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The American Journal of Comparative Law

Fall, 2004

52 Am. J. Comp. L. 825

LENGTH: 15460 words

ARTICLE: Balancing Relations Between Society and State: Legal Steps Toward National Reconciliation and Reconstruction of **Afghanistan**

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SUMMARY:

... The Constitutional Commission (CCA) and the Judicial Commission (JC) of **Afghanistan** were assigned a major task, that of setting up a national justice system as part of the reconstruction of **Afghanistan**. ... The historical accounts showing how every modern Afghan ruler has had to rely on the National Council, or the Loya Jirga, for legitimacy, ever since Amir Abdur Rahman used it to usher in the Nizamiya era, reveal that the people and the rulers of **Afghanistan** have understood the importance of process, acknowledging the people as keepers of custom and Islam. ... To avoid the risk of instability, one should explore whether it is possible to devise a system, or a model, where customary law, popular Islam, customized Islamic law, and intellectualized Islamic law can interact in a non-confrontational and coordinate way. ... This section is devoted to outlining various models and theoretical options which could be of use in structuring the justice system in **Afghanistan**. ... The state courts are allowed, however, to apply all sources of law: the constitution, statutes, customary law, and religious law, depending on the geographical region and/or the status of the litigants. ... For example, in the hierarchical constitutional model, where the constitution can formally trump all other laws, the judiciary may develop case law which avoids confrontation between the constitution and custom or religious law if judges prefer to find ways to reconcile the regimes. ...

TEXT:

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I. Introduction

The Constitutional Commission (CCA n1) and the Judicial Commission (JC n2) of **Afghanistan** were assigned a major task, that of setting up a national justice system as part of the reconstruction of **Afghanistan**. While this may appear to be a daunting challenge, it is not novel in Afghani history. Since the end of the

nineteenth century the system of justice in **Afghanistan** has gone through several reconstructions. Each such reconstruction reflects the given political balances of power in the country at the particular time.

Each historical era of reconstruction of the justice system has possessed, however, one common feature, namely a dualistic system with plural sources of law. In essence, the justice system has functioned on two levels, the formal and the so-called informal. The formal level consists of the official justice system set up by the state. It is based on the Constitution, Islamic fiqh, and statutory laws. The unofficial system is set up by the society. It functions outside of the state and is ruled by customary laws and a social understanding of the Islamic Shari'a (Shariat) with sufi underpinnings (from the tariqat, sufi orders). This study examines first the structure of each level, weighing the plurality of sources of law, and then looks at the relationship between the two levels of justice. It examines the extent to which the state system recognizes or disregards the informal system and vice versa. In particular, it analyzes the points at which they [*826] intersect in the law and in practice. Finally, we consider models already existing in other countries with dualistic and plural systems of justice and ask what **Afghanistan** could learn from these models.

II. Structure of the Official Afghan State Legal System

A. Pre-constitutional Structure

Historically, the King was the highest source of authority within the state's legal structure. He imposed his authority over the judiciary by appointing, promoting, and dismissing the justices. His opinion had to be sought in important cases. n3 Prior to the nineteenth century, the King appointed the members of the judiciary to function for a network of religious courts. Most judges (quzat) were graduates of private educational religious centers around the country. n4 At the private educational centers, the border between religion and law was not clear. Hanafi jurisprudence was taught as part of general theological studies. n5 In effect, in most cases, the judges were theologians with some knowledge of Islamic law, rather than full time jurists. They expanded their knowledge in the course of their practice in the courts of law.

In the late nineteenth century, a major political and public administration reform took place. After the British defeated various Afghan uprisings, though without achieving viable political control of the country, Amir Abdur Rahman Khan returned from exile in Russia and started a 21-year long (1880-1901) reconstruction of **Afghanistan** into a viable independent state. He won control over the various clan and tribal leaders by creating an advisory council (forerunner of the Loya Jirga, the Afghan Great Council consisting of representatives of the nation), began to restructure the tax administration, introduced a new conscription system, and divided the country into provinces along non-tribal lines. n6 His era was the start of the so-called Nizamiya period, the era of new statutes. In 1888, Amir Abdur Rahman Khan reshaped the Afghan court system along centralized and standardized lines. He issued the Asas ul-Quzat (a manual for [*827] judges) n7 in the form of governmental regulations. They contained procedures for all courts. All judges in the country had to acknowledge receipt of all regulations coming from Kabul by signing them. The Amir also established more control over the qualifying process of potential candidates for the judiciary. He appointed the jurists who set the standards by which graduates of religious schools could qualify for appointment by the Amir to the courts. n8

In terms of the procedural and substantive rules for the qadi courts, the Asas ul-Quzat was said to prohibit the qadis from issuing judgments in private homes or mosques. They were to perform their duties from the offices of the governor. n9 The King had the final authority to devise a rule if neither the qadi nor the chief qadi could extract one for a case from the authoritative books of

Abu Hanifa and Abu Yusuf or Fatawe Qadi Khan. n10 The King was also allowed to receive grievances directly from the people who disputed the legality of qadi judgments. The King in turn could also assign the grievance to a group of 'ulama' to review. n11 Qadis were to set aside one day especially for women litigants to bring forth their grievances. n12

The extent to which the state's qadi courts were the major forums for settling disputes is still not easily determined. It has been noted that litigants came to the Shari'a courts only after a long lapse of time. This might be an indication that other forms of reconciliation had been tried and failed. n13

B. Constitutional Transformations

After the consolidation of the independent n14 state of **Afghanistan** under Abdur Rahman Khan and his dynasty, n15 the next major innovation [*828] was the introduction of a constitutional framework for the state. This was in tune with the post-World War I developments in Turkey after the dissolution of the Ottoman and Russian empires. The monarch at the time, King Amanullah, had the support of a nationalist journalist and advocate of reform, Mahmud Tarzi, who happened also to be the King's father-in-law, as well as the support of the military and the Young Afghan Party. Declaring jihad on the British in India, he invaded the North-West Frontier Province of British India. After a punitive bombardment from the British, he signed the treaty of Rawalpindi in 1919 which recognized the independence of **Afghanistan** from British foreign policy control and the end of British subsidies to the Afghan government. King Amanullah then signed a treaty of non-aggression with the revolutionary government in Russia. He also sought support from modernist Turkish advisers. The King had the first Afghan constitution enacted in 1923. The Constitution guaranteed the courts freedom from any form of interference (including political and royal interference) (Art. 53 of the Constitution of 1923). The structure of the court system was regulated by a general statute, the General Law on Courts. The advisory council institutionalized by the Amir Abdur Rahman Khan in the late nineteenth century was expanded and formalized into a series of councils: a state council in the capital city, provincial and district councils for the rest of the country. Half of the members of these councils were appointed by the government and half elected by the people (Arts. 39, 40, 41 of the Constitution of 1923). They could hear petitions or complaints and offer their opinions on how to resolve cases. They functioned alongside the regular court system (Arts. 43, 45 of the Constitution of 1923).

In the shadow of suspicion of his involvement in the assassination of his father, the King's reforms provoked the formation of an anti-Turkish faction and a rebellion led by a Tajik tribesman. The King resigned in 1928, five years after the introduction of the constitution. The rebellious regime held power for less than a year before the central monarchy re-established itself.

The next major constitutional era coincided with the dissolution of the British Empire in Asia and Africa. The 1964 Constitution was the last before the era of Soviet influence and the Afghan wars. After the defeat of the Taliban regime in 2002, the 1964 constitution became [*829] the interim constitution for the interim government until the new constitution was adopted in 2003. n16

Ever since the start of the Nizamiya era, Afghani constitutions (including the constitutions in the Communist era) were all sanctioned by the Loya Jirga. n17 We have little evidence showing the extent of communication between the "bottom" - the people - and their representatives on the Jirga. Until in-depth historical investigation (through oral history or written documentation) is undertaken on this issue, we shall presume that the transition and transformation from a legal system without a constitution to a constitution-based regime was not a "bottom-up" but rather "top-down" process. If that is correct, it resembled the "colonialization" process that took place in the former European colo-

nies. As **Afghanistan** was no longer a colony, this process may be called "internal colonialization".

1. Constitutional State Court Structures

The 1964 Constitution, like the prior constitutions, recognized the independence of the official justice system. This independence was not absolute, as the executive (the King at the time) continued to have full authority over appointments to the judiciary, though he acted, at least formally, on the recommendation of the Chief Justice (Art. 99 of the Constitution of 1964). The latest Constitution of 2003 (in the Islamic calendar 1382 Anno Hegirae, hereinafter A.H.) modifies this rule by subjecting the power of the President to appoint the justices of the Supreme Court to the legislature's approval (Wolesi Jirga). The executive still has the power to appoint the Chief Justice (Art. 117 of the Constitution of 2003), n18 seemingly without consulting any official body. The appointment of all other subordinate judges is regulated by the Supreme Court (Art. 124).

The organizational independence n19 of the judiciary was guaranteed under the 1964 Constitution by making the Supreme Court responsible for managing the organization and function of all courts and affairs of the justice system of the country (Art. 107 of the Constitution of 1964). Its budget, however, was and is still subject to consultation [*830] with the government and eventual approval by the parliament (shura) (Art. 108, similar to Art.125 of the new Constitution of 2003, which uses the Pashtun word jirga instead of the Arabic word shura for parliament n20).

There was a certain ambiguity in the 1964 Constitution which left open which branch of government would be in control of judicial organization. While the Supreme Court was to organize the courts, the 1964 Constitution also provided for laws governing the organization and function of the courts (Art. 104 of the Constitution of 1964 n21). It is a question of interpretation which institution would be responsible for formulating the rules governing the organization and function of the courts - the shura, a ministry, or the Supreme Court? n22 The latest Constitution proposes clearly to divide the power. It confers on the legislature the power to determine the jurisdiction and administration of courts (Art. 123 of the Constitution of 2003) and leaves to the Supreme Court only the regulation of the appointment or dismissal of, or disciplinary measures against judicial officials (Art. 124 of the Constitution of 2003).

