator's statements as a verdict.⁹⁴⁵

From October 2016 to June 2017, Integrity Watch Afghanistan (IWA) and Society Empowerment Organisation (SEO) conducted a community court observation programme and monitored 929 trials in the Herat, Kandahar, Kapisa, Nangarhar and Balkh provinces. The overwhelming majority of the trials observed in the five provinces were criminal trials, where routine adherence to basic procedural requirements such as properly constituted judicial panels and properly attired judges were noted.⁹⁴⁶

The programme also found there were significant divergences concerning adherence to substantive legal requirements that promote transparency and protect the rights of the accused; across five provinces, it was more common to conduct proceedings in the judges' chambers instead of in an open courtroom as required by law; in the majority of the cases the verdict was not routinely announced in public in the presence of the accused and, across the five provinces, prosecutorial police revealed a gender bias, as crimes

⁹⁴⁴ AIHRC, "Observing the conditions of courts," 8-10.

⁹⁴⁵ AIHRC, 8-12.

⁹⁴⁶ IWA, "Lessons from Community-Based Monitoring," 1.

involving direct female victims were rarely prosecuted.⁹⁴⁷ According to TOLO News, the legal, judicial and educational institutions of Afghanistan are identified as the most corrupt institutions.⁹⁴⁸

There is yet another institutional problem that relates to the state of Afghanistan and how it pursues justice and manages the judiciary. Marin Lau, lecturer at SOAS University of London, argues that Afghanistan's official laws – such as the formal legal system established under the provisions of a constitution – do not represent *de facto* norms that govern the lives of the majority of the population.⁹⁴⁹ He finds the government to be unable to implement laws in a uniform and countrywide manner, and this is a reflection of under-development as well as political constraints.⁹⁵⁰ This is an ongoing problem in Afghanistan which requires the serious attention of the state and the judiciary.

Antonio De Lauri focuses on judicial constraints where judges use mediation rather than applying abstract laws. De Lauri claims that in civil and criminal courts, Afghan judges use mediation. He substantiates his points through quoting an actual case. The case was reported in a field research that relates to a kidnapping case in which mediation was used under the judgeship of Abdul in the Second District Court of Kabul. De Lauri states:

The story begins one afternoon when Homaira, an eighteen-year-old girl was approached by a car as she was beginning to make her way home from the bazaar, where she had done some shopping. The driver of the car, a twenty-year-old man named Hossain, offered to give her

⁹⁴⁷ IWA, 1.

⁹⁴⁸ Amiri, "Educational, Judicial Institutions 'Most Corrupt'."

⁹⁴⁹ Lau, "Afghanistan's Legal System," 7.

⁹⁵⁰ Lau, 7

a ride home. Since she knew the man, who was from her own neighbourhood, she accepted the ride and sat down in the back seat of the car. According to the girl, Hossain immediately became aggressive and threatened to kill her if she resisted him. After threatening her, Hossain drove out of town. Troubled by the fact that Homaira had not returned home, the father called the police, not to report that she was missing but that she had run away from home. As Homaira's mother explained, within the house her father was evidently worried about the girl, but in public he had to appear angry with his daughter for the insult she was bringing upon their family. In the meantime, Hossain was taking Homaira to the Pakistani border where he planned to sell her for profit. However, Hossain, not having any experience or the right contacts in Pakistan, almost immediately gave up on the criminal venture after some initial difficulties. Three days after her disappearance, Homaira returned home. She immediately recounted what had happened and gave Hossain's name. Despite this, a day later, she was put into jail and no measures were taken by the police against Hossain. The report of the prosecutor who sentenced the girl stated that she had run away from home with a man. While she was in detention, a meeting between her father, Hossain, his father, and other male members of the two families was organised. During the meeting Hossain was asked if he was willing to marry Homaira, to which he replied 'Yes'. Homaira was in detention when they gave her this news, but she refused the offer. After a few weeks, Hossain was also interrogated by the prosecutor, who did not charge him with kidnapping, but did obligate him to appear in court. During the first session, everyone involved was heard. Homaira remained in detention while Hossain returned home. In the second session, Judge Abdul dropped the charge against Homaira after having read all the papers and testimonies regarding her case. However, no measures were taken by the judge against Hossain.⁹⁵¹

The following is the judge's explanation for his decision.

Judge: Homaira was detained for many months. From the testimonies and the documents, it seems that her version of the facts was what actually happened. This is also demonstrated by the fact that she refused the marriage proposal of the boy. For her father and for the community, it did not matter what happened afterwards. The girl was wrong in accepting a ride from the boy. She should not have got in the car of a boy who was not her husband or one of her brothers. For Homaira's father this was a disgrace. These stories can end up even worse. Homaira had remained in prison for a long time. If she had been released she could have run away again or been beaten up at home before the matter was settled.⁹⁵²

⁹⁵¹ De Lauri, *Legal Reconstruction in Afghanistan*, 13.

⁹⁵² De Lauri, 13.

In the case of Homaira, the criminal responsibility of Hossain is invalidated by the fact that societal norms in Afghanistan dictate that a woman must not take a lift from a man who is not a husband or sibling. Homaira's case is not an exception, but it is an example that identifies the way judges decide in cases where the victim is a woman or girl. Women are more likely to be ordered by the judges to observe *Shari'a* rules of *tamkin*, which encompasses a woman's matrimonial obligations to her husband, the violation of which is called *noshūz*.⁹⁵³ The *tamkin* and *noshūz* concepts take precedent in Afghanistan's judiciary and these religious norms contradict provisions in Constitution 2004, ERAW law and the human rights norms. Therefore, most of the transplanted human rights norms remain on paper, and in practice, judges disregard them.

12.5 Conclusion

This chapter has shown that since the years of the government's expansion of judiciary in the 1960s, the tenure of judicial posts has been problematic; it has been affected by institutional failures, corruption and incompetency and this in turn has impacted the quality of judgments.

The chapter has identified that many legal provisions and human rights norms are disregarded by the judges in Afghanistan. In this thesis, I discussed the problem of disregarding human rights in the state education system, the bifurcation of legal education into *Shari'a* and law tracks, the ownership of

⁹⁵³ In Islamic Family Jurisprudence '*noshūz*' is when a woman is obliged to respect the rules of *Shari'a* in regard to following her husband's demands.

the judiciary by the executive branch and inconsistent constitutional provisions, alongside problems of institutional disorganisation, corruption and economic interests as a result of donations; explain major the factors of circumventing human rights norms. The chapter has also given particular attention to the problem of inadequate anonymous court data.

In less developed countries such as Afghanistan, religious interpretations, tradition and cultural practices limits women's social and political rights and exposes them to unfavourable conditions, despite elaborate formal provisions in the constitution and other laws. Therefore the way women are dealt with in society, government and before the law requires particular attention. The final chapter therefore investigates women's status in society and government and how they are dealt by the law.

CHAPTER 13: THE STATUS OF WOMEN OF AFGHANISTAN IN SOCIETY AND IN THE LEGAL SYSTEM

*I am a woman, I am a woman
The day I came to this world
I faced the judgment of my execution
I didn't see the doors of my court
I didn't see the faces of my judges*

Nizar Qabbani

13 Introduction

The governments of Afghanistan since 1880 to the present, have tried to create, expand and modernise government institutions and the state legal system. These reforms and expansions demanded that international conventions, transplanted legal norms and legal codes help the modernisation processes. Major issues relating to women, which governments over the last one hundred and forty years attempted to resolve, improve, expand or change are bride-prices, *baad* marriages, polygamy, divorce rights, barriers to women's education and their access to justice through reforming the tribal norms of *Pashtūnwāli*, Islamic law and administrative law. Governments intended and to a certain degree acted upon improving women's rights and their living conditions. This chapter uses the process-tracing method and offers a historical perspective for the above-written issues. Barriers in government and society that slow the improvement of women's rights will be discussed through the intersectionality framework.

This chapter argues that a number of intervening factors and a strong appeal to the various agents of traditionalism have negatively affected and continue to affect women's rights in Afghanistan. This chapter also offers an account of the national and international mechanisms and institutions seeking to

empower the women of Afghanistan. It discusses obstacles in society, in the education system and how modern legislations prove less fruitful when strong legal foundations or meaningful political will to improve women's conditions are absent. From socio-economic to cultural factors, (e.g. corruption, traditionalism) there has been little political capital in advancing women's rights within Afghanistan.

13.1 Women's Status in the Past

In the past, the women of Afghanistan could play active roles in society. Nushin Arbabzadah, an Afghan academic and a former Guardian columnist, examines historical records in regard to the freedoms the women of Afghanistan enjoyed during the Timurid dynasty (1370-1506) in the fifteenth and sixteenth centuries. In Timurid times, women held high status, and it was this status that in turn allowed them to commission the building of religious schools, *Sufi khangahs*, mausoleums and shrines.⁹⁵⁴ This special status was based as much on the position of women in *Shari'a* law as on the position of women in the Turko-Mongol sedentary societies.⁹⁵⁵ Evidence from Timurid literature and paintings suggests that women from rich families received an education, and in Timurid miniature paintings, girls are often depicted studying in rooms beneath those occupied by boys, suggesting that both genders received their education in the same building, presumably in a *madrasa*.⁹⁵⁶

13.2 Recognition of Women by the State

⁹⁵⁴ Arbabzadah, "Women and Religious Patronage," 58.

⁹⁵⁵ Arbabzadah, 58.

⁹⁵⁶ Arbabzadah, 65.

In Afghanistan, based on the operations of governments since 1747, women are not fully recognised by the governments. In a *Taskira* document, which is the formal identity document issued to citizens of Afghanistan, the mother's information is not included. The women of Afghanistan are only able to obtain a *Taskira* document based on their connection to their father, and again their mother's information is not included. The first state legislation for *Taskira* documents was enacted during the reign of Amanullah Khan (r. 1919-1929), known as the *Taskira* Law.⁹⁵⁷

To the present day, *Taskira* documents are issued upon citizens' requests. These national identity documents are not issued automatically. This means women in rural areas and some women in urban and cosmopolitan cities may not receive a *Taskira* identity document should their agnatic family members decide they must not leave home, study, travel or work. Since 1919, the governments of Afghanistan have not set up a central organisation to issue, record and archive identity documents to Afghanistan's men and women. Different governments of Afghanistan recorded and archived *Taskira* data in paper books and kept them in different departments.

In this chapter, the use of the term *misogyny* relates to general dislike, contempt or ingrained prejudice against women. This term may have different connotations in different societies, however, its use here is for the most obvious forms of prejudice against the women of Afghanistan. There are widespread misogynistic perceptions against women in Afghanistan. Women

⁹⁵⁷ Nawid, "Aman-Allah and the Afghan 'Ulama," 219.

are generally regarded as unintelligent, the honour of their men and at times as a commodity bought through the payment of bride-price. In the Pashto language, the word husband is translated as *khāwand* (owner). In order for men not to mention their wife's name, they use terms such as *mādar-e awlādhā*, (the mother of the children) or nicknames such as *Bibi Gul*, (Grandma, the Flower). There are derogatory and demeaning words used for women such as *siāsar* (woman with black hair) or *zaeefa* (the weak person). A recent example where men expect their women to hide their names was reported by the BBC. Rabia from western Afghanistan returned home suffering from pain and fever and gave her prescription to her husband to buy the medicine for her. But when the husband saw her name on the prescription, he beat her for revealing it “to a strange man” even though it was to a doctor.⁹⁵⁸

Afghan dentist, Ghazal Sharifi Mayel, a mother of two with a successful career in Kabul applied for her children's passports, but her application was rejected because she was not recognised as the legal guardian of her own children.⁹⁵⁹ Mayel stated, “As a mother, I felt humiliated because my husband's cousin has more [legal] authority over my kids that I have.”⁹⁶⁰ I carried these children in my womb for nine months, and I have delivered them after a complicated Caesarean operation.”⁹⁶¹ In Afghanistan's staunchly patriarchal society, women are often publicly identified by the names of their male relatives – who are seen as their owners.⁹⁶²

⁹⁵⁸ Nowrouzi, “Where Is My Name,” last accessed 25 July 2020.

⁹⁵⁹ Radio Free Europe, “I Felt Humiliated,” last accessed 15 July 2020.

⁹⁶⁰ Radio Free Europe, last accessed 15 July 2020.

⁹⁶¹ Radio Free Europe, last accessed 15 July 2020.

⁹⁶² Radio Free Europe, last accessed 15 July 2020.

In 2017, Laleh Osmany started the online campaign *Where Is My Name?* when she realised she was fed up with women being denied what she thought was a “basic right”.⁹⁶³ This campaign resulted in President Ashraf Ghani instructing the Afghanistan Central Civil Registration Authority (ACCRA) to look into the possibility of amending the country’s Population Registration Act to allow women to have their names on their ID cards and children’s birth certificates.⁹⁶⁴ This president’s order does not appear to be an outright victory for the women of Afghanistan, as there are mixed feelings and heated debates surrounding adding mothers’ names to the *Taskira* documents. Following Ashraf Ghani’s order for the inclusion of mothers’ names; on the 23 of September 2020, Javid Rasuli, head of National Statistics Office, announced that including mothers’ names on ID cards was optional and that mothers’ names would be recorded on the e-*Taskira* database, and would not be printed on the *Taskira* documents.⁹⁶⁵

Mohammad Ekram Andishmand views the lack of distributing e-*Tazkira* ID cards after the completion of all the legal and technical processes as the government’s failure in one of its biggest national programs.⁹⁶⁶ The roll out of electronic national identity cards (machine readable cards), also known as e-*Tazkera* has begun, heating up a contentious political debate that had been

⁹⁶³ Nowrouzi, “Where Is My Name,” last accessed 25 July 2020.

⁹⁶⁴ Nowrouzi, last accessed 25 July 2020.

⁹⁶⁵ 8 A.M. News, “Inclusion of mothers’ name is optional,” last accessed 23 September 2020.

⁹⁶⁶ Andishmand, “Failure of the National Unity Government,” last accessed 23 September 2020.

simmering since 2013.⁹⁶⁷ Afghanistan currently has six versions of paper *Tazkiras* in circulation.⁹⁶⁸

In Afghanistan, there are literatures in circulation which promote an anti-women sub-culture. BBC Farsi reported the circulation of a thirty-two-paged book, *Twelve Damned Women*, attributed to Mawlana Mohammad Ershad Qasimi from Riaz-ul-Olum Gurini of India, translated by Mawlawi Nasrullah Takhari; and another book, *Six Sinful Women*, whose author is unknown. In the contents list shared by BBC Farsi News, it reads:

Damn to the women who leave home without their husbands' permission; leaving the husband unhappy leads to damning; women putting make-up on and leaving home are damned; damned are women who visit the shrines; who are women damned by?; angels damn the women who disobey their husband's demands; damn to men and women who do not marry; damn to women who wear slippers; damn to women who wear clothes with bells; damn to women who cry for the dead; damn to women who argue and make excuses for their husband; damn to women who tear the clothes of a person who screams.⁹⁶⁹

In regard to these literatures, Mohammad Moheq, Afghanistan's ambassador to Egypt, states that these are traditional religious thoughts that accord with misogynistic mentality.⁹⁷⁰ The government of Afghanistan has not arrested or reprimanded those who printed, imported or continue to sell these books, and did not collect these hate literatures from the markets.

⁹⁶⁷ Adili and Bjelica, "The E-Tazkera Rift: Yet another political crisis looming?" 1.

⁹⁶⁸ Adili and Bjelica, 5.

⁹⁶⁹ Rahimi, "When they talk about twelve damned women," last accessed 09 December 2018.

⁹⁷⁰ Rahimi, last accessed 09 December 2018.

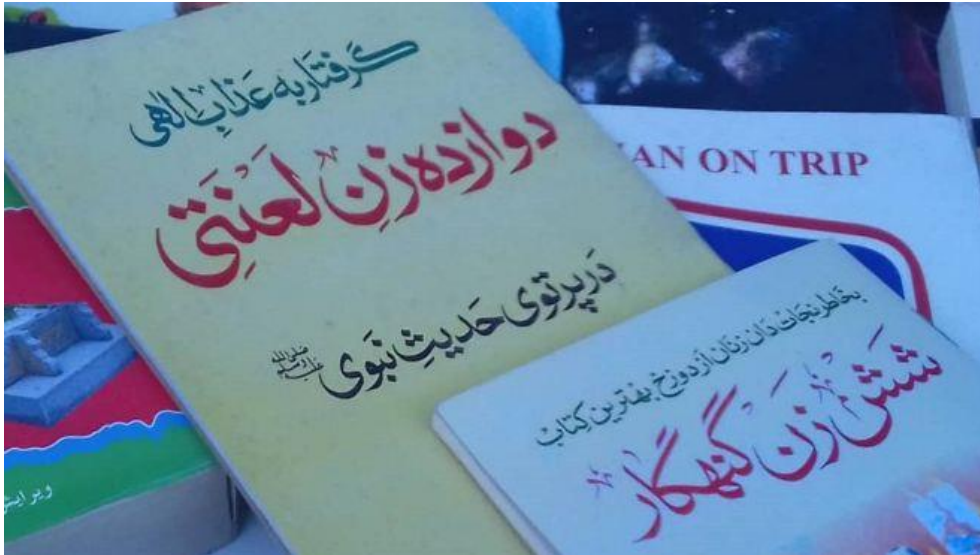


Figure 12: BBC Farsi News: When they talk about twelve dammed women, who do they talk about?

13.3 Marriage Registration

The Marriage Laws and civil codes from the 1920s to the present day require that each marriage is formally registered. In Afghanistan, to the present date there is no nationwide notary organisation or public body assigned for the registration of marriages. The registration of marriages continues to be voluntary and as a result child and forced marriages are more likely to be unregistered.⁹⁷¹ The lack of registration of marriages imposes difficulties on women with regard to their right to seek divorce in addition to their right to dowry (*mahr*), maintenance and child custody.⁹⁷²

Based on government practices, the citizens of Afghanistan are able to apply for the registration of a marriage in courts of law, mainly in primary courts under the Supreme Court of Afghanistan. This is different to a marriage registration office. It is voluntary and not enforced through legislation. Those

⁹⁷¹ Afghanistan State party report, U.N. Doc. CEDAW/C/AFG/1-2 (2011), para. 355; in MUSAWAH, “Thematic Report on Article 16,” 4.

⁹⁷² MUSAWAH, “Thematic Report on Article 16,” 4.

citizens of Afghanistan who migrate to other countries or work for the government may apply for court-approved marriage registration in a document known as a *Wasīqa*, whilst millions do not have a marriage certificate. This is the second area in which the government of Afghanistan does not fully recognise women and their rights. If a woman marries on condition that her husband must not marry a second wife, should the husband break his promise and marry another wife, then the first wife cannot defend her case in the courts of law in the absence of a formal marriage certificate.

Siwan Anderson postulates that bride-price and dowry have been linked to domestic violence against women, and inflation in these payments has prompted legislation against them in several jurisdictions.⁹⁷³ Marriage payments are often a substitute for investment in female human capital, so from a welfare and policy perspective, they should be prohibited.⁹⁷⁴ Bride-price and marriage payments, have been extensively researched by Alef Shah Zadran and Mohammad Hashim Kamali in the context of tribal practices and in formal law. Bride-prices and the existence of institutional discrimination against women, in *Taskira* issuance and marriage registrations, leads to a number of institutional injustices. These injustices against the women of Afghanistan intersect in several areas; it is rooted in societal negative perceptions and anti-women hatred, the government's inaction and a weak legal system that often sides with men.

13.4 Religious Obstacles Affecting Women's Rights

⁹⁷³ Anderson, "Human capital effects of marriage payments," 1.

⁹⁷⁴ Anderson, 1.

