Complementarity and Conflict: State, Islamic, and Customary Justice in Afghanistan

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Table of Contents

Abstract[1]

In Afghanistan, legal pluralism is not mere theory: it is an omnipresent reality.

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The major normative sources - state statutory law, Islamic *sharì a*, and unwritten customary law such as the *pashtunwali* - have developed in fundamentally different historical and cultural contexts. Even today, various authorities continue to develop them, and competing institutions apply them. In the best scenario they complement each other, but many cases reveal fundamental divergence.

Two basic tensions mark the landscape. First, there is a precarious relationship between state-made law - in particular, the Constitution, statutes, and international law - and *sharì a*, which flows from religious sources. Both state law and *sharì a* constitute the normative basis of the state jurisprudence. Whereas the Constitution asserts that religious law is subsidiary to state law, in practice the opposite is usually true. Second, in Afghanistan, the state's extremely weak and very unpopular justice system must contend with far more effective non-state institutions, especially tribal councils that resolve disputes at the local level.

In recent years, the state justice system and tribal councils have faced competition from an unlikely source. The Taliban's shadow rule over parts of the country has allowed the formation of a network of mobile Taliban courts, whose verdicts are based on a fundamentalist interpretation of *sharì a*.

Due to this enormous diversity, one cannot rightly speak of a regulatory system or even a legal order. The complex reality is better described as a "patchwork" of norms. This article assesses the coexistence and interaction of the various norm complexes from the standpoint of legal theory. The emphasis will especially be on mechanisms, institutions, or informal practices used in the case of a conflict of norms. Several concrete cases drawn from criminal law allow an evaluation of the - presumably minimal - effectiveness of these regimes in the resolution of legal conflicts. Therefore, the following analysis is intended to provide more than a simple description of the current legal situation.

1. Law before the Court: Conflicts between Religious and State Norms

It has taken centuries for norms based on Islamic *sharì a* to spread to all regions of Afghanistan. It was only in 1896 that Emir Abdur Rahman was able to Islamize the last parts of the country by force.[2] Nevertheless, Islamic rules are rooted deeply in Afghan society. Only against this background can Afghanistan's legal pluralism be understood.

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2. The population of what was then Kafiristan ("land of unbelievers") had animistic, polytheistic, and shamanistic beliefs. Since Islamization, it has been known as Nuristan, "land of light." Max Klimberg, Nuristan, Encyclopædia Iranica, 2004 (online ed.), http://www.iranica.com.

1.1. Shari'a and the Traditional Role of the Judge in Afghanistan

German scholar Dr. Annemarie Schimmel describes *shari'a* as the "totality of Allah's rules related to human action."[3] This broad definition is more accurate than the widespread translation as "Islamic law" because *shari'a* encompasses much more than just the rules corresponding to the western concept of law. It also includes moral, ritual, and ethical rules for the behaviour of Muslims and their relationship to non-Muslims. Because of their structure and function, some parts of *shari'a* - particularly the norms concerning family, inheritance, commercial, and criminal matters - can of course be labelled law without giving rise to misleading associations.

1.1.1. Interpretations of Shari'a in Afghanistan

The sources of *shari'a* were systematized for Sunni Islam by Muhammad ibn Idris ash-Shafi'i in 9th century C.E. Baghdad, long before the Islamic conquest of the territory of today's Afghanistan. His doctrine of the "principles of jurisprudence" (*usul al-fiqh*) gives a comprehensive list of the sources of *shari'a*: the *Qur'an*, the *sunna* - which comprises the reports (*ahadith*; sing. *hadith*) of the Prophet Mohammad's sayings and deeds -, the consensus of legal scholars (*ijma'*), and reasoning by analogy (*qiyas*).[4] Shia *shari'a* scholars similarly relied on the *Qur'an* and the *sunna*. However, not only is the life of the Prophet Mohammad an obligatory model, but so too are the words and deeds of his daughter Fatima and the twelve imams who followed him. *Ijma'* is also recognized as a source of law, however, *qiyas* is not, although deduction by reason (*'aql*) is recognized. Both denominations of Islam are relevant for the Afghan legal culture, as about 80-85% of the population are Sunni and 15-20% Shia Muslims. The Hanafi interpretation of the *shari'a* deserves special mention because this Sunni legal school has prevailed in Afghanistan since the 8th century C.E. It is referred to in the present Constitution as a subsidiary source for judicial adjudication. The Hanafi teachings are considered rather moderate, allowing Afghanistan to gain the reputation of a religiously tolerant state until the 1970s.

Radical and fundamentalist views emerged in Afghan Islam in wake of the *jihad* against the Soviet occupation (1979-1989). The radical teachings were

3. Annemarie Schimmel, Die Religion des Islam, 1990, 54 (author's translation).

4. Different schools of shari'a supplement these sources of law with istihsan (a deviation from the rule favouring precedence), istislah (a judgment that decisions are made based on public interest without reference to the Qur'an or to sunna), and 'urf (customary law). Ludger Kü hnhardt, Die Universalität der Menschenrechte, 2nd ed. 1991, 143.

introduced primarily by foreigners supporting the *jihad*. They were also taken up by many young Afghans growing up in refugee camps who later formed the Taliban movement and overran Afghanistan between 1994 and 1996. The Taliban's religious and social ideas closely resemble Wahhabism, a movement that emerged in 18th century Saudi Arabia. From the outset, Wahhabites were characterized by militant intolerance of all non-Wahhabites, and they sought to return Islam to its roots in the Prophet Mohammad's times. Others consider the Taliban to have been most strongly influenced by the fundamentalist teachings of the Islamic Deobandi school.[5]

In addition, the Pashtun-dominated Taliban increasingly, though probably unintentionally, began integrating elements of Pashtun customary law (*pashtunwali*) into their interpretation of *shari`a*.[6] The inclusion of customary law (*`urf*) as a subsidiary source of law is generally recognized for *shari`a,* insofar as it does not contradict recognized Islamic rules. However, these recent developments in Afghan legal history have yet to be examined more carefully.[7]

1.1.2. Scholars and Judges

Already in the early days of Islam, the question arose as to who was authorized to interpret the rules of *shari`a*. A separate class of scholars (*`ulama*) evolved to interpret the *Qur`an*, thus leading to the construction of Islamic jurisprudence (*fiqh*), which, in turn, was dealt with by legal scholars (*fuqaha*). During the systematization of the material, they formed legal schools that remain of influence until today.[8]

The original Islamic communities did not have judges but mediators. Only in the Umayyad Caliphate did a class of judges (*qudat*; sing. *qadi*) develop who were relatively free in their decision-making and who incorporated local customary law into the *Qur`an*ic sources. Under the Abbasids, who replaced the Umayyads around 750 C.E., formal courts and a system of appeals courts were established.

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5. The institution called Dar ul-`Ulum ("house of knowledge") is located in the Indian city of Deoband. It is considered the most important Islamic theological center after the Al-Azhar University in Cairo. Ahmed Rashid, Taliban: Militant Islam, Oil and Fundamentalism in Central Asia, 2000, 132, 139.

6. For example, Taliban courts condemn murderers to death under their reading of shari`a but permit the victim's family to execute the condemned according to the Pashtun manner of dealing with blood feuds. Thomas Barfield, Afghan Customary Law and Its Relationship to Formal Judicial Institutions, 2003, 35.

7. Christine Noelle-Karimi, Die paschtunische Stammesversammlung im Spiegel der Geschichte, in: Rechtspluralismus in der Islamischen Welt. 2005, 177.

