



THE CUSTOMARY LAWS
OF
AFGHANISTAN

A Report by the International Legal Foundation

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INTRODUCTION

The reconstruction of a legal system in any post-conflict country requires a certain understanding of the local customary laws. In Afghanistan, the need for such understanding is particularly acute because customary laws, de facto, govern the lives of a majority of the population. Pursuant to the Bonn Agreement of December 2001, the existing laws and regulations of Afghanistan remain in effect to the extent that they are not inconsistent with the provisions of the 1964 Afghan Constitution – subject to some limitations – and the international legal obligations, or treaties, to which Afghanistan is a party. The Transitional Government has the power to amend and repeal those laws and regulations. A new Constitution was adopted in January, 2004, but its implementation will be difficult.

A report prepared by the International Commission of Jurists (“The Jurists’ Report,” at www.icj.org) recognizes the dominance of Islamic and customary laws in Afghanistan. The formal legal system is simply not the norm governing the lives of the majority of the population. According to the Jurists’ Report, “the bifurcation of the legal system into an official law and an unofficial law has been a hallmark of Afghan legal history ever since attempts were made to introduce statutory laws.” The Jurists’ Report concludes by stating “with some confidence that past experience would suggest that any attempt to implement and enforce secular statutory laws which depart from customary and/or Islamic law is liable to be met with protest and civil unrest.”

In November 2001, the International Legal Foundation asked its Afghan colleague, now its Country Director, Prof. Karim Khurram to begin a compilation of the customary laws of Afghanistan, focusing on criminal law concepts. The following is the complete report. Part One deals with the customary laws of the Pashtun areas of Southern and Eastern Afghanistan; Part Two with the customary laws of the Central region of Hazarajat; Part Three with the customary laws of the Nuristan region ; and Part Four describes the customary laws of the Northern regions of Afghanistan.

Please bear in mind that our methods were limited. The following should be regarded merely as a snapshot of certain customary laws rather than as a comprehensive academic description of the complex and diverse customary laws of Afghanistan.

For additional information about this report, please contact:

Karim Khurram, Kabul Director, in Kabul at (93) 070-27-93-54

Natalie Rea, Executive Director, in New York at NRea@TheILF.org

PART ONE

**The Customary Laws of the
Southern and Eastern Regions**

*THIS RESEARCH HAS BEEN MADE POSSIBLE BY A GENEROUS GRANT
FROM ERIC FISCHL
IN MEMORY OF JUNE AND JEFF WILLIAMSON*

INTRODUCTION

Our findings are based on the research of our Afghan colleagues and their conversations with members of Jirgas, who act as judges in the Pashtun areas of Southern and Eastern Afghanistan. To the extent possible, we have separated procedural concepts from substantive legal concepts.¹

Pashto is the language of Pashtuns, but it also refers to the truth, to the lawful principles of Pashtun, and to the *collection of praiseworthy morals of a true Pashtun*.² In Afghanistan, where the central government has lost the power to maintain authority and provide security, social principles and customs exist to eliminate conflicts and problems. These customs and principles, known as Pashtunwali, apply to every aspect of life, have quasi-legal status, and are considered an essential part of Pashtu "elegance." Anyone who disobeys these principles is regarded as a criminal and consequently condemned by the community.

PROCEDURAL CONCEPTS

Before a dispute is resolved, one party may ask the other whether he wants to settle the conflict "Shariat-wise" or "Pashto." The following addresses the Pashtun concepts.

I. The Trial or Jirga

Jirgas date back hundreds of centuries. Ancient Aryans solved most of their large and small conflicts through Jirgas, also known as *peace missions*. In the past, there were two kinds of Jirgas: Semity and Sabha. A Semity was comprised of elders

¹ The ILF wants to thank Mohammed Asem, its translator in Kabul, Faiz Ahmed, a second year law student at Hastings Law School in San Francisco and 2004 summer intern in the Kabul office, Tina Giffin, an associate at the law firm of Williams and Connolly, and the Hon. Mary McGowan Davis, International Fellow at Legal Aid Afghanistan, for their immeasurable contribution to this project.

² Direct quotes from the researchers are set forth in italics.

and heads of tribes and dealt with issues of national importance such as appointing the head of the state and defending the homeland. A Sabha was active at the village level, passing judgment on minor inter-village conflicts. In modern-day Afghanistan, Jirgas remain prominent. Afghans regard Jirga decisions as the law and condemn those who refuse to accept these decisions.

Special principles and regulations apply to Pashtun Jirgas. Members of Jirgas are known as Marakchi. They are men who are well known in their communities and who have distinguished themselves by their ability to make decisions. *Their wisdom and knowledge of social issues oblige the people in the community to call upon them to solve their problems.* Jirga men are volunteers, who are neither elected nor appointed but are genuinely eager to serve and to find solutions to disputes.

When a dispute needs to be resolved, Jirga men gather in a private chamber, a common gathering place, or the local mosque. During the proceedings, *all members of a Jirga have equal rights regardless of their otherwise social position.* Typically, each speaker begins by sharing short stories, narratives, examples, and proverbs before addressing the issues. Then they freely discuss and evaluate the issues before them in a calm atmosphere. Every member is entitled to state his point of view and make suggestions. *While discussions are free, useless or offensive talk is prohibited.* Furthermore, *while Jirgas are not closed to the public, potentially disruptive elements — such as women and children — should not be included.*

The number of Jirga men needed in any given proceeding varies as does the length of the proceeding. If six or more Jirga men are asked to mediate a dispute between persons, villages, or tribes, half will be drawn from one side and half from the other. Because Jirga members are expected to be impartial, if a party suspects undue favoritism by a Jirga member, he may object. If these suspicions prove to be well-founded, the offending member may be replaced.

The length of the proceedings will depend on the nature and importance of the issues. Some issues require days, some weeks, of deliberation. At the beginning of the session, cash or property, known as Machilgha or Baramta, with a value equivalent to the case, is collected from the parties and given to a third party for safekeeping. Baramta usually refers to instances when a person, rather than property, is pledged to

guarantee the enforceability of the Jirga's pronouncements. Guns are commonly handed up as Machilgha. In essence, Machilgha and Baramta are a sort of *legal guarantee accepted by all tribes*. Any party to a dispute who does not feel competent to defend himself properly may have someone represent him until a decision is rendered. At the end of the proceedings, the Jirga will issue a decision.

These decisions are conveyed orally, as they have been for centuries, from one generation to the next. Decisions that set forth general rules and have precedential value are known as Tselay. If a party refuses to accept the decision of the Jirga, he forfeits the Machilgha or Baramta, which will be given either to the other party or be kept by Jirga members. Jirga members rely on prior decisions and Tselays to resolve conflicts. They also rely on Nerks, meaning "price," specific to every tribe, which are essentially recognized amounts of damages for different wrongs. *The Nerks and Tselays of the Ahmed Zai tribe are well known and deemed reliable because the tribe is the largest Pashtun tribe with the wisest Jirga men*. Because of that, they also have greater precedential value and are relied upon by other tribes.

II. Takhm or Appeal

A person dissatisfied with the decision of a Jirga may ask that another Jirga review the case. If a party is dissatisfied with the ruling of the second Jirga, a member of the Jirga may ask for a third and ultimate review known as Takhm. Parties must accept the final decision of the Takhm. If one refuses, the tribe will choose a suitable punishment, which ranges from cash fines to burning down the house of the guilty party.

Pashtuns regard Jirgas as the main foundation for Pashtunwali. In their view, Jirgas illustrate their republican and democratic spirit. Pashtuns strongly believe in the words of Khoshal Khatak that: *A community who knows the abundance of Jirgas will never undertake something not decided by a Jirga*. According to the Pashtuns, the nation has solved local and national conflicts despite the lack of a central government with this system, and the community has grown and developed under it

III. Enforcement

The men responsible for the enforcement and implementation of the Jirga decisions are known as Arbakai. In ancient Aryan tribes, the Arbakai led groups of warriors in wartime and maintained law and order in peacetime. Today, they take orders from a commander. They are given considerable immunity in their communities and cannot be harmed or disobeyed. Those who flout these rules are subject to the punishments set by the Arbakai organization.

SUBSTANTIVE CONCEPTS

Pashtun norms of criminal law are based on the notion of restorative justice rather than on the notion of retributive justice relied upon in Western and international law. Rather than being sent to prison for a wrong committed, the wrongdoer is asked to pay Poar, or blood money, to the victim and to ask for forgiveness. Because asking for forgiveness, or Nanawati, is part of many “sentences,” it seems appropriate to describe the concept at this juncture. Nanawati is a special custom for seeking apology and eliminating enmity. The custom is used in all Pashtun tribes, taking virtually the same form in every community.

In the case of an intentional or accidental murder, the murderer’s relatives may help carry the victim’s body to the gravesite. A member of the murderer’s family also may lie in the grave dug for the victim implying his surrender to death. Another form of Nanawati requires that the aggressor go to the other party’s house with *some elder, learned men, aged people and some old ladies* and slaughter a sheep. Taking the sheep is mandatory and the number of sheep will differ according to the importance and seriousness of the case. If the conflict is between families, the sheep is slaughtered at the gate of the house. If the conflict is between tribes, it is slaughtered at the gate of the local mosque.

Nanawati for the murder and abduction of a married woman requires the giving of four copies of the Holy Koran, four women, and a fat sheep to the victim’s family. The Nanawati for the taking of a person’s weapons by force during a fight requires a visit to the victim’s house with a sheep. Refusing the Nanawati subjects the victim’s

family to accusations of opposing the Nerks and Tselays of Pashtuns -- an allegation that *no one can afford*.

As mentioned earlier, when a crime is committed, the perpetrator will be asked to pay Poar, or blood money, also known as Khoon, to the victim. Poars differ from tribe to tribe and the following is an example of the Poars for different crimes in different tribes.

I. Crimes Against the Person

A. Murder

Generally, Pashtun tradition treats accidental and intentional murders differently. Moreover, if someone is killed by a group of persons, the group pays one Poar. The one who actually committed the murder pays a higher Poar than the others.