The comprehensive jurisdiction of the state courts was guaranteed in the 1964 Constitution under the provision that no law should exclude a matter from the courts' jurisdiction (except military affairs) (Art. 98 of the Constitution of 1964). Later constitutions continued this policy (Art. 98 of the Constitution of 1976; Art. 108 of the Constitution of 1987). The 1990 Constitution (Art. 108) provided even more clearly that only a court of law could issue a judgment. The latest (2003) Constitution (Art. 122) resembles the 1964 provisions, yet leaves open the question of whether state courts possess, or must maintain, a monopoly over adjudication and justice. It is a matter of interpretation for the state courts to choose whether to recognize the existence of non-state courts or not, and, if they are being recognized, whether to supervise them.

The organizational structure of the Supreme Court was laid out in the Law on the Jurisdiction and Organization of the Courts of **Afghanistan** ("Law of Organization") of 1967 (15 Mizan 1346 A.H.). The Court was divided into two parts: a Supreme Court with original jurisdiction to try judges (Art. 10, Law of Organization) and over jurisdictional conflicts, and a Court of Cassation with appellate [*831] jurisdiction. The Court of Cassation had various Chambers: the Chamber of Customary Criminal and Civil Law, n23 the Chamber of Public Law and Administration, and the Chamber of Commercial Law. n24

Several special courts were created: the Kabul High Central Court of Appeal (with chambers for criminal cases, public rights cases - i.e. expropriation, taxation, and electoral disputes - and commercial disputes), the Kabul Administrative Court, the Kabul Juvenile Court, the Specialized Court for Central Civil Servants in Kabul, the Warehouse Court in Kabul, the Kabul Primary Traffic Court, the Specialized Primary Family Court in Kabul and Herat, and the Army Tribunal.

The new Constitution does not name the specific courts to be established. It leaves the Supreme Court at the apex of the court system, but requires the legislature to set up an appeals court and other courts (Art. 116). It allows the President to select which of the justices on the Supreme Court shall be the Chief Justice (Art. 117). The general tendency in the new Constitution seems to be to rein in the judiciary's top echelons politically. A new court recently established is the Special Court for Solving Property Claims (Decree No. 136 of 2003/1381 A.H.).

Below the Supreme Court, a number of trial and appellate level courts existed in the urban and rural areas. The first instance tribunals were the Primary Courts. Their territorial jurisdiction coincided with the administrative unit at the district level in rural areas. The Primary Courts had unlimited original jurisdiction in all cases unless a statute or decree specifically granted jurisdiction to courts of exception, e.g. juvenile courts, labor dispute tribunals, or tribunals dealing with smuggling or some commercial disputes. The state capital Kabul and the provincial capital cities had their own first instance trial courts.

At the next level were the Provincial Courts. They had original jurisdiction and could also hear appeals from the Primary Courts. Provision was made for Provincial Court judges to sit as Primary Court judges if the latter were absent (Art. 58 of the Law of the Jurisdiction and Organization of Courts, 1967). The Provincial Courts [*832] were divided into Chambers similar to those at the Court of Cassation in the Supreme Court. n25

Appeals from the Provincial Courts went to the Court of Cassation in the Supreme Court (Art. 28 Law of the Jurisdiction and Organization of Courts, 1967). Regarding the frequency of appeals, the literature provides limited information, addressing only appeals from trial court levels. n26

With the exception of complex family disputes, all court sessions were to be open and public. The judgment was to be proclaimed publicly (Art. 71 of Law of the Jurisdiction and Organization of Courts, 1967).

Some literature refers to "religious courts" n27 applying the Hanafi jurisprudence. Yet, there is no indication in the respective statutes that such religious courts existed separately from the Chambers of Customary Criminal and Civil Law within the Supreme Court and the Provincial Courts, or from the Primary Courts, whose judges were trained in the Shariat.

2. Court Inspectorate

A group of administrators operated between the Supreme Court and the lower courts. This group was called the judicial inspectorate. The inspectors did not, it seems, go on circuit, n28 but instead received complaints about wrongdoings, corruption or mishandling of cases. The inspectors were to find ways to solve the problems or notify the Attorney General or the Supreme Court. In effect, they functioned as an administrative appellate body supplementing the formal judicial mechanisms. The literature does not examine the efficacy of the inspection system, its impact on the judiciary or how inspectors interacted with the provincial and district advisory councils which had also been used to hear complaints as provided under the 1923 Constitution.

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3. Creation of Conciliation Tribunals

By 1975, there were 225 Primary Courts in the country. This number increased in the Republic of **Afghanistan** after the overthrow of the monarchy. n29 The government of President Daoud (1973-1978) had thought that it could increase its influence at the rural district level by establishing more Primary Courts. n30 However, the shortage of logistics, resources, qualified personnel, and the incompetence of the government district officials began to disturb the local communities. The state courts became jammed with thousands of cases. In 1974, this forced the creation, on the recommendation of the Department of Research, of a new set of tribunals, called the Conciliation Tribunals. n31 These were mediatory dispute resolution bodies consisting of elders sitting in the mosques. Their jurisdiction was to be limited to civil disputes and minor misdemeanors. The parties could take their disputes directly to the elders or the Primary Court could decide to refer matters to them. The decision of the Conciliation Tribunal had force only if both parties agreed to abide by the outcome. At least in some places, the Tribunals seem to have been quite effective. In Kabul, they had solved 52 out of the 59 disputes n32 referred to them in a single month. The pilot project was extended to create 70 more Tribunals. The declared aim of the Ministry of Justice was to make the Conciliation Tribunals a nationwide institution.

We do not yet have evidence of what the Supreme Court or the general public thought about the Conciliation Tribunals. We also do not know much about the mechanism of the selection of the mosques that were included in the pilot project, nor how elders were selected, nor even whether they were compensated by the parties or the state for their efforts. Presumably, the appointment of the elders entrusted with mediation lay outside the competence of the King. We also do not know whether there was any dissent against the practice of adjudication in the mosques in light of the reform efforts reflected in the nineteenth century *Asas ul quzat* handbook, which prohibited qadis from judging in nonofficial settings. n33

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4. Councils under the Communist and Post-Communist Regimes

In 1978, the Afghan Communist regime no longer focused on the Conciliation Tribunals. n34 Instead it established a wide range of city, village, and district Neighborhood Groups comprised of twenty households in order to mobilize local communities to support the decrees of the Revolutionary Council. These local councils became sources of intelligence gathering and political rallies to support the ruling party. They created ever increasing internal conflicts resulting from personal vendettas by the party activists against fellow citizens. Members of these local councils and the party activists intervened in people's individual, family, and communal matters in an attempt to dissolve the autonomy of the Afghan legal system and to establish a single system under the total control of a national government. The Constitution of 1987 (Chap. 11) reflects this process of total reorganization and absolute uniformization. Below the district level, there were established sub-districts, precincts, and villages, each with a local council placed under the leadership of sub-district administrators, village chiefs, mayors, and heads of precincts. The former constitutional guarantees of the election of one-half of the members of these local councils were abolished.

Under the Communist government, the institution of advisory council, as used under Amir Abdur Rahman Khan in the late nineteenth century, was extended to the highest judicial level. An advisory Constitutional Council was formed (Art. 121). Its members were all appointed by the President. Its task was to assure

that all legislation conformed to the Constitution and to advise the President on constitutional matters. This undercut the role of the Supreme Court which continued to exist as provided for in the preceding constitutions. The whole process produced far-reaching resentment in the local communities and a widespread rejection of the state's interference. n35

We have no evidence or studies showing how people were resolving disputes during this period or how the formal courts were interacting with the new local administrative units. Perhaps the courts even continued to refer cases to mediation bodies established under the previous regime despite their formal abolition. In other words, we do not know how many structures or civil servant positions established since 1923 survived or metamorphosed during the decades of turbulence and change.

[*835]

5. Shura Councils under the Taliban

Two years after the Taliban seized power in 1996, they announced that the laws were amended so as to conform to the Shariat. These amendments do not seem to have been officially published. n36 Oral evidence indicates that the Taliban's local authorities interfered with the courts and appropriated them for their own purposes. The forums of adjudication, including the local customary jirga, were renamed shuras to give them a religious appearance. In most cases the government district and provincial authorities endeavored to use these forums to legitimate their role in local politics. They made membership of the local clergy in the village jirga compulsory. n37

6. Judges

The pool of judges appointed to the state courts was limited to graduates of the College of Law, the College of Theology, or of "a public institution of Islamic law" (Art. 75 (d) of Law of the Jurisdiction and Organization of Courts, 1967 n38). The meaning of "public institution of Islamic law" was not defined. Placement was not competitive unless the number of applicants exceeded the positions available (Art. 76). We do not have statistics on the proportional representation of the kinds of graduates appointed to judgeships. In general, Primary Courts were presided over by graduates coming from diverse institutions: the Faculty of Islamic law of Kabul University and Islamic secondary schools. n39 The graduates were still required to attend the Judicial Training Center run by the Supreme Court. n40 Attendance at a one-year course at the Training Center was required as part of the appointment process. Its alleged purpose was to fill in the gaps in the formal education of the appointees. Those with only an Islamic law education needed training in the state laws and those trained in the state laws needed education in the Islamic law. n41 The [*836] first batch of graduates from the Training Center according to a report in 1971 included five women, graduates of the Faculty of Law and Political Science. n42

III. The Structure of the Unofficial Non-State Legal System

The core of the unofficial or "informal" legal system is what is known in Pash-tun as the local jirga (council), or in non-Pashtun as shura or majlis. n43 At this level, people voluntarily set in motion a process to reach a solution to all kinds of conflicts between two or more parties, including criminal matters. The venue is a local mosque or the house of the village head or of a community leader. The jirga is not a fixed local organization with regular meetings, official membership, a budget, or a recognized system of recording and reporting. The adjudicating members of the local jirga need not have professional qualifications. They require instead a local reputation of respect, ability, and honesty, or simply a reputation for being a "good Muslim". Depending on the scope

of the dispute and its relevance to the well-being of the community, important leaders, including (in recent times) warlords or local commanders, n44 participate in the jirga, whether the disputants have requested their appearance or not. Generally speaking, we have only ad hoc observational evidence of various procedures for determining who shall adjudicate at a jirga. Sometimes, the disputants are given the opportunity to name the respectable members of the community they wish to constitute the jirga. n45 At other times, the person hosting the meeting will decide who shall be part of the jirga.