8. The four main Sunni schools of *shari`a*, which recognize each other mutually, are the Hanafi, Maliki, Shafi`i, and Hanbali schools. The Ja`fari schools of *shari`a* are dominant in Shia currents of Islam.

These judges were, in theory, independent of the government and were to make decisions based only on Islamic law.[9]

Even today, Afghan councils of *sharì a* scholars (*shura-e ` ulama*) claim the right to interpret the *sharì a*.[10] These religious councils convene at various levels throughout the country and the` *ulama* expect state institutions to align themselves with their opinions. They justify this authority with the traditional relationship between scholars and rulers - or at least their understanding of the relationship. The traditional view was that earthly rulers were to enforce rules in line with the interpretations of the ` *ulama*, while scholars, in turn, pursued knowledge independent of the ruling authorities. In March 2006, the head of the national *Shura-e` ulama*, Fazl Hadi Shinwari, quoted the following *hadith* in justification of this position: "The least worthy among scholars is he who makes visits to princes, and the worthiest of princes is he who seeks out scholars."[11] Of particular note is the fact that Shinwari at that point spoke in his capacity as the president of the Afghan Supreme Court, as well - he was carrying out the functions of the highest religious and highest legal offices simultaneously.[12]

1.2. Constitution, Statute, and International Law: Legal Imports without Recipient

The Islamic Emirate of Afghanistan which was set up by the Taliban in 1996 has been the only social order in recent times that claimed to be based solely on *sharì a*.[13] The law applied in the current Islamic Republic of Afghanistan consists of a combination of *sharì a* norms and laws that are mostly based on translations

9. Paul Dannhauer, Untersuchungen zur frü hen Geschichte des Qadi-Amtes, 1975.

10. This claim stems not only from their self-image as authorized to implement the universal validity of shari`a, but also their historical role. Until the late 19th century, they upheld a religious justice system. Their gradual decline began under the reign of Amir Abdul Rahman (1880-1901) with the introduction of state law making and courts. Ramin Moschtaghi, Organization and Jurisdiction of the Newly Established Afghan Courts - The Compliance of the Formal System of Justice with the Bonn Agreement, Max Planck UNYB 19 (2006), 535 et seq.

11. At the concluding meeting of a seminar organized in Kabul, Afghanistan by the Max Planck Institute for Comparative Public Law and International Law on Feb. 2, 2006 (author`s translation).

12. Shinwari, who had the benefit of neither a higher religious nor a legal education, received these positions as a concession by Karzai to the warlords and the Wahhabi-inspired fundamentalist Abdul Rasul Sayyaf, who counts Shinwari among his adherents. In 2006, the wolesi jirga refused to consent to another term as president of the Supreme Court for Shinwari. Carlotta Gall, Afghan Lawmakers Review Court Nominees, The New York Times, May 17, 2006.

13. This claim was misguided to the extent that many statutes continued to be applied as a practical matter and new statutes were adopted. This was true especially in regulatory areas not covered by shari`a, such as police law, public service law, and media restrictions. Later, when Taliban leader Mullah Omar had consolidated his power, he ruled increasingly by decree. In contrast to Iran and Saudi Arabia, however, the Taliban for the most part declined to establish administrative structures, in the sense of a modern state system.

of Ottoman, Egyptian, Soviet, European and other models which have found their way into the region since the early 1900s.[14] Importantly, legal norms of western origin were not brought to Afghanistan by a colonial regime. In contrast to many other countries in the Islamic world, Afghan rulers voluntarily introduced them as instruments of modernization. It should be noted, though, that other forms of coercion do exist, such as political pressure and dependency on foreign aid.

The 2004 Constitution of the Islamic Republic of Afghanistan formed the basis for a presidential democracy. The constitution-making assembly was the *Loya Jirga*, which is only convened in cases concerning the national interest. Since its creation, the Constitution has not enjoyed the development of a culture that actually reaches into society - much less asserted itself as a functioning part of Afghan life. Political conflicts among the legislative, executive, and judicial branches usually remain unresolved due to a lack of dispute resolution mechanisms such as a constitutional court.[15] Below the level of the constitutional institutions, the Constitution is largely unknown, which in itself is enough to undermine its applicability.

No less difficult is the situation with law making. The Afghan National Assembly consists of the *Wolesi Jirga* ("council of the people") and the *Meshrano Jirga* ("council of elders"). Besides being able to pass laws, the National Assembly is also empowered to decide the continued validity of older provisions. Therefore, statutes from various historical periods have survived the passing of the Constitution, and so far only a few of them have been replaced with new laws. For instance, provisions governing judges' official conduct stem from the brief democratic period (Criminal Code of 1976), the communist era (Code of Civil Procedure of 1990), the Taliban period (Public Servants Act of the Afghan Islamic Government of 1999), and the current constitutional era (Law on the

14. Reforms began under Abdul Rahman Khan, who at the end of the 19th century tended toward, above all, the Ottoman Tanzimat reforms. Amanullah Khan also looked to Turkey as a model when he introduced the first Constitution in 1924. Amanullah, however, was not able to realize his vision of a fundamentally modernized Afghan society. Along with Turkish influence, Egyptian law - and, through it, French ideas, as well - helped shape Afghan development. Over decades in the mid-20th century, Afghan jurists were in contact with especially Egyptian and French colleagues. During the socialist period, the Afghan government tended toward the Soviet model in restructuring the law. Moschtaghi, supra note 10, 537 et seq.

15. The conflict over the Wolesi Jirga's vote of no confidence in Foreign Minister Ragin Dadfar Spanta provides a current example. President Karzai has refused to remove Spanta from office and called on the Supreme Court, which supported the president's position despite having no authority to do so. This decision set off a persisting crisis of confidence between parliament and the Supreme Court. Ramin Moschtaghi, Aktuelle Probleme beim Rechtsstaatsaufbau in Afghanistan - Das Gutachten des Obersten Gerichtshofes zum Misstrauensantrag des Unterhauses gegen den Außenminister, Heidelberg J. Int'l L. 68/2 (2008), 509-540.

Organization of the Courts of 2005). Many of the provisions in these laws are inconsistent with each other, creating tremendous difficulty for Afghan lawyers because regulations governing conflicts of laws are still few and far between.

In article 161(6), the Afghan Constitution does provide that pre-constitutional law in conflict with the Constitution loses its validity. But the article is, at best, applied intuitively, as practitioners of law are usually unaware of it.[16] Moreover, the transfer of the western concept of law making failed to include the European canon of legal interpretation - i.e. rules such as *lex posterior derogat legi priori* and *lex specialis derogat legi generali*. Recent statutes drafted by foreign advisers further diversify the patchwork. For example, Italian lawyers in 2004 created a transitional criminal procedure that was significantly more abstract than its predecessor from the 1970s, and thereby overwhelmed Afghan practitioners, who, in unclear cases, continue to resort to the old, detailed provisions. The statutes governing illicit drugs and military justice, both from 2006, are no less problematic. They primarily serve to implement international strategies for combating opium trafficking and terrorism, and they are of conspicuously American origin. Very few lawyers are able to navigate these labyrinthine laws.[17]

Under international law, Afghanistan continues to be bound by its international legal obligations, as article 7 of the Constitution expressly recognizes.[18] Here, the same holds true as with the Constitution and statutory law: Afghan lawyers are almost completely unaware of international obligations that are directly relevant to practice - such as the International Covenant on Civil and Political Rights (ICCPR), ratified by the communist government in 1983. In short, law is being imported, but not implemented and is therefore not reaching its recipients.