In Afghanistan, the relationships between men and women in family and society are drawn by conservative Islamic interpretations of *qawāma*. Qawāma, a Qur'anic concept in Afghanistan's traditional society is interpreted in a way that superimposes legislative and normative laws in regard to gender issues. In different Islamic societies, *qawāma* is interpreted very differently. In communities where custom and informal practices are dominant, *qawāma* is literally translated as the *superiority of men over women*. This interpretation forms the focus of *Shari'a* law in regard to gender relations.⁹⁷⁵ The text of *qawāma* in *Sura An-Nisā*, Verse 34 is as follows:

Men are '*qawāmūn*' (protector/maintainers) in relation to women. According to what God has favoured some over others and according to what they spend from their wealth. Righteous women are *qāniāt* (obedient) guarding and unseen according to what God has guarded. Those (women) whose *noshūz* (rebellion) you fear, admonish them, and abandon them in bed, and *adribūhunna* (strike them). If they obey you, do not pursue a strategy against them, indeed God is Exalted, Great.⁹⁷⁶

In Afghanistan, there are very few *ulemā* who would interpret *qawāma* in a liberal fashion. The state education system does not promote norms that support women's rights. Fayeq Amiri's research described in the chapter on legal transplants showed that women's and girls' status is tarnished in the primary school education system; girls are depicted in the curriculum books in misogynistic and passive ways. Afghanistan's education system has not succeeded in the promotion of human rights – particularly the rights of women and girls. In another research by Shahir Sirat from the Afghan

⁹⁷⁵ Mir-Hosseini, "Rethinking the Construction of Male Authority," last accessed 16 September 2020.

⁹⁷⁶ Mir-Hosseini, last accessed 16 September 2020.

Institute for Strategic Studies (AISS), titled *Education and Politics: The Roots of Religious Radicalism in Afghanistan's School Curricula*, using contents analysis, Sirat investigated one hundred and forty-four schoolbooks. This research identifies and analyses more than fifty cases and examples that reinforce the spread of religious radicalism through teachings and lessons within Afghanistan's school curricula, which directly trains students as extremists, radicals and fundamentalists.⁹⁷⁷

Sirat quotes Gitasagal and Nira Yuval Davis who believe that fundamentalism has three main characteristics: a plan to control women's bodies; a kind of political action that rejects pluralism and a movement that uses the integration of religion as a means to follow their own objectives.⁹⁷⁸ Sirat observes that the educational curricula in Afghanistan are designed and composed inexpertly, especially from a philosophical, political and society point of view, and the work of Afghanistan's education curricula has been widely influenced and weakened by religion and politics.⁹⁷⁹ Radical narratives excessively undermine the status of women in Afghanistan.

13.5 A Century of Family Law

Since Afghanistan's statehood in 1880, available official records on the socio-legal status of Afghan women stem from limited primary sources. During the reign of Abdur Rahman Khan (r. 1880-1901), the position of women in Afghanistan was inferior to that of men and varied according to age and

⁹⁷⁷ Sirat, "Education and Politics," 146.

⁹⁷⁸ Sirat, 39.

⁹⁷⁹ Sirat, 146.

societal norms, and according to differences between ethnic groups to which the women belonged.⁹⁸⁰ Women were expected to remain at home and get involved in domestic work and child-rearing.⁹⁸¹ The division of males and females into separate realms is more pronounced in Afghanistan than in other parts of the world.⁹⁸² Abdur Rahman Khan claimed that the religion of Islam entitled men to control their wives and to kill them if they were unfaithful.⁹⁸³

In subsequent monarchical governments, the condition of women did not improve much until, in the 1920s, King Amanullah Khan decreed that women must appear in public, wear Western attire, receive an education and participate in government. The first school in Afghanistan opened in 1901 under Abdur Rahman Khan.⁹⁸⁴ The first girls' school opened under Amanullah Khan's government in Kabul in 1919.⁹⁸⁵ In 1928, there were eight hundred girls in schools.⁹⁸⁶ However, the girls' school closed under Nadir Shah who ruled Afghanistan from 1929 to 1933.⁹⁸⁷ In the post-2001 period, millions of girls have received primary education and thousands have received higher education, some outside Afghanistan.

The first ever legislation that dealt with family law was the 1921 Family Law. There were subsequent family law promulgations, namely the 1949 Family Law, the 1960 Family Law and the 1971 Family Law. Looking at the contents

⁹⁸⁰ Kakar, *Government and Society in Afghanistan*, 171.

⁹⁸¹ Kakar, 171.

⁹⁸² Kakar, 172.

⁹⁸³ Kakar, 172.

⁹⁸⁴ Prior to the establishment of government schools, in Afghanistan there were many religious (seminary) schools known as the *madradas*. In 1901, Abdur Rahman Khan established the first school for scientific and secular education.

⁹⁸⁵ Rahimi, "Status of Women: Afghanistan," 8.

⁹⁸⁶ Ruttig, "Afghanistan's Early Reformists," 3.

⁹⁸⁷ Green, *Afghanistan's Islam*, 17.

of these laws, they all sought to improve gender rights, women's access to judicial adjudication in matters such as dowry claims, child custody, divorce and receiving maintenance fees. For legal reform and modernisation purposes, these legislations in certain parts had to depart from customary and local interpretations of *Shari'a*. There are not many court records for women's cases. A sample family court decision from the 1980s is shown in Appendix 11. The current government of Afghanistan is reluctant to share adequate numbers of court promulgations regarding women.

The Civil Law of 1977, the Penal Code (last amended in 2017, in force since 2018), the Shi'ite Personal Status Law 2009 and Constitution 2004 form the family laws of Afghanistan. In 2016, the Ministry of Women's Affairs (MoWA) – together with relevant ministries and organisations – undertook efforts to review and draft a family law in order to replace the Civil Code 1977.⁹⁸⁸ The Family and Civil Code 1977 are primarily based on a fairly orthodox interpretation of the *Hanafi* school.⁹⁸⁹ According to women's rights groups who provide inputs into the draft of the family law, there is little information pertaining to the timeline and process of finalising and enactment of the new/revised family law.⁹⁹⁰ The amendments and new provisions have been watered down and do not address all the most urgent areas of discrimination under the Muslim family laws in Afghanistan and the draft currently remains under review with the Ministry of Justice.⁹⁹¹

⁹⁸⁸ MUSAWAH, "Thematic Report on Article 16," 4.

⁹⁸⁹ Sharan and Wimpelmann, "Women's Rights and Political Representation," 5.

⁹⁹⁰ MUSAWAH, "Thematic Report on Article 16," 4.

⁹⁹¹ MUSAWAH, 4.

Over the past nineteen years, the *ulemā* and conservative lawmakers in the parliament have repeatedly claimed that the laws of Afghanistan promulgated and drafted by the past governments are not Islamic. In July 2013 in a rally, students at Kabul University denounced the law on Elimination of Violence Against Women, and called it *un-Islamic* and a *Western* import.⁹⁹² The parliament of Afghanistan, dominated by conservative lawmakers, did not approve the Elimination of Violence Against Women (EVAW) Law, and this legislation exists due only to a 2009 presidential decree.⁹⁹³ The diarchy system of *modernising* and *conservative* groups in Afghanistan governments is a centuries old problem that severely affects women's rights in legislations. The conservatives in the government block or keep modern legislations unenforced. Judges' discretions described in the previous chapter is a major impediment.

Despite the problems and disagreements over legislations that support the women of Afghanistan, the international community and the state of Afghanistan have achieved some successes in empowering those women who show a willingness to be empowered, and whose family members support their female relatives despite risking their lives.⁹⁹⁴ The following two graph charts offer data collated by the government of Afghanistan on the number of

⁹⁹² Human Rights Watch, "Ending Child Marriage and Domestic Violence," 3.

⁹⁹³ The BBC, "Debate on Women's Rights Law," last accessed 28 May 2017.

⁹⁹⁴ Achievements for women may be summarised in three categories: short-term project-based, medium-term educational and professional support and long-term assistance guaranteeing a select number of well-networked women in government positions. Short-term projects depended on funding and the presence of foreign donor organisations like NGOs, and medium-term and long-term activities are ongoing, which have led to the incorporation of some of the elements of EVAW's presidential decree in the updated Penal Code. Debates (though still ongoing) are on increasing the marriage age and legislating a small proportion of EVAW cases due to advocacy organisations and some that received media attention.

women and men who participate in decision making, and the number of boys and girls in schools and universities.



Figure 13: Women and men participation in decision-making survey 2016, NSIA.

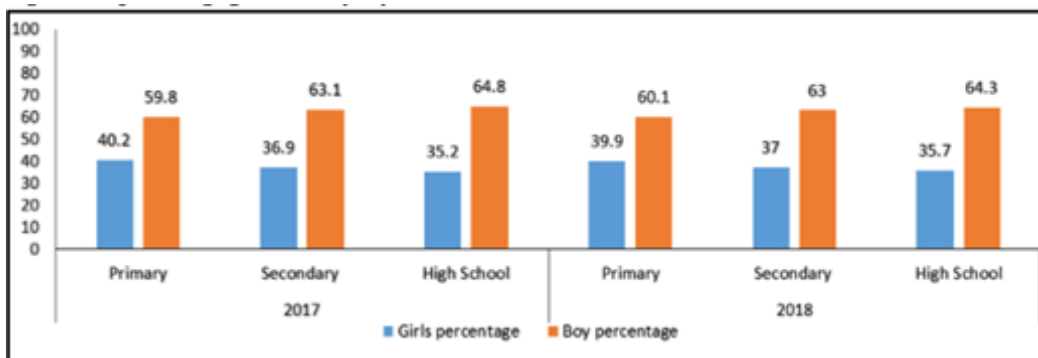


Figure 14: Statistical yearbook 2017 and 2018, NSIA.

13.6 The Ministry of Women's Affairs

In the post-2001 period, numerous government and independent institutions were formed for the support of women of Afghanistan. The first of these is the revival of the Ministry of Women's Affairs (MoWA). This Ministry is hailed as an important institution for supporting the women of Afghanistan.

The procedural regulations for MoWA are as follows:

The first procedural regulation of MoWA as a central institution was passed by decision No. 3 of 05.04.2004 of Ministers' Council, and

approved by Decree No. 26 of 24.05.2004 of President of Transitional Islamic State of Afghanistan in 4 chapters and 24 articles. Article three of this regulation states that: MoWA has the responsibility over implementation of political and social policy of the government in order to secure and expand legal rights of women and ensure the rule of law in their lives within its activity area.⁹⁹⁵

According to MoWA, the foundations of what has now resulted in forming the Ministry of Women's Affairs were first set in 1943.⁹⁹⁶ Ershad-e-Naswān (Women's Preaching) and *Mirman* (Woman) are two magazines published by MoWA. There are a number of local and international non-governmental organisations (INGOs) which provide help and support for the betterment of the lives and the welfare of Afghan women. Over the past nineteen years, the British Council's projects, *Tawāndmani* (empowerment) multi-partite

⁹⁹⁵ The official web portal of the Ministry of Women's Affairs of the Islamic Republic of Afghanistan, "MoWA History," last accessed 09 March 2019.

⁹⁹⁶ The official web portal of the Ministry of Women's Affairs of the Islamic Republic of Afghanistan, "MoWA History," (Last accessed 09 March 2019). In 1943, during Zahir Shah's reign, a twenty-member union of women established an institution called the Women's Grand Organisation in the centre of Kabul, in order to organise, train and educate women. In 1945, King Amanullah allocated a land plot in the Shahr-e-Naw area of Kabul (the present location of MoWA) for this organisation, on which a kindergarten, a school, a cinema and offices were built. In 1963, this organisation was incorporated into the Ministry of Labour and Social Affairs and was called the Women's Association, which continued its activities until 1978. In 1978 the name of the Women's Association was changed to the Women's Central Club. In 1986 this club was transformed to the Women's Central Association, which continued its activities under this name until 1991. After the event of 27 April 1978, the Women's General Council was formed as a social-political organization. The Women's Central Association, which had 360 members, became a second division of this council. The Women's General Council had social and political activities among women. This council established its branches both in the capital and in the provinces. In 1991, when the Mujahedin came to power in Kabul, the Women's Grand Organisation was restored and first led by Mahbooba Hoquqmal and then by Qudria Yazdanparast. In 1994, parallel to the Women's General Organisation, the Ministry of Labour and Social Affairs restored the Women's Association in its organisational structure, which continued its activities until October 1996. In October 1996, the Taliban entered Kabul and women and girls were forbidden to go to school or work. The Taliban incorporated the Women's Grand Organisation with the Women's Association and hired men instead of women. The Taliban regime collapsed in 2001. The Ministry of Women's Affairs was established according to the agreements of the Bonn Conference and became part of the executive of the Interim Administration.

projects and *Promote* were funded and supported by the United States, the United Kingdom and a number of European states.

13.7 International Instruments for the Support of Women

The United Nations has issued several resolutions pertaining to women's roles in the contexts of peace, gender equality, in society and in government settings. UNAMA's work on women, peace and security is enshrined in UN Security Council Resolution 2210 (2015) which reinforces the Mission's imperative to promote gender equality, including increasing women's role in public life and Afghan society.⁹⁹⁷

The promotion of the Women, Peace and Security agenda is guided by a series of commitments to women's rights including the Beijing Declaration and Platform for Action; the Millennium Declaration and the UN Security Council resolutions on Women, Peace and Security: 1325 (2000), 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010), 2016 (2013), 2122 (2013) and 2224 (2015).⁹⁹⁸ National Action Plan for Women of Afghanistan (NAPWA), was an initial step by the government of Afghanistan to implement its gender commitments in the Afghanistan Compact, I-ANDS and other national and international policy instruments on women.⁹⁹⁹ The Afghan government, Finland and UNWOMEN have worked to develop a national action plan on Women, Peace and Security.¹⁰⁰⁰

⁹⁹⁷ United Nations Security Council Resolution 2210 (2015).

⁹⁹⁸ United Nations Security Council Resolution 2210 (2015).

⁹⁹⁹ NAWPA, "President's Message," 5.

¹⁰⁰⁰ Sharan and Wimpelmann, "Women's Rights and Political Representation" 5.

The National Action Plan on UN Security Council resolution 1325 (NAP 1325) covers the period 2015-2022.¹⁰⁰¹ Its strategic priorities are grouped under the four main pillars of Participation, Protection, Prevention, and Relief and Recovery – divided into thirty-nine indicators and twenty-five strategic objectives.¹⁰⁰² According to the Annual Report 2018 on the Protection of Civilians in Armed Conflict by the United Nations Assistance Mission in Afghanistan (UNAMA), the security situation in 2018 has worsened and there are difficulties such as the lack of cooperation between ministries and the absence of budgeting and funding for the implementation of NAP 1325, compounded with the aggravated insecurity situation, which have hampered implementation and programming in provinces as well as Kabul.¹⁰⁰³

Women's rights formed a major part of the Geneva Conference 2020 held in Geneva on 23-24 November 2020. UNAMA wrote that violence against women and girls has negative consequences not only for survivors but also for their families, communities, and society.¹⁰⁰⁴ Deborah Lyons stated that violence against women is an impediment to the eradication of poverty, sustainable development and efforts towards peace.¹⁰⁰⁵

13.8 The CEDAW Convention

The Convention on Elimination of all Forms of Discrimination against Women (CEDAW) is an international convention that requires national states

¹⁰⁰¹ Women's International League for Peace and Freedom Afghanistan, "Universal Period Review of Afghanistan," 1.

¹⁰⁰² Women's International League for Peace and Freedom Afghanistan, 1.

¹⁰⁰³ Women's International League for Peace and Freedom Afghanistan, 2.

¹⁰⁰⁴ UNAMA, "Women and Girls Amidst Global Pandemic," 25 November 2020. Last accessed 27 November 2020.

¹⁰⁰⁵ UNAMA, 25 November 2020. Last accessed 27 November 2020.

to create institutional and legislative changes in order to meet the norms and provisions enshrined in this convention. The government of Afghanistan signed the CEDAW Convention in March 2003.¹⁰⁰⁶ The ratification of the CEDAW convention in 2003 made it part of Afghanistan's legal framework, which is an important obligation under international law.¹⁰⁰⁷ There are obstacles in the realisation of this convention. The Constitution 2004 at Article 3 stipulates that "in Afghanistan no law can be contrary to the beliefs and provisions of the sacred religion of Islam".¹⁰⁰⁸ This article affects the implementation of the CEDAW in many ways. Amin Tarzi argues that Article 3 of Constitution 2004 allows official and non-official *ulemā* to ascertain what is contrary to Islam and what is not:

In the approved version of the [Afghan] constitution, Article 3 was amended to read, 'In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam.'... This very significant clause basically gives the official and nonofficial religious leaders in Afghanistan sway over every action that they might deem contrary to their beliefs, which by extension and within the Afghan cultural context, could be regarded as 'beliefs' of Islam.¹⁰⁰⁹

In 2012, Afghanistan's Ulemā Council issued a *fatwā* (edict) proclaiming that "men are fundamental and women are secondary". The edict further said that women were to avoid mixing with men in public during social activities that included obtaining an education, going to marketplaces and working in offices, as well as in other areas of life where men and women mixed.¹⁰¹⁰ The women of Afghanistan face restrictions on their free movement, employment and education. These restrictions clearly violate the provisions of CEDAW

¹⁰⁰⁶ United Nations, "Third Periodic Report submitted by Afghanistan," 5.

¹⁰⁰⁷ Islamic Republic of Afghanistan, "(NAPWA) 2007-2017," 21.

¹⁰⁰⁸ CONSTITUTION 2004, art. III.

¹⁰⁰⁹ Travis, "Freedom or Theocracy?" 1.

¹⁰¹⁰ Canadian Women for Women in Afghanistan, "Family Law in Afghanistan," last accessed 02 April 2016.

and other international obligations supportive of women that Afghanistan's government has agreed to fulfil.

The Home Office of the United Kingdom describes the problems of CEDAW implementation in Afghanistan as follows:

In its 2013 Afghanistan report, the CEDAW committee expressed its concern at the existence of multiple legal systems with regard to marriage and family relations in the State party and their discriminatory impact on women. It is concerned that, despite amendments of the Shi'a Personal Status Law, discriminatory provisions remain, such as the requirement of the husband's authorisation for his wife to leave the house. It is also concerned about discriminatory provisions under civil law and customary practices, such as the husband's legal rights to authority over his wife and children. It is also concerned over the unequal and limited rights for women to divorce and obtain guardianship of children under the Civil Law. It is concerned that women are deprived of their inheritance rights owing to their subordinate role in society and domination by their male relatives. It is concerned at the low registration of marriages and divorces, which prevents women from claiming their legal rights. The committee is concerned at the persistence of child and forced marriages and that the minimum age of marriage for girls is set at 16. It is also concerned that polygamy is permitted under certain circumstances.¹⁰¹¹

The Report of the Special Rapporteur on violence against women prepared in 2015 identifies shortcomings by the government in eliminating violence against the women of Afghanistan. Rashida Manjoo, the UN Special Rapporteur, has concluded in her report as follows:

The Government has undertaken a number of legal and institutional initiatives to meet its human rights obligations and to address the situation of women and girls in the country, despite the continued political, economic, social and developmental challenges. Political commitments to protect and promote human rights continue to be highlighted through the Bonn process, the Kabul Conference, the Tokyo Conference and, most recently, the 2014 London Conference. However, these commitments have not translated into concrete

¹⁰¹¹ Home Office UK, "Afghanistan: Women fearing gender-based violence," 14.

improvements in the lives of the majority of women, who remain marginalized, discriminated against and at high risk of being subjected to violence. In light of the above, the Special Rapporteur would like to reiterate and expand on key recommendations made by her predecessors in 1999 and 2005, many of which remain relevant today.¹⁰¹²

The implementation of CEDAW in Afghanistan clashes with tribal and religious rules. A number of women living in the rural areas of the country suffer greatly when girls are given in *baad* marriages. *Baad* marriages, are exchange marriages, where a girl is married as compensation for a crime committed by a male member of their family. In *baad* marriage, there is no bride-price (*toyāna*) based on Afghan custom or a dowry based on Islam. The practice of *baad* marriage violates provisions of Constitution 2004 which outlaw discrimination and declare that men and women are equal in rights and duties.¹⁰¹³ In *baad* marriages, all Islamic laws which otherwise grant rights to the bride are also suspended. *Baad* marriages violate Afghanistan's statutory laws and the international legal instruments that Afghanistan has ratified.

In this section, using process tracing, changes in women's conditions between the government's first report on CEDAW submitted in 2011¹⁰¹⁴ and subsequent periodic reports, the last one having been submitted in 2018, will be discussed. The contents of the United Nations report, CEDAW/C/AFG/3 dated the 24 of January 2019, the findings by the Human Rights Watch and the Social Institutions & Gender Index (SIGI) 2019 report on Afghanistan

¹⁰¹² UNGA, "Report of the Special Rapporteur on violence," 18.

