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CULTURE AND CUSTOM IN NATION-BUILDING: LAW IN AFGHANISTAN

Thomas Barfield

- I. CULTURAL AND SOCIAL BACKGROUND
- II. COMPETING SYSTEMS OF LAW
- III. SYSTEMS OF JUSTICE IN CONFLICT
 - A. *Understanding the Strength of Afghan Customary Law*
 - B. *The Process of Initiating and Resolving Disputes*
- IV. THE IMPLEMENTATION OF STATE LEGAL CODES AND ISLAMIC LAW IN RURAL AFGHANISTAN
 - A. *State Legal Codes*
 - B. *Islamic Law and Rural Afghanistan*
- V. THE IMPACT OF 20 YEARS OF WARFARE ON TRADITIONAL SYSTEMS OF JUSTICE AND CONFLICT RESOLUTION
- VI. PROSPECTS AND PROBLEMS FOR REINSTITUTING FORMAL JUDICIAL INSTITUTIONS IN A POSTWAR AFGHANISTAN AND THEIR RELATIONSHIP TO CUSTOMARY INSTITUTIONS
 - A. *Legal Authority*
 - B. *Reconstructing the Legal System*
- VII. INTEGRATING INTERNATIONAL NORMS IN AN AFGHAN CUSTOMARY CONTEXT: THE CLASH OF TWO GOODS

CULTURE AND CUSTOM IN NATION-BUILDING: LAW IN AFGHANISTAN

*Thomas Barfield**

I. CULTURAL AND SOCIAL BACKGROUND

Afghanistan's restoration of the rule of law has set in motion a renewed debate about fundamental legal principles that has not been seen in the West since the time of the Enlightenment: Who is justice for? Who has the right to seek compensation or justice? Does the state or the individual have priority in seeking justice and delivering punishment? Is law a human creation or is it rooted in divine authority? But it is a debate without an audience in the international community that is assisting the Afghan government in restoring its judicial system because the answer appears so self-evident. Those from societies with long established systems of formal justice automatically assume that it is an ultimate good, that surely everybody wants justice applied by the state. The Afghans who run the formal system assert the same. But they have not won over the population by any means since people, particularly in rural areas, are still fighting out this issue politically and culturally: Is state authority a good idea? Who should set the terms of agreement? Who should determine the rights and the wrongs?

This is because so many areas of Afghanistan have operated without (or outside of) formal government institutions for a very long time; not just because of war, but because that is the way things have always been. For example, the assumption that the state has exclusive sovereignty over criminal matters is not fully accepted by most of the Afghan population. Here the family still takes precedence, reserving the right to take revenge or demand compensation when one of its members has suffered an injury.¹ Such injuries extend beyond physical damages to property or person and include damages to a group's honor that demand retaliation. While Afghan governments formally reject such claims of personal justice, they have never been able to extend the formal system to most of rural Afghanistan; the people there never relied on state institutions and often took offense when the state interfered in what they viewed to be personal matters.

The diminished role of formal government institutions has had both positive and negative impacts. One positive impact, for example, is that anarchy has not been as prevalent as one might expect at the local level even when government institutions proved incapable of maintaining order. People took matters into their own hands by mobilizing one's immediate relatives and larger kinship groups to get justice. But for state-building, it has had very negative consequences. The Afghan population has remained opposed to state systems of justice, which they see less as an extension of the

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1. See MONSTUART ELPHINSTONE, *THE KINGDOM OF CAUBUL* 339-40 (1815).

rule of law and more as an imposition of central state authority.² The dispute has been central to the politics of Afghanistan for the past 150 years and has yet to come to equilibrium.

II. COMPETING SYSTEMS OF LAW

For over a century, successive national governments in Kabul have sought to impose centralized code-based judicial institutions upon local communities that have historically had their own informal institutions for regulating behavior and resolving problems.³ While the content of these state-backed codes has varied significantly in ideology, opposition to them has not. More importantly, whenever the principles embodied in such codes were successfully attacked as the products of foreign influence that violated Afghan tradition, they sparked rebellions or civil wars that helped collapse the regimes that imposed them. The clearest example of this was the challenge to the spate of reforms promulgated by King Amanullah to modernize the Afghan legal system in the 1920s.⁴ Resistance to his new codes on the status of women, identity cards, and family law helped topple his government in 1929 and forced Amanullah into exile.⁵ Similarly, when a socialist party took power in a coup in 1978, its decrees providing for radical land reform, equality for women, and attempts to abolish existing rural debts and marriage payments provoked a new conflict. Within eighteen months, the Soviet Union felt compelled to invade Afghanistan to keep the government from collapsing, leading to a decade-long occupation and bitter war.⁶ Such opposition was not based exclusively on the secular modernizing content of the new codes, but rather on the impact all such state-imposed systems were perceived as having on Afghan society. Thus, when the Taliban imposed strict Salafist interpretation of Islamic law after seizing power in 1996, they too provoked antagonism by championing a set of values that were as far from the Afghan mainstream as those of Amanullah and the socialists had been (although opposite in direction).⁷ Like them, the Taliban were seen as using state power to impose a rigid legal system with foreign roots that ignored the country's traditions and values.

When a new government was installed in Afghanistan after the Taliban were expelled in 2001, the international community appointed advisors (mostly European and UN-based) to assist the government in Kabul in reviving the Afghan legal system. For these advisers, the absence of formal legal institutions in most parts of the country

2. Thomas Barfield, *Problems in Establishing Legitimacy in Afghanistan*, 37 *IRANIAN STUDIES* 263, 263-69 (2004).

3. MOHAMMAD HASHIM KAMALI, *LAW IN AFGHANISTAN: A STUDY OF THE CONSTITUTIONS, MATRIMONIAL LAW AND THE JUDICIARY* 4 (1985).

4. LEON B. POUILLADA, *REFORM AND REBELLION IN AFGHANISTAN, 1919-1929: KING AMANULLAH'S FAILURE TO MODERNIZE A TRIBAL SOCIETY* 99-103 (1973).

5. See SENZIL NAWID, *RELIGIOUS RESPONSE TO SOCIAL CHANGE IN AFGHANISTAN 1919-29: KING AMAN-ALLAH AND THE AFGHAN ULAMA* 72-104 (1999).

6. See generally M. HASSAN KAKAR, *AFGHANISTAN: THE SOVIET INVASION AND THE AFGHAN RESPONSE, 1979-1982* (1995); see also NANCY PEABODY NEWELL & RICHARD S. NEWELL, *THE STRUGGLE FOR AFGHANISTAN* 107-28 (1981).

7. See generally Thomas Barfield, *An Islamic State is a State Run by Good Muslims: Religion as a Way of Life and Not an Ideology in Afghanistan*, in *REMAKING MUSLIM POLITICS: PLURALISM, CONTESTATION, DEMOCRATIZATION* 213 (Robert Hefner ed., 2005).

was the clearest evidence that Afghanistan was a failed state in need of immediate reconstruction. Priority was therefore given to reviving Afghanistan's old law codes (drawn primarily from those implemented under the 1964 and 1973 constitutions) and extending the reach of the judicial system nationally.⁸ The existence of competing informal systems of justice and dispute resolution in local communities was viewed as an unfortunate (if understandable) by-product of state collapse that would wither away as the formal legal system expanded. The new 2004 constitution, which vested almost all political authority in a highly centralized government, buttressed this opinion since it gave no recognition to such alternative institutions at the regional or provincial level.⁹ Similarly, international observers, particularly NGOs operating in Kabul, assumed that because previous Afghan governments had already signed most of the standard international conventions and treaties guaranteeing such human rights as freedom of religion and equal rights for women, bringing Afghan laws into conformity with them would not be controversial.¹⁰

However, these planners were not operating in a vacuum. A quick review of Afghan history would have shown them that implementing a system of nationally applicable laws and courts was a state-building project that had never been successfully completed in Afghanistan. Renewing such a top-down process was sure to be challenged and contested as an infringement on community autonomy. And challenging the formal legal system was a feasible option because the alternatives to it were not wartime improvisations, but well-developed traditions with deep roots, both tribal and religious. These alternative systems better reflected local (particularly rural) values and traditions than did the formal legal system, which was often attacked in the past as a vehicle for introducing alien ideologies into the country. For example, while the protection of the individual rights guaranteed by treaties and conventions to which Afghanistan is a signatory may have absolute priority for the international lawyers advising the Afghan government, such agreements have no traction at the local level, particularly when they concern religion, women, and family affairs. Indeed, the values that the Afghan state has pledged itself to uphold internationally are largely unknown and unenforceable domestically. Similarly, ordinary Afghans do not always see the expansion of the formal legal system as a step forward in establishing the rule of law. Historically, they had no role in creating the national law codes they are being asked to accept now and view the whole judicial system as corrupt beyond repair.

8. DR. MARTIN LAU, INT'L COMM'N OF JURISTS, *AFGHANISTAN'S LEGAL SYSTEM AND ITS COMPATIBILITY WITH INTERNATIONAL HUMAN RIGHTS STANDARDS: FINAL REPORT 3-7* (2002), <http://www.icj.org/IMG/pdf/doc-46.pdf>.

9. See AFG. CONST. (2004), available at <http://www.ag-afghanistan.de/constitution.pdf>; see also Eileen R. Prusher, *Afghan Constitution Debuts*, CHRISTIAN SCIENCE MONITOR, Nov. 4, 2004, at 6.