1.3. The Constitution as a Conflicts Regime for Shari'a and State Law

The relationship between *shari'a* and state-made law - especially the Constitution, statutes, and international law - is addressed in the Constitution on two levels. First, there is the issue of which sources of law are to be considered in law

16. Many judges and prosecutors who have taken part on the Fair Trial Seminar organized by the Max Planck Institute for Comparative Public Law and International Law told the author and other project organizers that they use their own sense of fundamental rights and democracy to determine whether a norm conforms with the new Constitution or not.
17. These observations are based on conversations the author had with lecturers and professors, especially Prof. Dr. Hafizullah Danish of the University of Kabul, in courses on criminal law courses and legal procedure at the Max Planck Institute for Comparative Public Law and International Law.
18. Afghan constitutional law takes a dualistic approach to international law: treaties must be implemented into domestic law by an act of the legislator. Here, too, conflicts could be avoided by interpreting national law in conformity with international law.

making, and how inconsistencies are to be resolved. Second, the Constitution dictates which norms may, or must, provide the basis of decision-making in the state justice system.

1.3.1. Conflicts of Sources of Law in Law-making

Article 3 of the Afghan Constitution states, "No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan."[19] Some observers in 2004 considered this a de facto reintroduction of *sharì a*. In reality, the situation is not so simple. It is still unclear exactly what the "provisions of the holy religion of Islam" include. The language is markedly different to other constitutions, which explicitly elevate *sharì a* to a source of law[20] - so this cannot be intended, although Islamic factions in parliament do advocate this position. The wording leaves much room for interpretation, which has already led to heated disputes in parliament.

Article 3 of the Constitution is juxtaposed with article 7, which is addressed to the state, and thus to the legislator: "The state shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights." Advocates of reform use this norm to attempt to block the passage of *sharì a* norms that are inconsistent with human rights. One example is the Juvenile Criminal Code that the National Assembly passed at the beginning of 2008. Majorities in both chambers of parliament were of the view that the age of criminal responsibility was eighteen for men and seventeen for women. They relied explicitly on their interpretations of *sharì a* and article 3 of the Constitution. Opponents countered that under human rights treaties seventeen-year-olds could not be criminally responsible and declared the bill unconstitutional under article 7.[21] In the absence of rules on conflicts of law, the substantive conflict remained unresolved. Ultimately, President Karzai made the decision by refusing to sign the bill into law.[22]

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19. Quotations from the Constitution of the Islamic Republic of Afghanistan are taken from the English translation available at http://www.supremecourt.gov.af/PDFiles/constitution2004_english.pdf.

20. Examples include Iran, Mauritania, Saudi Arabia and Egypt.

21. Based on a conversation the author had with Prof. Shahla Farid of the University of Kabul, Oct. 20, 2008.

22. In 2009, a draft Shia Family Law that was passed by the National Assembly led to a similar controversy. President Karzai signed it after provisions grossly violating human rights were removed; among others, the age of marriage for female minors was changed from nine years old to sixteen years and an article allowing temporary marriages as well as an article prohibiting women from to leave the house without a male relative escort if they were to go to work, school or for medical treatment were removed. However, other provisions violating Afghanistan's obligations under the Convention on the Elimination of all Forms of Discrimination of Women and other international instruments remained in the document and became law. Lauryn Oates, A Closer Look: The Policy and law-Making Process

1.3.2. Conflicts of Law in the Justice System

Article 130 of the Afghan Constitution is addressed to judges and, by extension, the justice system of the state: "In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence and within the limits set by this Constitution, rule in a way that attains justice in the best manner."[23] Here, a conflicts regime seems evident, and at first glance it apparently places *shari`a* in a position subsidiary to the Constitution and basic law making. However, legal practice reveals the difficulties of the situation. Criminal cases like the following example particularly expose the precarious interrelations between *shari`a*, the Constitution, statutory law, and human rights.

2. The Prosecution of Convert Abdul Rahman

Afghan citizen Abdul Rahman converted to Christianity in 1990 while working for a Catholic aid organization in Pakistan. Three years later, he moved to Germany and Belgium, though he returned to Afghanistan after the end of Taliban rule, in 2002. By that time, his wife, with whom he has two children, had already divorced him because of his conversion. In Afghanistan again, Abdul Rahman sought custody of his daughters, clashing harshly with his family. In February 2006, he was arrested after his father reported him for violent behaviour. While in detention, Abdul Rahman admitted his Christianity, and the state charged him with apostasy and sought the death penalty. It relied explicitly on the Hanafi jurisprudence.

During the proceedings, an Afghan justice official suggested that Abdul Rahman could be declared mentally disturbed and therefore released.[24] Although the prosecution insisted on a judgment, Ansarullah Mawlazezadah, the presiding judge, sought another resolution: "We will ask him if he has changed his mind. If so we will forgive him, for Islam is a tolerant religion."[25] This followed the Hanafi jurisprudential approach, according to which an *`ulama* council is to speak with the apostate, make clear to him the error of his ways, and bring him back to the true faith. It is unclear whether such a discussion took place. Abdul Rahman,

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Behind the Shiite Personal Status Law, AREU 2009.

23. Article 131 of the Constitution permits the application of the Shia, instead of the Sunni-Hanafi, interpretation of shari`a in cases involving Shiites.

24. Wakil Omari, quoted in: Konvertit gestört?, die tageszeitung (taz), March 23, 2006.

25. Die Welt, March 23, 2006 (author's translation).

however, repeatedly and publicly made clear that he was not prepared to profess belief in Islam, even under threat of a death sentence.

On March 26, Judge Mawlazezadah sent the case back to the office of the prosecution due to "some technical as well as legal flaws and shortcomings."[26] He had instructed the prosecution to undertake a more thorough analysis of whether Abdul Rahman was competent to stand trial. Judge Mawlazezadah noted that the proceedings would have to be dismissed if he were declared legally incompetent. The judge further stated said Abdul Rahman's family reported that their son had been in psychiatric treatment in Pakistan. In testimony before the court, Abdul Rahman himself admitted that he had a mental-health problem and heard voices, although he maintained that he was nonetheless competent to stand trial.

The prosecutor, Abdul Wasi, also believed Abdul Rahman to be competent. The prosecution was planning to have Abdul Rahman analysed thoroughly to determine his competence,[27] but on March 27 the Attorney General of Afghanistan ordered his provisional release due to undue delay in the proceedings. Directly thereafter, the Italian government with the support of the United Nations brought him to Italy where he was granted asylum.[28]

2.1. Shari'a-oriented Positions

No passage of the *Qur'an* explicitly calls for the killing of apostates.[29] Abandonment of Islam (*irtidad* or *ridda*) appears in various suras only as a grave sin that will be punished in the hereafter. For example, sura 2:217 states, "Those among you who revert from their religion, and die as disbelievers, have nullified their works in this life and the Hereafter. These are the dwellers of Hell, wherein they abide forever."[30] Nevertheless, according to the traditional interpretations of all schools of *shari'a*, apostasy is to be punished with death.[31] All schools of *shari'a* do, however, agree that apostasy is not punishable when it occurs in a state of mental illness or under coercion.[32]

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26. Sayed Salahuddin, Afghan judge says Christian convert case has flaws, Reuters Canada, March 26, 2006.
27. Kommt Todeskandidat frei?, Die Zeit, March 26, 2006.
28. In 2003, Italy took over the role of "lead nation" for the reconstruction of the Afghan justice system. See http://www.rolafghanistan.esteri.it.
29. Shaikh Abdur Rahman, Punishment of Apostasy in Islam, 1972, 10 et seq.
30. Quoted at http://www.submission.org/suras/sura2.html#217. Other relevant suras include 3:72, 3:90-91, 4:137, 5:54, and 16:106. It is worth noting here that the Qur'an has full validity only in its Arabic original.
31. Werner Ende/Udo Steinbach (ed.): Der Islam in der Gegenwart, 1989, 190.
32. Ministry for Religious Matters and Sacred Foundations of Kuwait (ed.), Al-mausu'a al-fiqhiyya, vol. 22 (2003), 181-182; Clifford E. Bosworth et al. (eds.), Murtadd, in: Encyclopedia of Islam (online edition), 2006, last visited April 16, 2006.

