

Afghan Customary Law and Its Relationship to Formal Judicial Institutions

Thomas Barfield
Boston University

Produced for the *United States Institute for Peace*, Washington, DC

June 26, 2003

DRAFT COPY

NOT FOR ATTRIBUTION WITHOUT PERMISSION

Cultural and historical background of customary law in Afghanistan

For the past 120 years successive national governments in Kabul have sought to impose centralized code based judicial institutions upon local communities that have historically had their own non-state institutions for regulating behavior and resolving problems. Indeed this issue has so contentious that it has periodically provoked regional rebellions, national civil wars in 1929 and 1978, and was one of the issues that incited opposition to the Taliban. The current attempts to reintroduce a state legal code for Afghanistan therefore involves far more the restoration of an administrative *status quo ante*: it is an integral part of a state building process that has long remained unfinished.

In Afghanistan the legal system has been composed of three competing parts: the state legal codes, Islamic religious law (*sharia*) and local customary law. Customary, religious, and state sectors define their own exclusive shares of authority but also ally with other actors. 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. In some periods and places the religious or customary sector has been dominant while in other times and spaces the state has forcibly imposed its power as it pleased. Each sector proclaims itself an autonomous or even exclusive legal authority in theory, but in practice none has ever able to completely displace the others. All have had to come to grips with limitations on their power and ranges of 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 this plays a large role in how they are 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 code to resolve disputes, evaluate actions for praise or blame, and to impose sanctions against violators of local norms. While systems of customary law 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 a great deal of manipulation and internal contest. The most elaborate of these systems is the *Pashtunwali*, the code of conduct for Pashtuns. However, it is an oral tradition that consists of general principles and practices (*tsali*) that are applied to specific cases. 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 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. 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. Based on their training in a literate and urban tradition of orthodox Islam, the *ulema* held rural customary law systems in contempt, particularly when they strayed from classic Islamic practices. The *ulema* often used their influence to demand the replacement of customary law practices with more standard *sharia* interpretations, which of course then demanded their own services to resolve disputes. Until the formation of the modern Afghan state in the late 19th century the *ulema* was independent in its running of the legal system, providing both the system of laws and the judges to interpret it. This autonomy was progressively restricted by secularizing modernist rulers who demanded that the clergy recognize the state's right to promulgate laws on its own and control the appointment of judges. The Taliban rejection of this secularized state model marked the high water mark of Islamic clerical influence. After taking control the Afghan state in the late 1990s they abolished the national legal codes on the grounds that the existing *sharia* system already filled all of an Islamic society's needs.

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 Amir Abdur Rahman (r. 1880-1901) 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. Initially the state used existing Islamic law but put the *qazis* on the state payroll, making them part of the government. 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. 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. 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 back to the old "conformity with Islam formula" in the hopes of winning broader support after the Soviet invasion in 1980.

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. 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 religion (Sunni Islam) but make no claim that they share any overarching kinship links. Among some groups that are nominally tribal, such as the Uzbeks, only clan affiliation remains while groups like the Hazara that have a

tribal structure are more likely to identify themselves through their common Shia religion that sets them off 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 used that indicates "us" as opposed to "them". Fellow *qawmi* at its broadest can include all members of a large tribal or ethnic group (Pashtun, Hazara, Tajik, etc.) or 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.

Understanding Afghan customary law

In a comparative study of African political systems Fortes & Evans-Pritchard (1940:5) contrasted societies with centralized governments with those that lacked them. 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." 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."

In Afghanistan both types of systems can be found 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. It was the latter's very lack of wealth and marginal locations made these areas unprofitable for the Afghan state to administer. State control in these regions was therefore often indirect or even non-existent. While throughout the late 19th and 20th 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 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, particular 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 one 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. In the view of the 16th century English political philosopher Thomas Hobbes, the absence of government or its collapse inevitably led to anarchy and a breakdown of social order to produce a "war of each against all" that he regarded as the worst of all possible worlds. Thus he concluded that the authority of existing governments was legitimate as long as they could preserve social order. 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.

Communities using customary law rejected the Hobbesian bargain because their own experience had shown that social order could be maintained in the absence of government. Indeed in their view formal government brought with it oppression and not social order. 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 whose norms 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 individual blood feuds, 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 inflict on transgressors was not death but permanent exile because it severed the individual from the community, a form of social death.

The Pashtunwali and "Doing Pashto"

Afghanistan's Pashtuns, about forty per cent of the country's population, historically inhabit the area south of the Hindu Kush and number between five and seven million people, although a number of communities were also resettled (or deported) north of the Hindu Kush Mountains by governments in Kabul. In addition there are a larger number of ethnic Pashtuns in Pakistan's Northwest Frontier Province and Baluchistan who were separated from those in Afghanistan by the imposition the so-called "Durand Line" that divided the region between British India and Afghanistan in the late 19th century. The Pashtuns are tribally organized, all claiming patrilineal descent from a common ancestor but they are divided into a large number of separate clans and lineages. The largest division among Pashtuns in Afghanistan is between the Ghilzai who straddle the Pakistan border and the Durrani who are settled between Kandahar and Herat. Although the Ghilzais have historically been the larger group, for most of the country's history the Durrani have been politically dominant. With few exceptions Pashtuns are exclusively Sunni Muslims. In rural areas, however, there is such melding of their tribal law with Islamic religious law that the two are often viewed as inseparable and mutually supportive. Local charismatic religious leaders, known as *pirs*, played important roles in politics historically because they and their disciples crossed tribal lines and could act as counterweights to the landowning tribal khans who tended to dominate Pashtun clans and lineages.

Being born into a Pashtun lineage and speaking Pashto are the primary markers of Pashtun ethnic identity. But Pashtuns also insist that being a "real Pashtun" demands that one not just speak Pashto, but "do Pashto," that is follow the precepts of the *Pashtunwali*.

This is a code of conduct that stresses personal autonomy and equality of political rights in a world of equals. Thus it is more than a system of customary laws, it is a way of life that stresses honor above all else, including the acquisition of money or property. It is a code that is practically impossible to fulfill in a class-structured society or in areas where governments prohibit such institutions as blood feuds. It is therefore the people who inhabit the most marginal lands that are poor and beyond government control who see themselves as the only true Pashtuns because only they can maintain the strict standards of autonomy demanded by the *Pashtunwali*. In richer rural areas, such as the irrigated plains around Peshawar or Kandahar, this is less possible because leadership of local lineages came to be permanently dominated by hereditary landlords who reduced their fellow tribesmen to the status of clients. Here it was the landowning elite that tended to display the values of the *Pashtunwali* because only they had enough autonomy to meet its standards of behavior. In Swat, Pakistan, for example, Pashtun landlords created political factions composed of clients in order to compete with other powerful landlords, but it was clear that the khans were politically and economically superior to these clients (Barth 1959). Pashtuns, even wealthy ones, who moved to large cities were even farther removed from the values of the *Pashtunwali* because there they were enmeshed in state systems of government that restricted autonomy and cash economies that valued money more than honor.

It is for this reason that examples of customary law as a living tradition are found mainly in the marginal areas of rural Afghanistan even though the ethos of the *Pashtunwali* is common to all rural Pashtuns. Thus the Pashtun tribes that have remained in the hills and deserts continue to draw a sharp distinction between themselves and their tax-free way, blood feuding, way of life (*nang*) and those Pashtuns who live under state control (*qalang*). The hill tribes assert that it is only they who follow the proper Pashtun way because their cousins on the plains and in the cities have been stripped of any true autonomy and are forced to obey state regulations (Ahmad 1980).

The *Pashtunwali* has a number of specific institutions (Steul 1981). The most important of these are *badal* (revenge), *melmastia* (hospitality), and *nanawati* (sanctuary). In addition it valorizes the accumulation of personal honor (*ghayrat*) and defense against insults by outsiders to the honor of the group or its women (*namus*). Because of the *Pashtunwali's* stress on personal autonomy, the mobilization of a consensus is at the heart of leadership. The acceptance of any authority has to be seen as voluntary and not coerced by force. The *jirga*, where men meet as equals to discuss problems or resolve disputes, is the forum in which such decision making normally occurred. Let us look at these principles more closely before turning to specific cases in their application.

Revenge (*badal*) is the means of enforcement by which an individual seeks personal justice for wrongs done against him or his kin group. It is this right and expectation of retaliation that lies at the heart of the *Pashtunwali* as a non-state legal system. 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, it 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. Although lacking the power of adjudication that states take for granted, local communities can use social pressure to push for resolution of 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.

Homicide generates the strongest demand for personal blood revenge. 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 blood retaliation personally is deemed a sign of moral weakness, even cowardice, not just of the individual who was wronged, but his whole kin group. Payment of compensation agreed to by both parties can also bring an end to the dispute without violence, but settling too quickly may also impugn the honor of the victim's kin group. Nor is this a task that can be shifted to the state. Reporting a murder to get action from government officials is considered a sign of weakness, that the kin group is too weak to take revenge honorably themselves. In any event, punishment by a government court does not erase the obligation to take revenge: a victim's family is expected to kill the murderer once he is released from prison unless there is a settlement to end the feud before that time. Local communities also reject the legitimacy of state actions to punish men who have taken their revenge legitimately or to take action against a killer who has arranged a settlement with his victim's kinsmen. Similarly, if the death fails to meet the standards set for blood feud, people also believe that the government has no right to interfere because no crime was committed.

Thus the first question that must be answered is whether the homicide falls within the blood revenge category. If the death is the result of an accident or 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, 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, although in some Pashtun traditions it was legitimate to hire a substitute to take revenge in the name of the victim. The most honorable revenge attacks take place face to face, but 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. If revenge cannot be carried out 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 were killed and remain unrevenged. 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: "A man took his revenge after one hundred years although he regretted acting in haste;" or "Revenge is a dish best eaten cold." Given that each revenge killing demands a response by the new victim's family, blood feuds between hostile kin groups can last for generations and involve many deaths if left unresolved.

Hospitality (*melmastia*) sets out the rights and obligations of hosts and guests. The *Pashtunwali* demands that guests be welcomed without question and be given the best of whatever the host has to offer. In addition to shelter, food and rest, the code of hospitality demands that guests receive absolute protection as well. This solves two problems. First it allows for travel in rural regions outside the cash economy where one cannot buy food or rent a room in an inn or caravansary. Second (and as important) it solves the problem of how to ensure one's personal security in a world where there is no overarching legal authority that preserves the peace. Obviously in such a world a stranger who is travelling alone and outside of his own network of kin is highly vulnerable. *Melmastia* replaces the protection of kin with the protection of the host. The host is personally liable for the security of his guest and seeing that no harm comes to him is his primary obligation. The guest must not purposely bring on problems for his host, his stay must be limited, and he must accept the authority of his host. Because this relationship is temporary and the roles can be easily reversed at different times, seeking the protection of a host is not seen as an infringement of a man's autonomy. The man who seeks protection from his host when travelling one day can quite easily (and often does) return the favor directly by later receiving his former host as a guest in his own village. Wealthy individuals often actively attract guests to increase their prestige because they have the means to entertain them, but the obligation of hospitality applies to all regardless of wealth. In poorer villages the men's house or mosque may be used to receive guests and the responsibility for them shared out among different households.