¹⁰¹³ CONSTITUTION 2004, art. XXII.

¹⁰¹⁴ Torunn, *Pitfalls of Protection*, 60.

will be used. The United Nations CEDAW/C/AFG/3 report highlights the following points:

This report identifies that the state of Afghanistan has created commissions for the inclusion of women in the High Peace Council, it has established the EVAW High Commission and Provincial Commissions in 34 provinces, and significant improvements are made in the new Penal Code as it attempts to account for modern day human rights standards and international obligation including the Rome Statute of the International Criminal Court, Convention against Torture and Convention against Transnational Crimes. The new Penal Code has been modernised by reducing punishments of the death penalty for fewer criminal cases, refining the definition of rape based on more consent requirements, reducing penalty for consensual adult *zinā* (relationship outside marriage) and removing justifications on homicide as honour killing, and addressing sexual harassment, rape and abortion.¹⁰¹⁵

In the context of the CEDAW Committee's recommendation No. 49, expecting the state party to submit written information to the Committee within two years on the action taken to implement Recommendation No. 11 on "Support and Protection of Women's Legal Achievements" and Recommendation No. 23 on "Violence Against Women and Punitive Actions" a written report was submitted by the Government of the Islamic Republic of Afghanistan. The CEDAW Committee states that the government of Afghanistan has tried to fulfil its national and international obligations towards human rights commitments – particularly on women's rights.¹⁰¹⁶ The CEDAW Committee's assessment of actions by the state party is not consistent with the problems identified by objective sources. More actions need to be taken for meaningful support of women's rights in Afghanistan.

¹⁰¹⁵ United Nations, "Third Periodic report," 7, 9, 11.

¹⁰¹⁶ United Nations, 5.

The Human Rights Watch's (HRW), submission to the Committee on the Elimination of Discrimination against Women for the third period report – 75th Session, issued in December 2019 – raised a number of problems as follows:

Articles 7 and 8: expecting that the State of Afghanistan should be a strong defender of women's rights to be full participants in the peace process and ensure that any peace deal fully protects women's rights under international human rights law and the Afghan constitution; *Article 10:* seeking girl's access to education, whereas, in areas under Taliban, girls study for a few primary school classes and in areas where the government and insurgents are fighting for control, girls seeking education face heightened security threats including sexual harassment, kidnapping, and acid attacks, as well as attacks and threats against girl's education. *Article 12:* raising questions in regard to virginity examinations, the invasive, scientifically invalid and conducted without meaningful – sometimes any – consent. *Article 15:* highlighting Afghanistan's failure to enforce the law on the Elimination of Violence Against Women. *Article 16:* raising concerns for child marriage, criticising the government's poor track record of implementing laws and policies designed to protect the rights of women and girls. *Articles 15 and 16:* accusations of moral crimes that lead to the imprisonment of girls and women who run away from forced marriages or domestic violence, and endure up to 15 years jail term when accused of zinā crime, and at times the victim and her rapist both serve sentences under charges of zinā.¹⁰¹⁷

The Social Institutions & Gender Index 2019 Afghanistan report assigns values for areas such as discrimination in the family; restricted physical integrity; restricted access to productive and financial resources and restricted civil liberties. The higher values indicate higher inequality and percentages range from 0 to 100, whilst legal variables are categorised as 0%, 25%, 50%, 75% or 100%. The overall SIGI score for Afghanistan in 2019 is 53%. Low percentages show better performances.

¹⁰¹⁷ Human Rights Watch, "Submission to the Committee on the Elimination," 1-11.

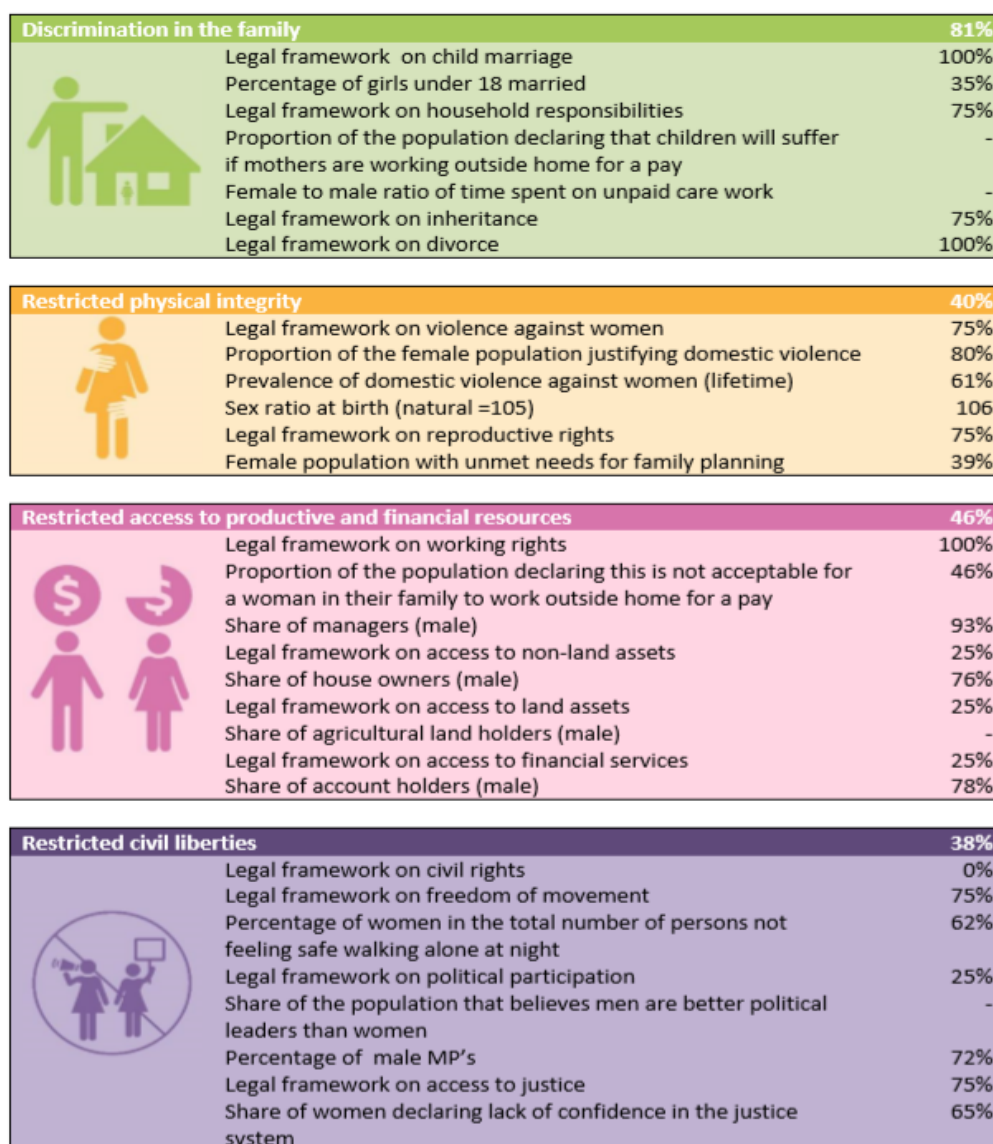


Figure 15: Social Institutions & Gender Index, SIGI. Afghanistan 2019.

In practice, over the past few years, women's rights have undergone a downward trend and have severely deteriorated, despite the updating of the penal code and the drafting of new legislations. Mehdi Hakimi, an Afghan scholar, observes that ten years since EVAW law was issued, violence against women and girls is rampant, is perpetuated by both private and state actors and breaches of the due diligence obligations of the state to prevent, investigate and punish violence against women constitute human rights

violation.¹⁰¹⁸ Despite the CEDAW Committee’s positive feedback on Recommendations 11 and 49, empirical evidence by the Human Rights Watch, Social Institutions & Gender Index and independent scholars indicate that the government’s performance to support and protect the women of Afghanistan has been inadequate, inconsistent, ineffective and too little to merit praise.

13.9 Challenges for the Implementation of the CEDAW

Women rights and the violation of women’s rights is a serious universal problem. Afghanistan is not the only country with abysmal performance in supporting women. In 2014, Heather Monasky wrote that after forty years of activism and law reform to eliminate Violence Against Women and Girls (VAWG), its lingering global prevalence indicates that the world community is short-changing women and girls.¹⁰¹⁹ Referring to Human Rights Watch’s 2014 article “Afghanistan: Rights Setbacks Fan Future Fears”, Monasky summarizes that in recent years, VAWG has worsened in many places across the globe, aggravated by conflict, economic inequality, nationalism and insecurity.¹⁰²⁰ Despite problems and setbacks, Monasky believes that the invention of laws and other standards to fight against VAWG has advanced women’s rights.¹⁰²¹ Effective implementation of EAW laws and the CEDAW convention and other laws supportive of women in Afghanistan requires much more time – possibly a few more decades to come to fruition.

13.10 Women’s Legal Cases

¹⁰¹⁸ Hakimi, “Elusive Justice,” 71.

¹⁰¹⁹ Monasky, “What’s Law Got to Do with It?” 328.

¹⁰²⁰ Monasky, 328.

¹⁰²¹ Monasky, 330.

The government of Afghanistan publishes adjudicated cases with anonymity and offers brief data, in a number of publications. A small number of criminal cases are recorded on the third page of *Mizān* publication issued by the Supreme Court of Afghanistan. Please refer to appendix 13. These cases are marked, “From some of the received court decisions.” These court data relate to both Afghan men and women. Court decision samples with more details are produced by the Supreme Court every few years. The first set was published in 2010, the second in 2019. The English translations of two promulgated cases are shown in Appendices 12 and 13. An undated *Qazā* (judgment) publication issued by the Supreme Court – has listed anonymous data for two hundred and forty-five rape cases involving women and children, three hundred and forty defendants, six hundred and sixty-one cases of violence against women, and eight hundred and fourteen defendants, all reported for 2014.¹⁰²²

There is another series of anonymised court data listing women’s cases in the quarterly reports published by the Supreme Court. These reports are available from 2011 to the present date. The table on the next page shows the English translation of quarterly court data for 2017, 2018 and 2019 translated and collected by the author. A couple of researchers in Afghanistan were asked to request court data on women’s cases for this thesis, but were not given any information by the Ministry of Justice, Supreme Court or the Attorney General’s Office. The next source of data on cases regarding women, again

¹⁰²² Supreme Court of Afghanistan, “Qaza,” 115-147.

brief and anonymous, are the media reports. These are general information about violence against women or about women's cases.

Table 20: Selected cases, Supreme Court Quarterly reports 2017-2019.

NO	Type of offence	1396 (2017)				1397 (2018)				1398 (2019)			
		Received Cases	Rejected cases	Written cases	Decided cases	Received Cases	Rejected cases	Written cases	Decided cases	Received Cases	Rejected cases	Written cases	Decided cases
1	Abortion	15	2	5	8	11	0	10	1	64		12	2
2	Adultery	67	0	28	39	24	3	21	0	19	2	13	20
3	Attempted adultery	370	10	301	59	61	2	55	4	131	3	101	24
4	Alimony	154	8	78	68	632	55	339	335	638	33	423	196
5	Attempted rape	9	0	8	1	51	2	41	13	43	1	38	3
6	Bribery	158	10	127	21	352	17	304	38	464	16	375	71
7	Canceling engagement	130	9	82	41	278	36	214	109	424	19	279	126
8	Custody of children	98	8	42	38	433	23	289	119	613	27	387	200
9	Divorce	947	64	485	398	835	77	441	161	549	23	348	181
10	Drinking wine	274	20	208	46	445	22	371	50	474	20	418	57
11	Escape from home	70	3	60	7	73	1	35	37	48	2	26	20
12	Forced marriage	6	0	2	4	15	0	12	3	22	2	18	2
13	Forcing into prostitution	4	0	3	1	15	1	15	2	123	12	79	32
14	Gambling	58	3	23	31	54	1	32	21	66	3	39	24
15	Illegal marriage	37	1	0	36	19	0	1	18	10	0	0	10
16	Mahr and alimony	75	10	29	36	311	23	175	113	0	0	0	0
18	Inheritance	2836	212	1465	954	5578	312	3115	2136	1687	309	2824	2155
19	Mahr (dowry)	148	11	81	56	373	31	219	109	946	64	592	430
21	Moral crimes	1563	85	1191	292	1869	67	1634	224	1325	47	1105	173
22	Prohibition of marriage right	0	0	0	0	6	0	6	0	6	0	6	0
23	Rape	444	24	270	150	1075	45	867	162	1758	74	1567	287
24	Selling and buying women	1	0	1	0	21	0	18	3	47	3	40	4
25	Sodomy	87	1	43	43	28	3	22	3	23	0	18	5
26	Throwing acid	2	1	1	0	22	0	19	3	2	0	2	0
27	Tafriq (judicial divorce)	3034	180	1637	1217	8865	583	5039	3178	10343	495	5157	4110
28	Underage marriage	0	0	0	0	156	12	124	20	19	0	19	0

The Supreme Court's quarterly reports do not clarify whether the above court data relates to cases adjudicated in the courts of law. With multiple and overlapping judiciary-related organisations doing similar activities in Afghanistan, it is possible that some of the above cases have not been resolved by the courts; they may have been resolved by the Prosecution Service, Family Resolution Unit (police), *Huqūq* (Ministry of Justice), by village elders (*jirga-shūrā*) or by the victims' family members. Despite these decisions being recorded as court activities, the judges may have confirmed decisions made outside the court. This means, some of many of these decisions do not follow judicial standards.

The Ministry of Women's Affairs registered 3,744 cases of violence against women in 2017 and 3,806 in 2018; of those reported in 2018, 24.4 percent were beatings, 7.4 percent leaving home due to violence, 14.6 percent separation and 9.0 percent were for not receiving alimony.¹⁰²³ The Afghanistan Independent Human Rights Commission reported 4,329 cases of violence against women in 2018 and 4,693 cases in 2019.¹⁰²⁴ From the total of 4,693 cases in 2019, 1,435 were physical violence; 194 were sexual violence; 1,783 were mental and verbal violence; 844 were cases of economic violence and 437 were cases of other forms of violence.¹⁰²⁵ AIHRC reported 1,241 cases of violence against women which forms 35.7 percent of cases from January to October 2020; the reported violence included physical violence, beating, dismembering, injury and forced labour.¹⁰²⁶

On the 06 March 2019, the Voice of America Dari/Farsi Service reported that 7,200 acts of violence against women had been adjudicated.¹⁰²⁷ Amanullah Iman, spokesperson of the Supreme Court of Afghanistan, stated that these cases related to 720 cases of beating, 320 of murder, 145 of sexual harassment, 113 of suicide, 87 of battery of women and 41 cases of injuring women.¹⁰²⁸ This break-down shows 1,426 of the claimed adjudicated cases. It is unclear what the rest of the cases were. On the 06 of March 2019, BBC

¹⁰²³ NSIA, "Yearbook – Women And Men In Afghanistan," 14.

¹⁰²⁴ AIHRC, "Annual Report of Violence Against Women," 5.

¹⁰²⁵ AIHRC, 5.

¹⁰²⁶ AIHRC, "Ten Months Report for Violence Against Women," 25 November 2020, 1.

¹⁰²⁷ Rustāee, "7,200 cases of violence against women," last accessed 06 March 2019.

¹⁰²⁸ Rustāee, last accessed 06 March 2019.

Farsi news reported that the government of Afghanistan had only managed to decide nineteen percent of cases of violence against women.¹⁰²⁹

UNAMA reports that women's access to justice remains limited and that women continue to face inequality before the law.¹⁰³⁰ The frequent failure of state officials to exercise due diligence in investigating, prosecuting and punishing perpetrators, and providing reparations to survivors has contributed to the existing high rate of impunity and strengthened the normalisation of violence against women in Afghan society.¹⁰³¹ UNAMA found that the police often failed to forward *honour killing* cases to prosecutors.¹⁰³² A failure that undermines efforts to promote the rights of women, erodes the rule of law; contributes to an expectation of impunity; discourages the reporting of these cases and increases citizens' perceptions of a corrupt and unreliable justice system in Afghanistan.¹⁰³³

Action Aid, a British charity, reports that a strong preference among police and prosecutors for resolving cases of violence against women outside the judicial process and through mediation and/ or referring cases to local *jirgas* for arbitration is a key factor in the weak enforcement of ERAW Law – *jirgas* commonly interpret *Shari'a* and tribal customs in ways that are unfavourable or harmful to women and girls.¹⁰³⁴

¹⁰²⁹ BBC Farsi, "Supreme Court of Afghanistan: Rape," last accessed 06 March 2019.

¹⁰³⁰ UNAMA, "Injustice and Impunity," 6.

¹⁰³¹ UNAMA, 6.

¹⁰³² UNAMA, 6.

¹⁰³³ UNAMA, 6.

¹⁰³⁴ Action Aid, "Hanging in the balance," 6.

The government of Afghanistan is formed by conservative and traditional men, and as experience in over a decade has shown, the parliament does not pass laws that are supportive of women. In the early years of the Karzai government (2001-2006) the Supreme Court was the bastion of conservatism.¹⁰³⁵ This institution is manned by conservatives to the present day. In sum, women's rights are entangled in a web of parochial attitudes and radical anti-women perceptions, and vile literatures are in circulation in Afghanistan. Women's affairs are strongly based on a group of ruling elites' discretion who on paper agree to the idea of protecting women's rights, but in practice exercise strong tribal customs, which subject women to inhumane treatment, servitude and at times trade them as chattel.

There are contradictory reports about the number of girls in education in Afghanistan. In April 2017, a Ministry of Education official told Human Rights Watch that there were 9.3 million children in school, 39 percent of whom were girls; Human Rights Watch regards these figures inflated by the government's practice of counting a child as attending school until she or he has not attended for up to three years.¹⁰³⁶ These reports indicate that the state of Afghanistan does not report women's access to education accurately.

13.11 Conclusion

This chapter has clarified that Afghanistan faces many challenges for legislating and enforcing laws that are supportive of women's and girls' rights. The chapter has shown that actions by Afghanistan's governments in

¹⁰³⁵ Wimpelmann, *The Pitfalls of Protection*, 45.

¹⁰³⁶ HRW, "I Won't Be A Doctor," 7.

legislating women's cases have been very limited and reliable court data is scarce. The chapter has further shown how injustices affecting women intersect between societal perceptions and block the implementation of the national laws and international instruments aimed at supporting women and girls. This once again reinforces the disparity between technical and practical endorsement of progressive legal transplanting impacting the women of Afghanistan.

The chapter concludes that efforts of the Afghan government due to international pressure and donor assistance conditionality has created some positive legislations for women's rights, but in lower courts where judges have full discretion to interpret the law in whichever ways Shari'a trainings deems fit, formal laws often remain unenforced because they are often perceived as incompatible with the large section of Afghan society, along the inability of their execution by the state legislators. The chapter further concludes that donor assistance conditionality has been insufficient in upholding mechanisms of implementation and thus it serves to undermine its very utility. Theoretically, donor assistance conditionality can induce a positive legal culture, however, the terms and processes by which donor assistance operates on, fails to be conditional upon practical implementations of such legislation, the government can effectively continue to pay legal lip service where the laws are articulated in namesake only. Further perpetuating the legal culture of public disregard.

This chapter has also shown that slow progress in women's rights is linked to the societal negative perceptions of women, misogyny and the forms of

radicalisation promoted in the government educational system atop the insecurity, lawlessness and weak governance that disadvantage women in personal and public life.

Finally, the chapter has shown that in nearly a century and half, issues such as bride-price, *baad* marriages, polygamy, divorce rights and women's access to education and justice for most of the women of Afghanistan are at point zero, and that positive achievements of past governments in women's rights have abysmally reversed, owing to lack of meaningful political will to protect women and their rights. The next chapter is the conclusions of the thesis.

CHAPTER 14: CONCLUSIONS

In this thesis, the central theme, *legal culture* of Afghanistan was discussed in light of legal pluralism and legal transplants with a focus on the beliefs and values of Afghanistan's citizens, some of which overlap between the different old and new religions of Afghanistan. The contributions of all the faiths and belief systems of Afghanistan combined with the information qualitative data collected in from forty questionnaire respondents, sixteen interviews and technical questionnaires, offers a holistic picture of law, legal development and the institutionalisation of justice in Afghanistan from 1747 to 2021. Through all the chapters of this thesis, both qualitative and quantitative data have been corroborated by existing scholarship as documented.