10. Afghanistan has ratified and is accordingly bound by the following relevant instruments: The Geneva Conventions of 1949; the Genocide Convention of 1948 (acceded 1956); the Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968 (acceded 1983); the Convention on the Elimination of All Forms of Discrimination Against Women of 1979 (acceded 1980); the International Covenant on Civil and Political Rights of 1966 (acceded 1983, but not to the optional protocol); the Convention on the Elimination of All Forms of Racial Discrimination of 1966 (acceded 1983); the Convention Against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment of 1984 (ratified 1987); and the Convention on Rights of the Child of 1989 (ratified 1994).

Since the Afghan state is currently weak, it would be very risky to follow the path of earlier governments and simply impose a formal legal system by fiat. It can only be rebuilt on a solid foundation if it takes into account the political and cultural expectations of the Afghan people. Opposition cannot be wished away and should be dealt with through the political process. Practical considerations make this even more important. At the best of times the formal system never handled any more than a small minority of the legal cases that might seem to fall within its purview and always relied on the informal system to fill that gap. Given the small size of the Afghan court system relative to the population, this situation will not change in the future.¹¹ Therefore, it is important to give legal recognition to the outcomes of informal dispute resolution that is definitive but that does not compromise the rights of individuals to use the formal system if they so choose. Even in criminal matters where the government has long claimed exclusive jurisdiction, informal systems remain vital to maintaining local peace. It is in this forum that aggrieved parties seek reconciliation in a process designed to restore social harmony through such measures as compensation for loss, public apologies, and pledges of amity.

III. SYSTEMS OF JUSTICE IN CONFLICT

The legal system in Afghanistan has historically been composed of three competing parts: the state legal codes, Islamic religious law (*sharia*), and local customary law.¹² In contrast to most nations where state power has moved all other contenders for legal authority to the margins or eliminated them, in Afghanistan the power of each has waxed and waned.¹³ In some periods and places the religious or customary sector has been dominant, while in other times and places the state has forcibly imposed its power as it pleased. In theory, each sector proclaims itself an autonomous or even exclusive legal authority, but in practice no single sector has ever been able to completely displace the others. Consequently, each sector has had to adjust to limitations on power and authority. The systems continue to interact in such a way that any single legal dispute has the capacity to migrate from one sphere to another and thus plays a large role in how an issue is ultimately resolved.

Customary law is the means by which local communities resolve disputes in the absence of (or opposition to) state or religious authority. It is based on a common cultural and ethical code that generates binding rules on its members. Communities use this unwritten code to resolve disputes, evaluate actions for praise or blame, and to impose sanctions against violators of local norms. While systems of customary law

11. The Supreme Court has approximately 1,350 official "judge" positions in its staffing scheme. THOMAS BARFIELD, NEAMAT NOJUMI & J. ALEXANDER THIER, U.S. INST. OF PEACE, *THE CLASH OF TWO GOODS: STATE AND NON-STATE DISPUTE RESOLUTION IN AFGHANISTAN 20* (2006), http://www.usip.org/ruleoflaw/projects/clash_two_goods.pdf. Of these, approximately fifty percent are occupied, and of that fifty percent, the U.N. estimates that perhaps one-third are educated to a university standard. *Id.* According to the office of the Prosecutor General, 2,212 legal professionals are needed nationwide, among a total of 4,934 staff; there is no discernable defense bar. *Id.* Even if fully staffed and trained, a judiciary of this size cannot really service the needs of a population estimated at twenty-six million or more people.

12. KAMALI, *supra* note 3, at 41-44, 209-10.

13. See BARNETT R. RUBIN, *THE FRAGMENTATION OF AFGHANISTAN: STATE FORMATION AND COLLAPSE IN THE INTERNATIONAL SYSTEM* 45-80 (1995).

are found universally throughout rural Afghanistan, their specifics vary widely and often idiosyncratically. In addition, far from being timeless and unchanging, they are subject to manipulation and internal challenges. The most elaborate of these systems is the *Pashtunwali*, the code of conduct for Pashtuns.¹⁴ It is an oral tradition that consists of general principles and practices (*tsali*) that are applied to specific cases.¹⁵ What is most distinctive about the use of customary law is its insistence on using community members, or respected outsiders chosen by the disputants, as fact finders and decision-makers. Both the system's strength and weakness lies in its reliance on mediation and arbitration to resolve problems. It generally lacks the power of coercive enforcement. Failures to resolve serious problems, particularly those involving threats of bloodshed, therefore often prompt state intervention.

Islamic religious law (*sharia*) in Afghanistan was implemented by trained religious judges (*qazi*) following the Hanafi legal tradition.¹⁶ They were part of a larger class of professional clerics (*ulema*) who issued opinions (*fetwa*) on religious issues. They saw themselves as protectors of a divinely inspired tradition in which religion and government were inextricably melded. As opposed to the highly localized systems of customary law, *sharia* was believed to be universally applicable to all times and places.¹⁷ Based on their training in a literate and urban tradition of orthodox Islam, the *ulema* saw the rural customary law systems as illegitimate, particularly when they strayed from classic Islamic practices.¹⁸ The *ulema* often used their influence to demand the replacement of customary law practices with more standard *sharia* interpretations, which of course then required the *ulema* to resolve disputes.¹⁹ Until the formation of the modern Afghan state in the late nineteenth century, the *ulema* ran the legal system independently, providing both the system of laws and the judges to interpret it.²⁰ This autonomy was progressively restricted through the secular reforms of modernist rulers who demanded that the clergy recognize the state's right to

14. See generally WILLI STEUL, *PASHTUNWALI* (1981).

15. Alef-Shah Zadran, *Socio-Economic and Legal-Political Processes in a Pashtun Village, Southeastern Afghanistan 205-07* (July 15, 1977) (unpublished Ph.D. dissertation, State University of New York at Buffalo) (on file with SUNY-Buffalo Library).

16. Shiite Muslims, on the other hand, employ the Jaferi tradition, which was not recognized in Afghan law until the 2004 constitution. There, Article 130 provided that where "[w]hen there is no provision in the Constitution or other laws regarding ruling on an issue, the courts' decisions shall be within the limits of this Constitution in accord with the Hanafi jurisprudence." AFG. CONST. art. 130 (2004), available at <http://www.ag-afghanistan.de/constitution.pdf>. However, Article 131 permitted application of *Shia* jurisprudence "in cases dealing with personal matters involving the followers of [the] Shia Sect," and "[i]n other cases if no clarification by this constitution and other laws exist and both sides of the case are followers of the Shia Sect." *Id.* art. 131. Before that time Shiites were compelled to have their disputes resolved using the Hanafi tradition, a form of discrimination they resented.

17. ANN K. S. LAMBTON, *STATE AND GOVERNMENT IN MEDIEVAL ISLAM: AN INTRODUCTION TO THE STUDY OF ISLAMIC POLITICAL THEORY: THE JURISTS 1-20* (1981).

18. See NAWID, *supra* note 5, at 8-12, 87, 188.

19. See VARTAN GREGORIAN, *THE EMERGENCE OF MODERN AFGHANISTAN 248-52* (1964); see also NAWID, *supra* note 5, at 87.

20. See M. HASAN KAKAR, *GOVERNMENT AND SOCIETY IN AFGHANISTAN: THE REIGN OF AMIR ABD AL-RAHMAN KHAN 153-55* (1979).

promulgate laws on its own and control the appointment of judges.²¹ After taking control the Afghan state in the late 1990s, the Taliban abolished these national legal codes on the grounds that the existing *sharia* system already filled the needs of Islamic society. While the Taliban's rejection of this secularized state model marked the high water mark of clerical influence, it proved a low ebb for Islamic jurisprudence. Because the Taliban drew their high officials from poorly educated clerics rather than the better trained *ulema*, they proved incapable of actually administering the complexities of *sharia* law.²²

State legal codes draw their power from their claim to be the exclusive source of legal authority that is enforceable on all people throughout the country. Beginning with the rule of Amir Abdur Rahman from 1880 to 1901, the Afghan state saw the extension of its own law codes and judicial institutions as an application of state sovereignty that it should not have to share with anyone.²³ Initially, the state used existing Islamic law but put the *qazis* on the state payroll, making them part of the government.²⁴ Subsequent rulers created independent state law codes and demanded that *qazis* have state training and certification. Such codes were always supposed to be in accordance with Islamic principles, but the state asserted the priority of its own laws over any applications of traditional *sharia* law where the two conflicted.²⁵ Even at the height of its power, however, the Afghan state never had the administrative ability to enforce its writ nationwide. While the central government refused to recognize the legitimacy of customary law formally, officials in rural areas often found it the best way to deal with problems in their districts. Similarly, communities employing customary law used the threat of going to the government courts as a way to put pressure on reluctant disputants to accept their decisions. The highpoint of the state approach occurred under the rule of the People's Democratic Party of Afghanistan (PDPA). In 1978 they removed religious symbolism from government to create an overtly secular regime. This move was so ill-received by the nation at large, however, that the PDPA retreated to the old "conformity with Islam formula" in the hopes of winning broader support after the Soviet invasion in 1980.²⁶

The social context in which these three elements play out is largely rural and highly localized. Historically, 80% of Afghanistan's population lived in the countryside in face to face communities.²⁷ If all politics is local, then Afghan politics is local and personal as well. The social structure of communities is based either on the tribe (where kinship relations determine social organization and basic political alliances) or the locality (where people identify themselves in terms of common place). Tribal organization uses common descent through the male line to define membership and is most characteristic of the Pashtuns and Turkmen who maintain elaborate genealogies that extend back to a common ancestor. Identification by locality is most characteristic of the Tajiks, who have a common language (Persian) and sect (Sunni Islam) but make

21. M.G. Weinbaum, *Legal Elites in Afghan Society*, 12 INT'L J. OF MIDDLE E. STUD. 39, 51-55 (1980).

22. Barfield, *supra* note 7, at 231-33.

23. ASTA OLESEN, ISLAM AND POLITICS IN AFGHANISTAN 66-67 (1995).

24. KAKAR, *supra* note 20, at 51-52.

25. *Id.* at 50-52.