(1) The Ahmed Zai Tribe

According to the Nerks of the Ahmed Zai tribe, every murder has its own Poar, also known as Khoon Bad Poar or Khoon Baha. If there is no plan for revenge and the perpetrator asks the victim's family for forgiveness, the murderer may only be charged a fine.

(i) Intentional murder without abuse or torture

(a) If the victim's relatives promise not to seek revenge and the perpetrator accepts the decisions of the Jirga, he will be charged with a full Poar or one Khoon. A full Poar in such cases requires the perpetrator's family to give *two fair and virgin girls*, or Pighlas (also known as Speen Paitsa, Got Laka, and Ronee) to be wedded to a member of the victim's family following special ceremonies. In some cases, additional cash payment must be made to the victim's family. *Generally, girls are preferred to money, because when the girls are wedded to the victim's family, kinship and blood sharing will transform the severe enmity into friendship.*

(b) If the victim's family chooses revenge and kills the perpetrator or a member of his family, the same rules will apply to them as did to the perpetrator. The Nerks and Tselay are clear on the subject, and there will be no need to convene a Jirga.

(ii) Intentional Murder with abuse or torture

(a) If the victim has been abused or a part of his body cut, the Poar is doubled to compensate for the "insult."

(b) If the perpetrator takes the victim's weapon, an additional payment, called Sharm-Shame, is required.

(2) The Wazir Tribe

The Nerks of the Wazir Tribe mandate that a murder be punished by either death (Qesas), giving blood money to the victim's family (Deiyat in Sharia, or Soara), or giving a girl to the victim's family. The following is an actual case:

At one time, a dispute arose over water allocation between two members of the Wazir tribe, Haji Sardar and Shah Tofan. The altercation escalated to the point where Haji Sardar's son shot and killed Shah Tofan's son. Haji Sardar's family was then forced to flee from the village to Pakistan. In their absence, the village elders decided to mediate the dispute between the two families and determined that the dispute and resultant murder could be resolved by having Haji Sardar's family give two girls and pay a fine 300,000 Pakistani Rupees to the family of Shah Tofan. In addition, the Jirga ordered Shah Tofan -- as an expression of his approval of the Jirga's decision -- to have a girl of his family marry a member of Haji Sardar's family. Shah Tofan accepted this resolution. He also agreed to accept the two girls as recompense for the murder of his son, but he rejected the payment of the

300,000 Pakistani Rupees. After this compromise was reached through the power of the Jirga, there was no further incident or dispute between the families.

(3) The Momand Tribe

The Nerks of the Momand Tribe require that a murder case be settled either by killing the perpetrator (Qesas), payment of blood money (Nika), giving of a girl (Soara), or exile of the perpetrator from the country (Kashinda). If someone is murdered intentionally for the purpose of receiving an inheritance, the perpetrator's property is confiscated, he loses the inheritance, and the community burns down his house.

(4) Other Tribes

In Dzadzai, Mangal and neighboring areas, a murderer may atone for his crime by offering a girl to the victim's family and paying a fine, known locally as Saz. In the area of Paktia (Paktia, Paktika and Khost), Nanawati is required in addition to the fine.

B. Assault

The punishment assessed for the infliction of injury depends upon both the nature of the injury and the instrument used to inflict the injury. The punishments required by the Nerks are listed below.

<u>Body Part Injured:</u>	<u>Punishment Assessed</u> (equivalent to)
An eye	half a murder
Two eyes	one murder
One ear	half a murder
Two ears	one murder
A tongue	one murder
Two legs	one murder

Two lips	one murder
A front tooth	one murder
Other teeth	1/12th or 1/13th of a murder
Cutting genitals	two murders.
Eyebrows (wounded/plucked)	special Poar
Mustache (plucked accidentally)	more than one special Poar
Mustache (plucked intentionally)	five special Poars because <i>the manhood and virility of the man are endangered.</i>

A wound caused by a gun, knife or sword is the equivalent of half a murder. An assault with a stick does not have a Poar and can be forgiven if no wound is inflicted and the victim accepts the perpetrator's apology.

C. Crimes Against Women

According to Pashtun tradition, *because of the importance of women, most of the severe fights and conflicts arise out of disputes over women's issues, for which special regulations and principles exist.* The following are examples of crimes and punishments involving women:

- If a married woman is kidnapped, the punishment is equal to seven murders. This rarely happens because kidnapping a married woman is a matter of life and death.
- If a woman and a man are caught committing adultery, they are both killed and no Poar is required.
- If a woman does not struggle against, or otherwise resist, a man who assaults her, she is deemed to be a willing participant and both she and the perpetrator will be killed.

- If the woman screams and struggles, the Nerks require that the aggressor's ear be cut off or that he be sexually insulted and die. If the harsher sentence is imposed, the person who performs the killing need only pay a fine equivalent to half a murder as Poar to the aggressor's family.
- If a woman enters a stranger's house seeking asylum and the owner of the house gives her shelter, he is considered a kidnapper and punished accordingly. If, however, he informs her husband or relatives and makes them reconsider their behavior towards her, he will not only escape the Poar but *he might also help to improve the life of an innocent human being*.
- In other contexts, providing shelter or protection, Panah, gives rise to specific rules. *Even criminals are given protection by Pashtuns. It has often happened that a family has given shelter to a stranger not knowing that he has just killed a family member. Even under these circumstances, the murderer will be sheltered.* Once he leaves the house, however, the rule is no longer valid and the relatives of the victim will seek revenge. In that case, killing the murderer is not regarded as a crime.
- If a man kidnaps a woman and takes her to his house by force he can be required to pay the equivalent of one Poar for murder to save his own life and half a murder as Sham to the relatives of the girl. If, on the other hand, the girl colludes in the kidnapping, the man is required to pay the equivalent of two murders and the woman forfeits the right to visit her father's home after the wedding. This may be avoided if the girl's new family apologizes (Nanawati) and her parents accept the apology.
- If a man reaches for the shawl of a woman and removes it from her head, or if he fires bullets into the air improperly indicating that her father has agreed to their marriage, he will not be given her hand. *Similarly, if a man proposes marriage to a girl and her parents do not approve of the marriage, the man will lose her hand forever to discourage similar situations in the future.*
- When a woman marries and goes to her husband's house, she becomes his Namos (pride, property, and responsibility). If her husband beats her, breaks a bone, injures a body part or kills her, her father may claim Poar . If the father does not

consent to the Poar, he can perform Qesas and kill her murderer.

Example: In Khogeany, the Bad, or fine for acts against women, is intended to discourage others from engaging in similar conduct and thus is often very severe. In one example, a man was accused of raping a married woman. The Jirga determined that the woman's family should receive two women as Bad from the members of the man's household. The accused's uncle had two wives and was forced to give up one of his wives to the family of the aggrieved woman as Bad. This exchange was viewed as fair compensation for the crime.

- Finally, widows can only marry the brother or the cousin of the deceased husband. If no such person exists, the whole tribe shares the widow. No other tribe is allowed to marry her. If a widow marries a man from another tribe, he is fined as a kidnapper for insulting the tribe.

II. Crimes Against Property

A. House / Tent

Invading or stealing private property is considered a crime, requiring a special Poar. In some tribes and villages, the perpetrator is made to return the stolen cash or goods to the owner and to make an additional payment of damages known as Sharm. If all or parts of the stolen goods are gone, the perpetrator has to pay twice the price and Sharm. If one finds evidence of the stolen goods or cash in a house, the owner of the house may have to give Sharm and to apologize.

When a house is burned down, the perpetrator must pay the owner the price of the house with additional Sharm. The same applies to a person who burns the tent of another, he will have to pay the price of the tent as well as Sharm. In addition, the perpetrator will have to ask for forgiveness, or Nanawati, from the injured person.

Breaking the gate of a property or making holes in the wall of a house has its own different Poar.

B. Crops / Water / Tree

A person who intentionally uses the crop of another to feed his animals is required to pay the owner the equivalent of four times the value of his crop.

If a person diverts irrigation water to his own fields when it is not his turn, he must pay Poar and Sharm to the person whose turn it was. If fighting occurs and that person is injured, the perpetrator must pay a special injury Poar.

Badann is a special agreement for preserving the forests. No one can cut down a tree for personal use in a forest. If he does, he will have to pay a specified fine to the tribe.

III. Other Crimes

A. Possession of Weapons

Carrying arms is not only lawful, it is deemed *necessary for every man in the community*.

B. Drug Crimes

The use of drugs is strongly condemned but no one has the right to take steps against, or even question, a person accused of using drugs. If, however, the tribe decides to take action, that decision is enforceable.

C. Firing on a Guest

If a person fires intentionally on someone's guest and injures him, he will have to pay a double Poar to the host. If the firing is accidental, a Sharm of 150 to 460 Rupees must be paid to the host, depending upon the region. If the guest is killed

as a result of the shooting, the perpetrator will pay double Poar to the relatives of the victim and a specified amount to the host as Sharm.

D. Bad

Bad refers to crimes ranging from saying an improper word to murder or violating someone's Namos. Different fines (Nagha and Sharm) are assessed for different Bads depending on their severity. For example, assaulting a person accompanied by a Badraga is a Bad. (A Badraga is a person or group from a neutral tribe chosen to escort an endangered person.) If the person is injured while being escorted, the Badraga will regard the act as a Bad done to it, requiring that the aggressor pay a suitable Poar. The eight tribes of Teera adhere strictly to this custom.

E. Crimes Involving Animals

If a person accidentally kills someone's dog, he must give the owner a sheep and a specified amount of money. If a person does so intentionally, he must either be put to death or pay the equivalent of one Poar/Khoon. *While killing a dog is not considered the equivalent of killing a human, dogs symbolize the protection of a house and its boundaries; therefore, killing a dog is regarded as a serious insult requiring harsh punishment.*

A person who shoots or steals a chicken must pay a fine equivalent to nine times the value of a chicken, while a person who stones a chicken to death must pay the equivalent of twice the value of the chicken. A person who intentionally cuts off the tail of a cow belonging to another must pay the specified Poar and Sharm. If he fails to do so, the owner of the cow may cut off the tail of the perpetrator's cow.