[*837] Yet, it seems established on the basis of oral evidence n46 that either of the parties to a dispute is free to reject the decision of the jirga. They may take the matter to a state court. If one of the disputants, or indeed both, are convinced that members of the jirga have been partial, oral and written history provide evidence that among certain groups one can appeal to even more reputable elders. n47 In this instance one or both sides may request a third party's participation to mediate the dispute. Often, this third party is not a member of the community and may not know anything about the case or the parties in conflict. He follows the rules of the traditional customary investigations, interviewing witnesses and collecting data to help him to mediate. Mediators need to have a well-known reputation for honesty, impartiality, and experience gained in other cases in the neighboring areas. The party or parties who call for these mediators are responsible for their expenses. In most cases, however, the mediators have enough resources to take care of their own expenses and serve the community out of piety and for the sake of being a helpful Muslim. For instance, the Pashtuns in Wardak often summon the Ahmedzai Pashtuns to mediate their local disputes. What makes the Ahmedzai respected among the local communities in Wardak is the belief that the Ahmedzai are sayyids, descendents of the Prophet. Genealogy gives them legitimacy. They are regarded as truthful and free from makr (hidden tricks) and corruption. In addition, they have a long-standing reputation for being talented in solving disputes and helping people. n48 Whether there are any women among those who have such a reputation has yet to be researched.

The literature on the mechanisms - historical and contemporary - of the jirga and on the extent of its use is not prolific. While some Pashtun areas have been examined in particular, a comprehensive overview of all geographical and language areas has hardly been undertaken; n49 nor have the variations among the Pashtuns been explored in detail. n50 We need more concrete evidence about the jirga in [*838] terms of its convenience and availability, cost effectiveness, legitimacy, and the impartiality of its members. We have started gathering survey-like information about whether people on the whole prefer the non-state justice system or the state system in general, n51 only for particular types of litigation, or only in certain areas of the country, and about whether economic and social standing play a role in the preferences.

It should not be assumed that a jirga belongs only to the tribal tradition. Jirgas are used in both tribal and non-tribal settings. An example of a non-tribal setting would be settlements on irrigated land in **Afghanistan**. In these areas, most disputes over water sharing between households and villages, as well as business matters relating to lease and debt, are resolved through the local jirgas. n52 In Maiwand in the district of Qandahar, the current land disputes between the settled communities of the Noorzai, Barakzai, and Mohmandzai are predominantly handled by the local jirga and to a lesser extent by the government institutions. n53

In a tribal setting, a jirga can handle serious and complicated cases such as tribal clashes and even murder. For example, in Mohmand Dara district, a murder case was bounced from government institutions to the local jirga because neither the government head of the district nor the Primary Court judge wanted to get

involved in complicated tribal issues and take political risks. They supported the decision of the local jirga that was able to find a solution satisfying the victim's family while punishing the perpetrator with heavy fines. n54 As a member of a tribal jirga explained: "The most important result besides making people responsible for their actions is the reconciliation so as not to split the whole community apart and also to stop the cycle of revenge that could go on for generations... And we can't get this kind of result in the government's courthouse." n55

In contrast to Maiwand, the state authorities in Paktia have prohibited the tribal jirgas at the village and district levels to adjudicate [*839] any criminal matters. At most, they can record statements and evidence from the parties involved. These will serve as eyewitness evidence for the Primary Court which is free to accept or reject the evidence. n56

As the jirga is a form of mediation, enforcement of its decisions is limited. It depends on the agreement of the parties and the support of the local community. For instance, the Khogyani (Khugiani or Khogeany) Pashtun jirga in the Sorkhroud district of Nangarhar has adopted the non-open-ended solution for cases that go back and forth between a jirga and a Primary Court. Disputants are allowed to select the members of the jirga for their case. At the opening session of the jirga, the mediators have the disputants write a statement that they will agree with whatever final decision the jirga may reach. When the jirga reaches a ruling and all members have signed the verdict, the disputants are asked to sign again under their initial statement to reconfirm their agreement to abide by the jirga's decision. At that point the verdict is announced to the disputants. These written statements serve as a hard evidentiary document to be kept by each party in case the dispute is reopened in a government court. According to the head of a Primary Court in the district, under these circumstances, "he would honor the jirga's decision". n57 On the whole, we still need more detailed and updated information about the similarities and differences in the ways jirgas function and enforce their decisions in various settings.

IV. Interaction between the Official State and the Unofficial Non-State Legal Systems

A. Structural Interactions

As in most systems marked by legal pluralism, the Afghan legal structure has many points at which the official and unofficial systems have intersected and for various reasons. We have already mentioned the creation of the Conciliation Tribunals in the 1970s. Because the Primary Courts were congested, the government turned to mediation. The elders in urban mosques who were already involved in mediating disputes brought to them by private parties were essentially co-opted by the state to help solve its problem of poor access to justice. This is an example of state reliance on traditional unofficial systems.

Examples of reliance in the opposite direction, that of the traditional system relying on the state apparatus, arise, as mentioned already, because the jirgas cannot enforce their own decisions in case of [*840] disaffection of one or both of the parties with the mediated decision for whatever reason, including allegations of partiality. The parties then go to a state court instead. Enforcement is even more problematic in cases of intertribal or intercommunal disputes. Oral evidence n58 reveals that a jirga directed its ruling to a Primary Court at the district level asking that its decision be sealed and recorded, which provided evidentiary support for the ruling. In most cases, such a formal recording did not make the government's official executive representative responsible for enforcing the ruling of the jirga. The government official could, however, decide to interfere if the representative of the community, like the village chief or clan elder, so demanded. If the government's administrative

head in the local district decided to disregard the ruling of the local jirga, he had two options: either to refer the case to the Primary Court, or to ask the locals to redouble their efforts to reach a satisfying remedy.

Apart from relying on the state courts for purposes of enforcement, we have some evidence of disputants using the threat of going to the state system to pressure the jirga. In areas where the state court system is within easy reach of local communities, either of the disputing parties can use the accessibility of the state court system as a source of pressure on the local jirga members to find a remedy that is fair, impartial, and agreeable. The credibility of such a move is typically a reflection of the reputation of the local jirga, the trust the local communities have in the jirga members and their rulings, and the esteem in which the local state court is held. More investigation is needed on the extent of this type of forum-shopping pressure. It is also not clear whether it is a form of self-serving manipulation or is instead a reflection of cultural perceptions of how best to achieve impartiality through means other than the common law tradition of adversarial process. n59

Another point at which the unofficial and official systems have interacted involves bypassing both the state and non-state adjudicatory mechanisms. For instance, if a father convinced the local administrative officer to jail a young suitor of his daughter on allegations of harassment, he had obviously bypassed both the jirga and the state courts to achieve a desired result. In such instances it has been reported that superior administrative officials have released the "culprit" and asked the local jirga to intervene and take up the matter. This only works if the jirga can convince the parties that they need to come together to mediate, or if the complaining party believes that he [*841] or she would have no justifiable or justiciable case or would not meet the evidentiary requirements in an official court setting.

The interaction between the state and non-state adjudicating bodies has been complicated by decades of war and Taliban rule. The local commanders who emerged during the war have enough power to interfere where both the state and non-state institutions interface. For example, in Paktia, as mentioned, the local officials prohibit the local jirga from passing judgment in criminal matters. The jirga may only offer written statements of witnesses to the state courts. If the local state court rejects the evidence offered, this amounts to a confrontation with the jirga members. Such a rejection can thus provoke the interference of local commanders, as well as local state officials competing for authority in the case, to reach the final verdict. The result is a loss of independence of both the non-state and state adjudicatory institutions. n60

What is particularly noteworthy regarding these examples of interaction between the official and unofficial justice systems is the interlocutory role of the local executive officials (now complicated by the interference of local commanders). This role of the executive officials is not surprising. It has deep historical roots, as illustrated in a well-known report from the late nineteenth century about a local qadi. The fact that he was the son of the governor in the same district posed no obstacle to his being appointed judge. In one case, knowingly flaunting the law, he condemned a man to death. The qadi apparently believed that his father's position would shield him from any sanctions. n61 In an effort in the following century to rectify such injustices, the 1923 Constitution instituted advisory councils created at the local and provincial administrative levels to accept and deal with complaints from the public about the handling of disputes (Arts. 41 and 42). The spirit of this Constitution appears to have influenced the administrative apparatus long after its abrogation. Later, in the 1960s and 1970s, the Supreme Court organized the office of an inspectorate which was charged with hearing complaints about adjudicating bodies. n62 Even the Office of the Public Prosecutor (Saranwali) was allowed to assign its

public prosecution duties to the local political authority. n63 In addition to a historical evaluation of the role of the administrative and executive branches at the interface of the formal [*842] and informal court systems, we also need an analysis of the expectations of the public. We need to reevaluate what kinds of checks and balances are appropriate for the interaction between the two systems. Should these checks and balances be situated exclusively either within the judiciary system or between the administrative and the judicial? The role of the Ministry of Justice as part of the executive branch vis-a-vis the Supreme Court representing the judiciary must be clarified as well. n64

B. Substantive Law Interactions between the Official State and Unofficial Non-State Legal Systems

First, the last two Constitutions of **Afghanistan** shall be compared with a view to understanding the subtle continuities and discontinuities that affect the interactions between official and unofficial law.