26. ANTONIO GIUSTOZZI, WAR, POLITICS AND SOCIETY IN AFGHANISTAN: 1978-1992, 57-64 (2000).

27. See LOUIS DUPREE, AFGHANISTAN 142 chart 10, 161 chart 14 (Princeton Univ. Press 1980) (1973).

no claim that they share any overarching kinship links. Among some groups that are nominally tribal, such as the Uzbeks, only weak clan affiliation remains; while other groups, such as the Hazaras, have a tribal structure, but are more likely to identify themselves through their common Shia religion, which sets them off from their neighbors. Tribal peoples who move to the cities tend to lose their kinship links and identify by locality over the course of a few generations. Whether based on locality or descent, Afghans call all of these groups *qawm*, a wonderfully flexible term that indicates “us” as opposed to “them.” Fellow *qawmi* can broadly include all members of a large tribal or ethnic group, such as Pashtun, Hazara, or Tajik, or narrowly indicate as few people as members of the same village or lineage. It is among people of the same *qawm* that customary law has its strongest force.

A. Understanding the Strength of Afghan Customary Law

In a collection of studies of African political systems, Meyer Fortes and Edward Evans-Pritchard contrasted societies with centralized governments with those that lacked them.²⁸ The first were characterized by “centralized authority, administrative machinery, and judicial institutions—in short, a government—and in which cleavages of wealth, privilege, and status correspond to the distribution of power and authority.”²⁹ The second included “those societies which lack centralized authority, administrative machinery, and constituted judicial institutions—in short which lack government—and in which there are no sharp divisions of rank, status, or wealth.”³⁰

Both types of systems can be found in Afghanistan within a single society. The urban areas of the country and the irrigated agricultural plains were under the control of formal governments and their institutions. The inhabitants of economically and geographically peripheral areas in the mountains, deserts, and steppes historically remained beyond the bounds of state control and therefore ran their own affairs.³¹ It was both the lack of wealth and marginal location that characterized these areas that made them unprofitable for the Afghan state to administer. State control in these regions was therefore often indirect or even non-existent. While throughout the late nineteenth and twentieth centuries the ability of the Afghan state to penetrate such areas through roads, communication systems, and force of arms progressively expanded, the level of local autonomy remained much higher than in other neighboring countries. In part this was because Afghanistan had avoided direct colonial rule by European powers and because the country’s economy has remained largely subsistence-based to the present day, conditions conducive to preserving local autonomy. And many areas, particularly among the Pashtuns in the east bordering Pakistan’s autonomous tribal belt, the inhabitants were also armed and willing to resist encroachments by the Kabul-based governments.

But how does a community preserve order and solve disputes in society without government? For people who depend on the state and its formal institutions to define law and ensure its enforcement, the absence of government presents a major problem.

28. Meyer Fortes & Edward Evan Evans-Pritchard, *Introduction to AFRICAN POLITICAL SYSTEMS* 5 (Meyer Fortes & Edward Evan Evans-Pritchard eds., 1940).

29. *Id.*

30. *Id.*

31. Barfield, *supra* note 2, at 265-67.

In the view of the seventeenth century English political philosopher Thomas Hobbes, the absence of government or its collapse inevitably leads to anarchy and a war of “every man against every man,” a condition he regarded as the worst of all possible worlds.³² Thus, he concluded that the existence of a strong sovereign power was necessary to achieve lasting social order and peace.³³ Anarchy and social disorder were greater dangers to the community than any tyranny. Most governments in Afghanistan have justified themselves using this Hobbesian bargain: they may be corrupt, oppressive and unpopular, but they preserve order. Failure in this primary task invites replacement. Islamic law supported this view as well, asserting that rebellion against an established Muslim ruler by his subjects was illegitimate because it created *fitna* (disorder, sedition, civil war) that was a greater danger to society than the worst misgovernment.³⁴

Communities using customary law rejected the Hobbesian bargain because their own experience had shown them that social order could be maintained in the absence of government. In their view, formal government institutions were not only unnecessary but oppressive. Here, law was based on a community consensus and the preservation of order fell to individuals and their kinship or residential groups. Bound together by complex sets of relationships in face to face communities, the lack of formal law codes or judicial institutions did not breed anarchy. Instead, the freedom of the individual to do as he pleased was restricted by his acceptance of a common cultural code of behavior, the norms of which were enforced by the community members at large. The stress was on the equality of community members because all power and jurisdiction was reciprocal; no one by right had any more power or authority than anyone else. It was expected that all community members would refrain from invading each other’s rights and property, and from injuring one another. In the event of violations, however, everyone had a right to punish the transgressors himself and to take appropriate retribution: an eye for an eye, a tooth for a tooth, a life for a life. Thus, instead of court prosecutions one had blood feuds that operated under specific sets of restraints that defined acceptable limits of action. It was to prevent the emergence of such disputes, or to end those in progress, that communities developed forms of mediation and arbitration designed to restore social harmony. Indeed, the worst punishment such a community could generally inflict on transgressors was not death but permanent exile because it severed the individual from the community, a form of social death.

B. The Process of Initiating and Resolving Disputes

Anthropologists examine sets of rules to understand how an informal legal system works. As outlined by K.N. Llewellyn and E. Adamson Hoebel, there are three ways to look at such rules: 1) rules as abstract principles, 2) rules as actual behavior, and 3) rules as principles derived from legal decisions in cases of hitch or trouble.³⁵ For Pashtuns, it is the *Pashtunwali* that is the source of abstract principles. Rules that

32. THOMAS HOBBS, *LEVIATHAN* 64 (J.M. Dent & Sons, Ltd. 1973) (1651).

33. *Id.* at 64-65.

34. *See generally* GILLES KEPPEL, *FITNA: GUERRE AU COEUR DE L'ISLAM* (2004).

35. K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* 20-23 (1941).

generate behavior embody the notion of “doing Pashto,” that is, enacting cultural values in the real world where they take on specific forms.³⁶ The specific set of rules that are derived from and employed in legal cases and dispute resolution are known as *tsali* (trail marker) in Pashto.³⁷ It is the last area that is most concrete because actions taken by individuals (or proposals for action) become subject to public judgment. Alef-Shah Zadran provided one of the best descriptions of how this system operates in an unpublished dissertation that focused on dispute settlement among the Zadran Pashtuns in the Paktia Province of eastern Afghanistan during the government of President Mohammad Daud from 1973 to 1978.³⁸

Disputes among Pashtuns are traditionally said to arise from the three “Z”s: *zar*, *zan*, and *zamin* (gold, women, and land).³⁹ Unlike state criminal codes that impose fines (paid to the government) and imprison wrongdoers, Pashtun customary law seeks compensation for the wrong done and social reconciliation, not the punishment of the perpetrator.⁴⁰ The easiest problems to solve are those small disputes in which judges must simply assess liability for damage claims to property or set compensation for personal injuries that have an accepted value. While this system of justice may be unwritten and informal it has a specificity that would impress even a practicing tort attorney, as evidenced by the two tables of compensation from the 1970s listed below:

Table #1: Bodily Injury Compensation Schedule⁴¹

<u>Body Part Injured</u>	<u>Level of Compensation (\$1=50 Afs)</u>
Right eye	7,500 Afs
Left eye	7,500 Afs
Right ear	5,000 Afs
Left ear	5,000 Afs
Nose	30,000 Afs
Middle incisor	5,000 Afs
Side incisor	3,500 Afs
Canine	2,500 Afs
Premolar	2,000 Afs
Molar	1,000 Afs
Hands	15,000 Afs
Right hand	10,000 Afs
Left hand	5,000 Afs

36. Fredrik Barth, *Pathan Identity and its Maintenance*, in *ETHNIC GROUPS AND BOUNDARIES* 117, 129 (Fredrik Barth ed., 1969).

37. See Zadran, *supra* note 15, at 205-07.

38. *Id.*

39. JAMES W. SPAIN, *THE WAY OF THE PATHANS* 46 (1972).

40. CHARLES LINDHOLM, *GENEROSITY AND JEALOUSY: THE SWAT PUKHTUN OF NORTHERN PAKISTAN* 84 (1982) (describing an incident where a man who betrayed his village allowed his two sons to be killed in “compensation for his crimes,” and then rejoined his village and “retained a position of prestige in the village”).