F. Unpaid Debts

Conflicts also arise when money is loaned but not promptly repaid. A common idiom in the Khogheay tribe is that one gives with one's hand and takes with one's legs, meaning that when loaning money a person does so with his hands but must run after the borrower with his feet to get back the money. In Khogheany, many of the

loan transactions revolve around the poppy trade. Most people must cultivate and sell poppies in order to obtain money to spend on funerals and weddings. Many times, individuals will borrow money using their poppy plants as collateral. In some cases, however, the poppy crop may not be sufficient to cover the full amount borrowed and disputes arise.

Example, in the Marki Khiel village of the Khogeani Region, one farmer borrowed money from a local businessman and provided as collateral the poppy crops growing in his fields. Unfortunately, a severe drought plagued the region that season and the poppy fields were destroyed. As a result, the farmer had nothing with which to repay the loan. When the businessman demanded his money, the farmer tried to explain his predicament, but to no avail. To illustrate his dire economic condition to the businessman and to garner some sympathy, the farmer explained that he only had his wife and children to offer in exchange for his debt. The farmer, of course, did not intend to offer his family in exchange for his debt, but instead simply made this statement to explain that he had no means to repay the debt. To the farmer's surprise, the businessman demanded that the farmer turn his family over to repay the loan. The farmer told his wife and children to go with the businessman, but as they were leaving the house, the farmer retrieved his rifle and shot and killed the businessman. The Jirga was summoned to hear the case and determined that, based on the equities of the situation, the woman was not obliged to go with the businessman and that the farmer was not required to pay any Bad or fine to the businessman's family.

G. Perjury

A person who denies committing a murder or is alleged to have lied about a land-related issue is ordered to take "seven oaths." He swears seven times on the Holy Koran to establish his innocence. If, contrary to his oaths, he is, in fact, guilty and has perjured himself, he will be punished in the hereafter.

PART TWO

The Customary Laws of the Central Region of Hazarajat



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INTRODUCTION

The Hazaras of Afghanistan, of Mongol origin, have historically been the subject of discrimination and were the victims of large massacres by the Taliban. They live primarily in the center of the country in the regions of Bamyan, Orozgan, Wardak and Blakh. Bamyan, where the Hazaras are in the majority, is the historical, political, and administrative center of Hazarajat. It is also an important historical site in Afghanistan. It is the site of the famous lake Band-e-Amir and until the Taliban destroyed them, it was the home of the gigantic Buddhas

A minority of Hazaras in Afghanistan are Sunni Muslims, the majority are Shia Muslims from two different Islamic schools of thought: Shia Jafary and Shia Ishmaelia (who are followers of the Agha Khan). These two groups have been in conflict for centuries. The former believes that there will be a total of 12 Imams in world history, while the latter believes that there is always only one Imam (whose current incarnation is the Agha Khan). Given the absence of any central government in Afghanistan during the past 25 years, disputes in this region, as elsewhere in the country, have been resolved according to religious principles or customary laws, or a combination of both. In some districts, however, the political party – Hezb-e-Wahadat -- or the local war lord rules. Because the Hazaras and Pashtuns live geographically close together, their customs have a lot in common -- such as their formal process of apology.

PROCEDURAL CONCEPTS

I. Proceedings

The jirgas in this region are known as Maraka (pronounced Marka in Hazarajat) or Majiles Qawmi. They have been in existence for thousands of years and constitute the most reliable ethnic authority. Jirgas or Marakas have three to fifteen to thirty members, depending on the seriousness of the case. The members are known as Maarkachi. They include elders, or Ulema, and the descendants of the prophet, known as Sadat or Saiid. Women cannot be members of a Maraka. A dispute between Hazara

may involve Hazara of different regions or different districts and the parties will ask to have members from their district or region represented on the Maraka. In the case of a conflict, the population will go to the elders and Saiid. The Malek, known as Wakeel in other regions, is the leader of the Maraka. As elsewhere, the Maraka meets in the mosque, or Takia Khana. It may also meet in a private house on the initiative of one of the parties. The host will then serve food and the relatives of the host will bring food. Our researchers were told by some that war lords have tried without success to end this tradition and impose their authority through force; others reported that the war lords do successfully impose their will by force.

At the beginning of the Jirga, the parties are asked to accept the full authority of the Maraka. One party may ask to have elders from other districts represented on the Maraka, and a date is set for the proceeding. When the time comes, the witnesses to the incident are heard by the Maraka. If a party needs assistance in representing himself, such assistance will be provided. The decisions in this region are based on Jafary jurisprudence and customs. Solutions are based on *prudent judgment, social justice, and careful deliberations*. In Ghazni province, there is a saying, *It is possible to have another trial after a trial, but it is impossible to have another assembly after an assembly*. During the war, in the region of Jaghourri, the people attempted to establish a judicial center, or Hawsa, to solve disputes, but armed groups refused to submit to its authority and the attempt failed.

II. Sentence and Punishment

The formal apology process is known as Ozrana or Nanawati. It generally involves the Uleman, or Mullah, and the elders taking the culprit to the family of the aggrieved party with a Koran, one or more sheep, money, rice, wheat, oil or other food stuffs, and a request for forgiveness. The apology group generally includes women because *they are precious and therefore, their presence demonstrates submission*. Other portions of sentences may involve the paying of a fine, known as Jarima, isolation, and the taking of land.

The decision of the Maraka is binding. A party who rejects the decision of the Maraka is dismissed from the tribe. His relatives will no longer be invited to weddings and funerals.

Example: The leader, or Malek, of the village of Irmak remembered a case where a house had been burglarized and two members of the family injured. The perpetrator was found and a Maraka called but the perpetrator would not listen. He even threatened the members of the Jirga. The Maraka issued a decision whereby the perpetrator was to give back the stolen property and a plot of land of two Jereb, approximately 4,000 square meters, as compensation to the injured victims.³ He refused. The village decided that he could not live there anymore. His house was burned and his property seized and given to the victims. One year later, he asked the leaders of another village to go back with him to the first village to ask for forgiveness. The elders ordered him to wear a leash and collar, put grass in his mouth, and ask forgiveness. The apology was accepted and everything but the 4,000 square meters of land was returned to him.

SUBSTANTIVE CONCEPTS

Our researchers found that people in this region were reluctant to talk about crime in their community. There was a feeling that they did not want to insult people. Some Ishmaelites seemed reluctant to talk about adultery and other crimes to avoid criticism from their religious leaders. All agreed, however, that customary law methods were the most efficient manner to resolve any conflict.

I. Crimes Against the Person

A. Murder

In cases of intentional murder, the matter must be sent to the government. With the approval of the government and the parties, the case may be sent back to the

³ A Jereb is 2,000 square meters.

Maraka. During the proceedings, however, the suspect remains in prison in government custody. The elders will gather evidence, find clues, study behavior, the history of the accused, and the animosity between the families. The Maraka will then reach a decision and impose a “sentence” which will include Deiyat, or payment to the victim’s family. The perpetrator may be ordered to give 50, 100, even 1000 sheep or the equivalent in money, land, or silk. Sometimes, the matter can be solved with an apology. If the perpetrator does not pay, he will stay in prison.

Example: In the district of Panjab, there was a murder. The Deiyat was 1500 square meters (35 Jerebs) of land with water for irrigation and a certain sum of money. The perpetrator could not pay, so he was left in prison.

Example: There was a murder in the village of Pataoujoy and the case was sent to the Maraka for resolution. Elders from two other villages were asked to join in and the proceedings lasted two days. The perpetrator confessed to the crime and the village was willing to pay the Deiyat for him, but the family of the victim wanted Qesas, or retaliation by death. The Maraka worried that this might be the beginning of a vicious circle of violence between the two families and they convinced the victim’s family to accept 4000 square meters of land or its cash equivalent and 500 times one Ser, or seven kilos of wheat. The family of the perpetrator offered to give a sister as Bad instead. When the victim’s family refused the Bad, the perpetrator agreed to comply with the Deiyat.

The exercise of Bad, or the gift of a girl to the family of the victim, is not common among Hazaras. When it does occur, it is generally in cases involving a dispute between tribes or villages rather than between people of one tribe or one village.

B. Manslaughter

Such cases are sent to the government first. If the government and the families of the parties agree, the case may be referred to the Maraka. The Maraka will always try to find a compromise and arrange for the perpetrator's family to apologize. Women must participate in the apology process and join the group going to the victim's family. The presence of women expresses extreme submission because *they are very precious*. Including women in the group presenting the apology *is like taking out the good silver*.

C. Adultery

This subject was difficult to discuss. Our researchers were told that Hazaras are very sensitive when it comes to adultery; they *detest it and do not want to talk about it*. They prefer to have the cases referred to the courts and the perpetrators punished under Sharia. We were told that adultery rarely occurs because the Hazara marry off their sons and daughters at the age of 16 or 18, if not younger. The members of the Maraka will find a person guilty of adultery only if there is testimony from eyewitnesses to the act or the woman gives birth to a child.

(1) Between an unmarried man and an unmarried woman

If the woman is unmarried or a widow, the tribe will ask the man and woman to marry. The man must then pay the family of the woman "milk money," which is a gift to the bride's mother for having nursed her daughter, and he must also pay the marriage portion, an amount settled upon and paid in cash beforehand. The milk money and marriage portions are only a fine and do not equal the cost of a marriage. This fine is 20,000 to 30,000 Afghanis, five to ten sheep, and 3500 kilos of wheat or other food stuffs.

(2) Between a married man and a married woman

The husband of the accused woman is entitled to get a divorce and the "guilty" man will be asked to marry the woman. The daughter or the sister of the perpetrator

will be given in marriage to the divorced husband. If the perpetrator has no sister or daughter, he will be asked to pay for the marriage of the divorced husband to another woman. The marriage between the perpetrator and the woman will be postponed for three months to determine whether she is pregnant because, if she is, the child is illegitimate.

In cases of actual rape, physical punishment is an alternative.