In the course of the modernization of Islam, certain scholars have disputed the traditional view on the loss of faith. Respected scholars such as Grand Ayatollah Hossein-Ali Montazeri and Dr. Khaled Abou El Fadl, point to the fact that the *Qur`an* itself speaks of apostasy exclusively in terms of an individual's relationship with God and therefore applicable passages in the *Qur`an* are not enough to legitimate the killing of apostates in this life.[33] In addition, the death penalty was not carried out to the Prophet's time, and thus conflicts with the model behaviour of the Prophet.[34] Other *shari`a* scholars - among them, Muhammad Abduh, Rashid Rida, Mahmud Shaltut and Yusuf al-Qaradawi - differentiate between individual apostasy and an apostate who works actively against the community or who seeks to convert others. Only the latter type of apostate, they argue, should be punished with death, whereas the former should not be penalized.[35] However, this position is quite exceptional in the Islamic world.

In pre-Taliban Afghanistan, the last known execution for apostasy took place in the 1920s.[36] In the case of the apostate Abdul Rahman, not only judges, but also *shari`a* scholars almost unanimously demanded the death penalty. This shift in legal opinion suggests that Islam in Afghanistan changed during the decades of *jihad* and Islamist rule. Calls for execution included statements of Supreme Court President Fazl Hadi Shinwari and other members of the Supreme Court.[37] Abdul Raouf, member of the national *Shura-e`ulama* threatened, "We will not allow God to be humiliated. … We will call on the people to pull him into pieces."[38] Another prominent *shari`a* scholar, Maulavi Habibullah, told hundreds of clerics and students in Kabul that international obligations did not apply in the case of Abdul Rahman: "The Prophet says, when somebody changes religion, he must

33. Ayat-allah Montazeri: Har taghyir mazhabi irtidad nist ("not every conversion is apostasy"), Interview with Mahdi Jami, BBC Persian, Feb. 2, 2005, http://www.bbc.co.uk/persian/iran/story/2005/02/050202_mj-montzari-renegade.shtml; Khaled Abou El Fadl, The Death Penalty, Mercy and Islam: A Call for Retrospection, in: Erik C. Owens et al. (eds.), Religion and the Death Penalty: A Call for Reckoning (2004) 73-105; see also Clifford E. Bosworth et al. (eds.), The Encyclopaedia of Islam, vol. 7, 1993, 635.

34. Wael Hallaq, Apostasy, in: Encyclopaedia of qur`an, vol. 1, 2001.

35. Patrick Bannerman, Islam in Perspective, 1988, 140; Albert Hourani, Arabic thought in the Liberal Age 1798-1939, 1983, 237; Gudrun Krämer, Gottes Staat als Republik, 1999, 151-157. Yusuf al-Qaradawi, Fatwa on Intellectual Apostasy, http://www.islamonline.net/servlet/Satellite?cid=1119503545098&pagename=IslamOnline-English-Ask_Scholar%2FFatwaE%2FFatwaE.

36. Yohanan Friedmann, Prophecy Continuous: Aspects of Ahmadi Religious Thought and Its Medieval Background, 2003, 27 et seq.

37. Supreme Court judge Khoaja Ahmad Sedeqi is quoted as saying, "The Quran is very clear and the words of our prophet are very clear. There can only be one outcome: death." Barbara Slavin, Karzai under pressure to free Christian, USA Today, March 26, 2006.

38. Quoted in Syed Saleem Shahzad, Losing faith in Afghanistan, Asia Times, March 25, 2006.

be killed."[39]

Other religious figures, such as the Shia scholar Asif Mohseni, took more balanced positions, pointing to the dilemma that the state's Constitution guarantees protection of human rights on the one hand, and Islamic norms on the other.[40] The presiding judge also promised that he would decide the case in accordance with his constitutional obligations.[41]

Afghan legal scholars have heatedly debated the legitimacy of the death penalty ever since this case.[42] A majority of criminal law scholars seem to believe that capital punishment is legitimate and reasonable. As a starting point, they rely on article 130(2) of the Constitution, which states, "If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner." There is a gap in the law: neither the Constitution nor any law regulates the punishment for apostasy. Article 1 of the Criminal Code of 1976 expressly limits its scope of applicability to offenses defined as *ta'zir*. Apostasy, though, belongs to the *hudud* - the category penalized most severely under Islamic criminal law - because it involves violation of boundaries set by God. For *hudud*, article 1 of the Criminal Code provides, "Those committing crimes of *hudud*, *qisas*, and *diyat* shall be punished in accordance with the provisions of the Hanafi religious jurisprudence."[43] When determining whether the elements of apostasy have been met, Afghan legal scholars draw from *shari'a* scholars, who research and teach separately from jurists in their own university departments or at Islamic seminaries (*madaris*; sing. *madrasa*). They, too, consider implementation of the death penalty generally consistent with article 130(2) of the Constitution: there is no constitutional violation because article 1 of the Criminal Code provides the legal basis of a law that, in the sense of article 3 of the Constitution, does not contravene the provisions of the holy religion of Islam. In a talk with the present author, Dr. Hafizullah Danish of the University of

39. Quoted in Abdul Waheed Wafa, Preachers in Kabul Urge Execution of Convert to Christianity, The New York Times, March 25, 2006.

40. Id.

41. Ansarullah Maulawizada, quoted in Barbara Slavin, supra note 39.

42. Conversation between the author and Prof. Dr. Hafizullah Danish, Kabul, July 18, 2008. The arguments do not represent the views of Prof. Dr. Hafizullah Danish.

43. Shari'a contemplates four penal categories, systematized in the substantive criminal law. Hudud are the acts punished most harshly (e.g., apostasy, fornication, highway robbery). Qisas are punishments based on the principle of retaliation. Qisas are harsher than diyat, material compensation for loss or damages. Ta'zir include all other offenses whose punishment lies in the judge's discretion.

Kabul pointed out the circular reasoning in this argumentation - a point his fellow law professors seemed not to notice.[44]

At this point, the question arises as to whether one who converts acts in full possession of his or her mental capacities. This was discussed intensively in the case of Abdul Rahman. Some commentators saw the very fact that he converted to Christianity as an indication of mental illness.[45] This issue ultimately provided the only opportunity to release Abdul Rahman.

2.2. Human Rights and Constitutional Counterarguments

Some Afghan jurists reject the above approach. If the state fulfils its obligation to protect human rights, they argue, the rule on conflicts of laws in article 130 of the Afghan Constitution leads to the opposite conclusion. During the Abdul Rahman proceedings, a representative of the Afghanistan Independent Human Rights Commission (AIHRC) noted that article 18 of the Universal Declaration of Human Rights also includes the freedom to choose and change one's religion.[46] Additionally, article 18(2) of the ICCPR, ratified by Afghanistan, forbids subjecting anyone to coercion that impairs the freedom to have or adopt his or her religion or belief of choice. The Afghan state is obliged to protect this freedom - even if the Constitution explicitly grants the freedom of religion only to non-Muslims.[47]

Another argument against penalizing apostasy is the fact that the Afghan Constitution contains the principle of legality - specifically the principle of *nullum crimen, nulla poena sine praevia lege poenali* ("no crime, no punishment without a previous penal law"). Article 27(1)-(2) of the Constitution states, "No deed shall be considered a crime unless ruled by a law promulgated prior to commitment of the offense. No one shall be pursued, arrested, or detained without due process of law."[48] There are, however, strong arguments that the term "law" (*qanun*) here

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44. Conversation between the author and Prof. Dr. Hafizullah Danish, Kabul, July 18, 2008.