In chapters 1-3, I set out the research parameters and research questions, established the hypothesis and detailed the methodology and a number of research methods. These chapters also provided information about the questionnaire respondents, interviews and the ethical research issues as well as the limitations to the research and research dilemma.

Chapter 4 provided a brief account of Islamic legal institution, a brief history of *Shari'a* and elaborated on a number of Islamic legal concepts. This chapter formed the bedrock of understanding Islamic law with a descriptive rather than an analytical nature. The chapter concluded that to date *Shari'a* remains broad, uncodified, informal and is prone to a number of varied interpretations by the people who claim to be rightly guided: the *ulemā*.

Chapter 5 offered an account of how the different religions of Afghanistan shape her legal conditions. The chapter used theories of oral culture and

offered insights into Afghanistan's different religions, cults and spiritual orders. The chapter further focused on the influences of old religions and their impact on Afghanistan's less literate society. The chapter showed different ways the citizens of Afghanistan understand and relate to the religious and cultural knowledge of justice.

Chapter 6 discussed the procedural and substantive justice based on the *Pashtūnwāli* tribal code with a number of examples from the 1970s and 2020. In this chapter, whilst being aware of the different connotations of the term *tribe*, I argued that in the context of studying Afghanistan, tribe is relevant and essential. The overarching conclusion of this chapter was that tribalism has formed a diarchy system of codified and customary practices which is a huge hurdle against modernisation and the empowerment of universal (modern) laws.

Chapter 7 commenced with the theoretical descriptions of legal pluralism, focusing on Afghanistan's customary justice practices (informal justice) by members of the different ethnic groups of the country. The chapter filled in a huge research gap on the customary law practices of the Turkic population of Afghanistan. The author had the benefit of receiving qualitative data from two Afghan academics and intellectuals. The chapter concluded that legal pluralism in Afghanistan has a number of drawbacks and that the state law is a pluralist system that often creates confusions for the litigants. The chapter showed that customary law becomes more problematic, when the institutions of informal justice vary from one ethnic group to another and are divided into further variations within each ethnic group of the country.

Chapter 8 focused on legal transplants in Afghanistan. It provided a detailed history of legal transplants from the 1880s to 2020. In this chapter, the author argued that for the most parts, legal transplants in Afghanistan have followed a form of mimetic isomorphism, and borrowings were often used for political scoring in situations where the state and society did not grasp the essence of the transplanted laws well enough, and a number of ill-fortunes such as the polygamous wars among the royals, tribal turf wars, political under-development, foreign invasions and civil wars led to the reversal of the positive gains of the transplanted laws between each government and from the 1880s to the 2020.

The chapter investigated legal transplants in two stages: transplanted laws that were instigated by the politicians of Afghanistan and those that were imported by foreigners, through aid money. The chapter assessed these as different borrowings with different effects. The author further argued that legal transplants for a variety of reasons did not resonate at local and communal level and were received with indifference to the point they were in large part disregarded. The chapter used the case-study method and proved the thesis' working hypothesis, concluding that the reversals and the intervening factors has been unable to create a *culture of legality* in Afghanistan. However, in light of the research conducted, it should be noted that rather than an outright inability to form a culture of legality *per se*, Afghanistan has had periods of gains and reversals as demonstrated in the empirical chapters throughout its respective reigns. As the thesis has served to demonstrate that there are a multitude of practically recognised informal legal cultures, these competing

visions of legality are in of themselves a microcosm of the ongoing power struggles within Afghanistan.

Chapter 9 extensively assessed the constitutions of Afghanistan from 1923 to 2004 and constitutionalism until 2020. My research argued against a number of other scholars' views who have regarded Afghanistan's constitutions as failed documents. I put my points across by focusing on the lasting effects of constitutions, whereas in essence, nearly all the constitutions of Afghanistan followed the provisions of Amanullah Khan's constitution of 1923. I concluded that each government of Afghanistan incorporated important provisions, upheld major provisions of previous constitutions, and despite Afghanistan's turbulent history of statehood and nationhood, Afghanistan has fared better in its constitutional commitments than shaping a *culture of legality* through legal transplantations that would not reverse from one government to the next. Each constitution of Afghanistan was assessed for its merits and demerits. I have based my arguments on the incrementalist nature of Afghanistan's constitutions, and for future direction, in order to accommodate inclusivity; I have suggested the adoption of *transformative constitutionalism*.

Chapter 10 used PEA and PAP in order to investigate fifteen sociological classifications of corruption in Afghanistan. This chapter identified how international aid distribution has led to the formation of a culture of corruption and impunity, and how the political system of Afghanistan does little to tackle corruption. The chapter drew a full picture of corruption in Afghanistan and

showed the ways corruption affects the citizens of Afghanistan, depriving them of the services they are entitled to free of charge.

The chapter concluded that the government of Afghanistan deals with corruption selectively and re-routes corruption instead of uprooting it, which in itself is a form of predatory political corruption. My arguments were supported by a number of actual examples of corruption and a few major corruption cases were cited. The chapter further concluded that Afghanistan's government, civil servants and politicians light-heartedly perceive the concept of corruption and are privy to the rhizomic fabric of corruption themselves. Finally, the chapter identified the existence of corruption in all facets of life and in all the major institutions of the government, including the president's office and the institutions of justice.

Chapter 11 gave an elaborate history of stages of legal development in Afghanistan. In this chapter, I argued that when the executive branch of the government excessively overpowers the Parliament, the Supreme Court and the Ministry of Justice, or uses the Attorney General's Office as part of the executive, it disrupts their operations and stops them from enforcing the law non-arbitrarily. I called this type of intervention and disruption *legal interregnum* and the mechanism used was presidential decrees and executive orders. The second part of this chapter listed the institutions of justice, the laws they use and shed light on their weaknesses and strengths.

Chapter 12 further investigated the judiciary with a focus on judicial quality. It described legal education, requirements for the tenure of judgeship and the sizable growth of judgeship in the post-2001 period. The chapter found a

number of problems such as irregularities and problems with ensuring qualified individuals are recruited as judges. The chapter also discussed the importance of open and verifiable public court data. The chapter found that publicising a minimal level of anonymous court data and crime statistics are inadequate.

Chapter 13 used the process-tracing method to investigate the legislative changes over the past century in regards to women's rights. The chapter has shown that justice for the women of Afghanistan is nearly non-existent. The chapter showed that achievements for women rights is minimal and legal protections and safeguards for women is ignored by members of the judiciary.

The chapter has shown that injustices affecting women intersect between societal negative perceptions which often block the implementation of the national laws and international legal instruments aimed at supporting women and girls. The chapter further identified that slow progress in women's rights is linked to the societal negative perceptions of women, misogyny and different forms of radicalisation promoted in the government's education system atop insecurity, lawlessness and weak governance that disadvantage women in personal and public life.

The chapter concluded that in nearly a century and half, issues such as bride-price, *baad* marriages, polygamy, divorce rights and women's access to education and justice for most of the women of Afghanistan are at point zero, and that positive achievements of the past governments in regard to women's rights have abysmally reversed.

In summary, the cultural influences of all the religions of Afghanistan have led to her being a country of many diverse beliefs, norms and customs. The tribal code of *Pashtūnwāli* forms the main justice forum for the rural Pashtūns. The ill-managed legal pluralism in Afghanistan is due to the failure of the state judicial system and the entrenched corruption. Legal transplants have shown reversals of gains, but Afghanistan like any other country in the world, would need workable legal transplants in order to correct its injustices. The constitutions of Afghanistan have upheld some legal protections that has proven good enough, despite some of them being weak and less useful. Corruption is the biggest impediment to justice in Afghanistan and future governments must tackle corruption in order to create a *culture of legality* and support independent and effective government institutions.

The legal development stages show that Afghanistan has achieved successes over the years but needs to empower the institutions of justice. The judicial institutions require improvements and de-politicisation. There is a need for good legal education. The women of Afghanistan must be protected by state law and all vestiges of discrimination, misogyny and societal abuses must end through reformed modern education that regards men and women as equals.

This thesis in thirteen chapters has drawn a *picture* of Afghanistan's legal culture from 1747 to 2020. The problem areas identified in this thesis are like ink blots that create stains on this *picture* which are not indelible and must be cleared by the capable future generations of Afghanistan, and possibly by the help of legitimate future leaders of Afghanistan who come to power through free and fair elections.

ACRONYMS

ADR	Alternative Dispute Resolution
AIBA	Afghanistan Independent Bar Association
AFO	Afghanistan Forensic Organisation
AGE	Anti-government Element
AIHRC	Afghanistan Independent Human Rights Commission
ANA	Afghan National Army
ANP	Afghan National Police
AREU	Afghanistan Research and Evaluation Unit
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CBDR	Community-Based Dispute Resolution
CIA	Central Intelligence Agency
CPN	Criminal Patronage Networks
CRB	Criminal Record Bureau
CSO	Civil Society Organisation
DFID	Department for International Development
EU	European Union
EVAW	Elimination of Violence Against Women
FRU	Family Resolution Unit
GTZ	Deutsche Gesellschaft für Technische Zusammenarbeit
ICCPR	International Covenant on Civil and Political Rights
ICG	International Crisis Group
ICOIC	Independent Commission for Overseeing the Implementation of the Constitution
IDLO	International Development Law Organisation
ILF	International Law Foundation
INGO	International non-governmental organisation
IWA	Integrity Watch Afghanistan
JSSP	Afghanistan Justice Support Program
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental organisation
OECD	Organisation for Economic Cooperation and Development
TMAF	Tokyo Mutual Accountability Framework
TUTAP	Turkmenistan, Uzbekistan, Tajikistan, Afghanistan and Pakistan
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNODC	United Nations Office on Drugs and Crime
USAID	United States Agency of International Development
WLUML	Women Living Under Muslim Laws

GLOSSARY OF TERMS

Ad hoc	Latin: made or happening only for a particular purpose or need
Adālat Afghanistan	A magazine by the Ministry of Justice of Afghanistan
Agāhi hoqūqi Afghanistan	A magazine by the Ministry of Justice of Afghanistan
Ahrīman	Persian: the evil or destructive spirit in the dualistic doctrine of Zoroastrianism
Ahūrā Mazdā	Ahriman's benevolent opponent in the Zoroastrian religion; worshipped as the saving and superior spirit
Amel	A place of religious congregation for the <i>Kāfirs</i> of Nuristan
Āqsaqāl/Aksakal	White bearded; lineage elder or leader
Arāzi	An organ of Afghan government for registering land titles
Arbāb	Persian: chief of a clan or head of a village
Arbakai	Pashto: tribal militias for policing tribes in Afghanistan
Asha Vahishta	Zoroastrianism: excellent order or truth. The lawful order of the cosmos according to which all things happen
Ashkun	One of the thirty-three languages spoken in Afghanistan
Ashokā	An Indian emperor of the Maurya Dynasty who ruled the vast majority of the Indian subcontinent from 268 to 232 B.C.E.
Āshti milli	Persian: national reconciliation
Atrāf	Rural areas
Avestā	The primary collection of religious texts of Zoroastrianism
Azhdhar	Persian: dragon
Baad marriages	Marriage for compensation of a crime
Bacha Bazi	Sexual abuse of children
Bahā'i	Persian: an Islam-inspired but heterodox monotheistic religion that emphasises the spiritual unity of mankind
Bakhshesh	Gift
Bakhshi	Kirghiz ritual specialist, shaman
Be	Kirghiz camp leader or elder
Beit Din	Hebrew: the name of a rabbinical court in Judaism
Bibi Gul	Dari: Lit., grandma, a pen name to conceal women's real name
Bilik	Orders attributed to Genghis Khan
Bodhi tree	Buddhism: tree of awakening
Burqa	An outer garment that covers a woman's entire body
Chaipooli	Tea money

Chitrāl	The largest district in the Khyber-Pakhtunkhwa province of Pakistan
Dabir	Persian: manager
Daitya	A clan or race in Hinduism
Darbār-e-kār	Dari: working audience
Dardic	A sub-group of Indo-Aryan languages spoken in eastern Afghanistan
Darvish/Dervish	A member of the Sufi order
Dawak	A footman, a junior person
De facto	Latin: in fact, whether by right or not.
Derāvidian/Dravidian	A family of languages spoken in India and Sri Lanka
Dhimma/Dhimmi	A non-Muslim living in an Islamic state with legal protection
Doshmani shakhsi	In Afghanistan: personal enmity leading to blood feuds
Duaxān	Persian: prayer reader
Dūtār	A two-stringed lute
Ershād-e-Naswān	A publication by the Ministry of Women's Affairs of Afghanistan
Ex post facto	Latin: after the fact
Fālbin	Seer
Fallaq	Foot whipping or bastinado
Farār az manzel	Persian: fleeing violence or forced marriages
Farmāns	Royal proclamations
Geser	Mongol: epic of King Geser
Ghilzai	One of the four Pashtun Super Tribe
Gholam Bacha	Janissary
Gorzang-e-Millie	A political party in Afghanistan meaning National Movement
Great Gīsh	The most popular god in Nuristani people's mythology. He received the highest amount of attention among the <i>Siāhpūsh</i> Nuristani of Bashgul Valley
Gurdwārā	Place of worship for Sikhs
Hazāra	Name of an ethnic group in Afghanistan
Heder	In Afghanistan: a Jewish religious class
Hevra	A community and religious traditional set-up by the Jewish citizens of Afghanistan
Hindu	Name of an ethnic and religious minority group in Afghanistan
Hoqūq/Hūqūq	Persian: legal affairs, a department in the ministry of justice
Indra	A Vedic deity in Hinduism, a guardian deity in Buddhism, and the king of first heaven called Saudharmakapla in Jainism
Jalga/Jirga	See Jirga
Jārchī	An announcer
Jarib/Jerib	A traditional unit of land measuring equal to 2,000 square metres
Jarida-e-rasmi	Dari: official publication

Jin-o-peri	“Jinni and Fairies”, the name given to large body of myths and legends among the Persianate and other communities
Kāfir	In this thesis, it refers to a group of non-Muslims of Afghanistan. Kāfir also means unbeliever and is a term widely used in different contexts.
Kalāsha	Name for an ethnic group of <i>Kāfirs</i> of Afghanistan
Kamdesh	A district of the Nuristan province in eastern Afghanistan
Kangāsh	Assembly of the notables
Kashr	Pashto: a young person
Kati	One of the thirty-three languages spoken in Afghanistan
Kazākh	Name of an ethnic group in Afghanistan
Khān	A community notable, a rich person with authority
Khāne-aman	Persian: safe home for women
Khāneghāh/Khāneqāh	A place for the Sufi spiritual retreat, a building specifically designed for the Sufi gatherings
Kharāj	Land tax
Khāwand	Pashto: husband, owner
Khwājah	Persian: a title equal to sir or mister
Khwājah ain	A wealthy person, a treasurer
Kirghiz/ Qirghiz	Name of an ethnic group in Afghanistan
Kitābchai’a Hukumati	Government record book
Kolantar	In Afghanistan: an elected member of the patriarch in leading Jewish families who represents the interests of their community
Kosher	In Jewish dietary law: appropriate food, according to biblical and rabbinical sources (<i>kashrut</i>)
Kurultai	A political and military council of ancient Mongol and Turkic people
Layeha	Taliban’s military and political manifesto
Lingua franca	Bridge language, common language
Loya Jirga	Afghanistan: assembly of elders to decide in important state matters
Luus	Dragon in the cult of Zhun
Mahayana	A term relating to certain groups and populations in Buddhist philosophies and practices
Magnus opus	Latin: a great work
Malang	An unworldly person
Malik	Afghanistan: a village chief
Malum in se	Latin: quality of a wrongful and evil act
Mamlūk	Arabic: property. It refers to Muslim slave soldiers and Muslim rulers of slave origin
Manas	Kirghiz epic about 16-century hero named Manas
Mantar	Sage’s writing
Mārgir	Snake charmer
Ma’rifat	Sufism: personal experience
Masharāno Jirga	Pashto: Upper House of Parliament

Mashr	Pashto: an elder, a person of high status
Megalithvolk	German: megalithic people
Mehtar	The name given to a ruler in Chitrāl
Miānjigari	Persian: mediation
Mikva	Judaism: ritual public bath
Mir/Mirs	A title given to the Hazāra people of Afghanistan
Mirman	Pashto: woman. Name of a publication in Afghanistan
Mizān	Persian: the scale. Name of a legal publication in Afghanistan
Münd	A clan priest of the <i>Kāfir</i> people of Afghanistan
Munshi	Persian: secretary
Murthi/Murti	A Hindu cult, also a statute or idol of a deity or person in Indian culture
Musawah	The name of a global movement for equality and justice in the Muslim family
Nikāh khat	Afghanistan: a marriage certificate
Nikur	In Judaism, the procedure of removing the sciatic nerve as well as certain forbidden blood vessels and fats from the hindquarters of a slaughtered animal
Nizāmnāma	Laws for the state similar to ‘constitutional laws’
Nizāmnāma-e asāsi	Afghanistan’s first constitution
Nizamnama-i-Jazā-i Omumi	Code of Penal Law
Oroq/Orūq	Kirghiz rules of patrilineal descent
Osūlnāma	The procedural laws of Afghanistan
Öz Beg	The reigning <i>khan</i> of the Golden Horde; also the name of an ethnic group of Afghanistan (Uzbek)
Pāmīri	Name of an ethnic group in Afghanistan
Panchāt Bāshi	In Afghanistan, an honorary role for a Hindu commercial arbitrator
Parachuted students	A term used in Herat province for students who entered education through orders from government officials
Pashtūn	Name of an ethnic group in Afghanistan
Passover	Judaism: a major Jewish holiday in the spring on the 15 th day of the Hebrew month of Nisan
Parūni	One of the thirty-three languages spoken in Afghanistan
Per se	Latin: by itself, in itself
Peri	In Persian and Armenian mythology, the <i>Peri</i> are exquisite, winged fairy-like spirits ranking between angels and evil spirits
Pir	Spiritual leader, master, saviour
Prajna	Buddhism: direct insight into the truth taught by the Buddha - a faculty required to attain enlightenment
Qalandar	A name for a Sufi saint
Qānūn	Statutory Law
Qānūn department	A department of the Ministry of Justice of the Islamic Republic of Afghanistan (2002-2021). This

	department deals with ‘out of court’ civil and family matters
Qawm/Qowm	A group of people, a solidarity group
Qazā	A legal magazine in Afghanistan
Qobuz	Horse fiddle
Rammāl/Ramalbāz	A person who plays tricks with a dice
Rashi	A Judeo-Persian language spoken by the Jewish citizens of Afghanistan
Reshwat	Dari: bribes
Sabbath	In Judaism, the day of rest and seventh day of the week
Samadhi	A state of meditative consciousness in Hinduism, Buddhism, Jainism and Sikhism and Yogic schools
Sardaftar	Persian: headman
Sefidpūsh, Siāhpūsh	Kāfiri groups of eastern Afghanistan named after the colour of their attire, “white clothes” and “black clothes”
Sephardic Jews	A group of Jews who inhabited in Afghanistan until 1978
Shāh-bālā	A rank in the āqsaqāl system
Shirini	Afghanistan: a term used for petty bribery
Shomer Shabbat	Judaism: a person who observes all the laws and commandments of Jewish Shabbat
Siāsar	Afghanistan: a derogatory name to address women
Siddhārtha Gautama	Sanskrit: In Buddhism it means “He Who Achieves His Goal”
Sikh	Name of an ethnic and religious minority in Afghanistan
Sila	The term used for Buddhist ethics and morality
Silsilas	Sufism: chains, lineage
Sirdār	Afghanistan: title for the male royal family members of Dūrrani origin. It is also used to refer to a Sikh originating from Afghanistan
Stāge	French: a professional training course that in Afghanistan is part of the study curriculum for aspiring judges
Sul’ h	Persian: reconciliation
Sultan	Persian: king and also a title given individually to a member of the <i>Hazāra</i> ethnic group of Afghanistan
Tajik	The name of an ethnic group in Afghanistan
Tāla’bin	A fortune teller
Tanggri/Tengri	One of the names for the primary chief deity of the early Turkic and Mongolian people
Taqnin	The department of drafting laws
Taskira	National identity card in Afghanistan
Taswir	Arabic: painting
Tawānmandi	Farsi: empowerment. A multipartite project funded by the UK government and Nordic states
Tawārchi	A person who gives news on marriages, deaths and funerals