Example: In one case of rape, the Jirga/Maraka ordered the woman to receive 60 lashes and the man to be stoned to death. Thereafter, the woman's husband divorced her, she became depressed and ultimately died

(3) Issues related to women and marriage

Our researchers were told on the one hand, that the most important part of a marriage agreement is the consent of the woman, followed by the agreement of her guardian, or Wakeel, and that of her parents. On the other hand, they were told that some consider the consent of the parents and the girl's representative to be the most important component of a marriage agreement; thus less emphasis is placed on the wishes of the woman herself. The question of marriage leads to numerous conflicts -- such as problems arising when the cradle-promised wife refuses to marry or the widow wants to marry without her in-laws' permission.

Example: A girl is promised to a boy at a young age and then refuses to marry him. If the boy's family has incurred any expenses, the girl's family must pay for those expenses.

In Hazarajat, where people are very poor, the father of the bride commonly asks for a lot of money from the future groom, leading to a number of problems.

Example: Shams-u-llah and the daughter of Rahm Ali wanted to marry. The bride's father was against the marriage but a number of people interceded and he

ultimately agreed to the marriage, setting a dowry of 500,000 Afghanis. The groom, of course, did not have that amount of money and everyone knew that, but he accepted the terms. After a while, the groom asked his future father-in-law to help him with the dowry and the father-in-law agreed if the future groom consented to gather as many people as he could find to advocate for the marriage and, in front of them all, to admit that he did not have enough money to pay for the dowry. At such a public gathering, the father-in-law would agree to lower the amount requested. Shams-u-llah gathered important people and said what he had been told to say. Whereupon, the father-in-law stood up and, in front of everyone, said that he would not give his daughter to someone who was worth nothing.

The groom was asked to accept the situation but others incited Sams-u-llah to go to his fiancée's house and kidnap her. He did and the couple was never found. Because the groom had no family, there were no repercussions from this kidnapping, but the father-in-law still threatens to kill the groom if he should ever return.

Problems often arise when a father agrees to “give” his daughter in marriage to a much older man in exchange for a substantial amount of money.

Example: A man of 60 was married to a girl of 12 and the problems became apparent on the night of the wedding when she escaped. He died the next day and because he had no family to make demands on the wife, there was no penalty and she eventually remarried.

Different problems arise when the father and the brother promise their daughter and sister to different men. The matter is resolved according to the following rules: first, the girl decides whom she wants to marry; then, if her mother and father agree,

the girl will marry the person she and her parents have chosen. If the girl does not wish to marry either suitor, and her parents concur, the Jirga will tell both men that they cannot marry the girl.

Other problems arise with the marriage of a widow. In one case, two men wanted to marry the same widow. She wanted to marry neither suitor. The Jirga secured an agreement from both men that they would not ask for her hand again. Although a widow should marry an in-law, if she does not want to do so, her wishes are *generally* respected.

Example: A widow wanted to marry a man named Noor but her brother-in-law did not approve the marriage. She then ran off to Noor's house saying that he was a friend. The family of the dead husband attacked Noor's house. A Jirga was called. Ishmaelia principles were applied. They allow a widow to marry whomever she wants and this woman accordingly was permitted to marry Noor. The Jirga concluded that the family of the dead husband was not justified in attacking Noor's house.

D. Assault and Torture

Cases of torture and beatings are rarely referred to the government. If one party or even a government official should ask for arbitration, the matter will be sent to the Jirga. The elders deal with these cases following the rules of Sharia. When a party has suffered serious injury, the perpetrator must give a formal apology, with an offering of rice, oil, meat, wheat and cash to the victim's household. This is known as "medicine." It inflicts punishment for the perpetrator and provides reparation to the victim. Many times, a simple apology suffices to bring the parties together, without the need for any payment.

When the dispute is between two villages, or over a girl, land or field, or stems from prior animosity between the parties, the elders from the two villages will gather; often they will be joined by elders from a third village and another tribe to resolve the dispute.

Example: Some years ago, there was a dispute between the Yari and Kol Bato tribes over land on a certain mountain. The elders intervened and stopped the fighting. After three days of discussion, they decided that the contested land should be divided based on the number of animals in each village. The Jirga found the people of Kol Bato responsible for the disturbance, and they were ordered to pay a fine of 25,000 Afghanis.

The elders will also step in before a dispute degenerates into actual fighting. For example, in an altercation between two groups of young people, the elders intervened and ordered one group to apologize to the other and the dispute was settled.

Example: Ten years ago there was a fight between two families over an inheritance. One person died and five were injured. At the time, there was no government authority and the elders met and assessed the injuries. They ordered the two sides to ask for forgiveness. They did, and one year later the daughter of one family married the son of the other and vice versa. The families are now close.

II Crimes Against Property

A. Theft

People in Hazarajat are poor and there is little theft. If a thief is identified, the entire family is punished. Generally, the perpetrator will be asked to return the property or its value.

Example: A sheep was stolen in a village. The perpetrator was identified when a dog found the bones of the sheep buried in his garden. The elders gathered and they accused him of the crime. He was told to swear by

the name of Imam Jafar Sadiq and other holy names, and to describe the incident. He was then ordered to pay the victim the value of the sheep.

In this region, they believe that when someone steals something the thief's appearance and demeanor change and the people recognize it immediately. *It is easy to distinguish the guilty from the innocent.* The Jirga never punishes the perpetrator to a degree greater than the value of the property stolen. The perpetrator must repent and promise never to steal again.

Debt leads to a different kind of "theft" and is treated differently. The problems are of two types: the debtor cannot pay and wants to postpone repayment, or he denies the existence of a debt. In the first instance, the Jirga will meet and set a different payment day. If the Jirga determines that he cannot pay, he will essentially be declared indigent. If the family confirms the situation, the Jirga will give the debtor a certificate of "indigency" and he will not have to pay. When this letter is handed to a creditor, that person cannot ask the indigent for money. However, having such a certificate is a source of tremendous shame and embarrassment. The indigent may agree, despite his indigence, to pay a debt at a certain point in the future. He will then be given another document showing that he can and will pay in the future. An indigency certificate is so shameful that very few are issued. In the district of Jaghato, there was only one indigency certificate last year.

When a person denies the existence of a debt, he is asked to swear that he does not owe anything. If the person so swears and is actually lying, *this is a big sin and a shameful act in our society.*

B. Trespass

Conflicts over land arise out of inheritance problems, preemption rights, and the return of occupied land. Conflicts over inheritance are the most common. The party claiming to own the land must prove his relationship to the land and the portion of the inheritance; then the people of the community must corroborate the evidence. The Jirga will make its decision according to the Jafary school of jurisprudence.

Preemption questions are also frequent. These deal with a person's right to buy a piece of land, house, field or farm. The neighbors and relatives of the owner of the land have a right to buy over others. These rules are the same for the Sunnis and Shiia, under the Jafary and Hanafy schools of thought.

Example: Last year, Mr. Amanuddin wanted to sell his land and both his neighbors and relatives wanted to buy it. The contesting buyers consulted the Jirga. It determined that two neighbors had owned and used their land for longer periods of time than the other two and they were allowed to purchase the land. The Jirga also determined that the buyers had to give the seller 10% of the land production for one year.

Unless the owner of land can prove that he owns the land, the person in actual possession of the land -- the person using the land -- is deemed to own it. With the war, many people left their homes and others used the land. When the people come back, they will not be given their land unless they can find documentation or witnesses to prove their ownership. Many conflicts also arise between the owner and the actual possessor of the property. If a person uses land for 20 years, he acquires a certain right to it.

Example: The owner of a piece of land went into exile. For 20 years or more, someone else cultivated the land. When the owner returned or when his children returned, they claimed the land and a conflict arose. The Jirga solved the problem by giving the land to the possessor and asking him to give the owner one third of the value.

There are some conflicts over grazing land but they are few because Hazarajat is rich in grazing land. There are three kinds of grazing areas: public grazing land for village people, mountain grazing land for those with a temporary license to use the land, and small grazing land used by individuals for cows, sheep and goats. The quality of the land may lead to disputes.

Example: Three brothers were sharing their father's land to raise their animals. The land was of different quality in different places so when the brothers decided to divide the land, problems arose. The people of the area summoned the Jirga and the land was divided into three parts without regard to quality. The best land was given to the eldest son. The two other sons realized this and went to the Jirga. The Jirga convened again and solved the problem by convincing the older brother to give part of his land to his brothers for a time so that they might gain the benefits of the better land.

Land disputes between villages are also handled by Jirgas with members from the two villages and even elders from Bamyan.

Example: There was a dispute between the people of Ghareeb Abad and Surkh Kol. There simply was not enough land for the people of the former village, but the people of Surkh Kol had far more animals. The elders decided that the people of Ghareeb Abad could use specific areas of the grazing land of Surkh Kol for one to two years.

Land disputes between Hazara and Pashtun nomads are also frequent. In the district of Bamyan, the land for pasture is in the mountains. The Hazaras from the village of Irak, for example, go to the mountains with their animals in the summer but so do the Pashtun nomads, and when the nomads come, conflicts often arise. The Hazaras in that area usually want to settle the conflict according to the Ishmaelia principles and the Pashtun want to apply the Hanafy school of thought. The Sharia is different depending on which jurisprudence is applied, so when the parties cannot reach an agreement, they call a Jirga made up of representatives of both schools.

Other times, however, the Hazara will ask to have a dispute resolved according to Pashtun customary laws because they are well established.

In one case, the Pashtun nomads were asked to settle a dispute between the heirs to one Hazara father. There were two points of view. One side wanted to divide the land according to the number of men and animals; the other side wanted to divide the land by families. The Pashtun nomads held a Jirga and asked the following questions: Fifty years ago, how many families existed in this village and how many descendants did the fathers have? At the time, there were five large families in the village. The Jirga determined that the property had to be divided into five plots and then, per capita, distributed among the separate families.

In a dispute between the sons and daughters of one family, where the father had left his property both to the girls and the boys, the Jirga divided the property among the boys because according to tradition, girls do not have a right to inherit. Under Jafary principles, a widow is entitled to one-eighth of the inheritance of her husband, but women rarely claim it because of the tradition against women inheriting property.