45. Pamela Constable, For Afghans, Allies, a Clash of Values, The Washington Post, March 23, 2006; Sultan A. Munadi/Christine Hauser, Afghan Official Calls for Release of Christian Convert, The New York Times, March 27, 2006.

46. Quoted in Barbara Slavin, supra note 39.

47. Article 2 of the Constitution states, "The sacred religion of Islam is the religion of the Islamic Republic of Afghanistan. Followers of other faiths shall be free within the bounds of law in the exercise and performance of their religious rituals."

48. This provision is simultaneously an expression of the fundamental shari'a principle of qubh-e 'iqab bila baian (roughly, no punishment with prior explanation, in the sense of a warning), which is based on sura 17:15: Ma kunna mu'azzabina hatta nab'asa rasula ("We never punish without first sending a messenger"). The common understanding interprets the "messenger" as notification of the threatened sanction.

refers to parliamentary statutes. *Qanun* derives from Ancient Greek *κανών* ("rule," or "standard"), and since the early stages of Islamic rule it has referred to provisions that specifically do *not* stem from Islamic sources because they govern subject matter such as administrative structures.[49] Classically, the term *qanun* is used in opposition to *ahkam-e islami* ("Islamic commandments"). The *shari'a*-based position, however, holds that *shari'a*, as "Islamic commandment," may not be *qanun*, but is so similar to *qanun* that it falls within the purview of article 27(1) of the Constitution.[50] Yet a strict interpretation of article 27(1), based on the rule of law, demands more than mere similarity between *ahkam-e islami* and *qanun*. The legislature would need to codify the rules of *ahkam-e islami* as formal *qanun*. Because Islamic criminal norms have not yet been laid down in statutory form in Afghanistan - which is the solution chosen by Iran, for instance - no recourse to Hanafi jurisprudence in criminal law is possible. Imposition of a *hudud* punishment for apostasy would violate article 27(1) of the Constitution and, by extension, article 130.[51]

2.3. Lessons from the Case of Abdul Rahman

While the Afghan legislator must reconcile the pressures of both *shari'a* and international law as sources of law without a conflicts regime, the Afghan Constitution offers the justice system, in theory at least, a clear set of rules. The Constitution and parliamentary laws take precedence, and *shari'a* - here, limited to Hanafi doctrine and, in exceptional cases, Shia doctrine - serves only to fill gaps in the law. In criminal law, the application of such doctrine is completely ruled out because of the principle of *nullum crimen* or, in some cases, because of violations of human rights.

In practice, however, the situation is different. Both judges and prosecutors draw on *shari'a* far more than the Constitution permits. There are various reasons for this, including the fact that different educational backgrounds lead to corresponding legal career paths. The majority of Afghan judges and prosecutors have had a *shari'a* education at a university or a religious school.[52] Thus, they

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49. Herbert Berg, Islamic Law, in: Berkshire Encyclopedia of World History 3 (2005), History Reference Center (online edition), last visited December 16, 2012.

50. The argumentation of Afghan jurists was described to the author by Mohammad Sadr Touhid-khaneh of the Max Planck Institute for Comparative Public Law and International Law.

51. Mandana Knust, The Case of an Afghan Apostate - the Right to a Fair Trial Between Islamic Law and Human Rights in the Afghan Constitution, Max Planck UNYB 10 2006, 600 et seq.

52. A 2006 survey found that 44% of judges had completed educations at shari'a departments, 16.1% at religious schools, 11.6% at law schools, 7.7% at other departments, and 20.5% at mere secondary schools. Livingston

have not studied the state's legal system and are more comfortable dealing with the norms they know. Secondly, Afghan legal studies have fallen to a low level in decades of war, chaos, and Taliban rule.[53] As a result, both legal scholars and practitioners have great difficulty dealing with complicated normative hierarchies, and are largely unfamiliar with basic legal doctrine or methodology. Thirdly, Afghanistan does not have a constitutional culture in which judges, prosecutors, and other practitioners could work toward protection of constitutional norms. The generally strong and conservative religiosity brings with it a tacit rejection of the Constitution as the highest normative source. At times, this is even openly stated: "Constitutions come and go, but *sharì a* remains."[54] This also implies a rejection of international law, particularly those norms which, in a conservative reading, seem irreconcilable with *sharì a*. Scholars, practitioners, and observers are discussing ways out of this conflict; however, their proposals mostly violate the fundamentals of international law and internationally recognized constitutional principles. For instance, some argue that article 3 of the Afghan Constitution qualifies the provisions of international law to the extent they conflict with *sharì a*. However, a constitutional norm cannot invalidate international legal obligations, as this would ignore the just-mentioned principle forbidding unilateral withdrawal from the ICCPR, the CEDAW (Convention on the Elimination of Discrimination against Women), and other treaties.[55]

This discourse reveals the actual and very understandable reason, why many Afghan jurists give precedence to *sharì a* when faced with conflicts between religious and secular norms. Their religious belief that *sharì a* is divinely ordained seems to leave them no other choice. In the case of conflict, they follow their faith and accept the violations of the Constitution and their oaths of office.[56] They accept the Constitution because it stands in general conformity with *sharì a* - but only to the extent of its conformity with *sharì a* in their view.

Armytage, Justice in Afghanistan: Rebuilding Judicial Competence After the Generation of War, Heidelberg J. Int'l L. 67 (2007), 190.

53. An LL.M. program worth its name has not yet been established in Afghanistan.

54. A judge expressed such sentiments to the author in April 2007 in Herat.

55. This does not mean that norms of international law should be considered superior to norms of constitutional law - that is, national laws that violate international law are not invalid - but the state in question nonetheless violates its international legal obligations.

56. For example, Judge Khan Mohammad Salimi of the appellate court in Herat expressed such an opinion at a Fair Trial Seminar of the Max Planck Institute for Comparative Public Law and International Law in April 2007. Under article 59 of the Law on the Organization and Jurisdiction of Courts of 2005, Afghan judges take an oath to respect and uphold the provisions of shari`a, the Constitution, and other laws of the land - enumerated in this order.

3. Law in the Village: Traditional Forms of Dispute Resolution

The second strand of conflict in the "normative patchwork" of Afghanistan runs between the state justice system and non-state institutions of dispute resolution, especially the tribal councils. A look at the history reveals how problematic the relationship has been. The central Afghan government has attempted to rule the people by laws, administrative systems, and judicial institutions since the end of the 19th century, but has been only moderately successful, even causing a bloody civil war in 1929 and 1978. Current efforts, therefore, represent not only a reconstruction of a legal order, but also an attempt to complete the interrupted reforms. Their success depends, among other things, on whether state and traditional forms of dispute resolution can be successfully integrated and whether rules on conflicts of norms can be successfully introduced.[57] However, UNDP-sponsored efforts to introduce legislation intended to create linkages between state and non-state justice systems failed in 2011. In 2014, a group of Afghan jurists, elders, ulama and civil society activists developed an innovative model of interaction between the two spheres on the basis of the "Basic principles on the use of restorative justice programs in criminal matters" of the United Nations (ECOSOC Resolution 2002/12), which could resolve the problem in the future.