The obligation of hospitality supersedes even the requirements of revenge. This means that even if a host discovers that his guest is an enemy that he should ordinarily kill, he must not harm him. If enemies are pursuing the guest, the host is required to take up arms to defend him from them. If another person is planning to carry out a revenge attack, he will ordinarily wait until his victim has left the host's property so as not to provoke a blood feud with the host. The scrupulous adherence to the code of hospitality brings great honor to the host, and breaching the code tremendous dishonor. Pashtun tradition revels in stories that reveal the extent to which a man is torn between his desire for revenge and the need to fulfill his role as host. Of course, as in any tradition, there are cases where enemies are murdered after inviting them to a feast, but while such killings may bring power they have no honor.

Sanctuary (*nanawati*) is a right to seek protection, request pardon or demand help from a more powerful person or kin group by a weaker one. In its best known form someone leaves his own community looking for permanent protection. A fleeing couple that has eloped against the wishes of their parents or a man avoiding a blood feud are common

supplicants. The institution of sanctuary recognizes that although equality of rights and obligations is an ideal, it is one that is not always possible to achieve. Because the supplicant must declare his weakness and lack of autonomy, the request for *nanawati* occurs only in extreme cases. *Nanawati* may also take the form of asking pardon for a wrong done to a person. This may be done to preempt retaliation by admitting a wrong or as part of a settlement in which the losing party is forced to ask for the victim's pardon in order to bring an end to the dispute. The latter is an inducement to settlement because a victim's kin may fear that agreeing to accept settlement will make them look weak. The formal request to grant pardon puts them into the role of the more powerful party even if this is not in fact the case. Finally *nanawati* can be employed in a way that forces a more powerful man to render assistance to a weaker one when the latter is unable to resolve a dispute himself.

The role of personal honor (*ghayrat*) in the *Pashtunwali* is the driving force behind these institutions. Men seek to preserve and enlarge their reputations at all costs. Such positive acts as physical courage, generosity, outstanding public speaking, success in building political alliances, or winning disputes add to a reputation. Equally important is defending a reputation against insult or attack. This includes protecting one's property (particularly land) from encroachment, responding aggressively even to symbolic attacks such as insults or disrespect that impugn one's honor, and willingness to sacrifice wealth or life to preserve one's reputation. These acts (positive or negative) are never confined to an individual alone but extend to his whole kin group. Thus an attack on a single member of a lineage is seen as an implicit attack on them all. And fear of shaming the group impels an individual to act regardless of the cost to himself.

Nowhere is fear of shaming the group stronger than in the requirement to defend the honor of women (*namus*). Women (except among the nomads) are normally secluded from contact with strangers and play no public role in disputes. While they cannot accumulate honor in their own right, they can lose it through misbehavior or attacks on them. Any attack on a woman, physical or verbal, is seen as an attack on a man's (father's, brother's, or husband's) honor. Such attacks must be revenged. Similarly any sexual improprieties by women themselves are deemed such serious violations of the honor code that they can and should be killed by their male relatives. Women's passive role in the honor system is well known, but they also play a large role in accessing men's honor: it is women's opinion that is often decisive in raising and lowering a man's position. Their praise or malicious gossip can have a powerful impact in how a man or group is judged (Grima 1992). Men induced to action by fear of women's contempt lay behind the famous story of Malalai, the Afghan heroine at the Battle of Maiwand against the British in 1880. She used her veil as a standard to urge the troops forward by proclaiming in a Pashto *landay* (couplet):

Young love, if you do not fall at the Battle of Maiwand,
By God, someone must be saving you as a token of shame. (Shpoon 1968:48)

The Process of Resolving Disputes

Anthropologists examine sets of rules to understand how an informal legal system works. As outlined by Llewellyn and Hoebel (1941) 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. In the Afghan case among Pashtuns it is the *Pashtunwali* that is the source of abstract principles that have been outlined above. Rules as generating behavior embodies the notion of "doing Pashto," that is enacting their cultural values in the real world where they take on specific forms. The more specific set of rules that are derived from and employed in legal cases and dispute resolution are known as *tsali* (trail marker) in Pashto. It is the last area that is most concrete because actions taken by individuals (or proposals for action) become subject to public judgement. Although there have been a number of ethnographic studies focusing on Pashtuns in Pakistan, there are relatively few such studies specifically on Pashtuns in Afghanistan. One exception is a detailed examination of dispute settlement of the Zadrans in eastern Afghanistan by Alef-Shah Zadran (1978) based on field research in Paktia Province conducted during the government of President Mohammad Daud (1973-78) from which the description below is drawn.

Use of assemblies

Since there are no formal judicial institutions to resolve disputes it is first necessary to get the parties involved to agree to mediation or arbitration to resolve them peacefully. In other words the community has no tools of legal adjudication. It cannot command or enforce a settlement against the will of the parties and it does not have the power to fine or imprison them. There are, however, a number of mechanisms for solving disputes that employ experts on tribal law, *marakachian*, who serve as both finders of fact and offer judgements that the parties themselves can agree will be binding. They operate as a type of *jirga*, or village assembly, that is the key institution for political decision making for the village as a whole or the kinship groups within it.

A *jirga* is an open forum for discussion at the village level. Its participating members, most often the older respected men, gather both to make decisions that affect the whole community and set policy. These may be local issues such as repair of the irrigation system, use of common forest or pasture resources, or construction of a mosque. They also handle more serious relations such as the declaration of hostilities against another community or selection of representatives to deal with the government. The more important the issue the larger the number of people involved.

The *jirga* and other similar deliberative institutions put great stress on the nominal equality of the participants. Everyone sits in a circle so that no one takes priority. All members have a right to speak and binding decisions are made by common consensus rather than voting. This may take considerable time (days, weeks or even months) or fail to come to a conclusion entirely. Individuals or whole factions assert their disagreement by leaving the circle and refusing to participate further. This is the only way to avoid becoming committed to the group's decision. If the protestors have enough support their action can bring a *jirga* to a temporary halt as people attempt to convince the dissenters to return by offering them acceptable compromises or putting them under some kind of social pressure. Good oratorical skills and political savvy are essential in such a system. The most influential people may wait until they see an opportunity to end the discussion satisfactorily by making a proposal that incorporates earlier discussions and objections.

Dispute resolutions take place in similar but smaller *jirga* forums in which the participants include the litigants and the judges they have chosen to handle the case.

There are two types: *maraka* and *tukhum*. The *maraka* is employed in simple case where the disputes were generated by minor injuries or small amounts of money or land. If the two disputing parties are members of the same lineage and have no other issues that divide them, then they simply invite two local elders to investigate the case and propose a resolution. In cases where the disputants are more distantly related or when the problem is more complex then as many as ten elders might be invited to be judges, *marakachian*. These *marakachian* investigate the facts themselves independently, question the parties and then propose a resolution of the problem. If they feel they are unable to resolve the problem, or one of the parties declares their conclusions bent (*kazha*) or invalid, an appeals level *maraka* is held. The structure and process is the same as the first but the number of number elders serving as *marakachian* is enlarged to bring in a wider range of people. As an alternative to a second *maraka*, the objecting party can demand that that the judges take an oath before God that their verdict was honest before he agrees to accept their decision, although he must pay each a substantial fee (about \$20 each in the 1970s).

If the disputants refuse to accept the decision of the larger *maraka*, then they can demand the formation of a *tukhum*, a tribal assembly in which representatives of other lineages and even other Pashtun clans are called in. This size of this assembly is determined by doubling the number of original judges at the first *maraka* and then doubling that figure. So if a first level *maraka* that began simply with two judges, the *tukhum* would have eight *marakachian*. These judges represent clans and lineages that come from a wide region. While the *tukhum* is the maximal level of appeal, as with all Pashtun *jirgas* it does not have the authority to impose a solution. However, through a system of guarantees and obligations of hospitality the cost of such an assembly to the litigants can be made so high that there is strong pressure to accept their conclusions. While very important disputes involving blood feud or large amounts of land or money might go immediately to a second level *maraka* or *tukhum*, even initially minor or silly disputes can evolve into major problems. Problems that began as disputes between two families can become problems between their respective lineages in which the desire to win at all costs makes settlement ever more difficult. The larger the group involved the more likely the dispute is to become a political football in which the original cause becomes a mere footnote.

Grabbing the disputants

Because retaliation always remains an option in any ongoing dispute, it is first necessary to get the parties to agree to accept the possibility of a peaceful settlement by bringing in outside judges. This occurs in three ways:

- 1) When there is no active fighting or threat of such, the disputants themselves may decide to seek a solution and request the formation of a *maraka* to come settle the problem.
- 2) When there has been a confrontation that resulted in injury and there is a fear of further fighting, a group of self-appointed mediators from other lineages or villages will approach the disputants directly and propose a truce.
- 3) When a weaker party seeks the intervention of a more powerful patron to help him get justice. Invoking a form of *nanawati* a man sacrifices a sheep at the entrance of a

strong man's household, which then obligates him to assist in settling the dispute. In order to avoid unwanted disputes, however, people commonly attempt to stop such requests from even reaching them by preventing the necessary animal sacrifice from occurring on their property (Zadran 1978: 217).

Imposing a settlement

In cases over small matters where there is no existing animosity simple mediation, that is a voluntary compromise that is acceptable to both parties, is the easiest way to resolve a problem. This may be done in a community *jirga* or by using a couple of respected elders. Employing their powers of persuasion, humor, and wise sayings, they stress the need for forgiveness and tolerance in order to bring about a settlement. It is therefore often advantageous to include a religious figure among the mediators because he can assert that any necessary sacrifices are being made to please God and not the other party.

If the case involves serious injury or valuable land, the judges may demand that they be given a *wak*, the power of arbitration. This is because the more complex the case, the more unlikely it is that simple mediation will suffice even if both parties agree to have their dispute judged and are willing to meet together. Each side is then required to provide a *baramta*, security deposit, to ensure that they will accept the final decision of the *marakachian*. The party that still refuses to accept the decision after its appeals are exhausted loses its security deposit to the opposing party. If the case is serious the *baramta* may be substantial, such as a valuable piece of property. In lesser cases it might consist of cash or personal property such as weapons, carpets or furniture.