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PART THREE

The Customary Laws of the Nuristan Region



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INTRODUCTION

The Nuristan province (Land of Light) is located in the Eastern part of Afghanistan in the Hindu Kush mountain range. Until ten years ago, it was not a province but an administrative district in the Kunar province. Before being annexed to Afghanistan in 1896 and becoming Muslim, the Nuristan was known as Kafiristan (Land of Disbelievers). The province covers an area of approximately 15,000 square kilometers, 40% of which is at an altitude above 3000 meters. The geographical conditions are such that *only people born there can live there*. It is vast and mountainous. The conditions of the roads and pathways are very poor; just ten years ago, there were no roads at all. Today, the capital city of Paroon is still inaccessible by car. The terrain makes the establishment of a central authority very difficult.

The population is divided into six tribes: Kata, Kom, Kuslha, Parsoon, Ashkoon and Guar. The province is divided into three geographic areas: the East or Prygram; the West or Rangal; and the center known as Kulshoom. The land is densely forested. Houses are built on the tops of mountains for more security and the valleys are used for farming. The economy is based on cattle herding and fruit farming. Men raise cattle, the women grow fruit and are responsible for the household. The village remains the political unit, governed according to customs. Every village has a council and its members are chosen by the villagers. They include elders, the Mullah Imam, and other persons from families firmly established in the village. They govern the village.

PROCEDURAL CONCEPTS

I. Historical Jirgas: Awra and Landhyar

Before becoming Muslim, the people of Nuristan, like other Aryan tribes, had two types of Jirgas: the Walisi Jirga, or Awra, and the Mashrano Jirga, or Landhyar, and they regulated the life of ancient Nuristan. The Awra dealt with small matters involving water rights, agriculture, cattle, and pasture. The Mashrano Jirga or Landhyar dealt with more important matters and had more authority. The members of

the Awra were younger, the members of the Landhyar were more “firmly rooted elders,” who were known as Sharamach, Jasht, Dhaal and Waytur. They were experienced, intelligent, and often members of the noble class. They convened in a grandiose and beautiful hall known as Awla Ama, Kankarkunt, or Kantarama, which was built by villagers and decorated with finely engraved wood, carved by skilled artisans. These Jirgas remain almost unchanged today and their decisions are still considered to be law.

II. The Modern Jirga

Eastern Nuristan remains very remote and customs have not changed much. Throughout Nuristan, the Jirga, or village council, remains a common institution known as Awri, Awra, Awrjast, and Uloo. These Jirgas resolve disputes according to custom and Islamic law. The members of the Jirgas or council, who are known as Majlis, must meet the following qualifications: They must be known as morally upright, virtuous, and God-fearing. They must be religiously observant, peaceful, firmly rooted in the village, and knowledgeable about the basic rules of the Jirga. They should have at least a formal primary education whether religious or scientific.

The members, which generally number between three to five persons, are elected for one to two years. They include a chairperson known as the Jasht or Ojasht. After the elections, a new Awra comes into being with full authority to solve disputes. Members serve willingly; they *never abuse their authority, they struggle to find the truth*. Their influence is considerable. They are not paid and use the money from fines for public welfare. The Majlis have been described as scholars, or Mullahs, *who studied in Pakistan*. They meet in mosques or cultural centers known as Ree and Natima

A. The Proceedings:

Generally, the parties resolve their differences among themselves. If they fail, the Mullah, or the head of the village and other important people gather to consider the dispute. If both parties agree with the Jirga or Awra they are bound by the decision. If one party refuses to submit to the authority of the Jirga, the elders of other villages will

be called and they will attempt to convince the person to submit to the decision. If they fail, that person will be expelled from the village.

The Wakeel or guardian: If one party to a dispute cannot represent his rights because of *lack of courage, simplicity of mind, or lack of information*, that person may have a guardian represent him or her before the Jirga. According to Nuristan custom, the person wanting a guardian must request one by letter in the presence of four witnesses. The letter must be submitted in the presence of the Mullah Imam or the head of the village.

At the beginning of the proceedings, the parties submit a guarantee known in Nuristan as Garaw or Zamanat (in Pashto as Machilgha). This guarantee is an acknowledgment that they will accept the decision of the Jirga. The guarantee consists of precious chattel like rifles or cash. If one party withdraws from the process, his guarantee is not returned to him but is divided between the members of the Jirga or given to the public welfare.

The council hears witnesses. Witnesses must be *adults, not senile, truthful, and healthy*. The testimony of two women equals the testimony of one man; however, if all the witnesses are women, their testimony is not accepted.

The decision of the Jirga is known as Rogha-jura, or peace. According to Nuristan custom, after a decision is reached, the members of the Jirga call the instigator to prepare for the reconciliation with the victim and to establish peace. The blood money is determined and given to the victim as a necessary pre-condition for reconciliation. The perpetrator will apologize.

B. The Sentence: Apology and Fine (Nanawati and Nagha).

The Nanawati, Uzr in Nuristani, or apology, is an intricate part of the resolution. As seen in other portions of this report on customary laws, the custom of apologizing is common among all Afghan tribes and has a special place in the interaction among people in all parts of the country. The perpetrator must apologize. The apology can take different forms. It generally depends on the crime. The perpetrator will be asked to go, with some elders from the village or members of the

jirga to the house of the victim, with a bull or a sheep. Once the parties engage in Nanawati (or apology), they are reconciled.

The fine, or Nagha, is paid by the perpetrator. It may be in the form of money – twice the value of the property – or may take other forms. If someone violates the rules governing pasture, he must give a goat; if he violates irrigation rights, he must give two Ser (a Ser is 7 kilos) of wheat and promise never to do it again. If someone other than a traveler or guest takes raw fruit from a tree – something forbidden – the fine is a cow or three goats. If a child takes a raw fruit, he is asked to give a goat. If someone steals something from another, the person must return the item and in addition, must deliver up goats (60 goats in the past, today only 20). If someone violates the prohibition against inter-gender dancing, the boy and girl must pay a fine. A fight requires payment of a sheep. Cutting a branch off a tree requires payment of a goat.

These decisions also become established rulings with precedential authority. According to our researchers, *they remove the envy and antagonism between the parties who sincerely forget their prior envy and jealousy.*

SUBSTANTIVE CONCEPTS

Our researchers were told that, under the customs of Nuristan, a girl cannot be given in marriage as a fine or penalty. The People of Nuristan strongly condemn this tradition of other parts of Afghanistan. Although Nuristan had a similar custom in the past, Mullahs have severely condemned the custom and it has been eliminated.⁴ Adult women in Nuristan are independent. When the parents of a girl want her to marry someone, they must discuss it with her and they must marry her in accordance with her choice. In Central and Western Nuristan, however, girls are married before they reach adulthood. The dowry at all times is the right of the father.

⁴ Examples described to our researchers, however, show that the custom of using girls as remedy to a dispute is not entirely gone.

I. Crimes Against the Person

A. Murder

In cases of murder, the village council will gather in an expanded version with the Mullah Imam, the head of the village, members of the victim's family, elders from the village and surrounding villages. The parties are asked to deposit a significant guarantee because of the gravity of the case. They are also asked whether they want the case to be decided under Sharia and if they do, the matter is transferred to the Mullahs for an appropriate decision under Sharia. If the case remains before the Jirga, the members of the Jirga will familiarize themselves with the facts of the case and after a decision is reached they will work with the victim's family to reach an agreement.

First, the Jirga must decide whether the crime was intentional murder, manslaughter, or justified by self-defense, duress, or the family's honor. Once a decision is made, the Jirga members will go to the victim's family, earn their trust and work on reconciliation. When they have the commitment of both parties, they determine what the families want. The punishment for intentional murder is execution. If the family of the victim insists on execution and the perpetrator refuses to apologize, the family of the perpetrator must turn him over to the Jirga and the Jirga will then hand him over to the victim's family for execution.

Execution may be avoided if the victim's family accepts a payment of Deiyat, or blood money. In Nuristan the Deiyat for a murder is 200 to 250 cows or the equivalent value of the cows. In the East, a cow is worth seven goats; in the Centre and West, a cow is worth only five goats. The victim's family may also pay in land or money. When the Deiyat is paid and the apology accepted, the process is complete.

In some cases, the perpetrator will be exiled for a period of time.

Example: Fifteen years ago, a man *mercilessly* murdered a woman. The Awra Majlis decided to execute the perpetrator but at the request of the people and pursuant to tribal customs of mercy, the Majlis withdrew the death sentence and expelled the man from Nuristan. He has

returned seeking unsuccessfully to be excused and has been forced to leave again.

In other cases, perpetrators are imprisoned in their houses.

Example: In Eastern Nuristan, there was a murder but the parties were not ready to accept the decision of the Awra. Both parties, perpetrator and victim, were kept in their houses for two months. They eventually accepted the decree of the Awra Majlis, which ordered the perpetrator to give 100 cows or their equivalent value to the family of the victim. Both parties were then freed from their houses (prisons).

When there is a risk that the perpetrator may flee, decisions are made swiftly.

Example: Last year, there was an intentional murder in Ghaziabad. The people immediately surrounded the house of the perpetrator and an Awra was convened. They determined that the murder had been unjustified and ordered execution. The perpetrator, however, did not have a criminal history. At the request of the villagers and the family of the victim, he was asked to pay Bad or blood money and his life was spared.

Members of the Jirga take into account mitigating circumstances.

Example: Naimat hit Ahmad's three-year old son with his car and the boy died. The village council and elders met and asked the victim's father to forgive Naimat. He refused. Naimat had to pay the victim's family 300 rupees, less than required by Sharia, because it was a traffic accident.

Example: Hamidullah was killed accidentally by Samiur-Rahman. After 2 days, a council was established by Mullah Imam, the elders and the family of the perpetrator. The council went to the victim's house for Nanawati, with a cow, a bull, and two sheep. The victim's family accepted the apology and even returned the animals.