41. Zadran, *supra* note 15, at 257-64.

Fingers	
Thumb	3,750 Afs
Index	2,500 Afs
Middle	2,000 Afs
Ring	1,500 Afs
Pinky	1,000 Afs
Feet	15,000 Afs
Right foot	7,500 Afs
Left foot	7,500 Afs
Amputation of foot	30,000 Afs
Fingernails or toenails (visible)	150 Afs
Fingernails or toenails (not visible)	100 Afs

Table #2: Farm Injury Compensation Schedule⁴²

<u>Type of Tree</u>	<u>Level of Compensation (\$1=50 Afs)</u>
Apple	1,000 – 2,000 Afs
Apricot	500 – 1,000 Afs
Pomegranate	100 – 300 Afs
Walnut	1,500 – 2,000 Afs
Mulberry	1,000 – 1,200 Afs
Willow	500 – 1,300 Afs

<u>Type of Animal</u>	<u>Level of Compensation</u>
Camel	10,000 – 20,000 Afs
Ox	3,000 – 7,000 Afs
Cow	2,000 – 5,000 Afs
Donkey	1,000 – 2,000 Afs
Sheep	1,000 – 3,000 Afs
Goat	600 – 1,000 Afs

In addition to seeking compensation that will make a victim whole (to the extent that is possible), Pashtun customary law also attempts to make the offender publicly and personally accountable for his deeds.⁴³ The community can therefore demand that the wrongdoer apologize publicly to the victim and make payments for *sharm* (shame). *Sharm* is a payment, usually consisting of one sheep and 500 Afs., that recognizes the social damage done to the honor of the victim.⁴⁴ Upon receipt of the *sharm* payment the victim slaughters the sheep and invites the neighbors, the village mullah, and the offender and his family to the subsequent feast.⁴⁵ The offender offers a public apology at this time.⁴⁶ This is expected to end the dispute and bring the community back into harmony.

42. *Id.* at 268.

43. *See id.* at 234.

44. *Id.*

45. *Id.*

46. *Id.*

More disruptive are those cases that generate a demand for retaliation or revenge (*badal*) because here an individual seeks personal retribution for wrongs done against him or his kin group, particularly in cases of murder.⁴⁷ There is the obvious desire to punish the person who committed the act by the victim's family, but it also involves questions of honor and personal responsibility. Not seeking retaliation personally is deemed a sign of moral weakness, even cowardice, not just of the individual who was wronged, but his whole kin group. It is this right and expectation of retaliation that lies at the heart of the *Pashtunwali* as a non-state legal system.⁴⁸ Kill one of our people and we will kill one of yours; hit me and I will hit you back. While the community may recognize that acts such as theft, homicide, or rape are wrong, unlike the state, the community does not take collective responsibility for judging or punishing people who commit such acts. This is a right reserved to the victims. However, the *Pashtunwali*, local tradition, and public opinion do play a large role in structuring how, on whom, and where one may take revenge legitimately. It also lays out mechanisms for resolving such disputes through mediation or arbitration. Communities exert considerable social pressure to end disruptive disputes, particularly in blood feuds where successive cycles of revenge attacks can only be brought to an end by the intervention of outside intermediaries.

Although associated with lawlessness in the popular mind, blood feuds are hedged by a large number of rules designed to limit their destructiveness.⁴⁹ For example, the first question that must be answered is whether or not a death falls within the blood revenge category. If the death results from an accident or is involuntary, the victim's family may be entitled to compensation but not revenge. Blood revenge may also be prohibited if the victim was engaged in a dishonorable act during the commission of a crime, such as a thief killed in the night or a man caught engaged in adultery. Personal blood revenge cannot be taken in time of peace for a man killed in battle because the fight was group against group, although if hostilities are renewed then each side tries to even the score. Finally, since blood revenge is the obligation of a kin group, a man who kills his brother is not subject to revenge (since the murderer would have to take revenge on himself) but he would have to flee the community. Revenge should ideally be directed at the murderer alone, but under some conditions the *Pashtunwali* makes his brothers or other patrilineal kin legitimate substitute targets. Women and children are excluded as targets of revenge in all cases. The person taking the revenge should be a close relative of the victim and the most honorable revenge attacks take place face to face. Killing in ambush is also acceptable as long as the revengers take public credit for their deed. Revenge attacks cannot be carried out in a mosque or against a guest. The goods and weapons of a man killed in a revenge attack cannot be robbed and his relatives should be given quick notice of the death so that they can recover his intact corpse for burial.

Taking revenge is often no easy task, particularly if the murderer is from a powerful family and the victim's kin group is weak.⁵⁰ If revenge cannot be carried out

47. FREDRIK BARTH, *POLITICAL LEADERSHIP AMONG SWAT PATHANS* 82 (1965).

48. *Id.*

49. *See generally* Zadran, *supra* note 15, at 314-15.

50. *See generally* Charles Lindholm, *The Structure of Violence Among the Swat Pukhtun*, 20 *ETHNOLOGY* 147 (1981).

the victim's family will often leave the village to avoid the public shame of having to live in proximity to the killers. Such unresolved cases may linger for years and hang over the communities like uncollected debts. The most classic of these cases involves the responsibility of blood revenge falling on young boys whose fathers' deaths remain unavenged. Upon reaching adulthood many years later they return to kill their enemies. The long period that may elapse between an offense and its resolution is recognized in a number of Pashtun proverbs; for example, a "Pukhtun waits for a century to take revenge and says, 'I took it quickly.'"⁵¹

The choice of taking blood revenge or other retaliation lies with the individual, but once a potentially violent dispute enters the public realm the community can intervene by sending its own intermediaries who ask for a truce and attempt to begin negotiations.⁵² It is hard for the individual to refuse such a truce, particularly when it is proposed by men of influence or in the name of religion. However, this intervention is only likely to occur if the community fears that the dispute will create wider waves of social disruption that need to be controlled. In this respect, episodic revenge-homicides may be less disruptive than disputes over the boundaries and the uses of community controlled forestland or pasture, which can provoke warfare between rival groups. But once a cycle of killing begins, blood feuds between hostile kin groups can last for generations if left unresolved.⁵³ For this reason, communities usually attempt to intervene to end the dispute by getting the parties to agree to a settlement before another death occurs. Although in violation of both national and *sharia* laws,⁵⁴ giving women in marriage as part of a settlement between the feuding parties was common and justified because it bound the formerly estranged groups by new marriage ties.⁵⁵ However, because settling too quickly may impugn the honor of the victim's kin group, they are often reluctant to accept any settlement unless the mediators address this problem.⁵⁶

IV. THE IMPLEMENTATION OF STATE LEGAL CODES AND ISLAMIC LAW IN RURAL AFGHANISTAN

A. State Legal Codes

The relationship of the Afghan state legal system to local communities employing their own forms of customary law was historically problematic and often contradictory. In theory, state law has always applied to all residents of Afghanistan equally; but in practice, government institutions were found almost exclusively in urban areas and in provincial centers of administration. The latter's direct control rarely reached beyond the limits of the towns where local officials were stationed. Even so, under strong central governments, the state attempted to expand its reach and had clearly become

51. LINDHOLM, *supra* note 40, at 76.

52. Niloufer Qasim Mahdi, *Pukhtunwali: Ostracism and Honor Among the Pathan Hill Tribes*, 7 *ETHNOLOGY & SOCIOBIOLOGY* 295, 297-301 (1986).

53. ELPHINSTONE, *supra* note 1, at 165-66.

54. See BARFIELD, NOJUMI & THIER, *supra* note 11, at 3.

55. See Ali Wardak, *Jirga: Power and Traditional Conflict Resolution in Afghanistan*, in *LAW AFTER GROUND ZERO* 187, 197 (John Strawson ed., 2002).

56. ELPHINSTONE, *supra* note 1, at 168-70.

the dominant force in Afghanistan by the 1970s because of its ability to intervene in local affairs if it chose to do so.⁵⁷ This high water mark quickly receded during the decade-long struggle to oust the Soviets from Afghanistan that ended in 1989 and receded even further during the civil war that erupted upon the fall of Najibullah's government in 1992.

State legal codes and formal administration had the greatest impact on local communities during the establishment of the modern Afghan state in the reign of Amir Abdur Rahman from 1880 to 1901 and during the period of intensive state-building from 1950 to 1978 under Zahir Shah and Daud Khan.⁵⁸ State control was weak or absent in periods when the power of the central government declined, such as in the wake of the civil war that toppled King Amanullah in 1929, when local communities regained their autonomy.⁵⁹ However, even during periods of strong state-building, the power of customary law was circumscribed rather than destroyed. In part, this was because the state used these systems as a form of indirect rule in areas where they lacked the administrative capacity to rule directly. It proved very useful for local government officials to rely on the informal system to maintain general peace and order. Only when disputes threatened public order, involved criminal activity, or were reported to the government for action, did the state normally intervene.⁶⁰

The state system was most at odds with the informal system in the area of criminal law. The Afghan state attempted to end blood feud and other forms of private justice.⁶¹ The state proclaimed exclusive jurisdiction in such matters on the grounds that these crimes were offenses against the community at large and deserved to be punished as such. There was also a strong equity argument to be made, that only the state had the capacity to protect the weak and powerless against abuse by stronger members of the local community who might otherwise commit crimes against them with impunity. Rural communities, however, still viewed the Kabul government with suspicion because in practice state legal authority was embodied not just in state appointed prosecutors and judges but in executive officials appointed by the central government, such as provincial governors, district administrators, and the police commandants who ran the Gendarmerie-Provincial Police. All of these executive officials had the power to detain and jail people for various lengths of time. Thus, local officials, without reference to the courts, decided many cases that one might expect would be judged in the formal legal system. This was hardly surprising given the small size of the Afghan judiciary: in 1972, it consisted of only 679 judges and assistant judges and dealt primarily with serious crimes or significant property cases, particularly where the court's control of land registration made it the deciding player.⁶² In Afghanistan, a country the size of France that in the early 1970s had a population of at least 12 million people, this formal legal system was very thin on the ground. This was particularly

57. Thomas J. Barfield, *Weak Links on a Rusty Chain: Structural Weaknesses in Afghanistan's Provincial Government Administration*, in *REVOLUTIONS AND REBELLIONS IN AFGHANISTAN* 170, 171 (M. Nazif Shahrani & Robert L. Canfield eds., 1984).