Ta'wiz	Amulet
Toyāna	Bride price
Turkman/Torkman	Name of an ethnic group in Afghanistan
Usūlnama	A body of state laws in Afghanistan
Utzen	Name of a <i>Kāfir</i> tribe of eastern Afghanistan
Uzbek	Name of an ethnic group in Afghanistan
Veda	A large body of knowledge originating in the ancient Indian sub-continent
Vedic	Related to Vedic Hinduism
Vis-à-vis	French: in relation to, in comparison with
Waigal	One of the thirty-three languages spoken in Afghanistan
Walwar	Pashto: bride price
Wamai	One of the thirty-three languages spoken in Afghanistan
Wekālat	A publication by the Afghanistan Independent Bar Association
Wolesi Jirga	Pashto: the Lower House of Parliament in Afghanistan
Yasa	"Order" or "Decree": written code of law created by Genghis Khan
Zaeefa	Dari: the weak person, a derogatory term used to address women
Zeitgeist	German: the defining spirit or mood of a particular period of history as shown by the ideas and beliefs of the time
Zoormandān	Dari: the powerful ones
Zoorwāk	Pashto: the powerful ones

RELIGIOUS TERMS

Ahkām	Religious commands followed by Muslims
Ahl al-dhimma	A non-Muslim living in an Islamic state
Al-Zakāt	A voluntary charity paid to the poor
Amir	The traditional title for a leader
Amir-ul-Momenin	The leaders of the pious community of Muslims
Aqqayyid	Theology, religious beliefs
Aqd-al-nikāh	The marriage ritual
Awqāf	An charitable endowment
Bay'at	Pronouncement of allegiance or swearing oaths of allegiance to a Muslim leader
Caliph	Leader of early Muslim communities
Caliphate	See: khilafat
Dhimmi	A non-Muslim subject living in an Islamic country
Diyyāt/Diyya	Blood money and compensation payment
Eslāh, Islāh	Arabic: correction
Fatāwā, fatwā	Religious opinions
Fiqh	Jurisprudence created by the Islamic religious authority
Fuqahā	The jurists

Hadd	A fixed punishment in Islamic law
Hadiths	The reports of the speeches attributed to the Prophet Mohammad
Halal	Religiously permissible
Hanafi	An school of Islamic law founded by Imam Abū Hanifa (699-767 C.E.)
Haq al-ibād	The duty owed to mankind. In Islamic criminal law: the harm that members of Muslim community inflict on each other.
Hijāb	The physical coverage of a woman's body
Huquq Allah	A duty owed to God according to the right that God holds over human beings.
Ijma	Consensus on legal issues
Ijtihād	Arabic: the process of making a legal decision by independent interpretation of the Islamic legal sources, the Qur'an and the Sunnah
Ikhwān, Ikhwānis	Member of an Egyptian Islamist and reformist movement known as the Muslim Brotherhood
Imam	The person who conducts prayers in the mosque
Imāmi	A follower of the doctrine of the Twelve Imāms according to the Shi'a branch of Islam
Ismaili	A branch of Shi'a Islam where believers accept and follow seven Imāms, also known as "Seveners"
Ja'fari	The school of jurisprudence as well as the name of main branch of Imāmi Shi'a Islam
Jezya	A form of taxation levied on non-Muslim subjects of an Islamic government
Khan molla khan	Supreme ecclesiastical judge
Khan-e Olūm	Ranks for heads of ecclesiastical education
Modarres Bāshi	
Khatib	Arabic: a Muslim who delivers sermons in the mosque.
Khilāfat	A form of governance in charge of managing the Islamic community, which orders Muslims to follow the life-style of the first generation of Muslims of the Arab Peninsula (also spelt "Caliphate")
Khut'ba	Arabic: sermon
Lavāt	Sexual intercourse between men
Madhab	A religious sect of Islam
Madrassa	Place of learning, Islamic seminary teachings
Mahr	Marriage portion (dowry).
Masjed al-Aqsā	A mosque located in the Old City of Jerusalem
Maslaha	An Islamic legal principle that translates as "public interest"
Mazālim	Arabic: injustices, grievances. In Mazālim courts, an official oversaw justice for ordinary people
Mir-wā'ez	Head preacher
Mohtasib	Supervisor of morality
Molla bāshi	Supreme ecclesiastical judge
Moudāwana	The family code in Moroccan law

Mu'āmelāt	Rulings governing commercial transactions
Mufti	Providers of legal opinions
Mullah, cleric, ulemā	Terms referred to someone with formal or informal knowledge of Islam
Murti	A statue in Hindu faith
Nasihah	Sincere advice
Nikāh/Zawāj	Islamic marriage according to Shari'a laws
Noshūz	A wife disobeying her husband
Orf/Urf	Custom
Qādi/Qāzi	An Islamic judge
Qāniāt	Obedient wives
Qawāma	Bread winner, a person who provides for the family
Qisās	Retaliation according to Shari'a injunctions
Qiyās	Arabic: deductions, analogy
Ra'y	Opinion
Sādāt	Plural of Sayyid, an ethnic group in Afghanistan believed to be descendants of the Prophet Mohammad
Sadr-i- Shahr	Head of the clerical groups in charge of religious endowments
Sahaba	The Companions of Prophet Mohammad
Sayyids	See: Sādāt
Shari'a	Literally: "the path to water", the most general term to refer to laws derived from the divine sources of Islam
Shiite	A sect of Muslims
Shūrā	Islamic concept of consultation
Shūra-e qanun asāsi	A Constitutional Shūrā
Sirāj-al-Akhbār	Afghanistan's second newspaper published in the 1900s.
Siyāsa	Discretionary decisions or punishments
Sunna/Sunnat	The tradition of Prophet Mohammad
Ta'zir	Deterrence, the power of discretionary punishment
Tafsir	Interpretation or exegesis of the holy writ in Islam
Tah'kim	Arbitration
Taliban	Insurgents formed by Mullahs and religious students
Tam'kin	A woman's obedience to her husband's needs or demands according to Shari'a
Taqiyya	Emulation
Taqwā	Piety according to rules of Islam
Ushr	Tithe, a religious tax where one-tenth of the crops are given to the religious authorities
Wāli	The legal guardian
Wali-ul-damm	The family members of a dead person who hold legal right over diyyāt (financial compensations)
Wasīqa	A court issued document
Wilāyat/Wilāya	Authority, dominion, guardianship and supervision
Zeidi	A sect of Shi'a Islam
Zakāt	A type of Islamic charity
Ziārat	Shrine, the grave a stint

ISLAMIC CURRICULAR BOOKS

Akhlāq-i-Mohseni
Al-Hedāya
Aqidāt al-Tantāwi
Asās al-Qudāt
Fatāwā-i-Ahmad-Shahi
Fiqh Akbar
Fosul-i-Akhhāri
Kafiyya
Kanz ul-Sādeq
Kanz
Mashkot
Mūgabāt al-Ahkam wa-waqi al ayyām
Noor ul-Izāh
Nur al-Anwār
Osul-i-Shahi
Ottoman Mujallah
Qoduri
Sarf va Nahv
Sahih Bokhari
Serāj
Sharh-i-Molla
Sharh-i-Waqqāya
Shrut Salāt
Sirāj-al-Ahkām
Tafsir-e Jalalain,
Tamassok-al-Qudāt

THE INSTITUTIONS OF PASHTŪNWĀLI

Badal	Retaliation or taking revenge in kind
Badd	Feud or unfulfilled revenge. Badd is also a type of marriage exchange where a girl from the culprit's family marries into the victim's family as compensation for the crime committed
Badragha	Accompanying a guest to reach safety
Baramta	An amount of money or asset deposited as a bond payment before litigation is finalised by elders in a <i>jirga</i> , also; usurping the opposing party's belongings in litigations
Ghayrat	Chivalry
Imāndāri	Righteousness
Istighāmat	Trust in God
Jirga	A council attended by the men of a village or tribe
Kabargen	Social isolation of those who violate their <i>Wāk</i> (agreement given to resolve disputes)
Khone	A type of sugar cone
Loya Jirga	A traditional set-up of a Grand Assembly where members of the government and the tribal elders make decisions for the whole of Afghanistan
Machilgha	See "Baramta"
Maraka	An assembly of tribal people who meet to solve a problem
Marakachian	The people who form the <i>jirga</i> and litigation process in <i>Pashtūnwāli</i>
Melmastiā	Hospitality
Nāmūs	Protection of women and guarding their chastity
Nang	Honour
Nangyālay	A person who preserves honour
Nanwatai	Sanctuary
Ozrāna	An apology, a form of paying a penalty or fine
Pashtūnwāli	The way to be a Pashtūn
Peghore	Satire
Pikra	A decision reached by a <i>jirga</i>
Purdah	Women's segregation from men
Sabāt	Loyalty
Sharm	A type of shame payment
Towda	The Pashto translation for ordeal
Tsāli	Tribal practices
Tūrah	Bravery
Wāk	The agreement of disputants in giving authority to the <i>jirga</i> to resolve a conflict on their behalf
Walwar	Bride-price: an amount of money paid to the bride's parents before marriage can take place

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Thank you very much in advance.

Constitutions

1. What do you think about the purpose of the numerous constitutions of Afghanistan?

.....

2. Are the constitutions of Afghanistan useful for separating the judiciary, legislature and executive powers? Please comment on as many constitutions as you like, i.e., the constitutions under King Amanullah, Zahir Shah, Daud Khan, the PDPA and Constitution 2004.

Note: The judiciary is formed by the courts, attorney general's office and ministry of justice; the legislature is the parliament and the executive is the president's office and offices working under the president.

.....

3. In your opinion, what needs to be done so that the constitutions serve their purpose of separating the three powers?

.....

4. Is *Loya Jirga*, where a small number of elders decide for 34 million Afghans, the correct way to represent all the people of Afghanistan?

.....

5. In your opinion, are there any problems with *Loya Jirga*?

.....

6. If you were asked to propose ways to improve *Loya Jirga*, what would you say?

.....

7. Do you think that the state of Afghanistan uses *Loya Jirga* for political advantage?

If yes, how?

.....

8. In your opinion, over the past 272 years, which government of Afghanistan was committed to law and order more than any others?

.....

Legal transplants

9. Do you believe the laws Afghanistan borrowed from Egypt, Turkey and Western countries from 1747 to 2001 have been useful?

Note: Afghanistan's laws from 1747 to 2001 have lots of borrowing from the above countries.

.....

10. Do you believe that laws brought to Afghanistan by Western powers from 2001 to the present day are useful?

Note: Alongside the Interim Criminal Code for Courts, Counter-Narcotics Laws and the Constitution, Western powers have aided Afghanistan's legal system immensely.

.....

11. As far as you know, how is formal justice delivered in Afghanistan?

.....

12. Do you believe that the Afghan legal system is getting better? If yes, in what way?

.....

13. Does the state of Afghanistan attempt to bring justice to all citizens without prejudice?

.....

14. Can one regard Afghanistan's law and legal system as fair for the children, women, non-Muslims and Muslims of Afghanistan?

.....

15. Are there any areas in the Afghan legal system that treat the defendants unfairly?

Note: These may include women, moral issues, conversion to another faith, crimes that the government see as hostility against state officials?

.....

16. In your opinion, how can Afghan officials improve the delivery of formal justice?

Note: Formal justice is justice delivered by the government.

Legal pluralism

17. How does legal pluralism function alongside the rule of law?

Note: By legal pluralism, I mean different types of jirgas, shūrās and the formal courts. In essence, rule of law means everyone must be accountable to the law.

.....

18. Do you believe that *jirga* is a good forum to deliver justice?

.....

19. Do you think that *jirga* must be officially recognised for the delivery of justice?

.....

20. In your opinion, is there anything wrong with *jirga*? If so, what?

.....

21. Do you think that *shūrā* is a good mechanism to deliver justice?

.....

22. Do you believe that Afghanistan must allow individuals in *jirga* and *shūrā* to adjudicate in different types of cases? *For example, personal disputes, criminal, commercial and family cases.*

.....

23. Do you believe that *jirga* and *shūrā* would be better if independent observers were present?

.....

24. Do you believe that recording the *jirga* and *shūrā* decisions is a good way to monitor their operations?

.....

25. Do you believe that Afghan citizens go to *jirga* because it is a better way to receive justice?

.....

26. Do you believe that Afghan citizens go to a *shūrā* because of the same reasons?

27. In your opinion, what can the state of Afghanistan do so that citizens go to the official courts? *For example: To create transparency, increase the education of judges, increase wages, speed up decisions*

.....

28. In your opinion, what are the good and bad points of using *jirga* and *shūrā* for justice?

.....

The different religions of Afghanistan

29. Do you believe that different researchers on Afghanistan must include the Buddhists, Christians, Kāfiristan’s people, Jewish, Hindus and Sikhs in their studies?

.....

30. Have you ever heard that the Jewish people of Afghanistan conduct their customary (informal) justice matters in a similar way to how Muslim use *shūrā* and *jirga*?

.....

31. Do you believe that non-Muslims must be judged under their own religious laws?

.....

32. In the past, the Hindus and Sikhs of Afghanistan (during Abdur Rahman’s and Zahir Shah’s rule) held *Panchat Bashi* commercial arbitrations. Do you believe this was a good thing for Afghanistan?

.....

33. Do you believe that the *Panchat Bashi* mechanism must be revived?

.....

34. Are you aware of the non-Muslims’ legal culture, life and how they conduct their affairs when in need of justice?

.....

35. Do you believe that Afghan and international researchers have ignored the non-Muslims of Afghanistan?

If yes, in what way?

.....

Customary law

36. Do you think that leaving a large population in Afghanistan to use informal justice mechanisms is correct?

.....

37. Do you believe this is because the government is weak? Are there more reasons?

.....

38. Do you believe that the government of Afghanistan must empower or disband informal justice institutions? These are *shūrā* and *jirga*. Please give your reasons for both.

.....

39. What are the procedural and substantive justice mechanisms for the Pashtūns? Please consider *jirga* operations to answer this question.

.....

40. Do you believe that the Pashtūns of Afghanistan conduct their legal affairs differently from other citizens?

.....

41. Do you believe that *baad* and revenge killing must be stopped?

.....

42. Do you believe that *Pashtūnwāli* must be recognised and used for delivering justice to all the citizens of Afghanistan?

.....

43. What is your view on *Pashtūnwāli*? Please list the positive and negative points

.....

44. Is *Hashar/Ashar* used by all poor communities in Afghanistan?

Note: Hashar/Ashar is a self-help community mechanism where poor people in Afghanistan help their friends, relatives and neighbours free of charge.

.....

45. Do you believe that *Hashar* can be a good self-support mechanism for Afghans to reduce poverty?

.....

Delivery of customary laws

46. Do you believe that decisions on family issues in a *shūrā* can be correct and fair?

.....

47. Do you believe that elders from different ethnic groups decide justly in a *shūrā*?

.....

Shari'a

48. Do you believe that *Shari'a* is included in all the laws and in formal judicial decisions in Afghanistan?

.....

49. In your opinion, how can *Shari'a* play a better role in delivering justice for Afghanistan? For example, writing guidelines for all *Shari'a* rules or interpreting *Shari'a* for Afghanistan's current conditions?

.....

50. Do you believe that the *ulemā* of Afghanistan have a big role in Afghanistan's delivery of justice?

.....

51. Do you believe that Afghanistan's *ulemā* need modern education to present *Shari'a* in a better light?

.....

52. In your opinion, how can Islamic education for the *ulemā* improve in accommodating justice based on Islamic rules that respect the international obligations of Afghanistan?

Note: Synoptically writing, international obligations are fighting corruption, treating all citizens under the same clear, open, recorded law. Laws must be fair to all. Fair trials and non-discrimination are the main focus of international obligations of any country, including Afghanistan.

.....

Women

53. Are the women of Afghanistan treated fairly in family circles, where family cases are not taken to courts?

.....

54. Is *jirga* a good place to solve familial issues?

.....
55. Is *shūrā* a good place to resolve familial issues?
.....

56. Do you believe that familial issues must be adjudicated in the state courts?
.....

57. In your opinion, how are the women of Afghanistan treated in society?
.....

58. In your opinion, how are the women of Afghanistan treated by the government?
.....

59. In your opinion, how are the women of Afghanistan treated under informal laws?
.....

60. In your opinion, how are the women of Afghanistan treated under formal laws?
.....

Corruption

61. Do you believe that corruption is a big problem in Afghanistan’s justice organisations?
.....

62. In your opinion, does corruption deter Afghans from using state courts?
.....

63. Do you believe that judges are recruited in transparent ways?
.....

64. What are the main problems that Afghan judges are facing?

Please use a tick where appropriate

Security	
Low wages	
Low education	
Lack of clear laws	
Bad management by the government	
State’s unwillingness to deliver justice	
Inadequate legal education	

65. In your opinion, how does corruption hamper the delivery of justice in Afghanistan?

.....

Education

66. Have you read Afghan school books, either in Dari or Pashto, that were printed between 2002 and 2019?

.....

67. Have you heard any positive or negative views about these books from others?

.....

68. Do you believe that Afghanistan’s education system prepares Afghans for developing their country?

.....

69. In your opinion, does the Afghan education from year 1-12 teach Afghan citizens tolerance?

.....

70. Do you believe that a few lessons to cover human rights and women’s rights in all curriculum books are adequate to bring Afghanistan in league with the rest of the world?

.....

71. Do you believe that Afghanistan’s education system needs reform and improvements? If yes, what do you propose?

.....

72. As well as your own answers to question 71, please answer the following question.

Please put a tick as appropriate

Subject	Inadequate	Fairly covered	Fully covered
World history			
History of the non-Muslims of Afghanistan			
Debates and reasoning			
Knowledge of different religions			
Scientific lessons			

Lessons for human rights			
Citizenship			
Equal opportunities			
Respecting the law			
Peace			
The development of Afghanistan			

73. Do you believe that a student completing the baccalaureate (year 12) attains adequate education to move on to Higher Education? Please explain your answer.

.....

74. In your opinion, what are the problems with Afghanistan’s primary, secondary and higher education?

.....

International community

In this part, my questions relate to humanitarian aid only. Please do not comment on military or war issues.

75. Do you believe that the international community is helping Afghanistan to deliver justice fairly?

Please explain your answer.

.....

76. Do you believe that Afghanistan’s government is able to improve the delivery of justice without intellectual or financial help from the international community?

.....

77. Is the international community interfering with Afghanistan’s plans to deliver justice fairly?

.....

78. Are you positive about the international community’s role in helping Afghanistan’s legal system?

.....

79. If you believe that certain activities should have been different, could you please list them?

.....
80. In your own words, if you were to advise the international community on helping Afghanistan's legal system, what would you propose?
.....

Final question

Thanks for your patience. Despite this questionnaire being long, have you enjoyed answering my questions?
.....

Please feel free to write anything else that you think may be important for me to note in my thesis.
.....

Thank you very much for your help and support.

Jawad Hassan Zadeh

21 November 2019

APPENDIX 2: QUESTIONNAIRE FOR JEWISH FAITH

Introduction

My name is Jawad Hassan Zadeh and I am an Afghan/British citizen based in England. I am writing a PhD thesis on Afghanistan at the Birkbeck University of London. The title of my thesis is “**Afghanistan: legal history and legal culture from 1750 to the twenty-first century.**”

I am asking for your help in answering this questionnaire and your answers will form a substantial part of my analysis and conclusions. Your information will be used anonymously.

Confidentiality declaration:

I declare that your name or personal and professional identity will not be revealed in my thesis if you choose to remain anonymous. I intend to refer to the interviewees as follows:

Interviewee A: An Afghan lawyer based in Holland, Interviewee B: An Afghan prosecutor based in Kabul or Interviewee C: A former Afghan lawyer based in France.

When citing your answers anonymously, it will read as: *According to interviewee A, the law in Afghanistan is getting better.*

Email: xxxxxxx@xxxxxx.com

Phone: 0044 xxxxxxxxxxx

Postal address: P.O. Box 476, Gravesend, Kent, DA12 9LS, UK

Interviewee information

Please state your name:

Education level:

Age:

Job status:

Would you like to be named in my thesis? Yes No

Please feel free to write more information if you like:

.....