Example: A woman in a village was home with her two children, and her husband traveling, when a man tried to enter her house at night. The woman told him not to enter but he did not listen. She retrieved a machine gun and killed him on the spot. The village gathered and provided her security so she would not be harmed. The next day, the Jirga obtained the agreement of the victim's family that she not be harmed. None of the people in the village took part in the funeral as punishment for the invasion.

In Eastern Nuristan, when there is a murder, the council and elders gather and expel the murderer and his family until tensions dissipate. After the council has obtained a peaceful resolution, the murderer and his family may return.

B. Adultery

Our researchers were told repeatedly that in Nuristan, there are very few cases of adultery and that these cases are treated seriously and decisively. It is a matter of the utmost importance. Once adultery has been proven, the only question is the nature of the punishment. In some cases, where husbands do not want to lose their wives, they will simply keep the crime secret.

(1) Between a Married Man and a Married Woman

When a married man and a married woman commit adultery and the husband of the woman learns about it, he can kill them both. Witnesses to an act of adultery

between a married man and a married woman may also kill them both immediately. The crime is an embarrassment to both parties and no one will take part in the Fatiha, or mourning ceremony. In the absence of pardon, the legal punishment for adultery is death by stoning. The parties, however, often reach a compromise.

Example: Some years ago, a widow became pregnant by an unmarried man. He did not want to marry her and escaped before the Awra made a decision. The Awra performed a marriage contract in his absence. He did not accept it but his family supported the woman financially.

(2) Between an Unmarried Man and an Unmarried Woman

The situation is different. If the father and brother of the woman know about it or people are suspicious, they will secretly go to the village council. The council will talk to the family of the boy and ask that a person be sent to the girl's family to ask for her hand in marriage. If the family of the boy refuses this proposal, the council will disclose the relationship to the boy's father, who will automatically agree to the union. The father of the boy then pays the father of the girl the average dowry and the two are married.

C. Kidnapping

(1) "Consensual kidnapping"

When an unmarried girl elopes with a boy ("kidnapper"), his family and the villagers call for a Jirga and the Jirga decides the amount of the dowry to be given to the girl's father so that the two can marry. The boy must also pay a fine to the village in the form of the cow or sheep.

When a married woman consents to be "kidnapped," the council urges the husband to divorce her, and she is then married to the other man. Her husband receives back the dowry he previously paid. The other man must give two cows and two sheep as Bad to the husband, as well as two cows and five goats to the village.

Suspicion of “consensual kidnapping:” In the districts of Want and Wama, a man who suspects his wife of adultery, but is unable to kill her *for reasons of fear or weakness*, asks the wife’s relatives to take her back because he cannot live with her any longer. He also asks for return of the dowry. In those districts the families will take their daughters or sisters back and return the dowry to the former husband. The husband may forbid the wife to marry the “kidnapper.” He can also put limitations on other opportunities she may have for remarriage.⁵

(2) Kidnapping by Force

When a girl is taken by force, the village calls a Jirga. The Jirga puts pressure on the family of the man to bring the woman back. The Jirga then asks her to agree to marry the man. If she accepts, the dowry is paid and she is married according to Sharia. The family of the boy is asked to perform Nanawati and to pay a fine to the village. If the boy refuses to admit to the crime, other compromises are found.

Example: A girl was kidnapped and returned to the Awra Majlis before returning to her family. She confessed to her participation in the crime but the boy refused to confess and was neither ready to marry her nor to pay a fine. The boy was told that if he had committed the crime and refused to confess, he would be stoned to death. The girl told her story to the Awra but the boy remained silent and refused to answer questions. The Awra asked him to swear but he would not. The girl’s relatives wanted them both stoned or at least to be given two girls as compensation. The following solution was found: The boy was ordered to pay 30000 Afghanis, his

⁵ Generally, when there are problems between husband and wife, the relatives sit together to find a solution. If the wife disobeys her husband, his relatives will ask her relatives to take her back and to return the dowry. The husband may then divorce her but she cannot marry a man from the same village. If there is evidence that the husband was mistreating his wife, then her relatives will obtain a divorce for her and the husband will return the dowry.

sister was given in marriage to the girl's father, and the boy and girl were married.

If the girl does not agree to marry the man, she is returned to the house of her father and the boy is asked to pay an extremely high fine, as well as half the price of the dowry to the girl's father. The girl may be kept in "prison" in her father's house *under severe conditions*. The Jirga always tries its best to convince the girl to marry.

Example: A girl was kidnapped by a boy from another tribe but adultery was not committed. The Mujahadeen intervened and the couple was not stoned to death. The father of the girl insisted on a severe punishment, but instead the Awra ordered the couple to be married. In addition, the sister of the boy was ordered to marry the brother of the girl and to pay a fine of 20,000 Afghanis.

D. Assault

As in the rest of Afghanistan, fighting and beatings in Nuristan are on the rise. The disputes are settled by the Awra Majlis. When the fighting is between two individuals, the Awra Majlis will identify the instigator and order him to gather a sheep, some oil, rice, or an amount of money, and to visit the house of the victim with his relatives and neighbors for an apology. The instigator is also ordered to pay a fine to the Awra Majlis.

Example: Recently, there was a fight between Akram and Shukh Khan. They were both badly beaten. The investigation by the Awra Majlis found that Shukh Khan was the instigator. Because both parties were hurt, the Awra Majlis ordered each man to perform an apology to the other; Shukh Khan was to go to the family of Akram first with a sheep as a sign of peace. He was also ordered to pay a fine of 1000 Afghanis because he was the instigator.

As a general rule, the instigator is fined and asked to apologize. The Awra Majlis try to tailor the punishment to the circumstances.

Example: Fighting erupted over the dowry of a girl. The future husband did not want to pay the dowry in full and determined to marry the girl by force. The relatives on both sides fought, resulting in many injuries. Mohammed Ismail Khan, the father of the girl, and Maseehullah, the father of the boy, were taken by force to the Awra Majlis for investigation. The boy's family was adjudged to have instigated the conflict. The Awra Majlis ordered the instigating party and its supporters to pay the dowry, as well as the damages sustained by the other party. They had to take all the wounded to Chagasaray hospital, or Jalalabad, and pay all of the medical expenses.

When the fighting is between villages, the Awra Majlis of the villages are called in to stop the fighting. If the conflict is important, the Landhyar Majlis will be consulted and an investigation undertaken.

II. Crimes Against Property

A. Theft

Nuristan is very poor, few people have jobs, and, as a result, thefts are rare. In many places, there is not even money with which to purchase items. There is no formal trade, but rather a system of barter and debt. The stealing of a small twig is considered a theft. Our researchers were told that there are virtually no burglaries, and thefts generally involve cattle. Because people are poor, however, theft is an extremely shameful act. When such an incident occurs, the village council immediately intervenes and investigates. It talks to the victim and other witnesses, tries to find the stolen property, and seeks to identify the perpetrator. The council, with the assistance of the Mullah Imam, will then decree a punishment. Generally, the perpetrator will have to return the stolen property, pay a fine to the owner equal to the value of the

property, and a fine to the Jirga of twice the value of the property. Often, the perpetrator must slay a sheep in the presence of the victim and another sheep in the presence of the Awra Majlis to be fully purified.

Example: Qasim Khan took the bull of Rostum to plow his field. Due to Khan's *carelessness*, the bull fell off a nearby cliff and the people below slaughtered it. The Awra decided that the meat of the bull should be divided between the two parties and half the price of the bull paid by each claimant.

Example: Hashim borrowed 140 kilos of wheat from Nasim for his own farm. When Hashim's wheat grew, he was to return the amount to Nasim. The weather was bad, there was a drought, and two years later Hashim had not returned the wheat. The Awra decided that Hashim had to return half the wheat immediately and the other half when it grew the following year. If it did not grow, he had to pay Nasim an equivalent amount of nuts and cumin instead.

When people from one village steal property from people of another village, the value of the fine is established by the village of the perpetrator.

In Central and Western Nuristan, where thefts involve goats and sheep and occasionally cows, the Jirgas will impose fines of three, four, and even five times the value of the property.

Example: A few years ago, three travelers in Nuristan -- a doctor selling medicine and two others collecting mushrooms -- had their money and mushrooms (25 kilos) stolen. They complained to the people of the Mangal mosque of the Kamdesh district and the village council ordered an investigation. Three perpetrators were identified. They were asked to return the doctor's

money, the 25 kilos of mushrooms, and to pay a fine of 12000 rupees to the victims.

Example: Recently, a tape recorder was stolen from the house of Morra; a few days later, neighbors heard the sound of a radio from the house of Mohamed Salim, a very poor man. The rumor was that he had stolen the tape recorder. The Awra Majlis ordered the search of his house and found the property. He claimed to have borrowed it. Before the jihad, the fine would have been seven times the value of the property; today it is only double. Because Salim was so poor, the Awra Majlis simply asked him to return the item and to sign a paper saying that he would never do it again. If he does, the fine will be seven times the value of the item. *Since this incident, Salim has grown gravely ill.*

Families of the perpetrators are held responsible in part for the fine if the perpetrators are not available.

Example: During the time of the Taliban, there was a robbery in a shop. A box of cigarettes and about 300 Afghanis were stolen. Two boys were suspected and the Awra ordered the search of their houses. A box of cigarettes was found in the house of one of the boys. The boys had gone and their relatives had to look for them. They went from village to village suffering a number of different problems. The families could not find them. Eventually, they heard the boys were in Iran. The families were distressed. The Awra Majlis had ordered a fine of seven times the price of the materials stolen and the exclusion of the boys from Nuristan. The families sent an oral message to the boys in Iran informing them of the “sentence.” The boys have paid the fine but are

still in Iran because they do not have permission to reenter Nuristan.

B. Trespass

Questions of land trespass all revolve around the determination of land ownership through purchase, inheritance, and now “preemption.” For a long time, women could not inherit land. Then the Awra Majlis, applying Sharia, allowed women to inherit one third, of the family property. Later and for the past 25 years, the concept of preemption has come into effect. If someone *captured* the land and worked it himself that person had preemptive rights over the *formal* owner. In addition, when land is being sold, the neighbors have the equivalent of a right of first refusal. If they decline the option to buy, others may purchase the land. The Awra Majlis are responsible for deciding these matters since there are no land-related documents in Nuristan.