1. The 1964 Constitution

The intersection between non-state substantive law and state law was formally acknowledged and regulated in the 1964 Constitution. Its provisions juxtaposed two sources of law - state and non-state. The definitions of law differed according to which organ of government was addressed. The laws enacted by the shura, the parliament, constituted the formal state system. Parliament could not enact any law that was "repugnant to the basic principles [authors' emphasis] of the sacred religion of Islam and the other values embodied in this constitution." (Art. 64) In addition, the provisions of Hanafi jurisprudence were also considered to have the force of law although they were not enacted by Parliament (Art. 69 n65). In regard to the Supreme Court and all other courts, the definition of the laws they were to apply is narrower. They were to apply only the state (dawla) enacted law (narrowly interpretable as only the law enacted by the shura or other state bodies), the Constitution, the principles (narrowly interpretable as not including the detailed rules) of Hanafi law, and finally justice as best defined by the judges within the parameters [*843] of the Constitution (Art. 102). No other non-state law was mentioned. In addition, the Supreme Court was permitted to issue regulations and rules for managing the courts (Art. 104), including, presumably, matters of jurisdiction. That would include determining which state or non-state laws were applicable. The reference to "principles" of Hanafi jurisprudence seems to have had deep historical roots. Already in the late nineteenth century, the manual for the qadis, *Asas ul quzat*, enjoined the judges not to pass judgment against the "principles of the luminous Sharia". n66

It would require a full-scale analysis of the protocols of the Constitution of 1964 to determine the extent to which these differences in the constitutional definitions of law consciously reflect a delicate political balance between pro-state modernizing forces and non-state forces, or instead result simply from drafting or translation difficulties. One could then consider what, if anything, has changed in this balance since 1964. n67

2. The New 2003 Constitution

The new Constitution of 2003 retains the reference in the 1964 Constitution to the religion of Islam as the yardstick for the validity of any law along with the Constitution. No law is to be repugnant to the "sacred religion of Islam" and the values of the constitution (Art. 3 n68). By comparison with the 1964 Constitution, the religious test is more broadly formulated. It is not limited to the "principles" of the sacred religion. It has also been extended to the judiciary. The justices of the Supreme Court have to swear (Art. 119 n69) to uphold justice in accordance with the sacred religion of Islam, the Constitution,

and the (enacted) laws. A similar oath had been required after the overthrow of the monarchy in the Republican Constitution of 1976 (Art. 108). The courts are bound to apply the state laws, and if no laws exist on the subject, then apply the "provisions" of the Hanafi "jurisprudence" (Art. 130, *feqh* - in Dari) or the Shiite "jurisprudence" and "laws of this Sect" (Art. 131), if both litigants are Shia. But the Hanafi *fiqh* (not defined as rules or principles as in the 1964 [*844] Constitution) is to be applied within the Constitution and the concepts of justice. n70

Unlike the 1964 Constitution, the new Constitution regulates the qualifications of the justices of the Supreme Court. They must have "higher education in law or in Islamic jurisprudence and have sufficient expertise and experience in the judicial system of **Afghanistan**." (Art. 118) As the justices who held office during the prior regimes meet the criteria of expertise and experience, one can only infer that this provision protects them for a while under the new government. Such protection serves as a counterweight to the executive's political control over the appointment of the Chief Justice (Art. 117). It may not be easy to introduce new blood into the Supreme Court in the immediate future.

The new Constitution raises a new set of issues which need to be researched. They include the investigation of the relationship between theology (*kalam*), spiritualism (e.g. *sufism*), and law; as well as the question whether the lawmakers understand their task to be that of incorporating religious "values" into the law as opposed to codifying specific black-letter rules of *Shari'a*. The legislation that the Parliament will enact regarding the laws that the courts will apply will be of crucial importance.

C. Application of Unofficial (Non-State) Law in State Courts

There is some evidence regarding the interaction between the formal state courts and non-state law. The Court of Cassation, the final appellate body for the Primary and Provincial Courts, was especially charged with checking the legality of the lower courts' decisions in terms of the laws and the principles of Islamic law (Art. 30 of the Law of the Jurisdiction and Organization of the Courts) in civil and criminal matters. No mention is made in the statute of any other non-state law such as customary law. Judicial officials, however, in writings in the 1970s give the impression that in practice they made no distinction between customary and Islamic law; perhaps they even blended them. In articles explaining what was meant by customary law, two officials designated the chambers of criminal and civil law as: the Chambers of Customary Criminal and Civil Law (Islamic law). n71 To better understand the implications of this terminology, we [*845] would need an in-depth survey of the Law of the Jurisdiction and Organization of the Courts in all its reincarnations, supplemented by research into court archives that survived the wars. We would also need to determine how the appellate judges and the Primary Courts understood customary law in relation to Islamic *fiqh* and Hanafi principles n72 as opposed to black-letter rules. One could check whether clear distinctions were made between customs ('urf) compatible with *Shari'a*, customs not compatible with *Shari'a* but necessary for the sake of public peace, and regional variations in the interpretation of the *Shari'a* that reflect localized social and political mechanisms of control as well as freedom of choice among possible *Shari'a* rules.

The concept of "justice" ('*adalat*) also needs researching. It is a term that appears in practically all of the Afghan constitutions regardless of political color, including the new 2003 Constitution (Art. 130). The constitutions have made it incumbent on all courts to decide according to justice as best they can when they cannot find a solution in state law (or the non-state Hanafi or Shi 'i law). It would be particularly interesting to research actual judgments and to interview judges about the question whether they used and still use "justice" as

a frequent source of law - whether it allowed and still allows them to escape the restrictions or irrelevancy of state or non-state laws, or whether it is a rare last resort. The absence of the mention of customary law does not imply in itself a prohibition against using it to do justice. One can well imagine that judges could find justice derived from custom.

V. Interactions Within the Unofficial Non-State Legal System

As shown above, the 1964 Constitution formally restricted itself to dealing with the intersection of state law with only one kind of non-state law, namely the Hanafi fiqh, whether in terms of rules or principles. The new 2003 Constitution expands the non-state law to include the law of the Shiite sects. While the absence of a specific mention of customary law in the 1964 Constitution need not be interpreted as excluding it as a source of law, the new Constitution for the first time in Afghan constitutional history refers explicitly to the "traditions" of **Afghanistan** although it limits itself to the context of traditions affecting family and women. Only in this context does the new Constitution oblige the state (Art. 54) to do all it can to eliminate the "traditions contrary to the provisions of the sacred religion of Islam". n73 [*846] The constitutional provisions on the judiciary, however, make no mention of traditions. Again, the Constitution does not expressly preclude the courts from referring to traditions that are not "repugnant" to the Islamic religion as such. Nor are traditions relating to commercial matters specifically mentioned. Such traditions might include the centuries old practice of charging interest in transactions involving non-Muslims. n74

The very non-state origins of Islamic fiqh contain the seeds of a three-way interaction - an interaction with the state, with the people's customs, and with popular understandings of Islamic rights and duties. The fiqh is the product of a multitude of non-state actors: scholars, adjudicating mediators, and individual Muslims. For purposes of this analysis, we shall leave aside the question to what extent Islamic law can transform into state law once it is applied and enforced by state courts, and to what extent it remains outside the control of the state by virtue of its non-state origins.

A. Popular Islam and Oral Legends

Let us start with popular Islam. Where do people get their knowledge of Islam? One important source, especially for the vast majority of Afghans who do not read and write, are oral narratives that have been passed down through the generations. These oral narratives take the form of madh, that is, praising the words and works of the Prophet, his Companions, and indigenous sufi leaders. They are popular among Afghan Sunni Muslims. The Shia Muslims recite the manaqabat, tales and history of the Prophet, the Imams, the Battle of Karbala, and the sacrifice of Imam Hussein and his family and companions. They impart an oral history of ethics and morality. Other oral reproductions consist of heroic narratives.

Alongside the oral traditions - only some of which can be traced back to written texts - are popular written texts called "basic Islamic guide-books". n75 They n76 hail from a variety of countries: Turkey, India, Iran, and **Afghanistan**. A significant number of the popular texts reproduce century-old ethical collections, mostly in the form of Diwan [*847] (collections of poetic philosophy) or Munajat (invocations), written by known authors, among them many sufis, such as Hafiz, Ahmed Jami, Mawlana-e-Balkhi (Rumi), Khawjah Abdullah Ansari, Saadi, Khoshal Khan Khatak, and Hamid Baba, to name a few.

These narratives have a profound influence on the individual, social, and religious psyche of Afghans. n77 They provide common ground across linguistic and ethnic groups. One sees evidence of this in daily life. People reference the

narratives in their daily conversations, in establishing friendships, and even in solving disputes. They begin their discourses, especially in public forums, with a narrative about a local legend in order to set an example and attract the attention of the listeners. The selective use of narrative by both sides in a dispute would make a worthwhile object of study of concepts of justice in dispute resolution, especially in light of the question whether these concepts are colored by the social and economic position of any one party. n78

B. Sufi Islam and Sufi Families

Other sources of popular understanding of Islam are the leaders of sufi orders (tariqat) and the custodians of ziyarats (holy shrines n79). Popular attachment to the orders and shrines is widely observable everywhere, cutting across all lines of division and identity: among Tajiks in the deep valleys of Badakhshan, among Pashtuns in the South and East and in Paktia and Nangarhar, and among Hazaran in the central highland as well as among the average population of the major urban centers. Backed up by popular devotion, the sufi orders have been prominent in the political arena for the last 150 years. Offspring of their prominent members have acted as power brokers between Afghan rulers and the people and served as points of interaction between state and non-state organs. Members of an important family, the Mujaddidi, of the Naqshbandi order (known for their commitment to Sunni Islam n80) moved from India back to **Afghanistan** at the beginning of the nineteenth century and established schools and hostels for their followers. An ancestor, born in Kabul, had enjoyed a high reputation as a sufi under Emperor Akbar in the sixteenth century. The family has the rank of pir, or saint, in the order. The Mujaddidis combined learning, spirituality, and public [*848] service. They served in the state's judiciary at the highest levels. n81 They were instrumental in the establishment of the primacy of Hanafi jurisprudence as the official system. n82 Their opposition to the 1923 constitutional reforms has been well documented. n83 In more recent history, a large number of the family members were massacred in 1979 and the leadership of the tariqat was left to the surviving member of the family, Sibghatullah Mujaddidi. He studied at Al Azhar University in Cairo, where he became familiar with the Egyptian Muslim Brotherhood. n84 In the 1980s he followed a moderate line in **Afghanistan** politics. He served as interim head of the Afghan government in exile and later in Kabul in 1992. He was elected head of the latest Constitutional Loya Jirga, where he was reputed to skillfully favor conservatives over reformists. n85 A study of this family and its role in the official and unofficial justice system could offer insights into many important legal and social aspects: the influence of sufism on populist and intellectualized (fiqh) legal thought and custom; the reverse influence of populist understanding of custom and Islam on sufi understandings of the law and on fiqh; the degrees of competition, alliances, partition of fields of influence in relation to other family tariqat, e.g., the Qaderiya and Cheshiya, and their relationship with the 'ulama' outside the sufi orders. To understand the dynamics of the sufi influence on custom, such a study would raise questions such as whether leaders of the tariqas critiqued, compromised or accommodated groups of people, individuals or local leaders (like village or clan heads n86) who held populist (i.e. non-academic) understandings of Islam and custom. There is already some evidence of such critique in oral history. Members of the learned class have condemned an expensive mahr (marriage dowry paid by the husband) as contrary to their understanding of sources of Islamic law, but this goes unheeded by the people who see it as a matter of honor and prestige. n87 Another matter of debate between intellectuals and [*849] popular understandings concerns the issue of requiring a debtor to labor for the creditor in case of default, the intellectuals disfavoring such practice while popular opinion embraces it. n88 More research is also needed on the question when a matter of Islamic law, or fiqh, is considered

debatable or negotiable between the intelligentsia and the populace and when it is not.