Please feel free to use a separate sheet of paper for longer answers.

Please type or write by hand if you prefer.

If you decide to answer this questionnaire partly, I will still gladly use your views.

I am aware that this questionnaire is long and I am very grateful to you for your valuable time. If you require more clarity from me, I shall be glad to assist.

Thank you very much in advance.

The different religions of Afghanistan

1. The non-Muslims of Afghanistan are under-researched. Do you believe that different researchers from Afghanistan and from other countries must include the history of the Jewish people of Afghanistan?
.....
2. In what way do you suppose that such research must be conducted and disseminated?
.....
3. Do you believe that the educational system of Afghanistan must include the history of the Jewish people of Afghanistan in its curriculum?
.....
4. In your opinion, based on your experience and knowledge, when the Jewish subjects of Afghanistan lived in Afghanistan, were they marginalised in society or in government? Or did they live happy lives in the midst of their Muslim countrymen/women?
.....
5. Please write the positive and negative experiences that you have lived through in Afghanistan.
.....
6. Different historical accounts point to the fact that the Jewish subjects of Afghanistan contributed to the economy of Afghanistan through the import and export of goods. Is this an indication that they had realistic chances to prosper in their homeland, Afghanistan?
.....
7. King Habibullah Khan and Amanullah Khan embarked on the modernisation of Afghanistan and spearheaded legal reforms through transplanting laws from other countries. What contributions did the Jewish people of Afghanistan make in this process?
.....
8. From 1747 when Afghanistan was formed, until the 1960s, Jewish people performed important jobs in the government institutions of Afghanistan. How did they influence plans to develop Afghanistan?
.....
9. In a PhD thesis recently written by Faiz Ahmed in the United States, the writer highlights the role of the Ottoman and Indian Muslims in Amanullah Khan's government and his legal reforms. Do you believe that the Jewish people of

Afghanistan, India and Turkey also had a role in these reforms which may have been under-researched and downplayed? If yes, please elaborate.

.....

10. Have you ever heard that the Jewish people of Afghanistan conducted their customary (informal) justice matters based on their religious precepts?

.....

11. How did Jewish people solve their disputes and issues if they did not want to avail themselves of the government court system? For instance, by elders' help, in a synagogue or in other ways?

.....

12. Do you believe that the non-Muslims of Afghanistan must be judged under their own religious laws?

.....

13. Are you aware of Jewish legal culture, life and how they conducted their affairs when in need of justice?

.....

14. When in need of religious guidance that could not be obtained in Afghanistan, where did the Jewish people refer to?

.....

Please feel free to write your personal account of being a Jewish subject of Afghanistan, and also how you have followed Afghanistan's affairs from your country of domicile/naturalisation. Please write as much as you like.

.....

Thank you very much for your help and support.

Jawad Hassan Zadeh

14 December 2019

APPENDIX 3: QUESTIONNAIRE FOR HINDU AND SIKH FAITHS

Introduction

My name is Jawad Hassan Zadeh and I am an Afghan/British citizen based in England. I am writing a PhD thesis on Afghanistan at the Birkbeck University of London. The title of my thesis is “**Afghanistan: legal history and legal culture from 1750 to the twenty-first century.**”

I am asking for your help in answering this questionnaire and your answers will form a substantial part of my analysis and conclusions. Your information will be used anonymously.

Confidentiality declaration:

I declare that your name or personal and professional identity will not be revealed in my thesis if you choose to remain anonymous. I intend to refer to the interviewees as follows:

Interviewee A: An Afghan lawyer based in Holland, Interviewee B: An Afghan prosecutor based in Kabul or Interviewee C: A former Afghan lawyer based in France.

When citing your answers anonymously, it will read as: *According to interviewee A, the law in Afghanistan is getting better.*

Email: xxxxxxx@xxxxxx.com

Phone: 0044 xxxxxxxxxxxx

Postal address: P.O. Box 476, Gravesend, Kent, DA12 9LS, UK

Interviewee information

Please state your name:

Education level:

Age:

Job status:

Would you like to be named in my thesis?

Please feel free to write more information if you like:

.....

Please feel free to use a separate sheet of paper for longer answers.

Please type or write by hand if you prefer.

If you decide to answer this questionnaire partly, I will still gladly use your views.

I am aware that this questionnaire is long and I am very grateful to you for your valuable time. If you require more clarity from me, I shall be glad to assist.

Thank you very much in advance.

The different religions of Afghanistan

1. The non-Muslims of Afghanistan are under-researched. Do you believe that different researchers from Afghanistan and from other countries must include the history of the Hindus and Sikhs of Afghanistan?
.....
2. In what way do you suppose that such research must be conducted and disseminated?
.....
3. Do you believe that the education system of Afghanistan must include the history of the Hindu/Sikh people of Afghanistan in its curriculum?
.....
4. In your opinion, based on your experience and knowledge, when the Hindu and Sikh subjects of Afghanistan lived in Afghanistan, were they marginalised in society or in government? Or did they live happy lives in the midst of their Muslim countrymen/women?
.....
5. Please write the positive and negative experiences that you have lived through in Afghanistan.
.....
6. Different historical accounts point to the fact that the Sikh/Hindu subjects of Afghanistan contributed to the economy of Afghanistan through the import and export of goods. Is this an indication that they had realistic chances to prosper in their homeland, Afghanistan?
.....
7. King Habibullah Khan and Amanullah Khan embarked on the modernisation of Afghanistan and spearheaded legal reforms through transplanting laws from other countries. What contributions did the Hindu and Sikh people of Afghanistan make in this process?
.....
8. From 1747 when Afghanistan was formed, until the 1960s, Sikhs and Hindus performed important jobs in the government institutions of Afghanistan. How did they influence plans to develop Afghanistan?
.....

9. Have you ever heard that the Sikh and Hindu people of Afghanistan conducted their customary (informal) justice matters based on their religious precepts?

.....

10. How did Hindus/Sikhs solve their disputes and issues if they did not want to avail themselves of the government court system?

.....

11. Do you believe that the non-Muslims of Afghanistan must be judged under their own religious laws?

.....

12. Are you aware of the Sikhs' and Hindus' legal culture, life and how they conducted their affairs when in need of justice?

.....

13. When in need of religious guidance that could not be obtained in Afghanistan, where did Hindus and Sikhs refer to?

.....

14. Are you happy to take part in this research?

.....

15. Please feel free to write your personal account of being a Sikh/Hindu subject of Afghanistan, and also how you have followed Afghanistan's affairs from your country of domicile/naturalisation. Please write as much as you like.

.....

Thank you very much for your help and support.

Jawad Hassan Zadeh

09 February 2020

APPENDIX 4: TECHNICAL QUESTIONNAIRE

Women

1. How can one obtain court statistics for Violence against Women (VaW) cases?
2. How can one find the case details (*nasse mahkama*) for Violence against Women (VaW) cases?
3. Which provinces of Afghanistan issue statistics on Violence against Women (VaW) cases?

Education

4. What is the education curriculum for the madrasas from which judges are recruited? Please list subjects of study.
5. What are the names of the books studied in *madrasas*? Please list the names chronologically if possible.
6. How do the *madrasa* graduate judges learn about *qanun*?
7. Which courses do *madrasa*-trained judges study before sitting as a judge?
8. What happens to judges who do not study stage *qazae*?
9. Do judges use the codified laws or do they use casuistry skills and their own intuition when making decisions in criminal cases?

Transfer of cases

10. How does the judiciary ensure that bribery does not take place when a case is transferred from one province to another by the litigants' request?

Open Courts

11. Can any member of public not related to the case sit in a criminal court and witness a trial?
12. Do certain criminal court branches disallow lay witnesses to sit and watch the trial?

Defence

13. Does the defence lawyer have adequate time to prepare for the trial?
14. What are the main problems for the defence lawyer in a criminal court?
15. Do judges respect defence lawyers and give them a chance to make a presentation in the hearing, or is their role ignored?

Public law

16. How can a person bring a case against the state?
17. If a person complains about police brutality, can that person defend his case?
18. How can a litigant seek to revoke a wrongly confiscated property by the government?
19. How are citizens able to seek a judicial review of an unfair government decision?
20. In cases where the prosecutor and judge ill-treat a defendant, how can this defendant seek justice against them?
21. Can a defence lawyer lodge a complaint against a judge or prosecutor?
22. How does the government assure that people who speak different languages and dialects are spoken to in their mother language?

23. Are there trials where the judge and prosecutor speak one language and the defendant another language?
24. How does the state assure that poor defendants in criminal matters have access to legal aid funds?

International Fair Trial Standards and Afghanistan domestic standards

25. How do judges assure that their decisions are based on Constitution 2004 and the other international obligations of Afghanistan?
26. How much have *motahedul-maal* directives affected trial procedures?
27. How do judges apply presidential decrees with *Shari'a* and the other laws of Afghanistan?
28. I am very grateful for your help and support.

APPENDIX 5: ĀQSĀQAL INFORMAL JUSTICE QUESTIONS

1. How do the Turkic people of Afghanistan (Turkmen, Uzbek, Kirghiz and others) deal with their legal issues? Here I am particularly interested in the role of the elders.

.....

2. What is *Āqsāqal*'s role in the delivery of informal justice? If there are differences with elders of other ethnic groups, please write these differences.

.....

3. How are cases dealt with from beginning to end?

.....

4. In your opinion, what is the reason for the scarcity of information about *Āqsaqāl* in English, Farsi and Pashto? Jirga and *shūrā* are mentioned in thousands of researches, but Turkic people's informal justice is not mentioned.

.....

5. Since 1747, how has the role of *Āqsaqāl* grown or lost significance? For instance, is it due to urbanisation that Turkic informal justice is not researched – or are there other reasons?

APPENDIX 6: QUESTIONS FOR THE AIHRC

1. Has an agreement been made with the Ministry of Education? What undertakings has been given?

.....

2. How successful has AIHRC been in incorporating human rights norms in the school curriculum?

.....

3. What problems have been noted on the side of the government in promoting human rights lessons?

.....

4. Have peace agreements with opposition groups affected the government's undertaking in the promotion of human rights?

.....

5. How much has Article 3 of Constitution 2004 affected the government's undertakings?

.....

6. Is AIHRC's assessment of the progress of its programmes positive?

.....

7. Has the government been committed to its undertakings in all parts of Afghanistan, or have these not been implemented in the Pashto speakers' curriculum? Furthermore, did some groups stop human rights lessons?

.....

8. Which programmes did AIHRC want to implement that it has not been able to?

APPENDIX 7: QUESTIONS REGARDING THE ARRIVAL OF ARAB FIGHTERS IN AFGHANISTAN

(INTERVIEWEE: FORMER PDPA MEMBER AND GOVERNMENT OFFICIAL)

1. What policies have the governments of Afghanistan pursued to protect Jewish subjects?
2. How successful were governments in protecting them?
3. Did close relations with the Nazis lead to anti-Semitism in Afghanistan?
4. The PDPA supported Palestine. Did such support cause anti-Semitism in Afghanistan?
5. To your knowledge, when did members of the Egyptian Muslim Brotherhood and the Palestinian *Hizb-ut-Tairi* infiltrate Afghanistan's political scene?
6. Were their influences connected to promoting a particular form of Islam or did they support the politics of a particular super-power?
7. Did the new form of Islamic exegetes' arrival in Afghanistan affect the Hindus and Sikhs?
8. How did the PDPA promote equality between men and women and how did it protect the religious values of non-Muslim subjects?
9. What was the reason for the growth in status of Hindus and Sikhs in the PDPA?
10. Please add any other information relevant to the above questions.

I am very grateful for your help and support.

APPENDIX 8: THE INTERVIEWEES' DETAILS

No	Interview date and number	Interviewee	Subject of interview	Objective of interview
1	# 1 – 02.12.2019	Interviewee A	The life of the Jews of Afghanistan	History, religion and legal culture of the Jews
2	#2 - 08.12.2019	Jack Abraham	The life of the Jews of Afghanistan	Security, trade and education
3	# 3 – 16.12.2019	Interviewee A	Support given to Islamic groups by the governments of Afghanistan in the 1970s	Foreign religious groups' entry into Afghanistan
4	#4 - 30.12.2019	Jack Abraham	Verification of information in books regarding Jewish Afghans	Accuracy of historical accounts/ objectivity and writers' biases
5	#5 - 21.01.2020	Interviewee B	The U.S. and Soviet competition to build infrastructure in Afghanistan	PDPA governments, attitudes to law and order
6	#6 – 29.01.2020	AIHRC Interviewee C	Human rights education in the school curriculum	Strategies, practices and problems encountered
7	#7 – 13.02.2020	Interviewee B	Informal chat	Daoud Khan and PDPA governments
8	#8 – 19.02.2020	Najmuddin Kaviani	Governments and legal progressions 1919-2020	Constitutionalism and legal developments
9	# 9- 04.03.2020	Behzad Hakkak	Legal questions	Procedural matters and legal reforms
10	#10 – 24.03.2020	Ichawar Dass	The life of Hindus and Sikhs in Afghanistan	History, origins and trade
11	#11 – 25.03.2020	Behzad Hakkak	Informal chat	Legal enforcements
12	#12 – 25.03.2020	Ziauddin Bozorgmehr	Taxation	Problems of tax collection under different governments
13	#13 – 29.03.2020	Najmuddin Kaviani	The life and culture of people in Nuristan	Kafiristan people and their conversion to Islam
14	#14 – 30.03.2020	Najmuddin Kaviani	History of language conflict	Identity problems since 1900
15	#15- 05.04.2020 and 06.04.2020	Ichawar Dass	Hindus' and Sikhs' contributions to the laws of Afghanistan	Law and societal interactions in informal justice matters
16	# 16 – 02.06.2020	Aziz Rafiee	Āqsaqāl informal justice mechanism	Turkic groups' informal justice system

**APPENDIX 9: RESEARCH QUESTIONNAIRE’S RESPONDENTS’
DETAILS**

No.	Name	Education level	Job
1	Mr A.	B.A., Political Science	Former diplomat, currently self-employed
2	Abdul Saboor Ragbar	M.A., Persian Language	Student
3	Mr B.	B.A.	Former Ministry of Foreign Affairs, currently retired
4	Ahmad Zia Siamak	M.A., Russian language	Former deputy spokesperson of Hamid Karzai, diplomat, journalist, novelist
5	Arzo Naubahar	B.A., International Relations and Global Politics	Integration Officer
6	Mr C.	M.A., International Law	AIHRC Afghanistan
7	Assadullah Kehstmand	M.A., Ecole Supérieur d’Agriculture de Purpan	Former Journalist and diplomat based in Tehran
8	Asadullah Shafae	M.A., Nationalism & Ethno-Religious Conflicts	Journalist, translator and researcher
9	Behzad Hakkak	B.A. Law, M.A., International Law	AIHRC Afghanistan
10	Besmellah Hedayat	B.A. Law and Political Science	Employee of the Parliament Administration
11	Ehsan Qaane	LLM International Law	President of Afghanistan Analysts Network
12	Elham Pasarlay	LLB Law, LLM., Law	Trainee Lawyer
13	Emal Viyaar	B.A. Law, M.A. International Law	Lawyer
14	Mrs E.	LLB Law, Legal Practice Course (LPC)	Solicitor
15	Mr F.	Primary education	Unemployed
16	Harpal Singh	High School, Child Psychology	Self-employed
17	Jawad Jawid	Master of Business Administration	Professional Translator
18	Kaneshka Morady	B.A. Pedagogy	Self-employed
19	Karim Rahim	B.A. Law	Interpreter and writer
20	Koroush Dehghan	B.A. and M.A. International Politics	M.A. Student, Birkbeck University of London
21	M. Ayub Yaqubi	B.A., M.A.	University lecturer of law in Kabul
22	Mr G.	B.A. Law	Retired
23	Mina Gawdi	BSc. Earth & Planetary Sciences	Interpreter

24	Mir Abas	MEng. Engineering	Former diplomat, business owner
25	Mr H.	M.A. Comparative Laws	International Development Consultant
26	Nadia Hashimi	Intermediate level literacy	Unemployed
27	Dr. Naqibullah Rasuli	Medical Doctor, M.A. International Development Management	Former diplomat, university student
28	Najibullah Rahimi	B.A., M.A.	Policy Advisor and linguist
29	Najmuddin Kaviani	B.A., M.A.	Former MP, researcher, writer
30	Nazifa Haqpal	B.A., M.A., PhD Student SOAS, University of London	Former diplomat at Afghanistan embassy in London, student
31	Professor Mohammad Nazif Shahrani	PhD. Anthropology	Professor at Indiana University, Bloomington; and writer
32	Mr K.	B.A.	Military Officer
33	Obaidullah Rahimi	B.A. Law and Political Science	Civil servant
34	Dr. (Mrs) L.	Medical Doctor	Médecines Sans Frontières, Afghanistan
35	Dr. Sediq Hemat	Medical Doctor (Military)	Former head of Afghanistan's prisons
36	Shams Sadat	B.A. Journalism	Owner of translation firm
37	Zahir Mohseni	B.A. Persian Literature	Former school principal, Radio Ketaab
38	Professor Zaman Stanizai	PhD. Philosophy	Professor at Pacific Graduate Institute, California
39	Zia Afif	B.A. Social Care	Senior Personal Advisor
40	Zia Bozorgmehr	B.A. Law & Political Science	Defence Lawyer

CASE PROMULGATIONS

APPENDIX 10: CASE 1 – AWOL MILITARY COURT

Details of the instance	
N	The Judiciary
S	Supreme Court
D	Islamic Republic of Afghanistan Presidency of Herat Appeal Court Presidency of Herat Primary Court Head of Military Branch Final Court Decision Format Primary Court Penal Cases

Details of the parties and type of case			
Prosecutor's details	W. B.	Type of incident	Absence from duty
Defendant's details	Q. D. son of E. D.	Place of incident	Herat Koh-e-Zoor Police Dept.
Defendant's job	Sergeant	Date of incident	12/08/2017
Lawyer's details	None	Reason for adjudication	AWOL
Victim's details	None	Relation between defendant and victim	None

Number of entry: ()

Date of entry: / / 13

The case brief	The prosecutor claims the defendant was absent from duty from 12/08/2017 until 06/04/2018. There are no exonerating documents for the AWOL.
Arguments brief and the prosecutor's request	-1 The defendant admits to his guilt -2 There are no leave papers or medical certificates. -3 The detachment's commander has confirmed the defendant's absence. The prosecutor relies on Section (2) Article (10) annex 1 of the Penal Code.
Defence brief / or the lawyer's defence	I have been absent from duty because of family problems. I accept that I was absent and promise not to repeat it in the future. I ask the judicial panel to aid me in this matter.
Judicial Panel's Decision	E. D. son of E. A. son of G. B. Sergeant at Koh-e-Zoor District Police Headquarters of Herat Province has ignored the military rules and decided to leave his post due to (family problems) on 12/08/2017 and went to his home, returning after (1 year, 1 month and 28 days). The AWOL returned to his duty on 06/04/2018 and his detachment introduced him to the prosecution office. His case was referred to the Penal Department of Military Officers of Herat Civic Primary Court for legal actions. The judicial panel investigated the case and found that the defendant violated the military rules and for his AWOL exceeding one year, he has not produced convincing evidence. Therefore, based on -1 the defendant's confession for his AWOL -2 Written complaint from his detachment for his absence (annex 2) of the dossier from 12/08/2017 until 10.10.2018 exceeding 1 year absence from duty.

	The judicial panel confirmed the criminal action based on Section (2) Article (10) of annex 1 of the Penal Code. The defendant has not had a criminal background and has returned to his duties voluntarily, and the detachment needs his services; according to Sections (1-17 and 12) sub-section (2) of Article (213) of the Penal Code lenient penal measures may apply, but as the defendant has held public duties, based on Section (4) Article (218) of the Penal Code, serious penal measures apply.
The promulgation	Herewith, we the judicial panel for offences of the military personnel of Herat Civic Primary Court, in an open court session held on 06.01.2020 in the presence of the parties reached a majority verdict that; You M. L. son of W. A. son of Y. M. Sergeant of Public Security of Kabul Province for having gone AWOL; based on Section (2) Article (10) annex 1 of the Penal Code, with consideration to Section (3) Article (211) and sub-section (4) Article (215) of the Penal Code must pay a cash fine of (20,000) Twenty Thousand Afghanis. The right to appeal is reserved for both parties.
Reasons for the finality of the verdict	The parties agreed with the verdict of the Primary Court, the Appellate Prosecution branch of Herat Zone also confirmed the verdict.