Example: Faisal and Khan had a conflict over land. Faisal had sold his property to Khan in exchange for money. A document memorializing the sale had been drafted and was kept by Khan, who moved to another country a few years later. During that time, ownership of the property reverted to Faisal. When Khan returned, Faisal refused to give him back the land. The Awra Majlis were called upon. They decided that Faisal should keep the land because he had worked it, but he had to pay to Khan the market price of the land and the apportioned tax on it for three years.

Example: Two individuals wanted to buy the same land adjacent to their property. The conflict between them delayed the process and the Awra Majlis were called in. They decided that the owner on the western side should withdraw because he had other land at his disposal, and the property was then sold to the owner of the adjoining land on the east.

Inheritance questions are solved according to Sharia but the conflicts between heirs will often be decided based on the amount of time the person has used/worked the land.

Example: Two brothers inherited a piece of property from their father. One brother had cattle and used the land as pasturage for 20 years; the other brother did not put any claim to it because he had no animals. The second brother found this arrangement unfair. The Awra Majlis decided that the land should stay with the first brother until the second one acquired animals and then the Awra would consider the matter again. In the meantime, the first brother was to give the second brother a sheep *for immediate help*.

Land disputes between tribes or villages are much more difficult to solve. When a decision is made, the implementation becomes difficult.

Example: There was a dispute between the villages of Kamdesh and Kishtooz in Eastern Nuristan. The dispute began over half a century ago over a stream of water. People fought over the stream. Other tribes of Nuristan mediated the dispute, and the problem was resolved. However, a few years ago, some renewed fighting occurred. The people of Kamdesh won and they burned the houses of Kishtooz. The inhabitants of Kishtooz became refugees in Pakistan. Our researchers were told that the situation in Afghanistan over the last 25 years makes it difficult to control the power of the people of Kamdesh.

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PART FOUR

The Customary Laws of the Northern Region of Afghanistan



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INTRODUCTION

This section covers the Northern provinces of Afghanistan -- Badakhshan, Takhan, Samangan, Balkh, Jawzjan, and Sari Pol -- bordering Tajikistan, Uzbekistan, and Turkmenistan. The findings are based on the research of our Afghan colleagues and their conversations with village elders, Imams, leaders of the Ishmailia community, and government officials. Again, please bear in mind that our methods were limited. The following should be regarded as a mere snapshot of certain customary laws rather than a comprehensive academic description of the complex and diverse customary laws of Northern Afghanistan.

The differences between the Pashtun areas of Southern and Eastern Afghanistan, discussed in Part One, and the Northern Region addressed in this section, are many: two are particularly relevant to the customary laws -- the ethnic make up of the region and its geography. Unlike the South, which is ethnically homogeneous, the North is ethnically diverse. Historically, it was divided into small kingdoms governed by kings with ties to other kings and kingdoms on the other side of the Oxus River. These kingdoms were autonomous and refused to submit to the King of Afghanistan. In the late nineteenth century, King Abdul Rahman Khan attempted to unify the country by sending Pashtuns from the South to live in the North. As a result, today, the Northern Region includes Tajiks, Uzbeks, Turkmens, Arabs, followers of the religious leader Karim Agha Khan, (known as Ishmaelites), as well as Pashtuns. Their customs differ and sometimes blend together but they are district-specific and relate to the ethnic reality of each district.

PROCEDURAL CONCEPTS

In the North, there are three types of traditional tribunals: 1) Shura-Eslahi or Shura-Qawnii -- known as Majles-Eslahy in certain Uzbek communities; 2) Jirgas; and 3) Mookee Khans. Years of war, however, have given local commanders -- outside the authority of the central government -- increasing power and today, in many districts, local commanders will intervene and resolve disputes.

I Shura-e-Eslahi or Shura-e-Qawmi

A Shura, or reconciliation council, is generally headed by the Imam of the local mosque, accompanied by the Walkill, and one or more elder. The Imam is also known as Ulema or Mullah. The Walkill – or Kalanter – is the person assigned by the village to be the link between the village and the government. He is not necessarily an elder. He is given the position of Walkill generally because he is educated -- often the only educated man in the village. Because there is a presumption that the son of an educated man is also educated, the position of Walkill is often hereditary.

The size and exact composition of the Shura will depend on the gravity of the dispute. A Shura can be held at the village, district or regional level. If a case is of little importance -- land under 200 square meters, petit larceny, etc -- the Shura may consist of one Imam and two elders. In more important cases -- murder, adultery and land disputes over pasture rights -- the Shura may consist of 12 elders from different villages and different ethnic groups. The Shura generally meets in the mosque, which is considered a sacred and impartial place. It can also meet in a Madrassa or even in the house of a neutral person of good will who agrees to host the meeting. *If the weather is favorable, it can be held outdoors under the shade of trees.*

Before the proceedings begin, the parties deposit money with the members of the Shura as a guarantee, known in the Pashtun areas as Machalgha. If one party to the dispute does not accept the decision of the Shura, he will lose the Machalgha and will have to seek redress from national government courts. At that point, the elders will attempt to disassociate themselves from the matter. The parties to the dispute are present during the proceedings. When a woman is a party to the conflict, the Shura will ask her to appoint a representative. If the Shura suspects that the representative is not impartial, the woman will be asked to represent herself. The elders usually open the proceedings saying *sit down without faith but stand up faithful*, meaning that the decision must be made faithfully, honestly and impartially. The law applied is Islamic law as understood by the local Imam. When a criminal case is being adjudicated, people are notified so that many can attend and *learn a lesson from the punishment.*

II. Jirgas

In the North of Afghanistan, the terms Jirga and Shura-Islahy are used interchangeably. A Jirga, as used in the North, is not the structured traditional tribunal of the Southern Region described in Part One, unless it is one conducted in a closed Pashtun community where Pashtun traditions remain unchanged.

III. Mookees

A Mookee-Jamaat-Khana is the traditional tribunal of the Ishmaelite community. A number of districts in the Northern Region, such as the district of Echkashem in Badakhshan, are populated by followers of Karim Agha Khan, known as Ishmaelites. Mookees meet in the mosque of the Ishmaelites, known as Jamaat Khan, and would never meet in an individual's house. Mookee is also the name of the religious leader of the Ishmaelite community and of the representative who presides over these councils. Mookees are educated and have distinguished themselves by their religious knowledge. Even with their knowledge, they often seek out the advice of elders. They are paid by the Agha Khan and are known for their obedience to him.

Generally, a Shura-e-Jamaat-Khana or Mookee-e-Jamaat-Khana will include three Mookees and two to five elders. The two sides will present their story and the council will attempt to "heal" the wound or dispute, Malhamana. Ishmaelites may not oppose the decision of the Jamaat-Khana. Malchalgha, or pre-dispute deposits, do not exist in this forum.

IV. Local Commanders

Since the war, local commanders and armed men – outside the authority of the central government -- have become powerful and now resolve disputes. In the provinces of Faryab and Jawzjan, bordering Turkmenistan, the majority of districts are ruled by local commanders, who apply their own rules to decide contested matters. In the Almar district of Faryab Province, disputes are taken to the local commander, before the Jirga or Shura is consulted. In the districts of Qaysar Kohistan and Qaram

Qol, we found that if the local commander cannot solve the dispute, the parties will seek redress in national government courts.

In the district of Argue, which is primarily Uzbek, most conflicts before the war were solved by Majles-e-Eslahy, Shura-like councils consisting of Mullahs and elders. Although local commanders have taken over this role, tradition has survived and commanders have been known to send cases back to Majles-e-Eslahy.

In many areas, however, it is clear that the elders have allied themselves with the local commanders and their decisions are tainted by their allegiance. As a result, they have lost their authority in the eyes of the population.

SUBSTANTIVE CONCEPTS

In the Northern region, the customary law principles will depend on the ethnicity of the community and region. Accordingly, we will present our findings by regions.

I Badakhshan Province

The centre of the province is Faizabad and its population includes Tajiks, Uzbeks, Pashtun, and people of the Ismaelite religion.

A. Non-Ismaelite Districts

A judge working for the central government in Faizabad admitted that judges take traditional customs into consideration and seek the advice of elders in reaching decisions. In addition, because government courts take a long time to decide a case, judges often send cases to the Shura-e-Eslahy where elders will solve disputes according to customary principles. In most districts, our researchers were told that there is no crime. When there is, criminal matters are governed by fairly uniform rules.

(1) Adultery

Adultery is always a sensitive subject. Families will often do their best to hide the matter and Shuras may refuse to deal with adultery cases. Generally, if an unmarried woman and an unmarried man leave their homes together, the matter will be decided by the Shura. The man's family will be ordered to give money to the woman's family (because the man/boy is deemed stronger, he is always deemed responsible for the crime), and the two will be ordered to marry. If either the woman or the man is married, the dispute will be decided by the Shura in accordance with the Shariat. If the shura does not feel competent to decide the case, the matter will be sent to a government court.

(2) Abduction

Abductions involving married men and married women are taken to the courts. Abductions of unmarried men/boys and unmarried women/girls will be brought before a Shura where the punishment is often more lenient than the punishments imposed in the Southern region.

Example: Recently in the District of Iaftal, a young man left home with a young woman. The family of the young girl reacted "strongly," creating a risk of violence. Elders learned about the problem and sent two of their number to the family of the young man. The elders, accompanied by the father of the young man bearing two sheep and two bags of rice, went to the girl's family. The sheep represent a symbol of submission, an acknowledgment that whatever conditions are exacted by the family of the young woman, those conditions will be accepted. The father of the young woman, however, asked for money. The elders and the young man's father went back to the Shura; the Shura decided that the young man and woman should marry. They did and the two families became friends.

B. Ishmaelite Districts

In the districts of Eshkashem, Wakhan, Sheghnan, Zebak and parts of Darwases, the population is primarily Ishmaelite. In the past, the government sent Sunni Muslim judges rather than Ishmaelites to these regions; as a result, the people did not go to the courts, preferring to resolve disputes on their own.