The most difficult cases are those in which the parties refuse to sit down with one another directly and cannot agree on a common set of judges. In this case each side appoints its own set of intermediaries who sit down together to decide the case. The judges are therefore in some sense adversaries who are expected to present the strongest case they can for their party. They are nevertheless constrained to decide the case on the basis of Pashtun tradition. Also as intermediaries they have less of a vested interest in the outcome than the parties themselves and are under social pressure to make a finding. Failure to accept the judges' common decision results in the offending side being publicly branded violators of Pashtun tradition and having their *baramta* is forfeited to their opponents. Religious figures often play an important role in bringing about settlements in these serious cases. Because they are generally not kin to either side they are seen as more neutral and because a religious reputation is based on sanctity and ability to attract followers through sage advice. In contrast to a Pashtun khan whose reputation rises because he wins disputes violently, religious figures gain prestige because they are able to settle them in ways that leave the honor of both sides intact (Zadran 1978: 221).

Social and economic coercion for settlement

The ability of an individual or kin group to refuse arbitration, delay the process, appeal decisions to higher levels, and to ignore verdicts would appear to give the community little power to resolve disputes that threaten the peace. There are, however, countervailing forces that put considerable pressure on the disputants.

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. It is hard 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 it is feared that the dispute will create wider waves of social disruption that need to be controlled, not just because some blood was spilled or some fighting broke out. In this respect the consequence of episodic revenge homicides may be less disruptive than disputes over the boundaries and uses of community controlled forestland or pasture that can provoke warfare between rival groups.

Once arbitration begins, either at a distance through intermediaries or face to face, the cost of the process begins to rise for the litigants. Both sides are expected to pay the judges at the end of the process, but more importantly they have to host them by turn for the duration of their stay. On the first day the parties draw lots that determine who will feed the judges first. In mediation cases this cost is low. The number of people who must be fed is small and the hosts are only expected to provide simple meals, most often chicken served with rice and beans. By contrast a large-scale *maraka* or *tukhum* can be ruinously expensive. The number of judges jumps from two to eight at a minimum and may involve many more. At a minimum the hosts are expected to slaughter a sheep daily to feed the participants, but they can do more. And because the stakes at this level are so much higher, the litigants often attempt to impress the judges through competitive feasting. Zadrin (1978: 226-227) records one case in which a disputant hoped to win the judges favor through his liberality by going beyond the expected slaughtering of one or two sheep by providing oxen instead. His opponent felt obliged to match him and they both ended up butchering several oxen at a turn. This fed not only the visiting judges but the entire village, with enough wasted meat for the dogs as well. Thus, because a dispute resolution may last weeks, months or even longer, the cost of the continued meetings can often only be met only with the aid of extended relatives who may put some pressure on the disputants to reach a settlement.

Getting at the truth

The judges in dispute cases expect to play an active role in their settlement by seeking out the truth and examining the evidence themselves, as well as questioning the parties. But in a society where written records are rare deciding who has title to disputed land, for example, can be problematic. Similarly in cases where there are no eyewitnesses accusations of theft that are denied are hard to resolve. Under such conditions the *maraka* may demand that the accused take an oath or undergo an ordeal.

Taking an oath before God is a very serious matter among Pashtuns. The demand for an oath is, at minimum, an attack on a man's honor because it implies you are accusing him of being a liar. Indeed a man with a great deal of prestige may refuse to take such an oath for this reason unless the issue at hand is critical and there is no way to avoid it. On the other hand, because the role of honor is so serious, it is generally assumed that a man will tell the truth in taking an oath because it would be better to be dead than live in dishonor. However, particularly because oaths required of men who are accused of dishonorable acts (such as theft) come from potentially dubious sources, there are a host of supernatural consequences that will rain down upon the perjurer should a man lie. These

include becoming poor, having your opinions disregarded, having your body become pale and ugly, seeing your land and livestock lose their productivity, as well as endangering the life of your children. As a result rituals that emphasize its seriousness surround the oath taking itself. Because swearing a false oath within village or farmstead is believed to bring illness or reduce the productivity of the land, the ritual must be held away from human habitation, often in a dry riverbed. Because the surface of the land is presumed to be polluted by contact with thieves, adulterers and criminals, a half-meter deep hole is dug and a copy of the Quran laid in it. After undergoing ritual ablutions, the accused places his right arm on the Quran and swears by Allah that what he is saying is true and fair. Since at least some of the evil consequences that can befall a false swearer apply equally to a false accuser, demanding an oath unfairly also has serious consequences and may impugn the honor of the accuser.

The second way of determining truth is to demand that the accused undergo an ordeal (*tawda*). Among some Pashtun 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 while the guilty will. Among the Zadran Pashtuns the ordeal consists of having a red-hot piece of iron placed on the accused'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 apologize. The Tani Pashtuns have a similar ordeal, but one that involves the accused picking three stones out of a pot of boiling water without suffering blisters. Zadran (1978:243) observed that the popularity of the ordeal as a means to determine truth was declining in favor 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 theft cases 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.

Restitution and Punishments

State law codes depend on fines paid to the state and imprisonment to punish wrongdoers while Pashtun customary law is more concerned with questions of restitution. At a minimum this includes the return of goods stolen or their cash value in cases of theft, payments for wounds inflicted, or even arranging a marriage settlement and blood money in the case of a revenge killing. But as important Pashtun customary law attempts to make the accused publicly and personally accountable for his deeds should he be found at fault. It lacks the authority to imprison or execute, but it does have sanctions at its disposal. These can include ostracism, forcing the wrong doer to apologize publicly to the victim, and payments for *pour* (indemnity) and *sharm* (shame). The latter two are types of penalties paid to the victim, not to the community or to the judges. In the cases of theft *pour* is an extra payment made to the victim in addition to the return of the stolen goods. It is the equivalent in cash or kind of twice the value of what was stolen. Should the thief attempt to deny responsibility for part of the amount of what he stole after he confesses, he can be forced to pay even more than the value of what the victim claims

was taken. *Sharm* is a payment by the offender that recognizes the social damage done to the honor of the victim. It was customarily set at one sheep and \$10 cash in theft case during the 1970s. 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. The offender offers a public apology at this time. This is expected to end the dispute and bring the community back into harmony.

Types of Disputes and Sample Cases

Disputes among Pashtuns are traditionally said to arise from the three 'Z's: *zar*, *zan* and *zamin* (gold, women, and land). The most difficult cases are those that have provoked blood feuds where settlements are difficult to arrange because they involve questions of honor and giving up the right of retaliation. Unlike state law they seek compensation for the wrong done and social reconciliation, not the punishment of the perpetrator. By contrast 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 minor personal injuries that have an accepted value.

Revenge Homicide

By old Pashtun *tsali* the murder of an innocent man put all of his agnatic relatives at risk as targets of revenge. Killing any of them was considered a legitimate form of retaliation. Over the course of the 20th century the custom was modified to make only the murderer himself the legitimate target of revenge attacks unless he had fled the area (a very common tactic) and could not be found. Under these conditions the murderer's adult sons or brothers were considered acceptable substitutes. Because revenge is an individual right the community does not have the authority to demand a settlement to bring an end to such bloodshed. However, when there have been a series of retaliation murders over a long period of time, or when a fresh set of murders threaten to begin a new one, the families may decide that they wish to bring the cycle to a close because each new murder only provokes another in response. If a family is too poor or politically weak to carry out revenge on its own it may also seek community arbitration to end the conflict, though this may involve a loss of face. In either the case a *maraka* is held in which the judges set a blood price (*nake* or *khun*), traditionally 60,000 afs or about \$1200. This money is paid to the victim's family by the murderer's family along with two sheep as a shame payment and an apology. In addition the victim's family is receives an unmarried girl in marriage. Giving a girl in marriage serves two purposes: it provides a replacement for the life lost and binds the two families with a marital alliance that should act as a barrier to further hostilities. In fact the judges may encourage an even larger exchange of women in which each side accepts in marriage the sisters or daughters of the other. This is sometimes easier to arrange because the exchange is a mutual one and thus does not call into question a family's honor (Zadran 1978: 274).

Some cases

- 1) In 1941 a group of men went hunting partridges in the mountains. Two men, one from Ismaelkhel and the other from Almara villages, quarreled 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 back 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 Quran on his head to signal his willingness to act as mediator. After talking to both sides he determined that the revenge killings were 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 (Zadran 1978: 119-120).

- 2) A's laborers were plowing his fields when B arrived and demanded that they stop work, claiming that the land was his. They did so and informed A, a powerful khan, of the trouble. A told them to return to work the next day and this time he accompanied them to the fields armed with a rifle. When B saw the workers plowing again he armed himself with a rifle and renewed his protests. A then shot B dead. Because B's family was too weak in wealth and manpower to take revenge, they left the village. Many years later in 1965 when B's son entered his early twenties he traveled to a nearby town that A regularly visited. When A appeared outside of a shop, B's son shot him dead and wounded some of A's bodyguards. B's son then fled but B's family returned to their old village now that revenge had restored their honor. Relatives of both families agreed that because both sides had suffered equally, the dispute should be considered at an end. This was accepted in the short run, but there were no long term guarantees that A's family might not retaliate and begin a new cycle of revenge (Zadran 1978: 124).
- 3) In 1954 a laborer 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. This case still remained unresolved at the time it was collected in the mid 1970s (Zadran 1978: 312-13).
- 4) In 1968 two closely related families from the same village got into a dispute over the ownership of a very small piece of land. While the dispute remained unresolved, A attempted to plant wheat on the plot and had his two brothers start plowing the land. B, his wife, and his two sons arrived at the plot and demanded that the plowing end. A's brother's refused and fight ensued in which B's wife hit one of A's brother's with a

shovel. This broke his leg and dislocated his hip, leaving him lame. Several *marakas* were held to resolve the dispute but failed because A's family because when a bone is broken the victim may prefer to seek revenge rather than settle. The revenge takes the same form as homicide revenge but the goal is to inflict an equivalent wound on the other side. As a result future fights between the two families reoccurred in which the members of A attempted (unsuccessfully) to lame a family member of B (Zadran 1978: 265)

Theft

Disputes that involve property theft are quite common. Targets include personal property and money in private households, livestock or crops taken from fields, or resources such as wood in a community forests. Thefts from private houses are the most serious because they dishonor the victims. In a society without formal policing institutions households are expected to defend their own property. As the result of a theft they may be perceived as too weak or cowardly to protect themselves. Such a perception insults not only their honor but also potentially invites more attacks. Thus regaining honor after suffering a theft is often of as much importance as getting one's goods back. If the victim knows the identity of a thief, the accused can be required to take an oath as part of a *maraka*. The accused must either assert his innocence or admit to the theft and make amends. If the thief is unknown the victim can announce a reward to anyone who can identify the thief. The reward must be returned if the thief takes an oath of innocence.