3.1. Non-State Dispute Resolution Mechanisms

The Afghan government and its formal judicial institutions have had limited influence since the state's structure was established.[58] This is especially true in rural and less accessible regions where the majority of the Afghan population lives. The Afghan state has increasingly been able to press further into remote regions through construction of streets and communication systems, as well as through expansion of military and police forces and its administration; nevertheless, the levels of societal autonomy and self-organization have remained remarkably high. This is in part due to the fact that no colonial regime ruled and transformed Afghanistan. Furthermore, exercising control over these sparse mountainous territories, deserts, and steppes has offered little economic or political benefit to the state.[59]

Even today, the social order and dispute resolution mechanisms still rely primarily

57. Ali Wardak et al., Afghanistan Human Development Report 2007: Bridging Modernity and Tradition - The Rule of Law and the Search for Justice, Kabul: Center for Policy and Human Development, 2007, 91 et seq.
58. Ahmad Shah Durrani's rise to the position of emir in 1747 is considered to mark the emergence of Afghanistan as a state entity. Martin Ewans, Afghanistan - A Short History of its People and Politics, 2002, 29 et seq.
59. Barfield, supra note 6, 3

on non-state structures and norms. Intra-familial problems - such as disputes over terms of marriage, divorce, inheritance, or domestic violence - are resolved within the private sphere of the Afghan extended family whenever possible. Such disputes are not made public so as to preserve the family's honour and to avoid burdening outsiders with the family's problems. When family disputes do spill into the public sphere, or when multiple families are involved, local and tribal institutions stand ready to settle the conflict. The most important dispute resolvers are the tribal councils.[60] Over centuries and in separate, more or less autonomous communities, these institutions have developed norms to govern communal life. The legitimacy of these norms, which are passed down orally, rests on consensus within the communities.

As late as in the late 19th century did a formal justice system emerge in the course of expanding statehood. This meant that judges began ruling on cases in the name of the emir. Formal judicial influence, however, did not extend beyond the big cities into rural areas until the 20th century. Even when the expansion of the justice system was at its peak in the 1960s and 1970s, tribal councils remained more important, at least at the village level, than the state courts in district and provincial capitals. Long years of *jihad* and civil war led to the collapse of the state justice system in the 1990s, allowing tribal institutions to increase their influence again.[61]

The structure and rules of dispute resolution of these informal mechanisms are inherently dynamic. Structural and regulatory changes reflect changes in the society and have thus accelerated significantly in the last thirty years.

3.2. Ethnic Peculiarities

Afghanistan is an ethnically and culturally diverse country, in which no single group is dominant over all others. The largest, traditionally most powerful group, the Pashtuns, makes up about 40% of the population but they are, similar to all other groups, fragmented into city populations, tribal communities settled in rural areas, and nomadic groups. Around 30% of Afghans are Tajiks, spread across the country in varying forms of settlements and communities. Smaller groups of Hazaras (10%), Uzbeks (8%), Aimaks (4%), and Turkmens (3%) are

60. Additionally, district administrators, clerics (`ulama), chiefs of police, and others resolve disputes. The Asia Foundation (ed.), Afghanistan in 2012: A Survey of the Afghan People (2012), 143.

61. There were also new structures typical of wartime, such as the shuras of the Mujahedin leader and the shari`a-shuras of individual military commanders. After the war, their importance diminished. Thomas Barfield et al., The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan, 2006, 2 et seq.

more homogenous.[62] Traditions and rules of dispute resolution vary by ethnicity and region. Some evince a high degree of coherence, particularly the Pashtun decision-making culture.

3.2.1. The Pashtun Jirgas and Pashtunwali

The state judicial institutions are particularly weak in the southern and south-eastern parts of the country, which is where the original Pashtun settlements are situated.[63] The Pashtuns generally use tribal councils, called *jirga*s,[64] to resolve disputes. These *jirgas* comprise men of a high social standing, i.e., elders, heads of families, and religious dignitaries. With the parties' consent, outsiders with useful expertise may be asked to participate. However, *jirga*s do not make decisions. The responsibility to resolve the dispute lies exclusively with the parties, although in serious cases a *jirga* does have the right to compel an agreement from parties who are not willing to compromise. Should a party refuse to accept a *jirga*'s unanimous recommendation, both sides can be made to exchange a valuable forfeiture. .[65]

The basis of dispute resolution in the Pashtun *jirga* is tribal law, called *pashtunwali*. It can also be seen as an honour codex , because honour (*ghairat*) is among the highest values, along with individual autonomy and equality. *Pashtunwali* includes seemingly archaic traditions, such as retributive vengeance (*badal*), because of its ancient, pre-Islamic origins. A harmed party can take vengeance through retributive acts, but also materially through seizure of money or goods, or through marriage.

Hospitality (*melmastia*) also ranks among the highest values. It is closely related to the *nanawat* (literally, "admission," with a dual sense of forgiveness and asylum). Immediately upon speaking the word, *nanawat* must be granted, even to one's worst enemy. Vengeance is therefore executed only in confrontational cases involving basic subsistence or survival. A person who does not grant *nanawat* when asked for forgiveness is considered ignoble and brings shame (*sharm*) and disgrace on himself.

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62. Estimated ethnic demographics are based on various, sometimes highly divergent sources, particularly the CIA World Fact Book, available at https://www.cia.gov/library/publications/the-world-factbook/geos/af.html#People, and Louis Dupree, Ethnography of Afghanistan, in: Encyclopaedia Iranica, vol. 1, 1989, 495-501.

63. The state's sphere of control here is de facto limited to the larger provincial capitals.

64. The Turkish term jirga originally meant "circle" and refers to the congregation of a small or large group for consultation. The Academy of Sciences of Afghanistan (ed.), Pashto Descriptive Dictionary, 1978, 1272.

65. Alef-shah Zadran, Socioeconomic and Legal-political Processes in a Pashtun Village, Southeastern Afghanistan, 1977, 217 et seq. Zadran's based his study on research in the province of Paktia in the 1970s.

Practices such as *nanawat* are often ritualized. For instance, in the case of asking for forgiveness, the *jirga* can direct relatives of the guilty party to send delegates to the victim's house. Often the delegation includes elders and women who, accompanied by a mullah, present the injured family with a sheep or other gifts. The sheep is often slaughtered at the house's threshold. Forgiveness is asked for in the house, and it may not be withheld.

3.2.2. The Shuras and the *'urf*

The rural Pashtuns traditions are unique among ethnic groups in Afghanistan. However, outside of the larger cities, the Tajiks, Hazaras, Uzbeks, Turkmen, and other ethnicities also use councils, usually called *shura*[66] or *majlis*[67] to resolve their disputes. In contrast to the Pashtun *jirga*, these are traditionally temporary institutions, which are convened ad hoc for specific disputes. Depending on the facts and subject matter of the case, they can include family members of the parties, elders known as "white beards" (Persian *rish-safid*; Uzbek/Kyrgyz *aqsaqal*), mullahs, and other members of the local community. In sensitive private matters, however, the group can be limited to members of the families involved.[68]

The Tajiks have no coherent body of customary law or any honour codices, and they reject independent normative orders, such as *pashtunwali*, as un-Islamic.[69] Instead, they rely on the local understanding of *shari'a* - which of course varies in the absence of recognized, official teachings - and on local tradition as a subsidiary basis for decision-making. This practice is, in principle, in line with most interpretations of *shari'a*, which permit the subsidiary application of local, non-Islamic customary law known as *'urf*.