The Afghan wars have taken a large toll on the influence of the sufi leaders. As mentioned above, a significant portion of a generation of sufi leaders died. They were replaced by new actors, especially the local commanders, who often responded to legal issues through the use of coercion instead of mediation. n89 The Taliban can be seen as part of this continuum. They employed the use of brute force in the context of a national centralist scale. The effects are still visible in the post-Taliban era. The local commanders in certain regions still override the role of sufi leaders, the 'ulama', and local popular community leaders. n90 It remains to be seen whether a struggle is emerging among sufi leaders to reestablish their authority over local commanders or popular community leaders.

C. The People as Sources of Custom and Law

The final source of understanding Islam and custom are the practitioners themselves, that is, the people. The people live in villages, nomad camps, towns, and cities. Louis Dupree's observation of Islam in 1980 aptly captures its pluralistic nature in **Afghanistan**:

The Islam practiced in **Afghanistan** villages, nomad camps, and most urban areas, (the ninety to ninety-five percent non-literates) would be almost unrecognizable to a sophisticated Muslim scholar. Aside from faith in Allah and Mohammad [*850] as the Messenger of Allah, most beliefs relate to localized pre-Islamic customs. n91

The people lead their lives according to their own customs that regulate conscription for the militia or military purposes, conscription of labor for infrastructure projects, expropriation of land, use of water, family and succession, access to the revenue from religious property (waqf), murder, misdemeanors, nomads' encroachments, nomads' rights to pasture (e.g., among the Kuchis n92), collection and distribution of taxes, contracts, debt agreements, and damages. The list is nearly endless.

D. Alternative Approaches to Studying Custom

Thus, studying how the people in **Afghanistan** intertwine Islam with indigenous custom requires a practical approach, i.e., how people view custom, not just a theoretical approach of how Islamic law views what can be allowed as custom under the Shari'a. As of yet, there are no updated comprehensive academic empirical studies on custom in **Afghanistan**. The usual approach to studying custom has been to ask or observe what are the rules constituting custom n93 - how people are expected to behave; what sanctions are attached to violating these expectations; and whether the outcome of an actual adjudication or mediation matches the pre-articulated rules and sanctions. One aspect that is rarely emphasized is the people's perceptions of how custom can or should change, i.e., expectations about how customs are to be adapted or not adapted as socio-economic conditions, ethical perceptions, or power relations change.

We also suggest the need for a study on custom seeking to clarify whether the people practicing custom perceive differences between custom and law. The paradigm to be tested is based on the following assumptions: Certainly, custom resembles any other law, whether statutory or constitutional or Islamic fiqh, in so far as the general principles and rules can be articulated, but these rules

and principles have little meaning until applied in a specific case. Each specific decision [*851] has its own distinct variation on the general rule or principle. What perhaps distinguishes custom from other rule systems are the mechanisms of control over legal knowledge, i.e., control over what is thought to be the correct custom and its correct application in any one case. In the non-custom based system, we are used to deferring to the knowledge of the person who pronounces the judgment. That person is regarded as the guardian of the deepest and most authentic knowledge of the rule. In the customary law situation, however, it is not only the adjudicators who guard the understanding of rules, but also the participants, i.e., the parties, the witnesses, and the public audience n94 attending the adjudication process. Each and every player in the adjudicatory process is a depository of custom. Dethroning the masses as depositories of knowledge of custom in order to privilege only a few to act as exclusive depositories of that knowledge can produce resentment and ensuing instability. This is not just a matter of a vested interest in keeping certain rules intact because they serve the advantage of a power group or a marginalized group. n95 There is a larger vested interest in the process of the evolution and a respect for the people's expectations. n96 The historical accounts showing how every modern Afghan ruler has had to rely on the National Council, or the Loya Jirga, for legitimacy, ever since Amir Abdur Rahman used it to usher in the Nizamīya era, reveal that the people and the rulers of **Afghanistan** have understood the importance of process, acknowledging the people as keepers of custom and Islam. n97

It would be interesting to examine further whether, since the late nineteenth century, the concept of process has been overshadowed by a new discourse on the hierarchization of the sources of law. There is an indication from the 1970s of such a change. Today, we read n98 that the statutory courts of the state (official) are exceptional courts, thus implying that Islamic law and custom are the general [*852] law of the land. This suggests that questions were being raised about the hierarchy of legal orders.

Hierarchization has many consequences for the survival or non-survival of certain sources of law. It implies deciding which law may trump other laws contradicting it. In **Afghanistan**, this means asking whether the statutory or constitutional law trumps the Hanafi Shariat or vice versa. Does the Hanafi or Shi'ite Shariat trump custom or vice versa? Hierarchization necessarily leads to confrontation. It is also an element of the "internal colonialization" process in **Afghanistan**, the top-down approach, mentioned before.

The new discourse focusing on hierarchization rather than control over legal knowledge puts custom, intellectualized as well as popular Islamic law, and state law on a collision course which is really about the survival of custom, popular Islam, and what we shall call customized Islamic law, i.e., law based on interpretations of traditional Islamic sources according to local custom. We do not have enough evidence to predict the consequences of such a collision - maybe it will lead to instability as in the past, maybe the situation will stabilize. The role of a strong central government in the process of stabilization has yet to be defined, since centralization without a vision of how to achieve stability can be self-defeating. To avoid the risk of instability, one should explore whether it is possible to devise a system, or a model, where customary law, popular Islam, customized Islamic law, and intellectualized Islamic law can interact in a non-confrontational and coordinate way. That requires finding compatibilities. One way to achieve this is to understand the ethical assumptions underlying the interacting justice systems. One needs to compare the ethics of substantive customary rules and compare them with the ethics of Hanafi plus Shi'ite principles and rules. The same approach would apply to the differences in the respective procedural processes. For example, what is the ethics of having a qadi pronounce a judgment as opposed to a solution proposed by a set of media-

tors chosen by the litigants with the approval of the immediately concerned neighborhood audience?

VI. Models for **Afghanistan**

This section is devoted to outlining various models and theoretical options which could be of use in structuring the justice system in **Afghanistan**.

The most appropriate models come from pluralistic legal systems in which religious law, customary law, and state law function within one state. There is no universal law for all. Pluralistic legal systems are typical of former colonialized countries. There are two basic types of models: the constitutional model and the court structure model. They are not mutually exclusive.

[*853] The constitutional model has two variations:

- . One is hierarchical so that the Constitution with its bill of rights as the basic law of the land trumps all other laws incompatible with it.

- . The other is non-hierarchical and allows religious and customary laws to survive even if they are incompatible with the Constitution.

Regarding court structure models, there are four types:

- . One is universal, that is, all litigation must exclusively take place in the state courts, which are arranged hierarchically. The state courts are allowed, however, to apply all sources of law: the constitution, statutes, customary law, and religious law, depending on the geographical region and/or the status of the litigants.

- . The second type consists of courts which have separate competencies, but are integrated or merged at the top level in a hierarchical system. Alongside the state courts, there are courts of religious law and courts of customary law. All three types of courts merge at the apex in a court of highest jurisdiction, a supreme, or high, court. This court has not only appellate and possibly also original jurisdiction but also exercises supervisory powers (inspection, control of personnel, etc.) over all other subordinate courts, whether customary, religious or state.

- . The third model is strict separation. The state courts, the traditional customary courts, and the religious courts all have their own levels of appeal. Each acts in its own sphere, independent of the other.

- . The fourth model is one of tolerance. The state court system is universal but tolerates the existence of non-state courts. Evidence from the non-state court system may or may not be used in the state system.

In all models, constitutional as well as court based, four issues stand out in particular. These are (1) conflict of laws rules, (2) issues of how non-state law (customary law and religious law) can be determined, (3) the presence or absence of lawyers, and (4) conflicts over the extent of supervision of customary and religious courts. Conflict of laws rules are sometimes legislated, but they are also often left to the courts. To determine what is customary or religious law, the state resorts to books or to experts. The state will sanction a horn-book reproduction of the rules and/or appoint assessors at all or only select

levels of the court structure. Assessors are respected persons from the community. Some models allow them to vote as members of the court, others permit them only to advise. Many pluralistic legal systems prohibit the presence of lawyers at the lower court levels where [*854] the majority of the people litigate. The origins of this rule lie in colonial policy which gave to the administrative district officers wide supervisory control over lower courts applying customary or religious law. These administrators felt that lawyers would only complicate their lives. The rule against lawyers in lower courts basically continues today. The reason given is that most lower courts are visited by "uneducated, unsophisticated" persons who are accustomed to a much simpler judicial procedure. If lawyers were involved, the procedure would get too technical and complicated, "confusing" the poor people. This has an impact also on the level of qualification of the judges or magistrates assigned to these first instance courts. They are not required to have the same rigorous legal training as judges and magistrates in all other courts but they may be subject to more frequent in-service training. They may also be given promotional opportunities. Regarding supervision of the customary law and religious law courts, sometimes the court of highest jurisdiction competes with the executive branch. Statutory law confers on the Ministry of Justice in the executive branch control over the non-state courts in terms of inspection or administration or the Ministry may even serve as an appellate body in minor matters.