Some cases

- 1) In 1954 a bull was stolen from a house. A man from the village was accused of the crime and the case was referred to a council of elders. The accused proclaimed his innocence but was obligated by the *maraka* to take an oath and submit to the Zadran hot iron ordeal. Afterwards his hand became blistered and the accused then admitted committing the crime (Zadran 1978: 243).
- 2) In 1950 thirteen people were accused of committing a theft that was investigated by a *maraka*. The *maraka* decided that the thirteen should undergo the boiling water ordeal. Their hands were all blistered by the water, even though the *maraka* believed that four of them were innocent. The four continued to protest their innocence and because the claim was based only on the victim's accusation, there was much criticism of the validity of the ordeal. The *maraka* decided that the ordeal was in fact unreliable and discarded it. (Zadran 1978: 244)
- 3) In 1964 A took a ride from a truck owner B. He also put some goods he hoped to sell on B's truck without telling him so he could avoid paying tax on them. The truck dropped A off at his house and he took his bags and left. After several months had passed A approached B to complain that some 30,000 af\$ worth of the goods he had put on the truck were missing and demanded that B compensate him for the loss. B refused because A had neither informed him of the presence of these goods nor paid for their transport. A and his brother later stopped B and his truck

on the road at gunpoint and then took him to their village where he was held prisoner. B's brother went to A's village where he was received as a guest to discuss the matter. A village *jirga* was held at which B's brother said he knew nothing of the lost merchandise. A demanded that the B's brother (but not B) take an oath swearing they did not take the goods or else pay compensation of 30,000 afs. A knew that as a prestigious member of the community, B's brother would refuse to take such an oath. B's brother did in fact refuse but continued to assert his lack of knowledge about the goods before the *jirga*. After a few days of discussion the *jirga* members decided that if A was will to take an oath that his claim was justified he could receive the full 30,000 afs he claimed to have lost, or half that amount as compensation without taking an oath. B then opted to give A 15,000 afs and the case was considered settled (Zadran 1978: 244-5).

Illicit Sex, Rape and Abduction

Sexual misbehavior is subject to rigorous consequences similar to those that legitimize revenge killings because it is deemed an offense against family honor. Pashtun tradition takes such violations so seriously that while revenge for murder is one for one, a victim's family is seen has having the right to kill seven members of the offender's family in revenge for adultery, abduction or rape.

Adultery is punished by killing both individuals if they are caught in bed together. If only one of the two is slain, the killing is viewed as illegitimate because it throws suspicion on the killer's motives. In the case of forcible rape or if a woman reports that she has been sexually harassed, only the man is liable to be killed. Such honor killings may also occur in cases of elopement (or forcible abduction) when an unmarried girl runs off with a man without her family's permission. Because her father and brothers are then expected to kill them, the couple often flees the area and seeks sanctuary (*nanawati*) elsewhere. They may later try to regularize their status by providing indemnity (*pour*) and two sheep as a shame payment. The man's family must also provide two women in marriage to the offended family by way of apology. In cases of the abduction of a married woman, the woman and her lover are similarly liable to be killed if caught by either the husband's family and the women's family since both have had their honor offended. Should the man be killed in revenge the woman is expected to marry her lover's brother, but this now marks him as a target for revenge as well. Such abduction may therefore lead to the emergence of a difficult and long-lasting blood feud. While sexual crimes are primarily committed by men on women, adolescent boys also fall victim (Zadran 1978: 272).

Some cases

1) In 1975 a handsome youth was kidnapped and sexually assaulted by some men who held him for two days in their village. The case was reported to the government and the leader of the group was sentenced to four years in jail. In the meantime the boy had reported the assault to his father and uncle. The boy, his father and uncle then went to town where they found the prisoner walking around under guard with his relatives. The boy's family used the opportunity to confront the prisoner. They inflicted serious injuries on him

by shooting him several times. As this was happening, the wounded prisoner shouted for his own brother to kill the boy's father. The brother pulled a knife from his pocket and stabbed the boy's father in the stomach, killing him. This created a situation in which the boy's relatives swore to carry out retaliation in the future (Zadran 1978: 321).

Marriage and Engagement Disputes

Marriages are arranged in rural Afghanistan. They often involve long negotiations and questions may arise as to when or if a commitment is binding. Negotiations center first on whether the offer of marriage should be accepted and then on the amount of brideprice that will be paid by the groom's family to the bride's family. In the 1970s the brideprice among the eastern Pashtuns ranged from 50,000-100,000 afs (\$1000-2000) and the costs of the required feasts could easily amount to half that amount. Brideprices were reduced significantly if the marriage was between cousins. Although by religious law divorce is relatively easy for a man to obtain, among Afghans divorce itself is viewed as dishonorable and occurred rarely. Under Islamic law a man can have up to four wives but the polygyny was common only among the wealthy or if the first wife failed to have children.

Elopements, as describe above, broke out of this system but provoked a violent response. Another area of trouble was a forcible engagement (*ghazh*) in which a man publicly announced his engagement to a girl without consulting her parents by firing off a rifle. Although the girl might agree to such an engagement, Pashtun customary law attempted to prohibit the practice on the grounds that unmarried girls had no independent rights. However, such a forceful engagement had the practical impact of making it difficult to marry the girl to anyone else in the community. The parents were then put in the position of reconciling themselves to the marriage and negotiating a settlement, marrying their daughter into a more distant community or, because their honor had been offended, killing the unwanted suitor.

Killing the suitor had fallen out of favor because the solution was deemed too extreme. More commonly the parents married the girl farther away and then demanded a symbolic compensation of 500 afs (\$10) as an indemnity from the suitor his wrongdoing. The rejected suitor was also expected to give one sheep for shame and ask forgiveness from the parents using a form of *nanawati* in which he would be accompanied by his relatives, village elders, and a mullah. Should the parents choose to permit the marriage, it could only occur as part of marriage exchange in which the suitor's family provided two girls in order to marry the one whose engagement had been coerced. As with other such marriage exchanges, the expectation was that the two incoming girls would marry the brothers of the one outgoing girl and thus bind the extended families close together and prevent future hard feelings (Zadran 1978: 269).

Some cases

- 1) 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 favor of marrying her daughter to his son. She therefore brought out some *khone* (a type of sugar cone used 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 Pashtun *tsali* and so a *maraka* was convened. The *marakachin* refused to hear the case until the 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 arbitration, they freed the men. Each side then presented its case. A claimed that 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 his rights. Using an equally homey 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 Pashtun 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 (Zadran 1978: 317-19).

- 2) A boy and a girl were born to two men on the same day. A announced that he was giving his daughter in marriage to B's son when they became adults and would ask nothing in return. Before his daughter reached maturity A died so B went to A's brother (who was the girl's marriage guardian, *wali*) when it came time to have the marriage take place in 1969. At that time A's brother demanded that B also agree to marry his daughter to A's son, his nephew. B refused on the grounds that A had made the promise without such a condition. A *maraka* was convened and proposed two solutions: 1) go through with the sister exchange as proposed by A's brother, or 2) that A's daughter and B's daughter should both be married only to men from outside the tribe. (Since women go to live with their husbands the second possibility would mean that both girls would leave the village.) B chose the second route and so his son married another girl and his daughter married a man from another tribe. A's daughter remained in the village, but unmarried and her brother left the village. The case was still unresolved five years later (Zadran 1978: 270).

Land and water claims

Three basic disputes commonly arise over land based on 1) questions of ownership and right to sell; 2) irrigation rights and their distribution; 3) encroachments by neighbors on plots of land.

Agricultural land is privately owned and the owner has the right to sell it or use it as a security for a loan. However, in case where the land's transfer has not been legally recorded in a government courts, determining who has the legal right to sell or pledge land may be disputed. This happens particularly in cases where when a man's lands are informally divided at his death by his heirs but remain in his name as a single unit in government records. Disputes also commonly arise over which relatives have rights of inheritance. The most problematic of these involve women. By Islamic law sisters are entitled to inherit one-half the share of land their brothers get but under customary law often find themselves with nothing. Some claim that this is because women have no rights to inherit land, or that their inheritance rights lapse after marriage, or that they had agreed voluntarily to renounce them. But since women can own land in their own right, and some families do transfer land to women when dividing an estate, determining the facts sometimes demands the arbitration of village judges.

Rights to land almost always involve rights to water as well because irrigation is what makes productive agricultural possible. This can involve questions of creating and maintaining a community irrigation system, the watering cycle, and the right to irrigate new lands. Water rights can be tremendously complex depending on the source of the water, the intensity and dependability of its flow, and the complexity of the distribution system. For this reason there is usually a water master (*mirab*) who is in charge of resolving technical questions, although village mediation or arbitration is used for non-technical questions. Rights to use agricultural land, particularly irrigated land, are jealously guarded against encroachment. This may occur on a small scale when a neighbor is accused of plowing into an adjacent fields or in disagreements over the placement (or replacement) of boundary markers or irrigation channels. However, it is not the legal questions concerning the land and water itself that cause the greatest problems. Rather it is the immediate responses that people make when they feel their perceived rights are being challenged that lead to trouble. Even minor disputes can quickly escalate into fistfights or worse when people are working their fields. One man may shoot another and ignite a bloodfeud or a person injured in a fight may seek arbitration to demand compensation for his wounds. In settling these consequent issues, who was right or wrong about the cause of the original fight is of little importance.

Some cases

- 1) In 1970 a man married a second wife. The first wife complained to a *maraka* that the husband was using water that belonged to he land to irrigate the land owned by his second wife. She asked the council forbid the diversion of water. The husband responded that, while it was true that the first wife's land had always been irrigated by that water, because this year there was a surplus of water there was no harm in taking the extra to irrigate the dry land owned by his second wife. The council determined that the first wife's land did have priority but if there were sufficient additional water he could divert it. They also demanded that the husband spend more time with his first wife because they recognized the case was more a marriage problem than a water problem (Zadran 1978: 309).
- 2) In 1963 A pledged a piece of land as collateral to borrow some money from B. When the loan came due A could not repay it in cash. After

talking with his brothers A offered to sell the land to B. However because of difficulties in getting the land officially reregistered after their father's death, the brothers had made only an informal division of the property. Thus at that time A did not have a clear enough title to sell the land outright. Nevertheless B accepted the offer and the sale was witnessed by a number of villagers. In 1975, after land values had greatly increased, A and his brothers went back on their word. They came to B and asked to repay the money they owed him and get the land back. Since the transaction had been publicly witnessed, although not legally registered, B refused. A and his brothers continued to press their case until a *maraka* was called to decide the dispute. The judges decided that the land should go to B but that he should help the borrower A by giving him 10,000 afs (\$200). Because giving back the land would have been an insult to his honor, B accepted the decision and paid the money. A accepted the money and the dispute was considered resolved (Zadran 1978: 311)

- 3) In 1974 A was struck with an illness and needed to borrow some money from a fellow villager B. A's illness got worse and so B approached him to ask if he wanted to raise enough money to pay off all of his debts by selling B his land. A agreed and B went to a government court to make the deal official. After receiving witnesses who swore to A's voluntary consent, a judge signed the necessary papers to register the sale. After A died his relatives discovered he had sold the land to B without their knowledge. They demanded that B return the land to them and also demanded a payment to compensate them for their lost honor because they felt B had cheated the dying man. A *maraka* was held in which it was decided that no one could sell land to an outsider unless his own relatives had been given right of first refusal. They therefore ruled that B should return the land and that A's relatives should return all the money B had given A. This was done and the case was considered resolved (Zadran 1978: 319-20).
- 4) In 1952 two tribes disputed the 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 Pashtun *tsali* rather than Islamic law, decided that the case could be resolved if the elders of village A were willing to take a special oath asserting the rightfulness of their claim that the land was theirs. Quran 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 oathtakers later became deaf, many people from village B thought this was punishment for swearing a false oath (Zadran 1978: 248).
- 5) A sold B a piece of agricultural land in 1966 that was adjacent to a forested hill. A later attempted to void the deal but was forced to admit that he had made the sale to B. However, he then maintained that while

he may have sold the agricultural land he had not sold the adjacent hill and therefore it remained his property. A *maraka* was convened in which B argued that by Pashtun *tsali* forested land was owned as a secondary attachment to its adjacent agricultural land. If one bought the land, the forested hill went with it. It need not be listed separately in a sales contract. Therefore it was logically impossible for A to admit to having sold the agricultural land and still claim he had any right to the forested hill. The only person who could make such a claim would be B's son and rightful heir to the property. Given that this case was argued on the logic of Pashtun land title, the *maraka* decided in B's favor without insisting on any oaths since the existence of underlying sale had not been challenged by A (Zadran 1978: 249-50).