58. RICHARD S. NEWELL, *THE POLITICS OF AFGHANISTAN* 80-88 (1972).

59. See GREGORIAN, *supra* note 19, at 274.

60. See Barfield, *supra* note 57, at 176-79.

61. NEWELL, *supra* note 58, at 80-84.

62. See KAMALI, *supra* note 3, at 230-31.

true in the country's 209 sub-provincial districts where the primary courts were located.⁶³ Most of Afghanistan's small judiciary was concentrated in the capital, Kabul, where the Supreme Court resided, and only major provincial cities had secondary courts.

Because residents of rural Afghanistan generally considered government officials of all types corrupt and oppressive, there was a strong desire to avoid both government officials and the formal legal system. This fear of becoming involved with a government process was one of the strongest tools that local mediators and arbitrators had at their disposal when enforcing decisions rendered by the informal system. If the parties refused to accept a negotiated settlement they would be threatened with the imposition of the formal judicial process. This was usually enough of a threat to gain compliance. But in many cases, local officials actually aided the process by jailing the disputants or their relatives until they agreed to arbitration in order to maintain the peace in the districts. In other cases, they acted as self-appointed arbitrators to resolve a problem without resort to formal adjudication. Unfortunately this was often done by demanding bribes to make a problem disappear. As one cynic informed me, a fair judge was one who demanded bribes equally from both parties so that he could then judge the case impartially. The state system also had a cultural barrier to surmount, particularly in Pashtun regions where seeking government help was considered a sign of weakness, evidence that the kin group was unable to take revenge honorably themselves.⁶⁴ Even when state authorities did arrest and jail the offender, such punishment by a government criminal court did not erase the obligation to take revenge. The victim's family was expected to kill the murderer once he was released from prison unless there was a settlement to end the feud before that time.

B. Islamic Law and Rural Afghanistan

Throughout the twentieth century there was an unresolved battle at the national level between modernists and Islamists over the Afghan legal system that involved replacing an exclusive dependence on *sharia* law with statutory law. The most contentious areas of legislation involved changes in family law that attempted to restrict brideprice, set minimum age for marriage, and revise the rules for divorce.⁶⁵ Conservative clerics often used these changes, actual and proposed, as a way to mobilize opposition to governments in Kabul.⁶⁶ For this reason historians have generally assumed that the people of rural Afghanistan were the natural allies of the conservative clergy in support of Islamic law.⁶⁷ The most widely cited example was the opposition to King Amanullah's reforms in the 1920s that resulted in rural revolts that eventually toppled his regime.⁶⁸ But since his family law code was never implemented in the rural areas, opposition to it was almost purely theoretical. What rural Afghans tended to resist, and what Muslim clerical opponents could effectively

63. *Id.* at 226.

64. See DUPREE, *supra* note 27, at 126-28.

65. NAWID, *supra* note 5, at 153-54.

66. *Id.* at 161-66.

67. See POUILLADA, *supra* note 4, at 157-59.

68. *Id.*

play upon, was the imposition of direct control by the Kabul government, whether that took the form of taxation, conscription, or the imposition of a new legal code.⁶⁹ But in this struggle, *sharia* law was not the champion of old rural traditions. Instead, it defended the state's right to tax or conscript its subjects as it pleased and rejected the right to rebellion against a Muslim ruler even when his acts were abusive.⁷⁰ Indeed one of the few things that proponents of state and *sharia* law could both agree upon was that customary codes or institutions should have no role as part of the judicial system.

Until the 1964 Constitution unified them and gave precedence to statutory law in the combined system,⁷¹ the Afghan legal system had two types of courts: those that administered *sharia* law and those that administered statute law.⁷² But even the codes authorized by the 1964 Constitution in the unified system often just restated *sharia* law interpretations in the form that was easier to use by judges.⁷³ This involved laying out crimes and their penalties clearly by statute, but then declaring that any gaps be covered by Hanafi interpretation of *sharia* law. Persian translations from standard Egyptian and Ottoman juristic manuals provided the source material for use in *sharia* law,⁷⁴ a translation project that was never completed for the entire code. By making this material available in Persian, judges no longer needed be competent in Arabic, an advantage the Islamic clergy previously had over other groups. The code proved to be less a replacement of *sharia* and more a modified version of it tailored to avoid controversy.⁷⁵ However, because combining the administrative and *sharia* courts into a single system affected only the top two levels of the judiciary (provincial Secondary Courts and the national Supreme Court), these changes had little impact on rural Afghanistan:

Since the reorganization of the judiciary in the 1960s did not affect the then existing structure of the primary courts, the jurisdiction of these courts remained largely unchanged in their capacity as the courts of first instance for ordinary civil litigations and crimes. Thus the primary court remained essentially a court of *sharia* jurisdiction in much the same way as they were before the Constitution of 1964.⁷⁶

As a product of a literate and sophisticated urban Islamic milieu, *sharia* law had developed procedures for properly evaluating evidence, deciding cases in a consistent manner, and justifying decisions by reference to Hanafi *fiqh* (science of jurisprudence).⁷⁷ When used by the state court system, however, there was often a poor fit between its procedures and the needs of illiterate rural Afghans. First, while custom-

69. NAWID, *supra* note 5, at 158-61.

70. *Id.* at 81-87.

71. AFG. CONST. art. 64 (1964), available at <http://www.afghan-web.com/history/const/const 1964.html>.

72. KAMALI, *supra* note 3, at 41-43.

73. Christina Jones-Pauly & Neamat Nojumi, *Balancing Relations Between Society and State: Legal Steps Toward National Reconciliation and Reconstruction of Afghanistan*, 52 AM. J. COMP. L. 825, 842-43 (2004).

74. *See id.* at 843 ("The reference to 'principles' of Hanafi jurisprudence seems to have had deep historical roots.").

75. *See id.* ("The Manual for the [*qazis*] . . . enjoined the judges not to pass judgment against the 'principles of the luminous Sharia.'").

76. KAMALI, *supra* note 3, at 227.

77. *See* OLESEN, *supra* note 23, at 41.

ary law was part of an oral tradition in which any competent adult could participate, state law courts demanded written documents and citation of specific laws to bring a case. Litigants therefore needed to employ specialists who had formal training in *sharia* law and court procedures. Second, state law courts (like most formal legal systems) were overly focused on process as opposed to substance. Appeals in a case could move it from the local Primary Court to a provincial Secondary Court or the national Supreme Court in Kabul where technicalities could tie the process in knots. Third, the use of *sharia* law by state courts was often at odds with rural traditions, particularly the right to blood revenge, payment of brideprice, marriage exchanges to end blood feuds, denying property inheritance to women, and punishment of crimes like adultery. Fourth, the exclusive use of the Sunni Hanafi tradition of *sharia* by state courts completely ignored the practices of the country's Shias (about 15% of the population) who had their own legal schools.

The process problems were perhaps more important than the content problems. For example, rural Afghans often ignored the gap between *sharia* law and local custom because they often assumed (incorrectly) that there was none. Surely, they thought, their own local traditions must be in accord with Islamic law because they themselves were such good Muslims. Indeed, given the high rates of illiteracy in Afghanistan and weak training in Arabic even among educated clerics, too few of them actually knew just what *sharia* law actually required. And since the judges assigned to the lowest level Primary Courts usually had only basic training in *sharia* law themselves, they were as often swayed by arguments drawn from local tradition as from Hanafi *fiqh* in deciding cases.⁷⁸ Thus, while the dispute at the national level focused on the content of the law, at the local level people focused on its administration. Whether based on the *sharia* or government legislation, the courts of all types were still viewed as tools of the central government that allowed the state to interfere in local affairs.

V. THE IMPACT OF 20 YEARS OF WARFARE ON TRADITIONAL SYSTEMS OF JUSTICE AND CONFLICT RESOLUTION

Over the course of the anti-Soviet war (1979-1989), and more thoroughly during the Afghan civil war (1989-2001), the state institutions of successive Kabul governments withered. In many parts of the country, formal government institutions ceased to exist. While this reinvigorated the autonomy of local communities, there was a change in their political organization in which the old domination of rural life by large landowners and traditional tribal leaders gave way to a new class of younger military commanders who also took on the responsibility of civil administration.⁷⁹ It also produced the rise of new representative institutions such as village *shuras*, assemblies that were designed to represent local communities.⁸⁰ While these had been common in Pashtun areas as *jirgas*, such collective assemblies were new to other parts of the country. At the same time, the power and influence of the Islamic clergy (*ulema*) rose sharply compared to pre-war Afghanistan, particularly when it came to

78. LAUREL MILLER & ROBERT PERITO, U. S. INST. OF PEACE, SPECIAL REPORT: ESTABLISHING THE RULE OF LAW IN AFGHANISTAN 5 (2004), <http://www.usip.org/pubs/specialreports/sr117.pdf>.

79. OLIVER ROY, ISLAM AND RESISTANCE IN AFGHANISTAN 160-62 (1986).

80. *Id.* at 142.

administering religious law (*sharia*) in the absence of central authority.⁸¹ The influence of the clergy peaked with the Taliban, the only clerical movement ever to seize power in Afghanistan.