A hybrid of council and court is widespread among the Hazaras. The so-called *maraka*s do not have a predetermined composition, but do make binding decisions. The basis for decision-making is the local interpretation of *shari'a* according to a Shia-Ja'fari understanding.[70]

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66. The term shura originally meant "consultation," "the seeking of advice," and stems from pre-Islamic times. In the Qur'an, it is considered praiseworthy (suras 3:159 and 42:38). For further information on the councils in Afghanistan, see Lynn Carter/Kerry Connor, A Preliminary Investigation of Contemporary Afghan Councils, 1989.

67. Majlis stems from the Arabic linguistic root j-l-s for "to sit (together)" and in the Islamic world refers to various convened groups like parliaments (Turkey, Indonesia, etc.) and religious ceremonies (e.g., to honour the Shia martyr Husayn ibn Ali), but also to rooms in which one receives guests (e.g., on the eastern Arabian peninsula).

68. The collapse of state structures during the years of war, however, led to an institutionalization of the shuras, which regularly met in more definite compositions and regulated local matters. Barfeld, supra note 6, 31.

69. Statement of the director of the huquq divisions of the province of Badakhshan, Alhaj Ashur Mohammad, in conversation with the author on Sept. 28, 2007.

70. The International Legal Foundation (ed.), The Customary Laws of Afghanistan, September 2004, available at

The *jirgas*, *shuras*, and *maraka*s represent the best-known and most widespread traditional forms of dispute resolution. The limited literature on Afghanistan's ethno-legal systems describes the further structures and norms of, among others, Central-Asian Arabs in Kunduz,[71] the Kyrgyz of the Wakhan Corridor,[72] and the Nuristanis in the eastern part of the country.[73]

3.3. Collisions and Conflicts Regimes between State Justice and Tribal Institutions

3.3.1. Unequal Competitors: A Comparison

Fundamental differences distinguish the dispute resolution mechanisms of the state's justice system from the *jirga*s, *shura*s and *maraka*s. These differences complicate attempts to combine state and non-state mechanisms.

The differences begin with the norms underlying dispute resolution. The state justice system is based on the Constitution, statutory law, and ratified international law, i.e., written norms of national origin and *shari a*, which claims universal validity. Furthermore, the goal of the state justice system is to treat all Afghan citizens equally before the law and to afford them legal certainty through predictability of decisions. In contrast, the dispute-resolution rules of the *shura*s and *jirga*s are decidedly limited to the local community or to the extended family or tribe. Generally, there is not a distinguishable system of rules but a set of unwritten moral and ethical principles and values. These provide orientation for consultations but leave much room for flexible resolutions. Moreover, the distinction between criminal and civil law, which stems from the European legal traditional, plays no role for the *shura*s and *jirga*s.

In regard to the procedural and institutional structures, the tribal councils and the state courts are worlds apart. Council members come from the community in which the dispute in question arose and their consultations aim toward consensus among all those involved. In contrast, the state's justice system makes decisions in which one party is victorious over the other, or in which a criminal is condemned

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www.theilf.org. For an older study, see Robert Canfield, Hazara Integration into the Afghan Nation, Occasional Paper of the Asian Society, 1970.

71. Thomas Barfield, The Central Asian Arabs of Afghanistan: Pastoral Nomadism in Transition, 1984; Thomas Barfield, Weak Links on a Rusty Chain: Structural Weaknesses in Afghanistan's Provincial Government, in: Revolutions and Rebellions in Afghanistan, 1984, 170-183.

72. Nazif Shahrani, The Kirghiz and Wakhi of Afghanistan, 1979.

73. Schuyler Jones, Men of Influence in Nuristan, 1984; Ahmad Yusuf, Emergence of the Ulema as Political Leaders of the Waigal Valley, 1994.

but the injury to the victim is not considered. In order to achieve an unbiased trial, state justice specifically appoints non-members of the local community as judges, as community ties could affect their impartiality.

In criminal law, a judicial decision complicates the restoration of peace within a given community. Criminals are often stigmatized as "bad" and, thus, "other," and they may be excluded from the community by prison sentences. Unlike formal courts, councils seek ways to reintegrate criminals into the community. The Pashtun principle of *nanawat* - that the victim must forgive the wrongdoer, if asked - exemplifies this desire to reintegrate. *Shari a* punishments, such as the payment of blood money (*diyat*), are oriented similarly. Such integrating mechanisms are often considered far more effective in combating and preventing criminality than socially controlling the individual through exclusion and re-education.[74] On the other hand, the verdicts of the *shura*s, *jirga*s, and *maraka*s, especially in the area of criminal law, violate norms that the state guarantees its citizens. For instance, under *pashtunwali*, *jirga*s can resolve violent conflicts by recommending the marriage of a woman from the offender's family into the victim's family. Such practices cannot be reconciled with the Constitution, statutory law, or human rights. They have, however, reportedly become less common in recent years and are purportedly virtually absent in ethnic groups other than Pashtuns.[75] Furthermore, taking in consideration that the Constitution guarantees men and women equal rights, the fact that councils almost always exclude women from the decision-making process appears problematic. Ultimately, the local and tribal institutions' impartiality should not be overestimated. In regions ruled by warlords or insurgent groups, these rulers exercise influence also over the institutions of dispute resolution.

However, the state justice system has its faults, too. Major weaknesses include the notorious lack of sufficiently educated judges and other justice personnel, as well as high susceptibility to external influence.[76] The ratio of about 18,000 citizens for every judge[77] in a post-war society full of severe, violent conflict

74. John Braithwaite, Crime, Shame and Reintegration, 1989.

75. Chris Johnson/William Maley/J. Alexander Thier/Ali Wardak, Afghanistan's Political and Constitutional Development, 2003.

76. Jane Stromseth/David Wippman/Rosa Brooks, Can Might Make Rights: Building the Rule of Law after Military Interventions, 2006, 233.

77. In his study, Livingston Armytage put the total number of judges at 1412. Since then, around 400 further judges have taken office; thus, there are approximately 1800 judges for a population of circa 32 million. In 1972, the ratio was almost exactly the same, with 679 judges for circa 12 million residents. Armytage, supra note 54, 186; Mohammad Hashim Kamali, Law in Afghanistan, 1985, 207, 230 et seq.

already suggests that the greater portion of disputes must be settled outside of state institutions. Studies confirm this assumption, with estimates of informal dispute resolution at approximately 80%.[78] Significant distrust of state justice institutions within the population contributes to this high quota, as judges and prosecutors are often considered incompetent and corrupt.[79] This is not surprising, given the poor state of legal education and the underpayment of justice-system personnel. In a systematic, country-wide survey in 2012 only 50% of participants said they trusted the justice system, which had thus fared far worse than the army, which 93% trusted, the police at 82%, and religious leaders at 74%, and non-governmental organizations at 53%. Only political parties and local militias ranked lower than judges and prosecutors.[80]

Accordingly, it is not surprising survey participants said that when dealing with a crime, they consider turning not only to the police (44%), but also to tribal leaders (22%) or the local *shura* or *jirga* (32%).[81] Some of the reasons for this trust have already been discussed, but it is also partly founded in the fact that in Afghan culture the elderly have an especially high social standing and are considered wise and just. The parties of the dispute usually know and trust the arbiters because of their knowledge of local traditions and circumstances. Furthermore, the *shura*s, *jirga*s, and *maraka*s resolve disputes without delay or costs for the parties. Also, lack of basic legal knowledge and widespread illiteracy discourage many Afghans from seeking out state justice. Judicial procedures are based on written norms and must be advanced by way of a written plea. Therefore, for many Afghans state justice represents a loss of control over the proceedings and an unpredictability of outcome, as well as additional costs for letter drafters or attorneys.[82]

3.3.2. The Huquq System as Conflicts Regime

The divide between state and non-state mechanisms appears large at first glance; however, it is bridged to some degree by a widespread system of Ministry of Justice offices, called *daftar-e huquq*, or *huquq* offices, after the Islamic term for individual rights (*huquq*; sing. *haq*). *Huquq* offices are available to answer

78. Ali Wardak et al., supra note 77, 8.

79. In 2012, 34% of those surveyed indicated that they had to pay bribes at least occasionally when dealing with judicial institutions. The situation was similarly troubling with healthcare (36%) and the police (31%). Other institutions frequented by citizens have also proven susceptible to corruption. The Asia Foundation, supra note 62, 151.