Personal Injury Claims

By far the most complex rules for compensation are applied to personal injury. Pashtun *tsali* divides the human body into four parts: eyes, feet, hands and the rest of the body. Historically the value of a human life of was set at 60,000 *Afghanis* (\$1200) and so the each of the four parts was deemed worth 15,000 *Afghanis* (\$300). Because of inflation by the 1970s the 60,000 *Afghani* value of a life was thought to be too low but nevertheless Zadran (1978: 257-264) found that the proportional principle still applied and that value of 15,000 *Afghanis* per major body part was used in most cases as a standard. In addition to actual wounds threatening a person with a knife or rifle carried a 1,000 afs compensation penalty. The specific values are listed in Table #1 (Zadran 1978: 264) below:

Table #1: Bodily Injury Compensation Schedule

<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	5,000 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
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

As in other disputes making a case for injury demands appointment of *marakachian* to weigh the merits of the claim and set damages. For example if an injury resulted in blindness the offender would be required to pay the specified indemnity (*pour*) of 15,000 Afghanis and compensate the victim for medical expenses. If these expenses were less than 30,000 the victim could get the compensation without swearing to the claim's accuracy. If medical expenses exceeded this amount, the money owed was placed in an open Quran. By taking the money from the victim is seen to be taking a non-verbal oath that his claim was accurate. In the company of his relatives, the judges of the case and representatives of the clergy, the offender also had to go to the house of the victim and apologize for his actions. There he offered a sheep or goat as *sharm* that will be slaughtered for a reconciliation feast that ends the dispute.

The process for resolving other injuries followed the same form, but it is notable that the most severe single penalties were for damage to the nose and to the feet that resulted in lameness or amputation. Injuring a nose was considered a very serious insult because it marred a person's face and so it was valued at 30,000 afs, or half the price of a life. Lameness or amputation was seen as such a disability that in addition to demanding the 30,000 afs compensation for the worst cases, the victims often sought revenge by inflicting similar injuries on the offenders. The difference in compensation between the left and right hand is because most people are right handed but also because the right hand alone is used to eat from a common food bowl.

Some cases

- 1) In 1956 A climbed up into a mulberry tree to cut fodder for his camel, which was eating the sticks and leaves as they fell. B passed beneath the tree to give his greetings to A who then insisted that B remain as his guest for the night. While B waited he rested his rifle against the tree trunk near to where the camel was eating. In reaching for the fodder, the camel brushed up against a branch that set off B's rifle, killing A in the tree. Several days after the incident A's relatives accused B of causing the death and demanded compensation because the bullet was from his rifle. B denied the charge and a *maraka* was assembled to hear the case. While the argumentation was proceeding B silently loaded his rifle with bullets and set it against the wall for several minutes to demonstrate that a loaded rifle cannot go off unless someone pulls the trigger, which he had not done. B's relatives then took the same rifle, unloaded the bullets, and pulled the trigger to demonstrate that had the gun been unloaded it could not have been fired at all. After these two silent demonstration the

maraka decided that A's death was caused equally by both the camel and the rifle. Since the camel was owned by A and the rifle by B, each side was equally liable for his death and both owed half the traditional bloodmoney payment of 60,000 afs. B agreed to pay his 30,000 afs to A's relatives and the case was considered resolved (Zadran 1978: 315).

- 2) In 1970 some men on the road who wanted a ride to a nearby village stopped a bus on its way to Khost. The driver said there was no room inside the bus so the men climbed onto the roof where the luggage was stored. When they reached the village the men refused to pay the fare and a fight ensued in which they hit the driver with an ax. The driver was taken to a hospital and after his recovery he received a messenger from the young men stating that they wished to come to terms following Pashtun *tsali*. A *maraka* was assembled to set the terms of the settlement that included payment of all medical expenses and a shame payment of one cow. The young men went to the driver's father's house where they presented the payment and the cow. The father, who was a wealthy man, rejected the medical compensation payment and returned it to them, keeping only the shame payment of one cow to preserve his honor. The cow was butchered and to feed the villagers and the visiting young men and their elders. At the feast the young men publicly apologized for their actions and the case was considered resolved (Zadran 1978: 314-15).

Property Claims

Damages inflicted on farms, orchards or domestic animals is subject to a compensation that restores to him the exact value of what was lost plus an indemnity and shame payment of 1,000 afs (\$20). Because the value of the injuries in such cases were generally below \$400, such disputes are generally handled by mediation because this is much less expensive than a *maraka* arbitration. Damages to animals is assessed in a similar way as damage done to human beings by four categories that have equal value: eyes, fore limbs, hind limbs, other parts. Mediators assess the price of the animal and the individual must pay the proportional cost based on that figure. Table #2 (Zadran 1978: 268) outlines the compensation schedule for trees and animals in the mid 1970s.

Table #2: Farm Injury Compensation Schedule

<u>Type of tree</u>	<u>level of compensation</u> (1\$=50 afs)
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

Other Comparative Customary law systems

The *Pashtunwali* is the most developed code of customary law in Afghanistan but other ethnic groups in rural areas have their similar traditions of dispute resolution that seek mediation or arbitration for problems outside of the state run judicial system. In general they lack the formal institutions of *jirga*, but some do have informal village assemblies (*shura*) that make decisions that affect the community as a whole. For resolving disputes they rely village elders (*rishsafid*, Persian; *aqsaqal*, Turkish) or important political leaders to serve as judges or mediators. Blood feud and private revenge taking also occurs but is less common among non-Pashtun groups. There is a greater willingness to take problems to government courts, particularly where disputants are not members of a single ethnic group, but even here informal mechanisms predominate.

The sample of non-Pashtun customary law systems is relatively small and not always representative of the country as a whole. For example, in Shahrani's (1979) ethnographic description of the Kirghiz living in the Wakhan Corridor of the Pamir Mountains political authority was vested in the Khan of the Kirghiz. Because of the remoteness of the region, he was not only a tribal leader but was also recognized by the Afghan state as the legal authority for the area. He had the power to adjudicate disputes among the Kirghiz and played a major role in dealing with the long distance merchants who did business in the region on credit. Such powers were not given to tribal leaders elsewhere. A more common relationship between the state administration can be found in a study of the Central Asian Arabs of Kunduz province (Barfield 1981, 1984). Here the customary law system established links between the villages and governments through the post of *arbab*. An *arbab* represented the village (or section of the village) to the local administration. In some cases state officials appointed him while in others he was chosen by the community. Those with influence within the community often played the role of mediator in dispute resolution while others used their influence with state authorities to get charges reduced or eliminated through payments of bribes. Canfield (1970) documented dispute resolution among the Hazaras by examination of a case in which the local community's resolution of a murder ran into opposition from state authorities who insisted on pursuing it the court system. The Nuristani people of eastern Afghanistan had their own unique system of village assemblies that had the power to enforce fines for breaking village rules and often served as a forum for playing out political rivalries (Jones 1984). Such systems found themselves in conflict with conservative clerics who doing the war attempted to give *sharia* practices priority (Nuristani 1994).

The implementation of State legal codes and Islamic law in rural Afghanistan

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 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 the dominant force in Afghanistan by the 1970s because of its ability to intervene in local affairs if it chose to do so.

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 (1880-1901) and during the period of intensive state building from 1950 to 1978 under Zahir Shah and Daud Khan. State control was weak or absent in periods when the power of the central government declined, such in the wake of the civil war that toppled King Amanullah in the late 1920s when local communities regained their autonomy. However even during these 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.

The establishment of Reconciliation Courts under the Constitution of 1923 was the most explicit recognition of the usefulness of the customary law as an informal mechanism that was not encumbered by formal rules or bureaucracy. These courts, established in every province, had jurisdiction over commercial and civil disputes but could only base their decisions on the agreement of the parties. Judges were not required to be trained in *sharia* law and their decisions were not subject to review by *sharia* courts. Only if the Reconciliation Court was unable to obtain a settlement could a case then be lodged before a Primary Court that used *sharia* procedures and had the right of adjudication. Reconciliation Courts lasted for about ten years after until they were eliminated as part of a court reorganization plan that created new commercial courts and returned all civil disputes to the jurisdiction of the Primary Courts under the Constitution of 1931 (Kamali 1985: 212, 215-16). Unofficially, however, government officials continued to encourage informal dispute resolutions without resort Primary Courts except in criminal cases.

Islamic law and rural Afghanistan

Throughout the 20th 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 that revised the rules for divorce. Conservative clerics often used to these changes, actual and proposed, as a way to mobilize opposition to governments in Kabul. 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. 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. 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 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. And in this struggle *sharia* law was not the champion of old rural traditions, but rather an alternative type of direct state control. Indeed, despite the debate between modernists and Islamists, every Afghan constitution before 1980 declared that the Hanafi School of *sharia* law to be the exclusive law of Afghanistan and gave no legal status to customary codes or institutions as part of the judicial system.

Until the 1964 Constitution unified them and gave precedence to statutory law in the combined system, the Afghan legal system had two types of courts: those that administered *sharia* law and those that administered statute law. 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. 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, 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 (Kamali 1985: 35-40). However, because combining the administrative and *sharia* courts into a single system affected only at the top two levels of the judiciary (provincial Secondary Courts and the national Supreme Court), even these changes had little impact on rural Afghanistan:

Since the reorganization of the judiciary in the 1960s did not affect the 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 litigation and crimes. Thus the primary court remained essentially a court of *sharia* jurisdiction in much the same way they were before the Constitution of 1964 (Kamali 1985: 227).