As with any model, the reality is more complicated. Many states with legal pluralism are marked by a combination of models. For example, in the non-hierarchical constitutional model, where the constitution does not trump custom or religious law, customary and religious laws may not be allowed to contradict the constitution in penal matters while in private law matters they may. Even when there is a statutory basis for a given model, the courts' case law can blur the boundaries. For example, in the hierarchical constitutional model, where the constitution can formally trump all other laws, the judiciary may develop case law which avoids confrontation between the constitution and custom or religious law if judges prefer to find ways to reconcile the regimes.

Where does **Afghanistan** lie on this map of models? The justice system in **Afghanistan** fits potentially into the first category of constitutional regimes. The constitution can trump custom and Islamic law since there are no express provisions to the contrary. This would be the most liberal interpretation that the courts could take. A less liberal approach would involve recognizing the three sources of law in such a way that Islamic law and customs are reconciled, but only within the framework of the constitution.

The new Constitution provides for constitutional review by the Supreme Court (Art. 121 n99) apart from the judiciary's general duty to [*855] apply laws within the framework of the Constitution and of justice. The new Constitution does not really change the present model. It does not nudge the judiciary in one direction or another. It only adds a certain ambiguity. On the one hand, it seems that only official bodies (the government or the courts) have the discretionary power to ask the Supreme Court to review laws and decrees for their constitutionality. On the other hand, the Supreme Court, as the head of the judiciary, could enjoy the freedom to interpret the laws and decrees regarding their constitutionality as it sees fit without an official request. By way of implication, the Supreme Court would be free as well to decide whether subordinate courts too have the authority and obligation to determine the constitutionality of a law as part of their adjudication.

Predicting which route the judges will take in **Afghanistan** in the future is not easy. It is clear that the constitutions of today and of the past have left great latitude to the judges in making their choices. Much more attention needs to be paid to the selection of judges and their training as well as to the tra-

ditional role of the Chief Justice. It would be useful to conduct background studies of past case law, the academic and in-service training of judges, and their specific training in the art of *ijtihad* (i.e. independent interpretation of sources as opposed to following preceding opinions). It would also be interesting to survey the judges' views on how popular perceptions of justice might affect or not affect their approach to constitutional review of custom and religious law.

In terms of court structure, the Afghan justice system falls between the first and fourth models. It has a universal court system (first model), in which only state courts are allowed, and they are competent to apply all sources of law. At the same time, the Afghan system is tolerant of the non-state court system and accepts evidence from it (fourth model). A factor that complicates the model in **Afghanistan** is the introduction of administrators appointed by the executive branch - especially outside Kabul - into the adjudicatory processes. They have served as alternative forums for people who are disaffected with the state and non-state systems of justice.

The model which **Afghanistan** will adopt for the future may well depend on its respect for compromise, which has guided its past history, while aiming at a consolidation of the universal court system. Some experimentation may be necessary in order to better analyze the higher courts' understanding of Islamic law, customized Islamic law, and customary law compared to that of the lower courts and the *jirgas*. One would need to know what sources (books or assessors) the [*856] higher courts have used to determine custom. The analysis should be historical as well as contemporary.

A contemporary study could, for example, involve designing a pilot project at the lower levels. A new level of statutory courts could be introduced below the Primary Courts in select rural and urban areas. n100 These courts would be essentially *jirga*-like courts. They would differ from any of the models described above in terms of the law to be applied. In all of the models cited above, even the lowest courts are restricted to applying only specific types of law. The experimental *jirga*-like mediational or conciliation courts would not be constrained in such a fashion. They would be free to apply whatever law was deemed best for achieving justice in the eyes of the parties and the mediators or adjudicators. Control mechanisms would have to be worked out, apart from appeals, in the event parties are under pressure not to appeal to the higher state level. Whether the institution of court inspector would be resurrected, or whether *jirga*-like courts would be required to notify the higher court of their final decisions (not necessarily with a record of proceedings) may depend on the findings of an empirical pilot study. The study would also have to pay careful attention to the background, reputation, and training of the persons selected by the parties or the community to serve as members of the *jirga*-like courts.

In the end, whatever model **Afghanistan** adopts, the crucial element will be the monitoring of its operations, not only by **Afghanistan's** own and international scholars, but also by internal mechanisms within the judiciary.

VIII. Conclusions

The reader will undoubtedly be more impressed by what we do not know than by what we do know about the workings of the justice system in **Afghanistan** during the last 100 years and about the actual statutes and regulations governing the system. Nonetheless, despite a dearth of detailed knowledge, we have identified persistent key issues. These are:

- . the autarchy of the Supreme Court and its subordinate courts

. the reluctance to give the judiciary an absolute monopoly over adjudication and the use of public administrators as checks on courts or as rivals to the judiciary

. the confrontation between the hierarchization of laws and the people's assertion of control over knowledge of customary law and Islamic law (customized Islamic law)

[*857] . the litigants' freedom to engage in forum-shopping

. the persistence of customary law as a central means of dispute resolution despite persistent state efforts to centralize the law.

There have been two basic mechanisms for dealing with these issues. One is to avoid mentioning custom or customized Islamic law as sources of law without excluding them explicitly. The other mechanism has been to provide the state judges with the general guideline that they are ultimately to achieve justice within the framework of the constitution. This implies that they may consult, and develop competency in, all sources of law if justice so requires.

This study of the realities of achieving Afghan justice also demonstrates the need to ask whether Islamic law needs to be deconstructed. There is not just Islamic law according to the Hanafi and Shiite madhabs (schools of legal opinion) and sub-madhabs, but also Islamic law according to who formulates and applies it. There is intellectualized Shari'a, customized Shari'a, and adjudicated Shari'a.

At the end of the day, any model that the Afghans design for their justice system will have to be based on an understanding of the dynamics of these issues.

FOOTNOTES:

n1. Inaugurated on April 26, 2003, absorbing the Drafting Constitutional Commission, which had been established on October 5, 2002.

n2. Established May 21, 2002, renamed the Judicial Reform Commission and reconstituted on November 2, 2002.

n3. Ghulam Mohammed Ghubar, **Afghanistan** Dar Masir-e-Tarikh [**Afghanistan** in the Course of History], Vol. 1, 601-642 (Qum, n.pub. 1977) (3rd ed. of original published in Kabul, Government Publishing Center in 1967). The author (b. 1898, d. 1978) was acclaimed as one of the most analytical historians of his country. He was elected to the Loya Jirga for Kabul City in 1928. He was imprisoned from 1933-35, was elected a member of Parliament from 1949-1952, founded the Watan party in 1952 advocating more democracy, and was imprisoned again from 1952-56 as a champion of more democracy in **Afghanistan**. His history of **Afghanistan** was banned in 1967 by the monarchy.

n4. Mohammed Hassan Kamali, **Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary** 35 (1985).

n5. Asta Olesen, **Islam and Politics in Afghanistan** 1-15 and 65 (1995).

n6. **Afghanistan**. A Country Study 32-33 (Richard F. Nyrop et al. eds., Washington, D.C., American University Foreign Area Studies January 1966).

n7. See Ashraf Ghani, Disputes in a Court of Sharia, Kunar Valley, **Afghani-stan**, 1885-1890, 15 International Journal of Middle East Studies 353-367 (1983), relying on Asas ul Quzat [Manual for Judges], Diwan-e-Qaza-i-Kunar [Court records of Kunar], and Qanun karguzari mamelat hukumati wa tain gerayim wa siyasat [Law defining the procedure of actions and the determination of offences and punishments].

n8. See Amin Tarzi, The Judicial State: Evolution and Centralization of the Courts in **Afghanistan**, 1883-1896, Chap. 4 (May 2003) (unpublished Ph.D. Dissertation, New York University).

n9. Ghani, *supra* n. 7, at 354.

n10. *Id.* at 354-5.

n11. *Id.* at 363-4, citing the case of an aggrieved widow whose husband had been stoned to death for adultery, while the adulteress had not been stoned. The King agreed with the 'ulama' that the qadi had not gathered sufficient evidence to warrant capital punishment.

n12. *Id.* at 356-7.

n13. *Id.* at 366.

n14. The British still maintained control over the foreign policy of **Afghani-stan** until the reign of King Amanullah (1919-28), who succeeded to the throne after the assassination of his father.

n15. Modern era rulers of **Afghanistan**: Ahmad Shah Abdali Durrani 1747-1773; Timur Shah, second son of Ahmad Shah 1773-1793, without designated heir; various contested rulers until Amir (replacing the title of Shah) Dost Mohammed 1826-1863; series of rulers and depositions; Amir Abdur Rahman Khan 1880-1901 (grandson of Dost Mohammed); Habibullah, 1901-1919 (eldest son of Abdur Rahman; assassinated); King Amanullah 1919-1928, introduced Constitution of 1923; Tajik rebel rule Jan-Oct 1929; King Muhammed Nadir Shah 1929-1933 (assassinated), introduced Constitution of 1931; King Muhammad Zahir Shah 1933-1973 (last king), introduced Constitution of 1964. We are grateful to Professor Frank Vogel for his valuable comments and guidance on this part and subsequent sections.

n16. The 1976 Constitution declaring **Afghanistan** a Republic was introduced by Daoud, cousin of the last King Zahir Shah. The 1987 Constitution was put in force during the Afghan-Soviet war by the pro-Communist Parcham party. The 1990

Constitution was introduced during the civil war by Dr. Najibullah Ahmadzai of Paktia, a member of the pro-Soviet regime.

n17. Honorable Walter V. Schaefer, Justice, Supreme Court of Illinois, and Professor Delmar Karlen, Director, Institute of Judicial Administration, Report on Judicial Administration in **Afghanistan** (submitted to A.I.D., Washington, D.C., March 22, 1965).