Date 04/07/2020 place of signature of authoritative director ()

Source: Supreme Court of Afghanistan, weblink:

<https://supremecourt.gov.af/sites/default/files/2020-09-10.pdf>

Last accessed 16 October 2020. [own translation.]

APPENDIX 11: CASE 2 – FAMILY AJUDICATION

The case of *Shirin v. Hura*

In the case of *Shirin v. Hura* (Decision No. 205/7.10.1971, Cassation Court for Civil and Criminal Affairs, Kabul), Shirin claimed that in 1964 when Hura was a child, she was contracted in *nikāh* (Islamic marriage) to him by her father Jamaluddin. On the 18.06.1966, that is two years later when Hura had attained majority, she also confirmed the marriage verbally. At this stage Shirin asked Hura to complete a *nikāh khat* (marriage certificate) but Hura refused to cooperate, and this, as Shirin claimed, was “due to provocation by Jamaluddin, and Hura’s brother Abdul Jabbar, as a result of which Hura now refuses to abide by her marital obligations to me”. The Primary Court of Jozjan province asked Shirin for a *nikāh khat* which he failed to produce. Consequently, without going into further detail, the court decided (Decision No. 4/27.2.1971) that on the basis of Article 5 of the 1960 Marriage Law, the claim could not be heard. On Shirin’s appeal, this decision was confirmed by the Provincial Court of Jozjan and later by the Cassation Court in Kabul. The Cassation Court noted in its decision that Shirin does not possess a valid *nikāh khat* required by Article 5 to prove his claim to *nikāh* against Hura, the result of which was that the lower court considered his claim non-hearable in a court of law. The Cassation Court, because of judicial stipulations, confirms the decision of the lower courts. Thus, Hura’s father and brother had no part to play through the proceedings as their confirmation or denial of the claim would be of no avail under the terms of Article 5. Yet, given the patriarchal and authoritarian pattern of family in Afghanistan, the guardian’s/relative’s influence can hardly be denied as an underlying basis of much litigation over child marriage. Where the alleged wife refuses to abide by her marital obligations, she is likely to be influenced by her guardian and close relatives. Shirin’s reference to provocation by Hura’s father and brother is a typical and yet unexpressed feature of disputes over child marriage. Such allegations, although unheeded by the courts, nevertheless constituted a basis of public concern and criticism, which was expressed in parliament and eventually led to the removal of the controversial Article 5 from the statute book. As borne out of the parliamentary debate of the Marriage Bill (later Law of 1971) Article 5 was criticised on the ground that it resulted in the loss of many lawfully married wives by their husbands merely because of the latter’s failure to complete a *nikāh khat*. A further criticism levelled against Article 5 was that it encouraged avaricious guardians to pursue their self-seeking interests with impunity. They denied the *nikāh* of their wards with the assurance that in the absence of a *nikāh khat*, the husband had little chance of winning in court litigation.

Source: Mohammad Hashim Kamali, *Law in Afghanistan*, pages 114-115.

APPENDIX 12: CASE 3 - ABDUCTION OF A MARRIED WOMAN

Courts Jurisprudence Orders

Jurisprudence Determination No. 659, dated: 20/03/1387 (09/06/2008), of the General Penal Dewan (Chamber) of the Supreme Court of the Islamic Republic of Afghanistan

Identification of the Attorney / Prosecutor: Alhaj Najibullah Zarenkhail,
General Penal Prosecutor of the Attorney General's Office (AGO)

Identification of the accused persons (Defenders): Mohammad Hakem, son
of -----, and Mohammad Sharif, son of -----, resident of -----,
province: -----

Type of incident: Abduction of a married woman.

The files and papers of the aforementioned case, with reference No. 1138,
dated: 10/02/1386 (30/04/2007), of the General Penal Prosecutor of the
Attorney General's Office, due to the objection of the appointed Attorney,
has been referred to the General Penal Dewan (Chamber) for further
consideration, and this has been registered in the receipt book with reference
No. 923, dated 15/02/1386 (05/05/2007).

Occurrence of the case (incident):

After scrutinising the files and papers of the aforementioned case, it has been
confirmed that Mrs Rahela married Mr Hafta Gull, son of -----, a resident of
Kapisa Province, three years ago and the offspring of their marriage included
a son. Mrs Rahela visited her father, Mohammad Qasim's house, which is
situated in the Mussahi area, to stay there for a few nights. Hakem, the
accused person and Rahela's cousin (her father's sister's son), and who is
Mohammad Qasim's nephew, also visited his maternal uncle, Mohmmad
Qasim's house. Perhaps in the past there may have been a love affair between
the above-mentioned persons (Rahela and Hakem). On the aforementioned
date, Hafta Gull wanted to take his wife Rahela to his home in Tagab.
Previously, Rahela may have reached an agreement with her cousin, Hakem,
concerning their marriage. Hakem told Hafta Gul that he wished to
accompany them to the city. All three of them thus began their journey
towards Kabul in a Siracha vehicle (an estate car). When they arrived in the
city, Hafta Gull went to the pharmacy to buy some tablets (medicine), and
during this time Hakem and Rahela managed to escape from the area. Using
the estate car, they reached the house of Mohammad Sharif, son of -----
--, situated in Qarabagh, in order to marry at an opportune time. Hakem left
Rahela in Mohammad Sharif's house and told Sharif to be careful and to
ensure that 'my cousin, Rahela, does not commit suicide, and I will return by
evening prayers.'

Hakem returned to Mussahi. Meanwhile, Hafta Gull thought that his wife had
returned to his father-in-law's house, and therefore Hafta Gull went to his

father-in-law's house where he then realised that neither his wife nor Hakem were there. He (Hafta Gull) submitted a petition to the District Office, and subsequently, Hafta Gull's father-in-law, Mohammad Qasim, and his nephew, Hakem, were arrested and were interrogated. During the interrogation, Hakem admitted his crime and stated that he had abducted Rahela and that she had been taken to Mohammad Sharif's house in Qarabagh. Finally, with the help of the Police Command of Qarabagh, Rahela and Mohammad Sharif were arrested at Mohammad Sharif's house at 3.30am and both were transferred to Mussahi. The accused persons admitted the crimes which they had been accused of. Rahela was underage and therefore her case was referred to the Children's Attorney Department and the files and papers of the others, after completion of the interrogation, were forwarded to the Mussahi Primary Court for judgement.

The aforementioned court arrived at a decision and following the decision, No. 9, dated 20/03/1385 (10/06/2006), in accordance with Article 130 of the constitution, the accused person was sentenced to six months of imprisonment, with one month of imprisonment and the remaining period, according to Article 161 of the constitution, which was an educational imprisonment. However, due to there being no justifiable reason and no evidence against Mohammad Sharif, according to Article 4 of the constitution, Mohammad Sharif was recognised as not guilty.

The Penal Dewan (Chamber) of the Kabul Appeals Court arrived at decision, No. 635, dated: 02/09/1385 (23/11/2006), accepted and agreed with the decision of the Preliminary Court as it was.

The appointed Attorney/Prosecutor of the Attorney General's Office submitted an objection appeal to this Dewan (Chamber) and stated that the appeals court did not take into consideration the errors in law that were made by the Preliminary Court of Mussahi, and these errors were repeated and the same errors were made by the appeals court. Furthermore, it was stated that, concerning the accused Hakem, according to Article No. 424 of the penal code, and concerning the accused Mohammad Sharif, according to Article No. 339 of the penal code, both must be punished, and consequently demanded that this Dewan (Chamber) overturn its decision.

Analysis and evaluation

The files and papers of the case were scrutinised, and it was confirmed that Mrs Rahela married Hafta Gull when she was 11 years old. Rahela complained about Hafta Gull and his family due to their misconduct and their bad attitude towards her, and this situation culminated in her escaping and there was therefore no issue of abduction. During the interrogation and interview, Rahela clearly explained the situation around her escape and that the issues of abduction and the love affair mentioned in this case were not true and were baseless, and this had been fully detailed in the attorney's statement. Furthermore, as per the declaration of Rahela's father, the notion of a love affair between Rahela and Hakem had not been observed. Finally, the issue concluded in the divorce of Rahela, and also in the divorce of the

sister of Hafta Gull. The verdict was thus issued and the decision of the Kabul Appeals Court was accepted.

Verdict:

We, the Judiciary Panel of the General Penal Dewan (Chamber) of the Supreme Court, during a meeting which was held on 19/03/1387(08/06/2008), have unanimously arrived at the verdict in accordance with the guidance of Article 26 of the Structure Law, and the power of the courts and with analysis and evaluation of the judicial advisers, have agreed with the decision of the Kabul Penal Appeal's court, No:635, dated: 02/09/1385 (23/11/2006). Therefore, the office of the secretariat should remove the case from registry and submit it to the relevant department.

Source: Supreme Court of Islamic Republic of Afghanistan [own translation].

APPENDIX 13: CASE 4 – UNDERAGE MARRIAGE

Report of Final Court’s Decision

The victim must not be harmed for his/her complaint as seeking this right is an accepted legal principle

**Jurisprudence Determination No. 2292, dated: 28/07/1395 (19/10/2016),
of the General Penal Dewan (Chamber) of the Supreme Court**

Details of the case:

Type of case: Underage marriage.

Place of incident: Kandahar Province.

Date of incident: 12/12/1394 (02/03/2016).

Identification of the accused person: A man known as (FD).

Occupation of the accused person: Self-employed.

Plaintiff: A girl named (ZH), aged 13 years old.

Relationship between the accused and the plaintiff (claimant): Father and daughter.

Motivation of the case: The plaintiff’s report.

Summary of the case, as stated by the investigator:

Having studied the decisions of the courts, it is known that on 12/12/1394 (02/03/2016), the officials of the Aurfi Police check post based in Dand District of Kandahar Province found a girl known as (ZH) whose feet and hands were chained. The police interviewed the girl.

The plaintiff, (ZH), stated during an interview, “My mother is deceased and I have siblings (brothers and sisters). After the death of my mother, my father organised my arranged marriage when I was seven years old to a man known as (MB), who in turn offered his sister as a substitute and (MB) gave his sister to my father for marriage. Without the performance of local traditions, I was then handed over to (MB) and my father married the sister of (MB). I spent two years at my husband’s house whilst he also had two other wives. After a few months, I visited my father’s house; however, being in my father’s house was dreary for me and I also did not want to continue living at my husband’s house. On numerous occasions, I escaped from my husband’s house and went to either my father’s house or to a relative’s house. However, my relatives used to hand me over to my father who would then hand me back over to my husband.

On this occasion, I escaped to my father’s house and my father chained me up; I managed to break free from the chains and came to the police.”

During the interrogation, the accused, (FD), who is the father of plaintiff, confessed to having carried out this action and stated that as he had no money to offer for his marriage, he had to give his underage daughter to (MB). He

stated, “On several occasions, my daughter escaped from my house and her husband’s house and so I chained her up.”

Circumstance of the Case in the Courts

1- Circumstance of the case in the preliminary court

1-1: The prosecutor’s summary pertaining to the allegation

Taking into consideration the contents of the case, the accused, (FD), gave his young daughter, who was aged seven at the time, to a man who already had two wives, for the purpose of marriage, and in return he married the sister of that man (MB). Thus, the accused had committed a crime according to the Law on the Elimination of Violence against Women which includes the arranged marriage of an underage girl.

1-2: Reasons behind the allegation:

- The admission of the accused during the interrogation, whereby he accepted that he had committed the crime and stated that his wife had died and in trying to secure his second marriage, he had offered his underage daughter for marriage.
- Direct allegation of the plaintiff, in the presence of the local police, against her father.

Taking into consideration the aforementioned reasons, the allegation against the accused person pertaining to Violence against Women has thus been substantiated. Therefore, I ask that the board of the Preliminary Court of Dand District sentence the accused person according to Article 28 of the Law on the Elimination of Violence against Women. This could help him improve as an individual and will further serve as a lesson for others.

After the allegations of the prosecutor, the lawyer of the accused provided a counter defence statement, which was as follows:

1-3: Summary defence of the accused

Having read the statement of allegation submitted by the prosecutor, the accused person was asked how he wished to defend himself against the allegations that the prosecutor stated against him: whether it be written, verbally or through a lawyer. The accused stated that he wished to provide his defence personally and verbally to the judiciary board of the court, and stated as follows:

“My daughter is bad tempered (she was suffering from nerves) and I sent her to the house of (MB) to teach her how to pray and to learn how to observe

Ramadan. After a few days, she left (MB's) house and escaped to another place. In order to prevent her from escaping again, I put chains on her feet. I am a poor and destitute person and I did this because of my deprivation and because I had no other alternative. My wife was blind and I was forced to give my daughter (ZH) for marriage as a substitute in order that I may marry another. I feel ashamed about my actions. In conclusion, I ask that an order of not guilty be issued in my case."

1-4: Conclusion and reasoning of the court:

Taking into consideration the file and declaration of the accused person, it has been concluded that the accused person arranged for his underage daughter to enter into a marriage with a person who already had two wives. The accused stated that he did this because of his state of deprivation and because he had no money to re-marry. Therefore, on the basis of the above-mentioned details, the accused person is responsible and committed the crime according to the Law on the Elimination of Violence against Women as he organised the marriage of his underage daughter and, consequently, he must be punished.

Reasons given by the court:

1- The accused had confessed his crime and stated that he had no money and therefore arranged for the marriage of his underage daughter to the person (MB) in order to marry his sister.

2- The plaintiff had stated, "My father arranged my marriage when I was underage to a man known as (MB) who in turn offered his sister as a substitute and (MB) gave his sister to my father for marriage. I escaped because of this dilemma."

3- The Public Health Directorate of Kandahar Province, in reply to the letter dated 24/12/1394 (14/03/2016), confirmed that (ZH) is 14 to 15 years old and her marriage to her husband took place three years ago.

Thus, taking into consideration the above reasons, the crime of the accused person is obvious, and the following decision has been taken:

1-5: Decision of the preliminary court:

We, the Judiciary Panel of the Preliminary Court of Dand District of Kandahar Province, during a meeting which was openly held on 09/02/1395 (28/04/2016), in the presence of both parties involved in the case, have unanimously arrived at the decision, in accordance with the guidance of Article 28 of the Law on the Elimination of Violence against Women, that you (FD) committed a crime against (ZH) and have been sentenced to two years of imprisonment, commencing on 12/12/1394 (02/03/2016), and that the husband of the plaintiff is also to be legally prosecuted.

2- Procedure at the appeals court:

After the issue of the *Qarār* (order) by the preliminary court, the prosecutor was not satisfied with the court order and requested that the case be referred to the appeals court.

2-1: Summary of the objection and the reasons for appeal:

The accused confessed his crime in having carried out this action and stated that he had to give his underage daughter to (MB). The daughter of the accused escaped from (MB's) house and made a complaint against her father. The allegation against the accused person pertaining to Violence against Women has thus been substantiated. Therefore, the court order for punishment is not adequate. As such, the preliminary court order must be reconsidered, and I am not satisfied with the court's decision.

2-2 Summary of objection and response of accused

The accused was brought from prison to a judiciary meeting and the accused stated that he would like to provide his reasons regarding his objection to the preliminary court order before the judiciary board in a verbal manner, as follows:

“My previous wife had died; I had a few children at home and I was forced to marry for the well-being of my children. I therefore offered my underage daughter for marriage in substitution for a marriage for myself as I was unable to pay for a second marriage; I did this because I was desperate, and this was an inevitability.

I now ask the judiciary board for mercy because I have no one to look after my family and I am a destitute and poor person.”

2- 3: Conclusion and argument of the appeal court:

Taking into consideration the contents of the case, the accused (FD) had a few children and his wife had died and he gave his underage daughter to a man for the purposes of marriage, and in return he married the sister of that man (MB). He took his daughter (ZH) to MB's house although she was not eligible for marriage. (ZH) escaped from her husband's house and escaped to her close relatives' house and made a claim against her father in which she stated that she was eight years old and was given for marriage to (MB). The accused confessed to the crime, but stated that he had been forced to do so as his previous wife had died, he had a few children at home and there was no one to look after his children and thus he was forced to re-marry for the wellbeing of his children. He maintained that he therefore offered his underage daughter for marriage in substitution for his own marriage because he was unable to pay for his second marriage and he did this because he had no other alternative. He asked the judiciary board for mercy because he had no one to look after his family and he was a destitute and poor person.

The objection of the accused person is valid, and the decision of the preliminary court may be amended. We, the Judiciary Panel, have therefore made the following decision with regard to the accused person:

Verdict

We, the Judiciary Panel of the Appeal Dewan (Chamber) of Kandahar Province, during a judiciary meeting which was held in the presence of both involved parties on 08/03/1395(28/05/2016), and taking into consideration the reasons and reports, have unanimously arrived at the verdict in accordance with the guidance of Article 54 of the Law on the Organisation and Power of Courts and in accordance with the provision of Article 267 of the Performance of the Penal Code, and Decision No. 4, dated 09/02/1395 (28/04/2016), of the Preliminary Court of Dand District, you (FD), in the case of Violence against Women according to Article 28 of the Law on the Elimination of Violence against Women and in accordance with the provision of Article 144 of the penal code, are subject from the date of imprisonment on 12/12/1394 (02/03/2016) to one year of imprisonment and MB is to further be legally prosecuted.

3- Process of the case in the General Penal Dewan (Chamber) of the Supreme Court of the Islamic Republic of Afghanistan.

The prosecutor accepted the verdict of the appeal court, but the accused made a request for its conclusion.

3-1 Summary of the objection to the conclusion

The accused did not prepare details regarding his reason, but in the order issued by the appeal court he inserted his thumb impression to indicate that he was not satisfied.

3-2 Analysis of the judicial advisors

The interrogation papers and decision of the Judiciary Panel of the Appeal Dewan (Chamber) of Kandahar Province considered the aforementioned court decision during a judiciary meeting and arrived at Decision No. 44 on 08/03/1395 (28/05/2016). According to Article 28 of the Law on the Elimination of Violence against Women, and in accordance with the provisions of Article 144 of the penal code, (FD) was sentenced to one year of imprisonment. The prosecutor accepted the verdict of the Appeal Court, but the accused made a request for its conclusion and the file was referred to this Dewan; there was no objection in the course of the interrogation and on the basis of the documents and the crime of the accused is confirmed in the lower court. According to Article 144 of the penal code, the accused person is sentenced to one year of imprisonment. Although there is no mercy in the Law on the Elimination of Violence Against Women and the prosecutor

accepted the court's decision, the accused rejected the decision. Therefore, according to the request of the accused, the decision was reviewed in accordance with the provisions of Paragraph 2, Article 9 of the Organisation and Power of the Courts.

3-3 Verdict

The Judiciary Panel of the General Penal Dewan (Chamber) of the Supreme Court, during a meeting which was held on 18/07/1395 (09/10/2016), based on the analysis and evaluation of the judicial advisers in light of the provisions of Paragraph 2, Article 9 of the Law on the Organisation and Power of the Courts, accepted Decision No. 44, dated 08/03/1395 (28/05/2016), of the Penal Court of the Kandahar Province Appeal Court in which (FD) was sentenced to one year of imprisonment according to Article 28 of the Law on the Elimination of Violence against Women and on the basis of the provisions of Article 144 and also agreed to prosecute the husband (MB) of the plaintiff (ZH).

Legal Analysis

The victim must not to be harmed for his/her complaint as seeking this right is an accepted legal principle. This principle has been accepted in Article 261 of the Penal Performance Law. (If the appeal was made by the accused person, the court may reduce the punishment or may withdraw the accused person's case, but it may not increase the punishment which has already been issued.)

All the procedures of the judicial prosecution of the accused or guilty persons are related to the public order as, in general, the penal code is a matter of general rights. In fact, in the conclusion of a matter, the implementation of the correct law must be applied without taking into consideration the contents of the objection of the person who objected, and the decision must be considered in accordance with the law and the person who required its conclusion; there is a procedure to be dealt with, although this is in a civil case. In the penal code, in order to ensure fair justice, if the accused person is accused by the state or justice authorities, according to the requirements and in the interests of society, such a person should not be sentenced without justification. Where a judge makes a mistake, this may require amnesty and a reduction of the punishment will be accepted. As Prophet Muhammad stated, "As much as you can, avoid the punishment of Muslims. If you can, find a way to subsidise the issue against a Muslim." In the event that an *Imam* (Judge) makes a mistake in amnesty, this is better than a mistake in punishment.