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). 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 customary 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 *sharia* law by state courts was often at odds with rural traditions, particularly the right to blood revenge, payment of brideprice, 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 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 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 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. 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.

State and society in rural Afghanistan

For rural Afghans state legal authority was embodied not just in state appointed judges (*qazi*) but in executive officials appointed by the central government such as provincial governors (*wali*), district administrators (*woluswali*) 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 with only about a 170 prosecutors (Kamali 1985: 207, 230-1). It dealt primarily with serious crimes or significant property cases, particularly where the court's control of land registration made it the deciding player. Recalling that Afghanistan is a country the size of France that in the early 1970s had a population of at least 12 million people, the formal legal system was very thin on the ground. This was particularly true in the country's 209 *woluswals* (sub-provincial districts) where the primary courts were located. In fact most of Afghanistan's small judiciary was concentrated in the capital, Kabul, and the major provincial cities that 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 them 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. 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 other cases they might act as self-appointed arbitrators themselves to resolve a problem without resort to formal adjudication. Unfortunately this was often done by demanding bribes to make a problem disappear. In one case in 1976 that I observed in northern Afghanistan, two sheep thieves were arrested red handed and faced a lengthy jail term. Intermediaries informed their families that a substantial payment would result in the charges being dropped. This certainly was sufficient punishment for the crime, but did nothing to induce respect for the legal system. In another case that I knew only through hearsay, the governor of a province was said to have been willing to free a man charged with murder for a payment of 20,000 af\$ (\$400). When the killer's relatives tried to bargain the price down he reportedly told them that 20,000 af\$ was his standard price and he would not take an *afghani* less. The governor then proclaimed that if they were willing to pay him 40,000 af\$ their relative could go out and kill another forty people for all he cared but that if they did not meet his price now he would be just as happy to send the man to jail. 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 impact of 20 years of warfare on traditional systems of justice and conflict resolution

Looking at Afghanistan today after more than two decades of war in the country an observer would be forgiven for thinking that Afghanistan had never been stable or peaceful. However, when a coup brought the communists to power in 1978 Afghanistan had been at peace for almost fifty years and the central government had unchallenged authority throughout the country. One reason for this was that regime changes at the national level during this period had little impact outside of the capital. The assassination of Nadir Shah in 1933 put his young son Zahir Shah on the throne as king but power remained in the hands of his uncles and cousin for the next thirty years. That cousin, Daud Khan, who served as Prime Minister from 1953-63, toppled Zahir Shah in a virtually bloodless coup in 1973 that ended the monarchy and made Daud the president of a self-proclaimed Republic of Afghanistan. Throughout this whole period, however, the central state grew ever stronger with the help of foreign aid. The national army of 80,000 was well equipped with modern weapons and its officers were Soviet trained. Men were conscripted from all over the country to fill the lower ranks of the army and police. The tribal rebellions that had periodically erupted among the eastern Pashtuns as late as the 1940s now seemed a thing of the past. An attempted rebellion by Islamists in the northeast of the country in 1975 had been quickly suppressed, in part because the local population refused to give the rebels any backing. That failed rebellion merely confirmed the power of Daud's government to keep his conservative Islamist enemies in check. From the perspective of rural Afghanistan, the state had become too powerful to confront directly. The government could send jet planes to bomb a village or troops to occupy one if it were challenged. Things seemed so stable that once during a ride through the Khyber Pass in 1974 an old Afridi Pashtun lamented to me about how boring life had

become. He explained that as a young man in 1929 he had participated in the *lashgar* (tribal army) that put Nadir Shah on the Afghan throne and looted Kabul to boot, but that young men today had no such opportunities to prove themselves. Of course, as it turned out, times were about to become much more challenging and difficult than he or anyone else could have ever imagined or wished for.

The danger to Daud Khan's republic was not the weakened Islamists who felt changes were occurring too fast, but from the more radical modernists who felt they were not occurring fast enough. They had considerable support among those in the military and the civil service who wished use government power more aggressively to transform the country. After the Peoples Democratic Party of Afghanistan (PDPA) seized power in a brief but bloody coup in 1978, they believed that they were in command of the tool they needed for this: a strong state that could be used to implement a policy of radical change. The new government intended to break from the policies of their predecessors who, fearful of the turmoil caused by Amanullah's attempted reforms in the 1920s, had made changes gradually and never attempted too get far ahead of public opinion. By contrast the PDPA immediately issued a series of decrees designed to transform rural life in Afghanistan through massive land redistribution, abolition of marriage payments, elimination of rural debts, and a creation of a secular socialist government. These decrees were met with suspicion and then armed resistance in the countryside. It was at this point that the PDPA discovered that the strength of the Afghan government was illusory. The state had encapsulated existing tribal and regional groups but had never broken their power at the local level. In addition, because the PDPA had no party structure in the countryside to speak of, it was dependent on the existing provincial administrative structure to implement its policies. But this administration was so corrupt and inefficient that it is doubtful it could have carried out any of the government's radical policies, let alone all of them at once (Barfield 1984).

The regime initially attempted to intimidate the opposition with its military force, but the threat of force had always been more effective than its actual use. While government forces could destroy villages, they could not get them to cooperate and it began to lose its control in rural areas where its presence had always been minimal. Worse, desertions and an inability to refill its ranks with conscripts soon plagued the military itself. In less than eighteen months the PDPA regime had become so weakened that the Soviet Union feared it would collapse. To prevent this, the Russians invaded Afghanistan in December 1979 and replaced the existing regime with one that was less confrontational.

The radical decrees were rescinded, but the Soviet invasion itself sparked an even wider level of resistance inside Afghanistan and international aid to the resistance. The Soviets then engaged in a wholesale war against the Afghan population in an attempt to force it into submission or run the resistance out of the country. Eventually three million Afghans fled to Pakistan and Iran, over one million were killed, and millions of others were displaced internally. In spite of having no centralized command, divided by ethnic and sectarian differences, and hopelessly outmatched in equipment by Soviet and Afghan government forces, a war of resistance – financed with billions of dollars in aid and training obtained from the United States and Saudi Arabia and administered by Pakistan – wore down the Soviets and in 1989 they withdrew. The regime they left behind in Kabul under the command of Najibullah collapsed three years later. This was followed by

an additional ten years of civil war that eventually brought the radical Islamist Taliban to power.

Changes in legal structures

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. It also produced the rise of new representative institutions such as village *shuras*, assemblies that were designed to represent local communities. 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 administering religious law (*sharia*) in the absence of central authority. 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. People were already used to solving their problems without resorting to the government. Instead it increased the power of local assemblies (*jirgas* and *shuras*) and the leaders who represented them (*maliks* and *arbabs*). Military commanders also began to play an important role in community life. 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). 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 area.

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. Educated clerics with advanced *madrassa* education (*malawi*) who could serve as *qazi* were far rarer in the countryside. And since 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. 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 gaining clients to 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. 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 their relatives (Roy 1990). However, as Edwards (2002: 167-73) 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*.

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. 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 the impression that stuck Olivier Roy (1990:150-160) most 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. 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. 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 have a right to make a complaint to the *qazi* against the 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 the *ulema* who have received legal training from a *madrassa*. The Afghan resistance probably takes more care than any other comparable movement to ensure the population receives fair treatment, a policy which has contributed to the considerable degree of support they enjoy (Roy 1990: 154).

This respect for law extended even to the treatment of enemy captives and possible spies. Summary execution was rare because 1) such an arbitrary action was likely to provoke a blood feud with the man's kin whose loyalties always superseded political affiliations; and 2) because determining guilt was the prerogative of the *qazis*, not military commanders. Roy (*ibid*) observed an example of this in 1982 in Herat when the resistance detained a man they suspected was a government spy. When he 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). 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.

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, their procedures, corruption and unreliability (as we noted earlier) had made them unpopular. 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:

- 1) *sharia* norms were more in harmony with rural Afghan's religious view of the world than government legal codes;
- 2) the *qazi* of the resistance movement was more accessible than his government equivalent and usually not corrupt;
- 3) court proceedings in both civil and criminal cases were conducted orally in a way that was understood by everyone; and
- 4) cases were disposed of quickly (Roy 1990:156).

It was no surprise then 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 by most of the judges who administered it, it 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.

Rise and fall of the Taliban

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 groups away from the Pakistan based *mujahidin* parties. They 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 (Giustozzi 2000). 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.

However, because the PDPA forces were completely intact and militarily undefeated when the regime fell, its component parts continued to play an important role in the new *mujahidin* government either by joining with rival factions as allies or setting themselves up as regional powers in their own right. Thus it was that the most radical Pashtun

communists of the Khalq faction joined with the most radical Islamic faction run by Hekmatyar because they were fellow Pashtuns. The Parcham communists allied themselves with their fellow Tajiks under the command of Ahmad Shah Masud's Northern Alliance, and the Uzbek militia under General Dostam became a new political player with his power base in Mazar-i-sharif. The Hazara factions in rural central Afghanistan and urban Kabul were united under the banner of *Hizb-i-Wahdat*.

The installation of a *mujahidin* government was nothing short of a disaster for Kabul. Each faction either occupied a part of the city or was on its outskirts so that the fighting among them was particularly destructive. In the course of a few years tens of thousands of people were killed or injured in Kabul as the result of battles or shelling and as many as half of the city's buildings were destroyed. Power devolved to the regions as the central government's authority ceased to exist. The consequences for local populations there varied. In areas such as Herat ruled by Ismail Khan there was a functioning local government that even raised its own army. The Northern Alliance areas in northeastern Afghanistan also maintained at least the shell of government administration. Dostam had his own government (and his own airline!) in Mazar-i-sharif and the *Hizb-i-Wahdat* attempted to keep the Hazaras unified. In all these regions the power of the major military commanders increased because they became the de facto executive authorities in their own regions. This gave the power to intervene in disputes or powerfully influence their outcomes if they so chose.

This was less true in the Pashtun regions of the south and east where political leadership was more fragmented. The *shura* in the Kandahar region, in particular, had trouble maintaining order. Part of the reason for this was that the leader of the mainly Pashtun *Hizb-i-Islami* party, Hekmatyar, was almost entirely focused on seizing Kabul. His strategy was to leave the problems of administration in the hands of local commanders while he struggled to become ruler of the whole country. This proved difficult to manage because there was constant bickering and fighting over which Pashtun leaders had the right to rule. Since each tribe naturally guarded its own autonomy and wanted only its own people in positions of power, they refused to unify around any single party or leader. The situation in Kandahar was particularly bad because the roads had been taken over by unemployed fighters who now specialized in robbery, rape and extortion. In response to a series of these outrages a small group of religious students (*taliban*) under the leadership of their teacher Mullah Omar murdered the worst of these outlaws in 1994 and demanded that the others come under the control of their new movement: the Taliban. With the aid of Pakistan, they displaced Hekmatyar's *Hizb-i-Islami* as the leading Pashtun faction in 1995 and their power spread quickly through other Pashtun regions. Despite a number of setbacks, they succeeded in occupying Kabul in 1996 and then extended their control to all of Afghanistan except the northeast by 1998. While uniting fractious tribes in the name of religion had been a common strategy in other earlier Afghan resistance movements, the Taliban was only explicitly clerical movement that actually came to rule Afghanistan.