Traditionally, the Ishmaelite community in these districts functioned under a royalty system. The family of King Abdul Jabar Maani reigned in Zebak, the family of Shaalem Khan reigned in Sheghnan and Eshkashem, and Mohabet Shah ruled in Darwase. These kings named a representative in each village to participate in the Shura. If the Jamaat-Khana did not find a solution, the king consulted the elders and then issued a decree. The system has been virtually abolished by the system of Mookee-Khan, described earlier. When criminal cases are sent to the Jamaat-Khana, the outcome is similar to the outcome of a Shura. That is, of course, in the *few* criminal cases that occur. Since the war, local commanders -- who are often Sunni Muslims -- have taken over the role of solving disputes

(1) Adultery

Adultery is a sensitive topic. If the man and the woman are unmarried, the Jamaat-Khana, with the approval of the two families, will order the boy's family to make a payment and the couple will be expected to marry. If the man and the woman are already married to others, the case will go to the court.

(2) Abduction

In this region, we were told that *there has not been a case of abduction*. If it were to happen, and a man/boy left with a woman/girl, the population would solve the problem by ordering them to get married.

(3) Theft

When the perpetrator is found, the property is returned and the perpetrator is subjected to some (undefined) corporeal punishment.

(4) Assault

The Jamaat-Khana will often order the perpetrator to give money and a sheep to the family of the victim

(5) Murder

In cases of murder, government authorities will arrest the suspect but will then try to have the king or his representative intervene. With the permission of the government, and at the request of the king's family, the Jamaat-Khana will order the perpetrator's family to give the victim's family, land, money or a girl.

II Takhar Province

In this region, the population is made up of Tajiks, Uzbeks and Pashtun. Commanders have power and reign. There is a lot less respect for tradition than in other parts of Afghanistan. In the past, however, the population felt that the government *behaved badly towards them* and they went to Jirhas/Shuras instead. The members of the Jirga/Shura often belonged to different ethnic groups and the elders intervened to find a solution.

(1) Adultery

The Shura will decide these cases, when they become known, according to the Shariat. If the man/boy and woman/girl are not married and the family of the woman/girl accepts the situation, the parties will be forced to marry each other. *The Pashtuns are far more sensitive about the issue and there are very few cases in their community.*

(2) Murder

In cases of murder, the Jirga/Shura will generally order the payment of a sum of money, known as Deiyat (or Bad in the traditional laws of the South), or the transfer of

a piece of land.

Example: Last year, in the district of Rostaq, someone was murdered by armed men. The case went to court but nothing happened. The parties wanted a solution and the government sent the case back to the Shura-e-Eslahy. The Shura ordered the family of the perpetrator (the perpetrator himself had fled) to pay Deiyat and to give a piece of land to the family of the victim.

III Kunduz Province

The population of Kunduz province includes Tajiks, Uzbeks, Arabs, Aimaq (considered Tajiks by some), and Pashtuns. Most of their disputes are decided by Jirgas/Shuras. An Uzbek elder told us that they will often invite other ethnic groups and particularly Pashtuns because they are familiar with the rules. In any event, depending on the importance of the dispute, the Jirgas/Shuras will meet at the village, valley, or district level, and they will generally ask for a guarantee (known in the south as Machalgha) before the proceedings begin. The deliberations of the Jurgas/Shuras may last several days.

A member of the court in Kunduz acknowledged that courts respect the decisions of the Shura-e-Eslahi when they are fair and invoke them to resolve disputes. An elder Pashtun from Kunduz added, however, that since the war elders have lost their reputation for objectivity. Commanders and armed men now exercise power locally and elders are increasingly allying themselves with them. Cases, nevertheless, are still sent to the Shuras/Jirgas for resolution.

(1) Adultery

Cases of adultery between married people must be determined by Shariat. Cases of adultery between non-married men and women are often decided by the Shura, which usually orders the individuals to marry each other and the family of the man to make a payment to the family of the woman.

Example: A woman had children with one husband. The husband left and she was forced by her father to marry another man. They had children together, but three years later her first husband returned. The dispute between all the parties became serious and the elders intervened. The father was ordered to give the first husband nine million Afghanis, printed on Dostum money, so that he could marry again.

(2) Murder

Murder cases are often resolved with a payment and a transfer of land or cattle.

A few years ago, there was a dispute between the Aimaq and Larkwabi tribes arising out of a killing between armed men on both sides. The perpetrators escaped and returned eight years later. The family of the victim collected signatures from the villagers and gave a letter to the council saying that they wanted the members of the Shura/Jirga to decide the matter. The council, consisting of eight elders and two mullahs, gathered and in the end, decided that the perpetrator's family had to give the victim's family six lots of 100 square meters of land and 21 sheep.

Recently, a man named Jan Mohammed was killed. The case went to the government court but for unknown reasons was sent back to the Shura/Jirgha. The Jirga resolved the problem by ordering the family of the perpetrator to give the victim 20 one hundred square meters of land.

One year ago, the commander of one district in Kunduz (Chardarah) was killed. The perpetrator, allegedly from

the tribe of Kalazi, was ordered to pay one million Afghani (the equivalent of \$20,000) to the family of the victim.

In the district of Dashte-Archi, different ethnic groups feel that today they have no rights. The commanders decide everything. One interviewee expressed his concern that simply talking to our researchers might put him in danger. In the past, problems were solved by elders and Mullahs convened in Jirgas/Shuras. Even cases commenced in national government courts were sent to local Jirgas for adjudication. The war has completely destroyed the district; people left the region and the customary system just disappeared. People are returning from exile, increasing the number of conflicts among the population. But rather than call upon tribal elders sitting in Jirgas/Shuras, the commanders intervene and decide disputes.

IV. Samangan Province

The population of this region consists primarily of Tajiks, Uzbeks, and Hazarats. There are few Pashtuns. The district of Araesoma is made up almost entirely of Hazarats. Each group has kept its own customs, and everyone tries to solve disputes through traditional methods for both practical and political reasons: the area is very remote, making access to courts virtually impossible, and people believe that government courts, rather than assisting them, make matters worse. People are scared of the government and only trust elders and Imams to deliver justice. Even now, when commanders and armed men have taken over and changed the society, Shuras still play an important role in resolving local disputes. In serious cases, people will get permission from the court before going to the Shura. In minor cases, they will go directly to the Shura.

(1) Adultery

These crimes are decided by the Shura in accordance with Shariat.

(2) Murder

Payment – Deiyat -- is again a common remedy.

Example: Two years ago, a person was murdered and the case went to the court. After six months, nothing had happened so the families got the matter transferred to the Shura, where the payment of Deiyat was ordered and the matter settled.

(3) Theft

Even in cases where the perpetrator is caught by the government authorities, the case may be transferred to the Shura. The perpetrator will be ordered to ask for forgiveness and to return the stolen goods. The perpetrator will also receive a corporeal punishment, administered in a public setting, where he will have to promise never to engage in such activity again.

(4) Abduction

A few years ago, a “respected” man in his tribe was kidnapped and the kidnapper asked for a ransom. The Shura intervened, ordered the ransom reduced, the victim freed, and the kidnapper to leave the district.

All matters involving women are difficult.

Example: Two boys wanted the same girl and both said that that the girl wanted him. No one knew the truth and the case became serious. The Shura intervened. It wanted to know which young man the girl preferred. As you know in a family, no one wants to admit that a girl likes a boy. In the presence of her family, the girl said nothing. The Shura asked the girl to appoint a representative. She appointed her father because she cannot do otherwise, even if the decision will affect her entire life. The father rejected both boys and the Shura agreed with this result.

The districts of Hazrat-e-Sultan and Tashqorghan in the Samangan Region are famous for their beautiful valleys, which are the subject of many Afghan songs. The chief of a valley is known as the Arbab and he sits on the Shura. Unfortunately, the Arbabs and other elders have allied themselves in recent years with the local commanders and armed men, and the community no longer trusts them judge matters objectively.

V. The Provinces of Balkh, Jawzjan and Sari Pol

The customs of these three provinces are similar. In fact, until recently, the Sari Pol and Jawzjan provinces were one province. The population is Tajik, Uzbek, Turkmen, and Pashtun, and the customary laws of this area depend on the ethnicity of the community rather than the geographic region or district. We will address them accordingly.

A. Tajik and Pashtun Communities

(1) Murder

The perpetrator is made to pay *Deiyat*. If the murderer has no assets and cannot pay, his family will be ordered to give a girl in marriage to the family of the deceased, and the resulting kinship will repair the wound between the families.

(2) Theft

The Shura will order that the stolen goods be returned to the owner and the *thief will be shamed and punished*. The punishment ranges from a fine, to public humiliation, to forced labor.

(3) Abduction

If a boy or a girl leaves his or her house voluntarily and moves to the house of another family, his or her own family may consider killing their “guilty” child. In cases of forced abduction, the family of the abducted girl may ask in turn to be given a

girl from the family of the abductor. The aggrieved family may also accept payment, or Deiyat, for the wrong committed against them.

(4) Adultery

In cases of mutual consent between the parties, the family of the boy or girl may ask for the other family to give them a girl. In a non-consensual case, the family of the boy or girl may consider murdering one or both parties.

B. Turkmen and Uzbek communities

(1) Murder

In these cases the population does not seek recourse from a decision-making body. Revenge is the rule. In the district of Shortipa, Turkmen talk of *washing blood with blood*. When a murder occurs, the murderer is killed. Payment is not an option. In the Balkh district, Tajiks, and Pastuns are also *very strict about murder and seek revenge*.

(2) Theft

The perpetrator will be asked to return the goods and often, in some districts, he will be beaten.

(3) Adultery

The population does not appear to seek a decision from a council or court of any sort. In cases of rape, *the same action is performed on the aggressor*.

CONCLUSION

This research has made it possible for the ILF to gain some insight into the thinking of judges, prosecutors, the ILF's own Afghan defense lawyers, and clients.

Understanding the customary laws of a country is indispensable to a successful rebuilding of a criminal justice system.