Related Legislative Articles

Article 9 of the Law on the Organisation and Power of Courts:

(1) The cases in general will be resolved in the courts in respect of their nature, quality and contents in two stages: primary and appeal. However, if the law allows, it may be considered in three stages or one stage.

(2) With regard to paragraph (1), the Supreme Court recommend that this article is only for the assurance of the correct implementation of the law and will consider the orders of the lower courts, according to its persistence, violation, abolition cancellation and change.

Article 54 of the Law on the Organisation and Power of Courts

The appeal court reconsiders the decision and order of the lower courts specified in this law and other related laws.

The appeal court shall reconsider, in all circumstances, the decisions of the lower court and must rectify, cancel, change and approve or withdraw the decision in accordance with the law.

Article 144 of the Penal Law:

Where extenuating circumstances are present in a misdemeanour, the punishment shall be reduced as follows:

(1) If the anticipated punishment has a minimum limit, the court in determining the punishment cannot be restricted by it.

(2) If there is more than one anticipated punishment, the court can consider only one of them.

(3) If no minimum punishment is fixed in the law, the court can order a cash punishment.

Article 28 of the Law on the Elimination of Violence Against Women

If a person marries a woman who has not attained the legal age of marriage without considering Article 71 of the civil code, the offender, in consideration of the circumstances, shall be sentenced to a minimum imprisonment of not less than 2 years, and based on the request of the victim, the marriage shall be revoked in accordance with the provisions of the law.

Article 267 of the Performance of the Penal Code

In the conclusion of its matter, the appeal court will take one of the following decisions:

- (1) Issue an order to verify the decision of the preliminary court;
- (2) Reject the decision of the preliminary court and issue a new order;
- (3) Amend the decision of the preliminary court;

- (4) Rectify the decision of the preliminary court in the event that there are errors in the writing or incorrect figures recorded which does not have a material effect on the order;
- (5) Dismiss the decision of the preliminary court and refer the case to a higher authorised court, and issue an order regarding the rejection of the previous order;
- (6) Issue an order for further investigation, where there are errors in the documents or an investigation which affected the order.

Source: Supreme Court of Islamic Republic of Afghanistan. [own translation.]

APPENDIX 14: PROMULGATION OF SERIOUS CRIME BY THE ACJC

Continuation: page of the verdict

Verdict:

We, the Judiciary Panel of the Directorate of the Preliminary Court responsible for the investigation of serious state corruption related crimes, have unanimously arrived at the following decisions, in the presence of both parties of the case, during a meeting which was publicly held on 02/12/1395 (20/02/2017):

You, Mohammad Arslan, son of Mohammad Qasim, in the matter of obtaining a \$300 (three hundred US dollars) bribe, in accordance with Section 1 of Article 255 of the penal law, you have hereby been sentenced to two years' imprisonment and a cash fine equivalent to the amount of the relevant bribe. In the case of mediation in the act of bribery for the sum of \$48,000 (forty-eight thousand US dollars), in according to Section 2 of Article 255 of the penal law, you have been sentenced to three years' imprisonment and a fine equivalent to the amount of the relevant bribe. In the case of mediation in the act of bribery for the sum of \$36,000 (thirty-six thousand US dollars), in accordance with the abovementioned article of the stated law, you have been sentenced to two years and six months' imprisonment and a fine equivalent to the amount of the relevant bribe. In the matter of obtaining a bribe for the sum of \$36,000 (thirty-six thousand US dollars), according to Section 1 of Article 255 of the penal law, you have been sentenced to two years and six months' imprisonment and a fine equivalent to the amount of the relevant bribe. Further, according to Article 158 of the penal law, you have been sentenced to a total of ten years' imprisonment and a fine for the sum of \$120,300 (one hundred twenty thousand, three hundred US dollars).

You, Ali Mohammad, son of Abdul Ghani, and Naqibullah, son of Najibullah, have both been found to be involved in receiving bribes for the sum of \$36,000 (thirty-six thousand US dollars), in according to Section 1 of Article 255 of the penal law, and taking into consideration Article 39 of the same law, each of you have been sentenced to two and a half years' imprisonment and a cash fine equivalent to the relevant bribe aforementioned , including the sum of \$120,000 (one hundred and twenty thousand US dollars) applicable to both you and Arslan and, according to Section 2 of Article 48 of the penal law, a guarantee will be applied.

You, Naqibullah, in the matter of obtaining a bribe amounting to \$400 (four hundred US dollars), have been sentenced, according to Section 1 of the

Article 255 of the penal law, to two years' imprisonment and a cash fine equivalent to the amount of the relevant bribe.

You, Ali Mohammad, son of Abdul Ghani, in the matter of obtaining a \$300 (three hundred US dollars) bribe, have been sentenced, according to Section 1 of Article 255 of the penal law, to two years' imprisonment and a cash fine equivalent to the amount of the relevant bribe.

In total, you have been sentenced to four and a half years' imprisonment and the abovementioned cash fine. According to Article 158 of the penal law, you, Naqibullah and Mohammad Ali, have been sentenced.

You, Q.A. son of Alfatullah, in the matter of requesting a bribe in the sum of \$48,000 (forty-eight thousand US dollars), have been sentenced, according to article 254 and Section 1 of Article 255 of the penal law, to three years' imprisonment and a cash fine equivalent to the amount of the relevant bribe.

You, Mohammad Ullah, son of Mohammad Mir, in the matter of requesting a bribe in the sum of \$36,000 (thirty-six thousand US dollars), have been sentenced, according to article 254 and Section 1 of Article 255 of the penal law, to two and a half years' imprisonment and a cash fine equivalent to the amount of the relevant bribe.

You, Mohammad Arslan, Naqibullah and Ali Mohammad, in the matter of misusing powers of your employment in order to obtain the sum of \$40,000 (forty thousand US dollars) as a bribe are not guilty due to the absence of any legitimate reason, pursuant to Article No. 25 of the constitution, Article 5 of the penal executive law and Article 4 of the penal law, who is not guilty.

You, Mohammad Bashir, son of Abdul Qoddus, according to article 381 of the penal law have been fined to pay the sum of 24,000 AFS in cash, and a 1994 model Corolla vehicle as recorded in the file of the prosecution in accordance with Article 119 of the penal law. The sum of \$1,000 (one thousand UK dollars) received from Arslan, Naqibullah and Ali Mohammad, must be returned according to Article 262 of the penal law.

Furthermore, Ahmadzai Group must be carefully and lawfully subject to financial costs for re-investigation. In the event that other persons are identified during the course of this investigation, a case will be registered against them.

Source: The Attorney General's Office of the Islamic Republic of Afghanistan, (ACJC Tracker). [own translation.]

COURT DATA

**APPENDIX 15: CORRUPTION CASES REPORTED IN BULLETIN,
BY THE SUPREME COURT OF AFGHANISTAN**

The Chart Number (1) Shows the Kabul Primary Anti-Corruption Court Convicts from June 21, 2020 to July 21, 2020

No	Type of case	Number of cases	Judicial decision (Verdict)								
			No of accused	Acquitted	No of convicts	Prison Sentences					Cash penalty
						One month to one year imprisonment	1-5 years imprisonment	5 - 15 years imprisonment	Convicted of cash fine		
1	Misuse of authority	3	11	1	10	1			9	15,064	
2	Bribery	1	1		1		1				
3	Forgery	3	6		6	1	1		4	2,402	
4	Extortion	2	4	1	3	3					
Total		9	22	2	20	5	2		13	17,466	

SOURCE: BULETTIN NO. 118, SUPREME COURT OF AFGHANISTAN, PAGE 37.

Chart Number (4) Shows the Rulings of the Appellate Anti-Corruption Court of Kabul Province from June 21, 2020 to July 21, 2020

No	Type of case	Number of cases	Number of the accused	Reason for ruling	Relevant Authority
				Legal gaps and Defects	
1	Misuse of authority	1	2	1	Prosecutor's Office
2	Treachery	3	14	3	Prosecutor's Office
3	Bribery	1	1	1	Prosecutor's Office
4	Forgery	2	2	2	Prosecutor's Office
5	Illegal Firearm Acquisition	1	2	1	Prosecutor's Office
Total		8	21	8	

Source: Bulletin No. 118, Supreme Court of the Islamic Republic of Afghanistan, 08 October 2020, page 41. <https://supremecourt.gov.af/sites/default/files/2020-10/118/pdf>

APPENDIX 16: SAMPLE FOR MIZĀN COURT DATA 2020

Translation of *Mizān* number 483, dated 20 May 2020

Court Name	Charges	Number of Defendants	Date of judicial session	Judicial decision
Herat Appeal Court, Public Security Department	Narcotics, alcoholic drinks	1 person	03.05.2020	18 months' imprisonment
Herat Appeal Court, Public Security Department	Smuggling and selling narcotics	1 person	03.05.2020	18 months' imprisonment
Herat Appeal Court, Public Security Department	Fake banknote	2 persons	03.05.2020	1 person 6 years', 1 person 4 years' imprisonment, 60,000 AFS cash fine
Herat Appeal Court, Public Security Department	Embezzlement	1 person	03.05.2020	18 months' imprisonment
Herat Civic Primary Court, Public Security Department	Forgery	1 person	22.03.2020	1 year's imprisonment
Herat Civic Primary Court, Public Security Department	Forgery, deceitful with judgement, deception	3 persons	22.03.2020	2 persons 18 months', 1 person 1 year's imprisonment
Herat Civic Primary Court, Public Security Department	Smuggling weapon	2 persons	22.03.2020	1 person 4 years', 1 person 2 years and 1 month's imprisonment
Herat Civic Primary Court, Public Security Department	Smuggling narcotics	1 person	22.03.2020	3 years' imprisonment
Herat Civic Primary Court, Public Security Department	Having fake banknote and weapon	2 persons	22.03.2020	1 person 6 years', 1 person 4 years' imprisonment, 60,000AF cash fine
Balkh Appeal Court, Criminal Department	Usurpation	2 persons	25.04.2020	Each person 10 years' imprisonment
Balkh Appeal Court, Criminal Department	Usurpation	3 persons	25.04.2020	Each person 10 years' imprisonment

Balkh Appeal Court, Criminal Department	Usurpation	2 persons	05.05.2020	Each person 10 years' imprisonment
Balkh Appeal Court, Criminal Department	Murder	1 person	02.05.2020	20 years' imprisonment
Balkh Appeal Court, Criminal Department	Usurpation	2 persons	02.05.2020	1 person 12 years', 1 person 10 years' imprisonment
Balkh Civic Primary Court, Criminal Department	Armed usurpation	2 persons	28.04.2020	Each person 3 years' imprisonment
Balkh Civic Primary Court, Criminal Department	House burglary	1 person	28.04.2020	2 years' imprisonment
Appeal Court, Criminal Department for External and Internal Security, Kunduz Province	Membership of Taliban group	1 person	26.04.2020	13 months' imprisonment
Appeal Court, Criminal Department for External and Internal Security, Kunduz Province	Membership	1 person	26.04.2020	13 months' imprisonment
Appeal Court, Criminal Department for External and Internal Security, Kunduz Province	Membership	1 person	26.04.2020	13 months' imprisonment
Kunduz Civic Primary Court, Criminal Department	Rape (sodomy)	1 person	02.05.2020	7 years' imprisonment
Ghazni Appeal Court, Public Security Department	Submitting weapon to the enemy	1 person	31.03.2020	7 years and 4 months' imprisonment
Ghazni Appeal Court, Public Security Department	Selling, buying weapon	1 person	05.04.2020	13 months' imprisonment
Ghazni Appeal Court, Public Security Department	Selling, buying weapon	1 person	05.04.2020	7 years' imprisonment

Ghazni Appeal Court, Public Security Department	Selling, buying weapon	1 person	05.04.2020	7 years and 1 month's imprisonment
Ghazni Appeal Court, Public Security Department	Selling, buying narcotics	1 person	05.04.2020	13 months' imprisonment
Ghazni Appeal Court, Public Security Department	Membership	1 person	12.04.2020	5 years and 1 month's imprisonment
Ghazni Appeal Court, Public Security Department	Membership, destructive activity	1 person	12.04.2020	5 years and 3 months' imprisonment
Ghazni Appeal Court, Public Security Department	Membership, national treason	1 person	14.04.2020	7 years and 6 months' imprisonment
Ghazni Appeal Court, Public Security Department	Selling buying narcotics	1 person	19.04.2020	15 months' imprisonment
Ghazni Civic Primary Court, Criminal Department	Murder	1 person	13.04.2020	16 years and 1 month's imprisonment
Ghazni Civic Primary Court, Criminal Department	Armed robbery	3 persons	13.04.2020	Each person 16 years' imprisonment
Ghazni Civic Primary Court, Criminal Department	Murder	1 person	06.05.2020	25 years' imprisonment
Ghazni Civic Primary Court, Public Security Department	Membership of Taliban group	1 person	06.04.2020	5 years and 1 month's imprisonment
Urozgan Appeal Court, Criminal Department	Murder	1 person	21.04.2020	10 years' imprisonment
Urozgan Appeal Court, Criminal Department	Rape	1 person	21.04.2020	17 years' imprisonment
Takhar Civic Primary Court, Public Security Department	House burglary	1 person	26.04.2020	18 months' imprisonment
Takhar Civic Primary Court, Public Security Department	Smuggling narcotics	1 person	04.05.2020	18 months' imprisonment

Takhar Civic Primary Court, Public Security Department	Kidnapping	1 person	05.05.2020	24 years' imprisonment
Baghlan Appeal Court, Criminal Department	Murder	1 person	21.04.2020	12 years' imprisonment
Baghlan Appeal Court, Criminal Department	Death due to accident	1 person	28.04.2020	2 years and 6 months' imprisonment
Baghlan Appeal Court, Criminal Department	Adultery	1 person	28.04.2020	2 years' imprisonment
Baghlan Appeal Court, Criminal Department	Murder	2 persons	28.04.2020	1 person 25 years' imprisonment, 1 person acquitted
Baghlan Appeal Court, Criminal Department	Attempted robbery	2 persons	05.05.2020	Each person 1 year's imprisonment
Baghlan Appeal Court, Public Security Department	Smuggling narcotics	1 person	03.05.2020	2 years' imprisonment
Baghlan Appeal Court, Department of Elimination Violence against Women	Murder	1 person	03.05.2020	Execution
Badakhshan Appeal Court, Public Security Department	Membership	1 person	05.05.2020	5 years and 6 months' imprisonment
Badakhshan Appeal Court, Public Security Department	Promoting fake banknote	2 persons	05.05.2020	Each person 3 years' imprisonment
Badakhshan Appeal Court, Public Security Department	National treason	1 person	05.05.2020	21 years' imprisonment
Badakhshan Civic Primary Court, Criminal Department	Injury due to accident	2 persons	06.05.2020	1 person 3 years' imprisonment, 1 person 20,000 AFS cash fine
Kunduz Appeal Court, Criminal Department	Murder	1 person	06.05.2020	20 years' imprisonment
Kunduz Appeal Court, Criminal Department	Injury due to battery	3 persons	06.05.2020	1 person 10 years', 2 persons 2 years' imprisonment

Samangan Appeal Court, Criminal Department	Battery and laceration	2 persons	14.04.2020	1 person 18 months' imprisonment, 1 person acquitted
Samangan Appeal Court, Criminal Department	Usurpation of car	1 person	03.05.2020	3 years' imprisonment
Samangan Appeal Court, Criminal Department	Murder	6 persons	10.05.2020	1 person 30 years' imprisonment, 5 persons acquitted
Samangan Appeal Court, Public Security Department	Membership	2 persons	03.05.2020	Each person 18 months' imprisonment
Samangan Appeal Court, Public Security Department	Murder due to kidnapping	1 person	03.05.2020	21 years' imprisonment
Samangan Appeal Court, Public Security Department	Membership of Taliban group	1 person	10.05.2020	6 years' imprisonment
Samangan Appeal Court, Public Security Department	Deception	1 person	22.04.2020	2 years and 1 month's imprisonment
Urozgan Civic Court, Public Security Department	Kidnapping	3 persons	30.04.2020	Each person 1 year's imprisonment
Urozgan Civic Court, Public Security Department	Anti-state activity	2 persons	05.05.2020	Each person 21 years' imprisonment
Appeal rights are reserved by law				

Source: Mizān Fortnightly Publication, Supreme Court of Afghanistan

[own translation.]

APPENDIX 17: TRANSCRIPTION OF THE CONVERSATION BETWEEN AN AFGHAN DIPLOMAT BASED IN GERMANY SOLICITING FOR BRIBES

Speaker 1: Salam. Are you well?

Speaker 2: Fine, thanks. Are you okay?

Speaker 1: Thanks. How are you?

Speaker 2: I am fine, thanks. I am Mohammad.

Speaker 3: Basir, Mohammad is one of our friends. Please look after him. He is like my brother.

Speaker 2: Hello.

Speaker 1: He has told you *** he knows the problem. If you had one it would be better, but you do not have a Taskira.

Speaker 2: I do not have a Taskira because I grew up in Iran. I have no family members left in Afghanistan. I am from Kunduz; I have no family in Kunduz. I do not have a Taskira. That is why I spoke to Mr Jawad. He told me, “7,000 Rupis.”

Speaker 1: Yes, he under-quoted. If it was not due to him, this would cost no less than 10,000. Because you do not have a Taskira, I will do something for you ***. I will do something.

Speaker 2: Now there is no Taskira, will you make me a Taskira? Or maybe you will make me a number 2? Is it a fake one?

Speaker 1: *****?

Speaker 2: There is a number 2 Taskira: the fake one.

Speaker 1: I will make it myself to enable me to do this work.

Speaker 2: Okay, 7,000 or 8,000 – or you are saying 10,000?

Speaker 1: It is the 10,000 that I quoted.

Speaker 3: 10,000? Before contacting you, I spoke to Mohammad; he is my friend. You speak to Basir yourself; agree on whatever you two would like to agree between you. You know better.

Speaker 2: That is correct. There is no problem. Whatever amount is needed, I will borrow. But my work has to be finished in one day because my mother is unwell. She is in Iran. I have to visit her immediately. Where do you want the money to be handed to you? When do you want it? Shall I

come alone or with my children? We are five people: I, my wife and three children.

Speaker 1: We will talk about that later; we cannot talk over the phone. Talk with ***; he is your contact person. I will arrange what you should do.

Speaker 2: Berlin contact persons?

Speaker 1: Speak to ***; he will tell you where to come and what not.

Speaker 2: It is okay. Do you need photos for the Taskiras and the passports?

Speaker 1: He will tell you all of this information.

Speaker 3: You talk about the price and reach a fee. Mohammad, do not worry about this issue.

Speaker 2: What is the final price then?

Speaker 1: The same price that was quoted. It is not negotiable: there are many problems, there are several people, not 1 or 2, you know there are many *** in Berlin.

Speaker 2: I know. I have recently arrived. I still have not found a proper job and my mother is unwell in Iran, which is why I want this work to be completed quickly.

Speaker 1: Over the passage of time this will be more difficult.

Speaker 3: You conclude the prices and come to a mutual agreement. Mohammad, do not about those issues. Just agree on the price.

Speaker 2: That is fine. 10,000 Euros, I will pay that. What else can I do? My mother is unwell. I agree to pay 10,000 Euros.

Speaker 1: That is agreed.

Speaker 3: That is okay, Mohammad; I will call you and inform you later. I say, "Goodbye" now.

Speaker 2: Goodbye.

Speaker 3: Goodbye.

Speaker 3: Hello, Basir. This guy has driven me mad.

Speaker 1: Do you know him?

Speaker 3: Yes, he is from Kunduz. I do not know where he lives, but he is from Kunduz.

Speaker 1: Have you told him my name? No names are to be mentioned.

NOTES: The word 'Rupis', an old currency name from Afghanistan, is used habitually to mean 'money'. Depending on the location, Rupis may be used to mean Euros, Dollars or Pounds Sterling.

Source: Social Media.

[own translation and transcription of video.]

THANK YOU VERY MUCH FOR READING MY THESIS