The Taliban movement was dominated by Durrani Pashtun clerics from southern Afghanistan. Although its leadership was almost exclusively clerical, most of them had neither distinguished religious lineages nor particularly prestigious (or even very good) religious education. They had not held important political or religious roles previously

but, given the anarchy created by the *mujahidin* civil war in the Pashtun regions, their promises to restore order at the local level initially gave the movement some popularity. Because almost all of its leadership was Pashtun it was less well received in other parts of the country, particularly after 1997 when the movement became more heavily dependent on Pakistanis and other foreigners to fill its military ranks. The Taliban failure to broaden its political base by including other Afghan ethnic groups as it expanded into non-Pashtun areas was one of its greatest weaknesses.

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 who they promoted to the rank of *Amir-ul-Momenin*, Commander of the Faithful. 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. 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* (science of jurisprudence).

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.--*Al-Sharq al-Awsat* (March 23)

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.

The Taliban proved themselves just as anxious as the communist PDPA to use 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 *Pashtunwali*. 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. For example, executions of murderers could only be authorized by a *sharia* court, but at 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 rolled into one package. 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." This ministry

was home to the religious police who forced people to pray, checked that men had long enough beards and who beat women who violated Taliban rules on dress or movement. Their religious controls extended to bans on music, dance, films, kite flying, chess playing, card games and other forms of popular entertainment.

While the Taliban left the structure of old government court system intact in Kabul, they also created a parallel court system run out of Kandahar that had its own High Courts in thirteen provinces (Rashid 2000:102). Both old and new courts were expected to judge cases strictly accordance with *sharia* law. No new government codes would be needed since the *sharia* offered answers to all questions. Taliban courts were particular keen on imposing religiously sanctioned punishments (*hudud*) such as stoning adulterers and amputating the hands of thieves that had largely disappeared from Afghanistan generations earlier. Yet in spite of their clerical garb and professed interest in imposing a pure form of Islamic law, Taliban leaders were not so much *ulema* scholars as they were "tribal puritans," men who focused more easily on what they wished to destroy than what they wished to build.

The Taliban leadership never made the transition from political movement to rulers of a state. Mullah Omar, for example, never left Kandahar, but he did not transfer the capital there. Instead he simply overruled his agents in Kabul whenever their decisions displeased him, making it difficult or impossible for them to function as a government. The Taliban also alienated all of Afghanistan's neighbors, with the partial exception of Pakistan, and could never gain significant international recognition of their government even after they had captured most of the country. Nor did they anticipate the potential difficulties that might arise by giving sanctuary to Osama bin Laden and his al Qaeda movement in the late 1990s. After September 11th 2001, when the United States threatened them with destruction if Osama and al Qaeda were not expelled, Omar called for an assembly of clerics to meet and affirm his claim that because Osama was a guest of the country he could not be given up. With a nuanced approach that would have done credit to any Pashtun tribal *jirga*, the assembled clerics told Omar that he must indeed protect his guest, but that because a guest should not cause his host problems Osama should be asked to leave Afghanistan voluntarily as soon as possible. It is notable that the question Omar tabled was not one of *sharia* jurisprudence, but rather an issue of *Pashtunwali*. Thus, and very fittingly, the last major policy decision of the Taliban before they were driven from Afghanistan was based on good customary law standards in which religious law provided only the window dressing.

The current situation

The American invasion of Afghanistan in October 2001 involved the mobilization of Afghan opposition forces, most notably the Northern Alliance, which had long opposed the Taliban. After the fall of Kabul, the Pashtun areas that had been viewed as the strongest supporters of the Taliban also deserted them. An immediate provisional administration was organized through the Bonn Accord and a more permanent government installed under the leadership of President Karzai after the national Loya Jirga was held in the spring of 2002. A new constitution and elections are planned for 2004. As a result of Afghanistan's newest war, power has again reverted to the regions, although the international community has given great emphasis on rebuilding the power

of the central government in Kabul and international troops based there ensure it remains a zone of peace.

Rise of Regional Power Centers

After the expulsion of the Taliban, many of the leaders who had wielded power (for better or worse) under the pre-Taliban *mujahidin* government returned to the regions they formerly controlled. Herat and the surrounding provinces in the west saw the return of Ismail Khan as its governor. Gul Aga, a member of one of the powerful Durrani clans, ruled as governor of Kandahar and its surrounding regions. The traditional home of the Ghilzai Pashtuns in the east retained its fragmented leadership structure in which no one figure was paramount. The Uzbek commander Dostam returned as ruler of the north in Mazar, but his leadership has been challenged by a Mohammed Atta, a Tajik Northern Alliance commander who is also powerful in the region. With the assassination of their renowned commander, Ahmad Shah Masud, power within the former Northern Alliance devolved onto his subordinates. One of these, General Mohammed Daud, was the locally born commander of the four provinces of the northeast. Other Masud followers from the Panjshir Valley took positions in the national government, the strongest of whom was the defense minister, Fahim. Control of the Hazarajat returned to the *Hizb-i-Wahdat*.

One major change from earlier times has been the growth of regions rather than provinces as the most important units of local government. While the more than thirty provinces created by successive central governments remain the formal units of sub-national government, in reality they have been amalgamated into six super regions, plus the capital and its hinterland. With the exception is the Hazarajat each of these regions is based around a nodal city that has international trade links:

1. Eastern Afghanistan with Jalalabad as its nodal city is the center for the Ghilzai Pashtuns. It is the major trade link with Pakistan's NWFP via the Khyber Pass to Peshawar.
2. Southern Afghanistan with Kandahar as the nodal city is the center of the Durrani Pashtuns. It has major transport connections to Baluchistan in Pakistan via Quetta where a rail link runs to the border at Chaman.
3. Western Afghanistan with Herat as its nodal city is predominantly Tajik in population and has good road links to the nearby border with Iran in the west and Turkmenistan to the north.
4. Central Afghanistan or the Hazarajat has is the home of Shia Hazaras and some Sunni Aimaq tribes. It is the only region to lack both an urban center and direct trade connections with the outside world except through Kabul that has a large Hazara population.
5. Northern Afghanistan or Afghan Turkestan with Mazar-i-sharif as its nodal city has a large Uzbek population with a strong admixture of Tajiks and Hazaras. It has road link to border with Uzbekistan at Termez, which has the only bridge across the Amu River into Afghanistan as well as rail and river port facilities.
6. Northeastern Afghanistan (or Qattaghan and Badakhshan) with Kunduz as its nodal city has a predominantly Tajik population with a strong admixture of

Uzbeks and some immigrant Pashtuns. It has a road linking it to Tajikistan at the river border port of Shir Khan Bander.

7. Kabul has historically been the primate city of Afghanistan with the largest population of any city in the country. Although it has no direct international links except by air, it sits at the center of the Afghan road network that via the Salang Pass links it with the north, to the south with Kandahar and to the east to Jalalabad. It is primarily Tajik in population with a high percentage of Hazaras and Persianized Pashtuns. Although the capital has long seen itself as the center of national power superior to any other region, it has devolved into such under the influence of Masud's Panjshiris who dominate local administration there.

Although these regions have no basis in Afghan constitutional law, they generally have economic cohesiveness, common language and cultural traditions, and old historical roots. And it is now these new regions that are the political actors, not the old provinces that make them up. This is not necessarily an obstacle to creating a national state, indeed the regions are ready made templates for a possible federal system of government in which power would be more equally shared than in the past. Today, while the regional leaders (often pejoratively labeled warlords) have almost complete autonomy, they all have expressed their loyalty to the central government if only because they see the need for a national government. While Kabul currently makes the formal appointments to provincial offices, in practice such appointments appear to be generated by (or at least agreed to) by the regional leaders. The regional leaders, whether they hold the civilian title of governor or a military rank, have dual roles as both civilian administrators and commanders of military forces, although the central government is attempting to separate the two tasks. In comparing today's officeholders with those of pre-1978 Afghanistan, it is clear that most local officials are now influential residents of their own region whereas in the past they were almost always outsiders. Thus, for the first time in over a century, regional political elites appear to be emerging who see their futures in their own home regions rather than in Kabul.

Impact on legal administration

Despite twenty years of warfare the legal administrative structure is still intact in many regions. Political movements may come and go, but it seems that civil servants last forever. For example in Kunduz, I was told that the primary courts had access to local sources of revenue such as fees for land registration that were used to pay their staffs. In other areas such as Herat or Mazar-i-sharif, local governments have access to funds through taxes on transit and trade. Clerics who served as *qazis* might also have jobs leading village congregations so that their legal work was part time. The ability for the system to function in the absence of a central government or national law code was one of the strengths of the *sharia* based court system. And the vast increase in the number of *madrassa* graduates over the past decade has made it easier to find judges than it was during the Soviet occupation period, but it is unclear just how well qualified they are. However the very looseness of the system is now an obstacle to the restoration of a formal legal system. Since the majority of the judges on the higher courts are former

Taliban appointees, their receptivity to legal reform is lukewarm at best and they have often used their positions to reverse government initiatives they do not like.

Attempts by the national government to restore its official system of prosecutors (*saranwol*) and centrally appointed judges as key players in the judiciary system appear to be less successful. Senior authorities in the Supreme Court claim to have fully restored the three level court system throughout the country and staffed them with 2-3000 judges. Such courts would include the primary courts in each of the country's 216 districts, the provincial appeals courts for the country's 32 provinces, and the supreme court system in Kabul (Johnson et al 2003: 26). Since the cited number of judges never reached this level before the war such claims appears to be based more on wishful thinking than fact unless it includes the large number of de facto *qazis* who hear cases on a voluntary basis. Similarly while judicial system may be functional in major cities, it has had little impact on the countryside. For example, in October 2002 a UN official reported interviewing a *saranwol* appointee in Bamiyan who had not seen a case come across his desk in six months.