n18. The 1987 and 1990 Constitutions also conferred this power on the President, but extended it even to the Deputy Chief Justice (Art. 110 of the Constitution of 1987 and Art. 110 of the Constitution of 1990).

n19. 1964 Constitution, Articles 97, 98, and 104.

n20. The National Assembly which officially determines the budget consists of the Wolesi Jirga (House of the People) and the Meshrano Jirga (House of the Elders) (Art. 82 of the Constitution of 2003).

n21. Art. 104 of the 1964 Constitution: "Subject to the provisions of this Constitution, rules relating to the organization and the function of the courts and matters concerning judges shall be regulated by law. The principal aim of these laws shall be the establishment of uniformity in judicial practice, organization, jurisdiction, and procedures of the courts."

n22. It is unclear at this point whether the constitutional rule was deliberately left vague or is simply unclear due to poor drafting.

n23. It is not clear whether the Chamber combined a regular civil law division with a division for customary criminal law matters, or had a division for customary civil law cases along with customary criminal disputes.

n24. Walid Hoqoqi, Judicial Organization in **Afghanistan** (1971). Prior to the 1960s, some commercial disputes were handled in special tribunals attached to the Ministry of Commerce (See Department of Research, Supreme Court of **Afghanistan**, The Judicial Training Program in **Afghanistan** 2 (1971)).

n25. The Provincial Courts had special Chambers like the Chamber of Public Security and the Chamber of Narcotics Law Violations. The Kabul Provincial Court separated the Customary Civil Law Chamber from the Customary Criminal Law Chamber. See Qasim Hashimzai and Richard C. Csaplar, The Judiciary in **Afghanistan** 13-14 (1975).

n26. Id. at 12. Over 50% of the trial court decisions were appealed (1975).

n27. Walid Hoqoqi, The Training of Judges, Prosecutors and Attorneys in **Afghanistan** 4 (1971).

n28. It would be interesting to compare this system of inspection with the very comprehensive arrangement that provided for officials to go on circuit in Malawi in regard to customary law courts. See Christina Jones, *Rezeption europaischen Rechts in Malawi und Botswana* [Reception of European Law in Malawi and Botswana], 29 (3) *Verfassung und Recht in Ubersee* 347-74 (1996). The interaction between the village head, or khan, in **Afghanistan** and an inspector on circuit would be a worthwhile research topic.

n29. Hashimzai, *supra* n. 25, at 12.

n30. Henry S. Bradsher, **Afghanistan** and the Soviet Union 33-53 (1983).

n31. It seems from the literature that the Department of Research was attached to the Supreme Court, but the Ministry of Justice took responsibility for implementing the recommendation. Both the Court and the Ministry were located in the same building. See Hashimzai, *supra* n. 25, at 4.

n32. In the remaining seven cases, the disputants decided to go to the regular courts.

n33. Hashimzai, *supra* n. 25, at 5 and 20. We might be able to learn more if we studied carefully the Department of Research publication called *Qaza*, as well as statistics that might have been gathered by the Department of Research.

n34. Whether the Tribunals continued to exist in part independent of the regime change or fell into disuse is not known.

n35. Willem Vogelsang, *The Afghans* 303-320 (2002).

n36. See Agence France Presse (AFP), Taliban Islamise Afghan constitution, laws (July 19, 1998) at www.rawa.org/Islamise.htm. See the International Development Law Organization website <http://www.idli.org> for a list of decrees enacted during the reign of the Taliban.

n37. Ali Wardak, *Jirga: Power and Traditional Conflict Resolution in Afghanistan* 199, in *Law After Ground Zero* (John Strawson ed., 2002); Neamat Nojumi, *Field Study in Kuhsan, Farsi, Guzarah, Pashtun Zarghoon, and rural districts of Herat* (November 2003) (unpublished field report, on file with the author).

n38. Art. 75 (d) of the Law of the Jurisdiction and Organization of the Courts of **Afghanistan**, 15 *Mizan* 1346/1967: "Judges are appointed from persons who meet the following requirements: d) They must have graduated from the College of Law or the College of Theology or have received a diploma from one of the public institutions of Islamic Law no less than the equivalent of a high school diploma."

n39. Marvin G. Weinbaum, Legal Elites in Afghan Society, 12 (1) International Journal of Middle East Studies 39-57 (1980).

n40. Hashimzai, *supra* n. 25, at 13.

n41. Walid Hoqoqi, *supra* n. 27, at 12-16. While it has been lamented that political turbulence prevented an evaluation of the long-term effects of the training in **Afghanistan**, equivalent training programs in Malawi have been highly effective. The Malawi program differs from its Afghani counterpart in so far as it was not limited to pre-service training, but included regular one-year in-service courses for judges to keep them up to date on new legal developments (See Jones, *supra* n. 28). The Afghan program began in 1969 to offer in-service training for judges lasting only 10 days (See department of research, *supra* n. 24, at 11-12.). There was apparently no attempt, as in Tunisia, to have all government servants trained in the same institute where they could learn to reconcile modernity and tradition as the Bey of Tunis had done in founding Sadiki College in the late nineteenth century.

n42. Department of Research, *supra* n. 24, at 4. The exact year in which the women were appointed is not specified.

n43. See Wardak, *supra* n. 37, at 190, explaining that other groups use the words shura or majlis, the equivalent of the Pashtun word jirga (based on Lynn Carter and Kerry Connor, A Preliminary Investigation of Afghan Councils (Peshwar, Agency Coordinating Body for Afghan Relief (ACBAR) 1989). See also Karim Khurram and Natalie Rea, The Customary Laws of **Afghanistan**. A Report by the International Legal Foundation 21, 51, 53, (New York, New York, The International Legal Foundation September 2004), at <http://www.theilf.org/customarylaws.htm> referring to the words majles (Uzbek), mookee-jamaat-khana (Ishmaelite), and maraka (Hazarajat).

n44. Wardak, *supra* n. 37, at 200.

n45. An interesting comparison could be conducted with regard to Islamic Sudan, where litigants continued to choose their judges in certain types of cases after the British introduced Shari'a courts whose judges were appointed by the state. See Ahmed Ibrahim Abu Shouk, Native Courts at Work: A Case Study from Dar Bidayriyya in the Sudan 75-94, in Access to Justice. The Role of Court Administrators and lay adjudicators in the african and islamic contexts (**Christina Jones-Pauly** et al., eds., 2002).

n46. Interview with Mr. Abdul Ghafoor Wasil, currently resident of Connecticut (July 2003). Mr. Wasil served as the governor of Perwan and as district head (Haakem and Wolesswal) in Qandahar, Herat, and Panjshir.

n47. Ashraf Ghani, Islam and State-Building in a Tribal Society. **Afghanistan: 1880-1901**, 12 Modern Asian Studies 269-284, 269 (1978), citing Frederick Barth.

n48. Interview with Mr. Abdul Ghafoor Wasil, *supra* n. 46.

n49. Alef-Shah Zadran, Socioeconomic and Legal-political Processes in a Pash-tun Village, Southeastern **Afghanistan** (Ann Arbor, UMI Dissertation Services 1977). See again Wardak, *supra* n. 37, at 190, showing how other groups use the words shura or majlis, the equivalent of the Pashtun word jirga. See also the investigation undertaken for all parts of **Afghanistan** by Khurram, *supra* n. 43.

n50. E.g., Hakim Ayoubi, Da Paktia simy tamodi huquq [The Customary Law of the Paktia Province], in VII Huquq (Afghan periodical on law in **Afghanistan** cited in Ghani, *supra* n. 47, at 269).

n51. Interviews with legal authorities and residents in Kabul, Herat, Mazar-e-Sharif, Kunduz, and Nangarhar (2002).

n52. Neamat Nojumi, Field Study in Kunduz and Herat (2003) (unpublished field study, on file with the author). See also Wardak, *supra* n. 37, at 195. Already in the nineteenth century, irrigation disputes were not uncommon (See Ghani, *supra* n. 7, at 360ff).

n53. UNHCR, OCM (Office of Chief of Mission), Kabul, **Afghanistan**, Land Issues within the Repatriation Process of Afghan Refugees (September 1, 2003, at <http://www.idpproject.org> and [http://www.db.idproject.org/Sites/idpSurvey.nfs/3807E05A3C730F4C1256E15004900450/\\$file/law+issues+within+repatriation+process.pdf](http://www.db.idproject.org/Sites/idpSurvey.nfs/3807E05A3C730F4C1256E15004900450/$file/law+issues+within+repatriation+process.pdf), External Version, pp. 9-11). Confirmed in Norwegian Refugee Council, Property restitution in practice: The Norwegian Refugee Council's experiences, April 2005, at [http://www.nrc.no/NRC restitution in practice.pdf](http://www.nrc.no/NRC%20restitution%20in%20practice.pdf), pp. 12-13.

n54. Interviews with Mohmand Dara district officials, Nangarhar, **Afghanistan** (November 2003).

n55. Neamat Nojumi, Field Study on Tribal Jirga in Mohmand Dara, Nangarhar, **Afghanistan** (November 2003) (unpublished field study, on file with the author).

n56. Interviews with several dozen judges in Kabul, Nangarhar, Qandahar, Budghis, Balkh, and Herat (October-December 2003).

n57. Interviews with Primary Court Judges, Surkhroud district, Nangarhar, **Afghanistan** (November 2003).

n58. This section is based largely on field studies by Neamat Nojumi and interviews with court officials and members of local jirgas (2002 and 2003).

n59. This assumes that one regards the adversarial process as one designed to check the partiality of the judge and to boost the knowledge and analytical skills of the judge. See Shouk, *supra* n. 45.

n60. Interviews with several dozen judges in Kabul, Nangarhar, Qandahar, Budghis, Balkh, and Herat (October-December 2003); Wardak, *supra* n. 37, at 200.

n61. Ghani, *supra* n. 7, at 363.

n62. Hashimzai, *supra* n. 25, at 6; Abdul Hakim Ziaie, Chief Justice of **Afghanistan**, Afghan Judiciary after the Establishment of the Supreme Court, Speech at an assembly in Tokyo including the Chief Justice and Justices of the Supreme Court of Japan, in October, 1970, 7 (Kabul, Government Printer, 1970).