During the Soviet war the central government lost direct control of most rural regions but maintained its power in the cities. Because rural Afghanistan had such a strong tradition of customary law and enforcement based on self-help, the withdrawal of government institutions such as the police did not lead to anarchy.⁸² People were already used to solving their problems without resorting to the government. Instead, the withdrawal of government institutions increased the power of local assemblies (*jirgas* and *shuras*). Military commanders also began to play an important role in community life.⁸³ As leaders of resistance groups, this emerging class of younger men from less prestigious social backgrounds filled the vacuum left by the departure of the old khans. In order to get arms and money, these commanders needed to be affiliated with one of the seven recognized political parties in Pakistan that had a stranglehold on such resources (except for the Shia Hazaras who were dependent on Iran).⁸⁴ While most of these parties had an Islamist agenda (particularly Hekmatyar's *Hizb-i-Islami*), the commanders who affiliated with them represented their own regions and *qawms* for whom such overarching ideologies were of little importance. Hence the formal party structures and their agendas had little influence on local affairs in most rural areas.⁸⁵

While most Afghan villages had a local mullah, these men generally had only a minimal amount of education and were considered employees of the community so that they had little prestige or political influence.⁸⁶ Educated clerics with advanced *madrassa* education (*malawi*) who could serve as *qazi* were far rarer in the countryside. And because for almost a century the government in Kabul had attempted to control the appointment of *qazis* by making them salaried employees, those who did serve as judges were part of the formal government administration. As the government withdrew from the countryside, however, an *ulema* independent of the Kabul regime grew up.⁸⁷ Some were former government judges who had quit the regime, while others were men who had not previously held formal positions but had the training to fill them. These clerics took advantage of the networks created by the political parties in order to gain clients through which they could impose themselves and *sharia* law on areas controlled by the resistance. They did this in part by arguing that fighters in a *jihad*, or holy war, were under the obligation to obey religious law and give it primacy over customary practices.⁸⁸ In the absence of strong political personalities, such unarmed clergy who preached the supremacy of God's law came to have real power over resistance commanders who feared their influence. From the point of view of the local community, such religious figures often served the useful purpose of restraining military commanders from taking arbitrary actions that would benefit themselves and

81. *Id.* at 150-53.

82. *Id.* at 153-55.

83. *Id.* at 160-61.

84. *Id.* at 139-48.

85. *Id.* at 205-06.

86. DUPREE, *supra* note 27, at 104-10.

87. ROY, *supra* note 79, at 48-50.

88. *Id.* at 158-60.

their relatives.⁸⁹ However, as David Edwards relates in an account of the early anti-government uprisings among the Safi Pashtuns of Kunar, this often came at the price of sacrificing *Pashtunwali* practices and their replacement with orthodox *sharia*.⁹⁰

Over time, religious figures used their positions as judges to create an autonomous legal system employing *sharia* law but outside of a formal state structure.⁹¹ In some respects this was a return to pre-modern Islamic legal practices in which judges were largely independent of the state because law was derived from religion and not legislated law codes. This meant that, although state power and prestige was in decline or absent, a legal framework remained. Indeed, an impression that struck Olivier Roy forcefully during his many visits to *mujahidin*-controlled areas in the 1980s was the importance of law in organizing social relations, and the increased power of the *ulema* in bringing *sharia* law to rural areas.⁹² With the exception of the areas where strong adherence to *Pashtunwali* still prevailed, the *ulema* had taken responsibility for handling almost all civil affairs. Even without the state, a court system survived and flourished. Where there were sufficient *ulema*, they maintained both primary courts and courts of appeal.⁹³ Indeed, the judiciary in some respects was actually more independent and respected than it had been under pre-war central government control.

The *mujahidin* commanders, while not constrained in their political or military actions against other armed forces (including both Kabul regime forces and other *mujahidin* groups), found themselves bound by the legal rulings of the *ulema* in their dealings with the civilian population:

The local people always have the right to make a complaint to the *qazi* against any abuse of power, such as theft or brutality on the part of the resistance. Few resistance leaders would be willing to defy the judgement of a [*malawi*]. The parties forming the resistance movement have no power to nominate a *qazi*, who are co-opted from among the [*ulema*] who have received legal training in a *madrasa*. The Afghan resistance probably takes more care than any other comparable movement to ensure that the civilian population receives fair treatment, a policy which has contributed to the considerable degree of support they enjoy.⁹⁴

This respect for law extended even to the treatment of enemy captives and possible spies. Summary execution was rare because such an arbitrary action was likely to provoke a blood feud with the man's kin whose loyalties always superseded political affiliations, and because determining guilt was the prerogative of the *qazis*, not military commanders.⁹⁵ Roy observed an example of this in 1982 in Herat when the resistance detained a man they suspected of being a government spy. When the man attempted to escape he was captured and beaten. The next day his relatives brought a case before a *qazi* accusing his *mujahidin* captors of torture. A commission of inquiry consisting of four judges interviewed both the prisoner and *mujahidin*, with additional testimony from the prisoner's relatives (who were living in government controlled territory).

89. *Id.* at 154-55.

90. DAVID B. EDWARDS, BEFORE TALIBAN: GENEALOGIES OF THE AFGHAN JIHAD 167-73 (2002).

91. ROY, *supra* note 79, at 153-55.

92. *Id.* at 150-60.

93. *Id.* at 153.

94. *Id.* at 154.

95. *See id.* at 155.

After investigating and deliberating for two weeks, the judges reminded the resistance fighters that Islamic law prohibited any form of torture but also found the prisoner guilty of being a government agent. He was then executed.⁹⁶

Why, one might ask, did *sharia* courts become more popular and accepted during the Soviet war than they had been previously? One reason was that, even though the previous government courts at the local level had been based on *sharia* principles, the procedures, corruption, and unreliability of those previous courts (as we noted earlier) had made them unpopular.⁹⁷ By contrast, in *mujahidin* areas they had come to play a positive role. They were viewed as bulwarks against the tyranny of the powerful that offered at least four advantages over the justice system previously employed by the central government: first, *sharia* norms were more in harmony with rural Afghan's religious view of the world than government legal codes; second, the *qazi* of the resistance movement was more accessible than its government equivalent and usually not as corrupt; third, court proceedings in both civil and criminal cases were conducted orally in a way that was understood by everyone; and, finally, cases were disposed of quickly.⁹⁸

It was no surprise that *sharia* law and the *ulema* who interpreted it began to play a larger role in society. In many respects, this form of *sharia* law began to take the place of customary law in non-Pashtun regions. Given the informality of its administration and lack of deep legal training for most of the judges who administered it, this law was in many ways a type of customary system itself. This would become apparent when the Taliban attempted to implement what they saw as "true Islamic law," the hallmarks of which were harsh punishments and narrow legal reasonings that were previously alien to Afghanistan.⁹⁹

One of the great weaknesses of *mujahidin*-administered *sharia* law was that it applied only to civil affairs. It had no power to bring an end to the political violence that plagued the country. Battles between local commanders, rival parties, and ethnic groups remained all too common, and no one had the power to put an end to the fighting. The withdrawal of the Soviet Union in 1989 actually increased the power of local armed factions because the Najibullah government attempted to retain its power by winning such factions away from the Pakistan-based *mujahidin* parties.¹⁰⁰ The government offered them weapons, money, and autonomy in exchange for their participation in the regime's rural militia. And with the Soviets gone, Najibullah was able to portray the Kabul regime as just another Afghan faction.¹⁰¹ Only after the Soviet Union collapsed, bringing an end to the flow of money, food, and weapons that sustained the regime, did Kabul fall to the *mujahidin* forces in April 1992. The collapse of the government led to a civil war in which the factions organized themselves on regional and ethnic lines, with none of them able to displace the others. The chaotic conditions in the Pashtun south and east opened the way for the emergence

96. *Id.* at 154.

97. *Id.* at 156; *see also supra* Part IV.B.

98. ROY, *supra* note 79, at 156.

99. NEAMATOLLAH NOJUMI, THE RISE OF THE TALIBAN IN AFGHANISTAN 152-57 (2002).

100. GIUSTOZZI, *supra* note 26, at 207.

101. *Id.* at 163-75.

of the Taliban, a Salafist religious movement that promised to restore order by implementing a stern version of Islamic law.

The Taliban never created a clear administrative structure. Political power was vested in a new Kandahar-based *shura* of Taliban clerics who followed the lead of Mullah Omar whom they promoted to the rank of *Amir-ul-Momenin*, Commander of the Faithful.¹⁰² This gave him supreme executive power. In his rhetoric Omar often harked back to the days of early Islam for the model of society he wished to see installed in Afghanistan.¹⁰³ His stock answer to every legal question was that the issue was adequately addressed by the *sharia*, without ever referencing the many issues that were still subject to long debate within the different legal schools of Islam. This insistence on imposing *sharia* law without being clear on its details or sources was a hallmark of Taliban *fiqh*.