Of course, as we have seen, the visibility of such officials in rural areas has always been weak because outside of the urban areas local officials have historically wielded the power to dispense justice as they saw fit, often without resort to formal judicial institutions. This tradition continues today because provincial power holders still dispense their own justice with little reference to the court system. Even before 1978 when government power was at its height, the available number of judges and prosecutors was far too small to run a national legal system. This was particularly true for criminal cases that involved minor offences. As a result there was a whole system of police courts in cities where ranking officials could impose fines, beatings or jail time on people their subordinates had arrested. In rural areas similar powers were delegated to provincial governors and the commanders of the Gendarmerie. Although such sentences could in theory be appealed to the court system, they rarely were. We noted earlier that officials would often jail disputants and their relatives as an incentive to force voluntary settlements. Today regional commanders have taken the place of centrally appointed government officials, but they act in a similar manner. It is the local commander who decides who is to be arrested and, once arrested, how the case will be handled. Thus preliminary hearings are far more likely to be heard and judged by such an executive authority than by a *qazi* court. It is lack of due process at this level that makes the provision of justice so problematic in most of Afghanistan and subject it to abuse by those in power. At present the relationship between the judiciary and executive power holders, whether they are local commanders or national government officials, is problematic because there are no clear lines of responsibility between the two.

This is a conflict between executive and judicial authority is one of long standing in Afghanistan and one in which the ruler of the state generally has stronger legal rights. As Kamali (1985: 209) has explained,

The longstanding executive domination of the judiciary in Afghanistan is due to the nature of judicial authority in the constitutional organization of Islam. The *imam* or temporal head of the Islamic state has the fundamental duty to administer the *Shari'a*. In this capacity as the highest judicial authority, the head of state is vested with all the powers necessary to enforce *Shari'a* and administer justice among his subjects. All officials of the state, regardless of the

nature of their offices act by the virtue of a delegation of jurisdiction (*wilaya*) conferred upon them by the ruler. The nature and scope of this delegation can vary according to the wishes of the ruler.... The *qadi* thus merely administers delegated judicial functions and the ruler retains the right to administer justice himself.... Thus a consequence of the doctrine of *wilaya* is the total lack of separation between judicial and executive powers. Furthermore, the *qadi* is not the sole judicial authority to adjudicate in all litigation. Criminal jurisdictions were exercised by such other officials as the governor (*wali*), the *shurta* (police) and the *hajib* (chamberlain), although the governor usually delegated his other judicial functions to the *qadi*.

Prospects and problems for reinstating formal judicial institutions in a postwar Afghanistan and their relationship to customary institutions

Much of the current emphasis devoted to restoring the rule of law to Afghanistan is focused on the choice of what constitutes the basis for legal authority and reconstructing formal legal system. Customary law, by contrast, needs no reconstruction, but there is considerable debate over whether it should be given formal recognition and, if so, how it might be integrated into a national judicial system.

Legal authority

The choice of what constitutes binding legal authority and relationship between religious law and government codes has been contested in Afghanistan for well over a century. The recent national Loya Jirga gave priority to the 1964 Constitution and law codes that were developed under it, but these codes are not widely available and many judges insist on using *sharia* law alone. Nor are the mechanisms in place for implementing a national law code since most of the judiciary is in the hands of religious scholars who proclaim the supremacy of *sharia* law. Foreign observers and advisers have been keen to make the boundaries clearer and to give explicit precedence to state law codes. Afghans, on the other hand, have been less keen to clarify the situation because it would inevitably provoke another major political battle between Islamist and modernist factions that have so plagued the country in the past. Indeed the 1964 Constitution itself fudged the issue by requiring that the state's laws be in conformity with the Hanafi legal tradition but then giving priority to its own legal code if there was any disagreement. Where the state had not legislated, the Hanafi interpretation of *sharia* continued to apply. Since there was no court empowered to compare state laws against classical Islamic law to decide if they were in conformity, the state was effectively free to legislate without fear of a religious veto. At the same time it could declare that all of its actions were firmly within the Islamic tradition. Because the state controlled the appointment and payment of judges, those who disagreed with this point of view could be excluded from the formal system of justice.

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 their strategy has been oblique: not to oppose the *sharia* directly but simply to proclaim that as a Muslim nation Afghan government would of course be guided by it (as was done in 1964). In this they play on an old Afghan belief that a government composed of good Muslims is by definition an Islamic government. 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 debate has significant implications for Afghanistan's constitutional and legal developments in the near future. Attempts to define clearly the boundaries between religious and state law in principle will be resisted even by those who approve of such an approach because the political price of making such an explicit division is too high. Rather, for those who wish to restore the primacy of state institutions, the debate will focus on stripping the *ulema* of any power to determine what is or is not Islamic. Without such leverage the formal judicial institutions would be confined to administering the law code but would not have the capacity to override it. The Islamists realize that this is a key source of their power and so will attempt to give themselves such a role. As noted above, however, because Islamic law itself delegates the power of adjudication to the ruler, the *ulema* in a Sunni Muslim state are structurally subordinate to him and therefore weaker. Clerics becoming rulers of the Afghan state, which occurred under the Taliban, was a solution to this problem but also a unique aberration in the course of the country's history.

Reconstructing the legal system

Interviews with officials from the supreme court, prosecutor's office, police, and other representatives of the formal judicial system in Kabul in September 2002 revealed a surprising complacency about the structure of the judiciary and its implementation of the law. Reconstruction was defined as bringing back the same three tiered court structure (district, province, capital) that existed in the country for most of the 20th century without examining whether this model still served the country's needs. More confounding was the common insistence that a) the system was already completely up and running and 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 assertions stands up to scrutiny.

The size and organization of the Afghan judiciary as a formal branch of government has some obvious structural problems. First the number of courts and personnel appear far too small for a country that has a population that could range between 16 to 22 million people. Second, given the devolution of power to the regions, should there not also be regional courts that handle the affairs of these units? Third, there has never been a clear demarcation of legal authority between the formal judicial system and para-judicial system of police courts, provincial lockups run by local governors and interior ministry prisons. Fourth, no one has addressed the question of whether and how existing holders of judicial power in provincial areas will be integrated into a reconstructed national

system. If they are not either be melded into central government or granted some sort of federal autonomy then they are likely to come into conflict with any new officials appointed by the central government. Finally no attention has been given to how the informal, customary law sector should relate to the formal institutions of justice. This last issue is of particular importance because it is not clear how well any formal legal code (of whatever origin) is likely to be implemented in the countryside where government authority and institutions are weak on the ground.

Integrating customary law into the legal system

Successive Afghan governments have all opposed the formal recognition of customary law institutions. By prohibiting special courts Article 55 of 1923 Constitution was the first to explicitly deny recognition to tribal methods of adjudication (Kamali 1985:210). 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. In the Supreme Court judges felt it 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 (Johnson et al 2003: 27-28).

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 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 (Moore 1986). 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 restore the “courts of reconciliation” similar to those briefly established by King Amanullah in the 1920s. These, it may be recalled, served as a filtering device because no civil case could be lodged in a local district primary court until attempts at mediation/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 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 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.

Integrating international norms in an Afghan customary context

The clash of two goods

Customary law seeks to find solutions to problems 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 as decision-makers than insiders. 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 the two is 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. They cite an equally praised principle that customary systems deserve protection and respect because they embody unique local cultural values.

Competing sources of legitimacy

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 making sure the new constitution and the country's law code is in accord with international standards set out in treaties and conventions that previous Afghan governments have ratified. Influencing changes in state law codes, however, does not guarantee performance 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 customary practices. The most difficult question raised about the disjuncture between these three systems is 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. 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 Islamists clerics seemed a natural one, it was not. Islamist clerics also opposed such customary law institutions as blood feud, marriage payments, and exclusion of women from inheritance rights as much or more than the Kabul government did, 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. 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 disagreed. 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. 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 provisional 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. It does not include the right of other religions to have equal status with Islam or to permit proselytizing for other religions. Implementing only the Afghan version would be a great step forward for the country, but it would not meet international standards for freedom of religion. 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. 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 ensures human rights more generally in the new constitution of Afghanistan and its laws. At the same time it needs to realize that within Afghanistan recognizing such rights are still politically contentious. Most western democracies that subscribe to high goals admit 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?

International role in Afghan customary law systems

The international community has difficulty integrating customary institutions that are by definition variable, informal and not easily codified with the formal bureaucratic institutions that the international peacekeepers normally rely upon. However, since (unlike in the former Yugoslavia or East Timor) international forces in Afghanistan are currently 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 paper, 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 more dispassionate judges or demand enforcement of their though national law codes that apply to all citizens equally.

BIBLIOGRAPHY

- Ahmed, Akbar (1980) *Pukhtun Economy and Society*. London: Kegan Paul.
- Barfield, Thomas (1981) *The Central Asian Arabs of Afghanistan: Pastoral Nomadism in Transition*. Austin: University of Texas Press.
- Barfield, Thomas (1984) "Weak Links on a Rusty Chain: Structural Weaknesses in Afghanistan's Provincial Government." In *Revolutions and Rebellions in Afghanistan*, edited by Nazif Shahrani and Robert Canfield. Berkeley: Institute of International Studies, #57, pp. 170-183, 1984.
- Barth, Fredrik (1959) *Political leadership among the Swat Pathans*. London: Athlone.
- Canfield, Robert (1970) *Hazara Integration into the Afghan Nation*. Occasional Paper of the Asian Society, 3.
- Edwards, David (2002) *Before Taliban*. Berkeley: University of California Press.
- Fortes, Meyer & E.E. Evans-Pritchard (Eds.) (1940). *African political systems*. London: Oxford University Press.
- Giustozzi, Antonio (2000) *War, politics and society in Afghanistan, 1978-1992*. London: Hurst & Co.
- Grima, Benedict (1992) *The Performance of Paxtun Women*. Austin: University of Texas Press.
- Johnson, Chris, William Maley, Alexander Their and Ali Wardak. (2003) *Afghanistan's political and constitutional development*. London: Overseas Development Institute.
- Jones, Schuyler (1984) *Men of Influence in Nuristan*. London: Academic Press.
- Kamali, Mohammad Hashim (1985) *Law in Afghanistan*. Leiden: Brill.
- Llewelyn, Karl N. & E. A. Hoebel (1941). *The Cheyenne way: conflict and case law in primitive jurisprudence*. Norman: University of Oklahoma Press.
- Moore, Sally F. (1986) *Social facts and fabrications: customary law on Kilimanjaro, 1880-1980*. New York: Columbia University Press.
- Nuristani, Ahmad Yusuf (1994) *Emergence of the Ulema as Political Leaders of the Waigal Valley*. Ann Arbor: UMI Dissertation Services.
- Rashid, Ahmed (2000) *Taliban*. New Haven: Yale University Press.
- Roy, Oliver (1980) *Islam and Resistance in Afghanistan (2nd ed.)*. Cambridge: Cambridge University Press.
- Shpoon, S. (1968) "Paxto folklore and the *landey*." *Afghanistan*. 20(4): 40-50.
- Shahrani, Nazif (1979) *The Kirghiz and Wakhi of Afghanistan*. Seattle: University of Washington Press.
- Steul, Willi (1981) *Paschtunwali*. Wiesbaden: Steiner.

Zadran, Alef-shah (1977) *Socioeconomic and Legal-political Processes in a Pashtun Village, Southeastern Afghanistan*. Ann Arbor: UMI Dissertation Services.