n63. See Art. 6 of the Law of Saranwali of 1345/1967: "Where a Saranwali has not been established, the Lovi-Saranwali (Public Prosecutor in the Ministry of the Interior), pursuant to the written agreement of the Ministry of the Interior, has the authority to assign the duties of Saranwali to the Assistant Governor, the Chief of Police, or the administrative chief of the provinces."

n64. Botswana and Malawi offer two differing models. In Botswana, it is the Ministry of Justice which supervises the non-state customary courts. In Malawi it is the High Court which has supervisory powers over the traditional customary courts (See Jones, cited *supra* n. 28, and Christina Jones, The Exogenous and the Indigenous in the Arguments for Reforming the Traditional Courts System in Malawi, 32 (3) Afrika Spektrum 281-296 (1997)).

n65. Art. 69 of the Constitution of 1964: "Excepting the conditions for which specific provisions have been made in this constitution, a law is a resolution passed by both houses, and signed by the [King]. In the area where no such law exists, the provisions of the Hanafi jurisprudence (feqh - in Dari) of the Shariat of Islam shall be considered as law."

n66. Ghani 354, *supra* n. 7.

n67. Some of the Protocols are available at the International Development Law Organization website, <http://www.idli.org>.

n68. Art. 3 of the Constitution of 2003: "In **Afghanistan**, no law can be contrary to the sacred religion of Islam and the values of the Constitution." In contrast, the repugnancy clause in the Egyptian Constitution refers to the Shari'a as the measuring rod.

n69. Art. 119 of the Constitution of 2003: "The Justices of the Supreme Court shall prior to assuming their offices take the following oath in the presence of the President: ['']In the name [sic] Allah, the Merciful and the Compassionate, I swear in the name of God Almighty to support judicial justice and righteousness

in accord with the provisions of the sacred religion of Islam and the provisions of this Constitution and other laws of **Afghanistan** and to execute the judicial duties with utmost honesty, righteousness and nonpartisanship.['']"

n70. Art. 130 of the Constitution of 2003: "The courts in the cases under their consideration shall apply the provisions of this Constitution and other laws. Whenever no provision exists in the constitution or the laws for a case under consideration, the court shall follow the provisions of the Hanafi jurisprudence within the provisions set forth in this Constitution then render a decision that secures justice in the best possible way."

n71. Hoqoqi, *supra* n. 24, at 9: "Afghan courts may be divided into two categories: Courts of customary law (Islamic law) and courts of exception." Hashimzai, *supra* n. 25, at 11 "...the trial courts and certain appellate courts can be divided...into two basic jurisdictions, the courts applying customary (Islamic) law and the so-called courts of exception applying statutory law."

n72. That is, the "kolli-ye fiqh-e hanafi-ye" (Art. 102 of the Constitution of 1964). We are grateful to Aron Zysow for the transliteration.

n73. Art. 54 of the Constitution of 2003: "Family is the fundamental unit of society and is protected by the state. The state shall adopt necessary measures to ensure physical and psychological well being of the family, especially of child and mother, upbringing of children and the elimination of traditions contrary to the provisions of sacred religion of Islam."

n74. Ghani, *supra* n. 7, at 360, 366.

n75. M. Nazif Shahrani, *Islam in Afghanistan and Turkistan in the Modern Period in Turko-Persia in Historical Perspective* 161-188 (Robert L. Canfield ed., 1991).

n76. Books such as Panj Ganj [Five Treasures], Mu'alim-ul-Din [Teacher of Religion], and Kulliyat-e-Char Ketab [The Complete Four Books], Miraj-e-Muhammadi [The Prophet Mohammed's Ascension to the Heavens], Gasas-ul-Anbya [Story of the Prophets], Tazkiat-ul-Auliya [Biographies of the Saints], Safinat-u-Awliya [The Ship of Saints], Qiamat Namah [The Book of Resurrection].

n77. But cf. **Afghanistan** (Peter R. Blood ed., Washington, D.C., U.S. Library of Congress 1997), also available at <http://countrystudies.us/Afghanistan/1/htm>, where it is asserted that sufism has considerable influence especially among the middle classes (Chapter on "Sufism").

n78. See for example, Susan F. Hirsch, *Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court* (1998).

n79. See Ghani, *supra* n. 47, at 275 on the historical role of designated shrines as sanctuaries for political opponents and criminals.

n80. David McDowall, *A Modern History of the Kurds*, Chap. 4 on Ottoman Kurdistan, 1850-1914 (1995).

n81. A study of the Almanac, the Salnamah-ye Kabul, would reveal positions.

n82. Ghubar, *supra* n. 3, at 166-175.

n83. Vartan Gregorian, *The Emergence of Modern Afghanistan* (1969); Olesen, *supra* n. 5; **afghanistan**, cited *supra* n. 77.

n84. Neamat Nojumi, *The Complexity of Faith and Ideology in the Post Taliban Politics of Afghanistan* 16-25 (January 2004) (unpublished manuscript, on file with author).

n85. *Id.* at 22-32. But cf. report where he is seen as a moderate (Institute for War and Peace Reporting (January 28, 2004,) *Loya Jirga: Roundup in Proceedings*, at [http://www.iwpr.net/index.pl?archive/arr/arr 200401 102 1 eng.txt](http://www.iwpr.net/index.pl?archive/arr/arr%200401%20102%201%20eng.txt)).

n86. See Ghani, *supra* n. 47, at 270 on the historical variations of strong or weak links between tribal chiefs and religious authorities and the collection of taxes for the upkeep of religious establishments, citing *The Gazetteer of Afghanistan* and Faiz Muhammad, *Seraj ul tawarikh* [The Lantern of History].

n87. Conversations with 'ulama' in Kabul and Herat (February - May 2002). Specifically in regard to amounts of mahr, the Qur'an makes it a matter of negotiation, but debates on how high a mahr can be would be a matter of differing interpretations of classical texts and of what is in the public interest.

n88. It would have to be established whether the popular notions are based on the difference of opinions among the classic Islamic scholarly jurists on whether this is a legitimate means of settlement in debt cases. See hadith in Bukhari (chapter/ kitab on rahn (3rd section/bab on mortgage/pledge of weapons), reporting the story of Muhammad bin Maslamat who sought to buy on credit and was asked by the creditor to mortgage his women or sons. The borrower, Bin Maslamat, gave practical reasons for refuting this demand in the case at hand since the amount of the loan was very low. Bin Maslamat offered his weapons instead. Also see Pashtunwali [Way of the Pashtuns], defining terms of 'bota' and 'baramta' referring to ransoming or taking of cattle or kith and kin when the debtor adopts delaying tactics for an overdue debt at <http://www.afghanland.com/culture/pashtunwali.html>, maintained by Wahid Momand (2000). But cf. Khurram, *supra* n. 43, at 18-19 (Part I on the Khogeani (Khogyani or Khugiani) Pashtun, III. F. Unpaid Debts) with a different interpretation.

n89. Neamatollah Nojumi, *The Rise of the Taliban in Afghanistan* 152-8 (2002).

n90. Neamat Nojumi, Field Study in Mirbacha Kot, Paghman, Surobi, and Masayi, rural districts of Kabul (October-December 2003) (unpublished manuscript, on file with the author). See also Khurram, *supra* n. 43, at 53 (Part IV, Northern Region, IV. Commanders).

n91. Louis Dupree, **Afghanistan** 104 (1980).

n92. They are nomads estimated at 500,000. They migrate from the east to the central regions to pasture their herds or move from the west to the north. The Kuchis' amicable relationship with the Taliban is said to complicate matters. See <http://www.reliefweb.int>. The new 2003 Constitution obliges the state (this term is used instead of the term government) to improve the settlement and living conditions of nomads (Art. 14).

n93. E.g., I. Atayee, A Dictionary of the Terminology of the Pashtun Tribal Customary Law and Usages (Kabul, Academy of Sciences 1979), as cited in Wardak, *supra* n. 37, at 203. See also black-letter reformulations of the rules relating to blood money in **Afghanistan**. Some New Approaches 231-32 (George Grassmuck et al. eds., Ann Arbor, The University of Michigan 1969), citing the publication of the tribal code of the Isakhel, a branch of the Ahmadi, in Salnamah-ye-Kabul [Almanac], 1939-40 (no pages cited). For a good start see the recent study by Khurram, *supra* n. 43.

n94. See Wardak, *supra* n. 37, at 194-5 on the role of the audience in the jirga, and Jones, *supra* n. 28, on the role of the audience in African customary courts.

n95. As asserted by Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (1985).

n96. Questions of checks and balances as well as the role of gender would have to be addressed. See also Jones, *supra* n. 28 and n. 64. Most people in Botswana see themselves as depositories and guardians of custom, while in Kenya many lament that custom has been stolen and placed in the hands of only lawyers. See also Heike Behrend, *Alice Lakwena & the Holy Spirits: War in Northern Uganda 1986-97* (1999). In that region the reassertion of an old custom was the rallying point of a mass movement.

n97. It is said that he had even borrowed it from the pre-constitutional era of Ahmed Shah Durrani who was elected king by the tribes in 1747 in Qandahar (see Wardak, *supra* n. 37, at 198-99).

n98. Hoqoqi, *supra* n. 24, at 9: "Afghan courts may be divided into two categories. Courts of customary law (Islamic law) and courts of exception." Hashimzai, *supra* n. 25, at 11: "The trial courts and certain appellate courts can be divided...into two basic jurisdictions, the courts applying customary (Islamic) law and the so-called courts of exception applying statutory law."

n99. Art. 121 of the Constitution of 2003: "The Supreme Court shall only by the request of the Government and/or the Courts review the compatibility of laws, decrees, inter-state treaties, and international covenants with the Constitution. The Supreme Court shall have the authority to interpret the Constitution, laws, and decrees."

n100. This would be similar to Ward Tribunals in Tanzania. See Andrew Mwaka-jinga, *Court Administration and Doing Justice in Tanzania*, in *Access to Justice*, *supra* n. 45, at 231-37.