The rest of the Islamic world had little respect for the Taliban interpretation of Islamic law. For example, in 2001 a set of high-ranking Egyptian clerics personally visited Omar in Kandahar and attempted to convince him that Islamic law did not require the destruction of the Bamiyan Buddhas. After his refusal to heed their advice, they were scathing in their opinion of Taliban legal reasoning, stating that,

because of [the Taliban's] circumstances and their incomplete knowledge of jurisprudence they were not able to formulate rulings backed by theological evidence. The issue is a cultural issue. We detected that their knowledge of religion and jurisprudence is lacking because they have no knowledge of the Arabic language, linguistics, and literature and hence they did not learn the true Islam.¹⁰⁴

Omar responded to this (and other) rebukes for his destruction of the Buddhas by ordering the sacrifice of 100 cattle and giving the meat to the poor to express his regret for not having destroyed the monuments sooner.¹⁰⁵

The Taliban proved as keen as the Communist PDPA in using state power to enforce an alien worldview on the Afghan population. The movement's religious orientation was strongly influenced by conservative Salafi sects of Islam that had their origin in Arabia and the local *Pashunwali*.¹⁰⁶ The influence of the latter was only indirect because, as a movement led by clerics, the Taliban was opposed to the tribal system and as well as customary law. But because most of the leadership was trained in rural Pakistani *madrasas* that could not provide advanced religious training in Arabic, they too easily conflated Pashtun tribal culture with religious law.¹⁰⁷ For example, executions of murderers could only be authorized by a *sharia* court, but at

102. NOJUMI, *supra* note 99, at 136-40, 152-53.

103. *Id.* at 179-81, 228-29.

104. *Egypt's Mufti Wasil Interviewed on Recent Visit to Afghanistan*, BBC SUMMARY WORLD BROADCASTS, Mar. 23, 2001 (citing the text of an undated interview with Dr. Nasr Farid Wasil by Muhammad Khali in Cairo that appeared in *Al-Sharq Al-Awsat*, a London-based Arabic journal, on March 20, 2001).

105. Thomas Barfield, *Idol Threats*, RELIGION NEWS, Summer 2001, available at <http://www.trincoll.edu/AcademicResources/values/greenbergcenter/default.htm>.

106. Olivier Roy, *Has Islamism a Future in Afghanistan?*, in FUNDAMENTALISM REBORN? AFGHANISTAN AND THE TALIBAN 199, 204-06 (William Maley ed., 1998).

107. See LARRY P. GOODSON, AFGHANISTAN'S ENDLESS WAR: STATE FAILURE, REGIONAL POLITICS, AND THE RISE OF THE TALIBAN 117-19 (2001).

the public execution itself the victim's family was given the opportunity to shoot the prisoner personally, a combination of Islamic punishment and blood feud revenge. Similarly, their severe attitudes toward the seclusion of women seemed more strongly rooted in rural Pashtun life than interpretations of religious law. Indeed, the Taliban's only innovation in government was the creation of a powerful new and Saudi Arab-inspired Ministry of Promotion of Virtue and Prevention of Vice.¹⁰⁸ This ministry was home to the religious police who forced people to pray, checked that men had long enough beards, and beat women who violated Taliban rules on dress or movement. The Taliban's religious controls extended to bans on music, dance, films, kite flying, chess playing, card games, and other forms of popular entertainment.¹⁰⁹ The longer they ruled, the more unpopular the Taliban became with ordinary Afghans. This perhaps explains why they were so quickly driven from Afghanistan when the Americans invaded in 2001.

VI. PROSPECTS AND PROBLEMS FOR REINSTITUTING FORMAL JUDICIAL INSTITUTIONS IN A POSTWAR AFGHANISTAN AND THEIR RELATIONSHIP TO CUSTOMARY INSTITUTIONS

A. Legal Authority

The choice of what constitutes binding legal authority and the relationship between religious law and government codes at the national level has been contested in Afghanistan for well over a century. Under the *mujahidin* and Taliban governments, Islamists who proclaimed that *sharia* law had controlling status came to dominate the judiciary. Today they are eager to see this power continue by demanding that *sharia* law be made the controlling legal standard. If this were done it would give the *ulema* the power to determine what was, or was not, in conformity to Islamic law and there would be no way to override their decisions. For this reason modernists are determined not to have *sharia* law recognized as the controlling legal standard. But in opposing the Islamists the modernist strategy has been oblique: not to oppose the *sharia* directly but simply to proclaim that, as a Muslim nation, Afghan government would of course have no laws that were not in conformity with *sharia*. In this the modernists play on an old Afghan belief that a government composed of good Muslims is by definition an Islamic government and would do nothing that was not Islamic. They also make the argument that in order to include Afghanistan's Shiites (who employ the Ja'afari interpretation of *sharia*) the state has an obligation to work out a law code that is acceptable to all groups in the country, regardless of sect. This is reflected in the 2004 Constitution, which requires the Afghan laws to be in conformity with the Hanafi interpretation of *sharia* but also makes an exception for the Shiites to use their own codes.¹¹⁰ More importantly, because it does not provide a clear mechanism for resolving whether state laws are in conformity with *sharia*, it effectively allows the government to legislate without fear of a religious veto. Because the state

108. See generally KAMAL MATINUDDIN, *THE TALIBAN PHENOMENON: AFGHANISTAN 1994-1999* (1999).

109. *Id.* at 34-40.

110. AFG. CONST. art. 131 (2004), available at <http://www.ag-afghanistan.de/constitution.pdf>.

controls the appointment and payment of judges, it also has the capacity to exclude those who disagree with this point of view from the formal system of justice. Such a process has already begun in 2006 with the replacement of the conservative Supreme Court, which had been staffed by Taliban sympathizers, by more state oriented technocrats.

B. Reconstructing the Legal System

My own discussions with officials from the Supreme Court, prosecutor's office, police, and other representatives of the formal judicial system in Kabul beginning in September 2002 revealed a surprising complacency about the structure of the judiciary and its implementation of the law. They all defined reconstruction as bringing back the same three-tiered court structure (district, province, capital) that existed in the country for most of the twentieth century without examining whether this model still served the country's needs. More confounding was their common insistence that (a) the system was already completely up and running, (b) that its size was adequate for handling all of Afghanistan's legal problems, and (c) that the formal system alone was all that was needed. None of these statements stand up to scrutiny, but neglecting the importance of the informal system is particularly egregious because it is unlikely that any formal legal code (of whatever origin) can take precedence in the countryside where government authority and institutions are weak on the ground.

The refusal to address the role of informal dispute resolution in maintaining order in rural Afghanistan reflects a long tradition, however. Successive Afghan governments have all opposed the formal recognition of customary law institutions. By prohibiting special courts, Article 55 of the 1923 Constitution was the first to explicitly deny recognition to tribal methods of adjudication.¹¹¹ In part this was because the state wished to assert its exclusive right to make laws and execute them. Tribal *jirgas* and other local dispute resolution mechanisms were seen as obstacles to achieving this goal. Ideology had little to do with this; both the Communists and the Taliban wished to implement universal law codes (though obviously of very different types). Currently, as a result of the devolution of power and their closer connections with the customary law tradition, it appears that members of the judiciary are more open to the recognition of customary law by the court system.¹¹² In the Supreme Court, judges felt that such an arrangement would reduce their workload to a more manageable level, although some lawyers were concerned that any recognition of customary practices might reduce the status and prestige of the formal system and its agents. By contrast, Ministry of Interior officials opposed incorporating any customary law institutions, arguing that all disputes should be settled through the formal system.¹¹³

Formalizing an informal system, however, presents a number of obstacles. First, customary law is not a single set of rules that can be collected and codified for simple application. Rather, it encompasses sets of principles and rules that are tailored to

111. KAMALI, *supra* note 3, at 210.

112. See BARFIELD, NOJUMI & THIER, *supra* note 11, at 20-22.

113. CHRIS JOHNSON, WILLIAM MALEY, ALEXANDER THIER & ALI WARDAK, OVERSEAS DEVELOPMENT INST., AFGHANISTAN'S POLITICAL AND CONSTITUTIONAL DEVELOPMENT 27-28 (2003), <http://www.odi.org.uk/hpg>.

specific contexts that are used to seek reconciliation rather than adjudication. It is this very flexibility and sensitivity to local social relations that make it so effective. To the extent that such systems are codified and used in adjudication by outsiders, they simply become an alternate form of law. British colonial policies in Africa, where they often attempted to determine land rights by codifying customary practices, had the unintended consequence of freezing the system and producing a new arbitrary set of rules that were now enforced by the government rather than the local people.¹¹⁴ Second, it is the desire to avoid government institutions and its agents that encourages people to use the informal system. In its most successful outcome the government should never become aware that a problem arose in the first place. Giving the government a role in formally recognizing the customary system would also mean that the government would become a player in it. The desire to keep the government at arm's length by denying it access to a community's problems makes this outcome undesirable. Third, giving the government the power to enforce the rulings of local *jirgas* or *shuras* would mean they would become bodies that adjudicate disputes. Currently such bodies serve either as either mediators or arbitrators that must first get the cooperation of the parties to begin their work but ultimately lack the coercive power to enforce their decisions. It is this very lack of coercive power that pushes the players to come to an acceptable compromise agreement instead of standing on principle. Allowing the government to enforce a *jirga*'s decision would also mean that its enforcement moves outside the community itself. Finally, customary law in Afghanistan is not restricted to civil disputes but also handles criminal cases such as murder, theft, and assault. It is not clear that any state would be willing to cede power to enforce criminal codes to customary institutions publicly, although in practice many criminal complaints are resolved in this manner.

One way out of this dilemma would be to reestablish "courts of reconciliation" similar to those briefly established by King Amanullah in the 1920s.¹¹⁵ Those courts served as a filtering device because no civil case could be lodged in a local district primary court until attempts at mediation or arbitration through a court of reconciliation had failed. Because their decisions were not subject to review by upper level courts, the voluntary agreements that these courts ratified did not have to be uniform or in accord with either state law codes or orthodox *sharia* practices. If the old courts of reconciliation were restored, then this would be a way to recognize acceptable customary law outcomes without making the state the main actor in the process. Nor would a judge in such a system necessarily be required to have formal legal training since his rulings would not apply to other parties or other judges. While such a court could be used to negotiate settlements by hearing complaints that had not been previously resolved, its more common function might be to serve as the place where solutions already derived through the customary system could be formally recognized. For example, evidence that a property dispute had been resolved by a tribal *jirga* could be presented to such a court and given legal imprimatur so that an individual's land rights were better secured. Similarly, the reconciliation of an inheritance dispute that might meet local norms, but was in violation of some *sharia* principles, could be made

114. See generally SALLY FALK MOORE, SOCIAL FACTS AND FABRICATIONS: "CUSTOMARY" LAW ON KILIMANJARO, 1880-1980 (1986).

115. See BARFIELD, NOJUMI & THIER, *supra* note 11, at 18-20.

legally enforceable without setting a precedent for all other such cases. Because parties to a civil dispute would still have access to the formal court system if they could not reconcile, no one would be forced to accept a “customary law solution” unless they were willing to be bound by it. Nor in such a system would state actors have the responsibility of defining what was, or was not, the application of appropriate customary law.

VII. INTEGRATING INTERNATIONAL NORMS IN AN AFGHAN CUSTOMARY CONTEXT:
THE CLASH OF TWO GOODS

Customary law seeks to solve problems in a way that will end a dispute and be seen as fair by the local community. Without deep knowledge of local norms, practices, and community sentiment, however, it is difficult for outsiders to have a role in such a system; although in some cases, as outsiders, they may be seen as potentially more fair decision-makers than insiders.¹¹⁶ Of greater difficulty is how to deal with cases in which the norms and expectations of the local community violate internationally accepted standards embodied in an ever-wider series of conventions designed to protect human and civil rights that are presumed to be universal (or at least applicable to signatory nations).

Normally in a country with a sovereign and functioning government, potential contradictions between competing norms are mediated by the state. The state may adopt new policies and through its legal system change how its people act at the local level by enforcing the new standards. Or, all too commonly, a state may join its international brothers in Geneva to sign an international treaty that endorses some lofty aims that are then ignored at home if there is likely to be substantial opposition. This can be done either by failing to incorporate the treaty’s provisions into the country’s body of legislation or by approving some legislation that is then left unenforced. However, when the international community takes charge of a failed state and attempts to rebuild its judicial institutions, it is faced with this problem directly. Its agents, more than any others, are responsive to criticism that they should be instituting international norms and practices. But at the local level these same agents encounter defenders of customary practices and cultural values who are just as keen to see that their own prerogatives be respected. These defenders of local practices cite an equally praised principle that customary systems deserve protection and respect because they embody unique local cultural values.

In Afghanistan this dilemma is at one remove: the actual administration of justice remains under the control of the Afghan state (such as it is) and foreigners serve only as advisors, albeit powerful ones. Therefore, most of the focus has been on ensuring that the new constitution and law code are in accord with international standards set out in treaties and conventions that previous Afghan governments have ratified.¹¹⁷ Influencing changes in state law codes, however, does not guarantee compliance at the local level where such codes compete with *ulema* interpretations of *sharia* law and community based customary law. In addition, *sharia* law is often in conflict with

116. For example, British colonial officials found their position as outsiders useful when dealing with disputes between tribes in the North-West Frontier Province.

117. See *supra* note 10 and accompanying text.

customary practices. The most difficult questions raised about the disjuncture between these three systems are whose values should prevail and at what cost.

Historically, the most dramatic conflict among the three systems is over the rights of women. Between 1920 and 1992 Afghanistan's national government, under various regimes, attempted to improve the status of women through changes in the law and their own policies. National law codes attempted both to reform *sharia* law practices and change or abolish customary ones.¹¹⁸ Opposition to these reforms came from conservative religious scholars who rejected the state's right to interpret religious law, and from local communities hostile to any form of outside interference. Although to outsiders the alliance of rural communities and Islamist clerics seemed a natural one, it was not. Islamist clerics also opposed customary law institutions, including blood feud, exchange of women in marriage to resolve disputes, bride price payments, and exclusion of women from inheritance rights, as much or more than the Kabul government, and they had more influence to change them at the local level.

Under the *mujahidin* government that succeeded the PDPA, and more dramatically under the Taliban, the rights of women in the national law codes were abolished in the name of bringing state law in conformity with *sharia* law.¹¹⁹ Although the Taliban asserted that its draconian policies that removed women from the workplace and required them to be veiled were simple applications of religious law, *sharia* legal experts in other Islamic countries disagreed.¹²⁰ However, in the Afghan countryside the emphasis on enforcing *sharia* often increased women's rights to inheritance and control over marriage that were denied to them under customary practices.¹²¹ And the social restrictions that were so widely resented in the cities provoked little opposition in the countryside because they reflected commonly accepted rural values and lifestyles.

The Karzai government marks a return to state law codes as the controlling law of the land. While it has been much more receptive to the values reflected in international norms and conventions, it too is limited by Afghan cultural sensitivities on many issues. For example, freedom of religion in Afghanistan is usually interpreted by the Afghans as the right of all Islamic sects to be treated equally and without prejudice. Implementing this Afghan definition would be a great step forward for the country but is far below international standards for freedom of religion. It does not include the right of other religions to have equal status with Islam or to permit proselytizing for other religions. Almost all Afghans consider apostasy as a crime for which the death penalty is fully justified, forcing the Karzai government to get the offender quickly out of the country in rare cases that have become publicly known.¹²²

118. See generally SAYED HASSAN AMIN, LAW, REFORM AND REVOLUTION IN AFGHANISTAN: IMPLICATIONS FOR CENTRAL ASIA AND THE ISLAMIC WORLD (3d ed. 1993).

119. See NOJUMI, *supra* note 99 at 154-55.

120. Barfield, *supra* note 105; see also *supra* text accompanying notes 104-05.

121. Deniz Kandiyoti, *The Politics of Gender and Reconstruction in Afghanistan* 25 (U.N. Research Inst. for Soc. Dev., Occasional Paper No. 4, 2005), available at [http://www.unrisd.org/unrisd/website/document.nsf/d2a23ad2d50cb2a280256eb300385855/3050be40da5b87/cc125704400534a7u/\\$FILE/O PGP4.pdf](http://www.unrisd.org/unrisd/website/document.nsf/d2a23ad2d50cb2a280256eb300385855/3050be40da5b87/cc125704400534a7u/$FILE/O PGP4.pdf)

122. Amin Tarzi, *Afghanistan: Apostasy Case Reveals Constitutional Contradictions*, RADIO FREE EUR./RADIO LIBERTY, Mar. 22, 2006, <http://www.rferl.org/>.

Similarly, the international pressure to give greater emphasis to women's rights puts the government in a difficult position. The most successful changes in the country have been done gradually by beginning in Kabul and other major cities and then working outward. Governments like those of King Amanullah or the PDPA that demanded rapid universal changes found that this undermined their political power because they were accused of abandoning true Afghan values.¹²³ For this reason, the international community needs to work for the broad acceptance of universal principles that bring equality of status to women, protect the rights of ethnic and religious minorities, and ensure human rights more generally in the new constitution of Afghanistan and its laws. At the same time, it needs to realize that within Afghanistan the recognition of such rights is still politically contentious. Most western democracies that subscribe to high goals admit that achieving them remains a work in progress. How should it be otherwise in a country like Afghanistan that is recovering from two decades of war and the disastrous implementation of unworkable policies by the Communist PDPA and the Islamist Taliban?

The international community has difficulty integrating customary institutions that are by definition variable, informal, and not easily codified with the formal bureaucratic institutions upon which the international peacekeepers normally rely. However, because (unlike in the former Yugoslavia or East Timor) international forces in Afghanistan are largely confined to Kabul, and only in a security role, they are not confronted with the problem of deciding whose farm is whose or protecting the rights of one ethnic group from attacks by another. Instead, the major role of the international community has been in aiding the reconstruction of the Afghan state. As has been demonstrated throughout this Article, the writ of the Afghan state has always been limited although its influence has had periods of strength and weakness. One reason that Afghan society has survived so many years of turmoil has been its ability to govern itself at the local level even in the absence of state institutions. The international community should take advantage of this strength by recognizing that most problems are not solved in the formal judicial institutions but rather informally. Some ways of keeping order, such as blood feud, will never be acceptable and should disappear as state authority expands. Others, such as the use of *jirgas* or *shuras* to hear local disputes, are grassroots democratic institutions that should be encouraged. But precisely because such institutions give priority to the community over the individual, disputants should always have the right to the formal legal system where they can get a hearing by (hopefully) more dispassionate judges, or demand enforcement of their rights through national law codes that apply to all citizens equally. It perhaps goes without saying that western legal codes recognize the validity of mediation and arbitration and provide means by which their decisions can become binding. Perhaps the West's resistance to customary law is simply a product of labeling—customary law is just mediation and arbitration in another guise, and therefore should be encouraged as such.

123. NAWID, *supra* note 5, at 186-93; Barfield, *supra* note 57, at 183.