80. The Asia Foundation, supra note 62, 84.

81. Id., 43.

82. For similar findings with respect to pre-war times, see Barfield, supra note 6, 27 et seq.

citizens' legal questions in almost all districts of the country.[83] Personnel at the offices, at least according to the official statements, have Islamic or legal schooling. The focus of advice is on civil law. For the most part, these officials have four tasks to fulfil: referring conflicts to the *shura*s or *jirga*s, or to state institutions, independent mediation, case administration, and education of the public about dispute-resolution mechanisms.[84] They play especially important roles in conflicts over land ownership and in protecting the rights of women and children. *Huquq* offices already performed these functions before the current war.[85] There is no reliable data on case frequency and office effectiveness, but an upward tendency in citizen trust and a concomitant increase in number of cases are apparent.[86]

In practice, *huquq* offices use questionnaires when taking on new cases. Initially, they decide whether the matter is one of criminal or civil law, and, if they suspect a crime has been committed, they must refer the case to the police or the office of the prosecutor. In civil law matters, they investigate the underlying facts and collect as much evidence as they can. If the conflict requires further attention, the *huquq* office refers the matter to an appropriate *shura* or *jirga*. If the *shura* or *jirga* reaches a resolution, it notifies the *huquq* office in writing, and the case file is closed. If the *shura* or *jirga* fails to obtain a settlement, it reports to the *huquq* staff, who then mediate further on the basis of state law, unlike the *shura* or *jirga*. If this second round of negotiations is unsuccessful, the matter is referred to the court of jurisdiction. In interviews, high court judges,[87] prosecutors,[88] and heads of *huquq* offices[89] in the north-eastern Afghan provinces expressed satisfaction with the

83. Gaps exist especially in particularly unstable Pashtun provinces such as Kandahar and Helmand where civil servants can perform their functions only under life-threatening circumstances, but gaps also exist in other remote areas, as well. Rebecca Hekman, The Hukuk Department in Afghanistan's Justice System, unpublished paper, 2007, 9.

84. The Ministry of Justice of the Islamic Republic of Afghanistan, Rights (Huqooq) http://www.moj.gov.af/rights.html.

85. The huquq structure was set up in 1921, although it presumably served initially only as a secretariat within the Ministry of Justice. The employees acted as case coordinators and mediators only after the mid-1970s. In the communist period, the structure was overhauled as an instrument of modernization, and later it became an instrument of Taliban rule. See the contemporary account of Abdul Qadir Adalatkhah, former deputy director of the huquq division of the Ministry of Justice, in: Hekman, supra note 86, 6 et seq.

86. Id., 12.

87. In September 2007, the author held conversations with chief judges of the provinces of Kunduz (Maulawi Murad Ali Murad), Takhar (Mohammad Mostam), and Badakhshan (Qari Abdul Shukur).

88. In September 2007, the author held conversations with chief prosecutors of the provinces of Kunduz (Hamidullah Abed), Takhar (Shir Ali Sheenwary), and Badakhshan (Najeebullah).

89. In September 2007, the author held conversations with directors of the huquq divisions of the provinces of Kunduz (Abdul Qodus Khan) and Badakhshan (Alhaj Ashur Mohammad).

interlinked state and informal mechanisms for dispute resolution.

The *huquq* offices' function as mediators is provided in the Afghan legislation, but a legal basis for referring conflicts to *shura*s or *jirga*s does not exist. *Huquq* offices operate in a precarious position: although non-state dispute resolution is technically illegal,[90] they know that the personnel and physical resources of the state's justice system are, by far, insufficient to come even close to handling the high number of cases. Despite some current progress in reinforcing the justice system, experts estimate that it will be decades before the state's legal institutions are able to carry out their mandates effectively across all regions.[91] Among the responses that have been discussed in recent years is the establishment of reconciliation courts (*mahakim-e islahiya*) based on the 1920s model.[92] However, some voices in Afghanistan's government and civil society oppose this suggestion and reject as unconstitutional any formal integration of the *shura*s, *jirga*s, and *maraka*s into the state justice system. A different model of communication and interaction between the two spheres, combined with express limitations of the matters councils of elders may resolve, seems advisable.

3.4. The Stoning of Alleged Adulteress Bibi Amina

Cases in which state justice conflicts with *shura*s, *jirga*s, or *maraka*s are generally hardly documented and thus cannot be easily reconstructed. The following case is based on newspaper reports[93] and interviews this article's author conducted with officials from state institutions in Badakhshan province.[94] It involves the *shura*'s handling of actions considered to be punishable. The following discussion is not the only version of the case, but the evidence suggests that this account, or

90. This is how Prof. Hamida Barmaki, professor of civil law at the University of Kabul, described the situation in conversation with the author on Nov. 6, 2008.

91. Conversation between the author and Dr. Ali Wardak, Center for Policy and Human Development, Kabul, on July 17, 2007.

92. Courts of reconciliation were established in all provinces according to article 55 of the first Afghan Constitution of 1923. The arbitrators were named from among the ranks of "respected persons known for their trustworthiness" under article 211 of the Organization Act of 1923. No formal education was required. In matters of civil law and commercial law, they negotiated amicable settlements, and only in cases where such agreement could not be reached would a case proceed to a court of first instance. Reconciliation courts were absolved in the mid-1930s in favour of shari'a courts. Kamali, supra note 79, 212 et seq.

93. Mónica Bernabé , Cita con el mula lapidador, El Mundo-Cronica, Nov. 11, 2007, 1-3.

94. Conversation with Wahiduddin Arghun, head of the provincial office of the Afghanistan Independent Human Rights Commission in Badakhshan, on July 22, 2008; conversation with Nadjibullah, chief prosecutor in Badakhshan and investigating prosecutor in the case of Bibi Amina, on July 23, 2008; conversation with Rashid, vice chief judge of the appellate court of the province of Badakhshan, on July 23, 2008; conversation with Alhadj Ashur Mohammad, director of the provincial office of the Ministry of Justice's huquq office in Badakhshan, on July 24, 2008.

something very similar, is what actually took place.

In April 2005, residents of the village Panjdaran in Spingul Valley near Faizabad, the capital of Badakhshan province, saw 29-year-old Bibi Amina alone with her alleged lover, Mohammad Karim. Further details of the situation are not known. Bibi Amina had been married to another man for years - a marriage arranged by their parents. Shortly before the incident, the husband had returned from Iran, where he had lived for five years. Bibi Amina had already tried to divorce him, arguing that he could not economically provide for her. This is grounds for divorce under article 191 of the Afghan Civil Code, which allows a woman to apply for divorce (*tafriq*) if her husband refuses to support her and apparently has no estate or assets.[95] Bibi Amina thus had good prospects of being granted a divorce.

With Mullah Mohammad Yousuf presiding, the local *shura* deliberated on the case for two days and decided that Bibi Amina must be executed for adultery.[96] Her companion was sentenced to 100 lashes with a whip.[97] It is doubtful whether the strict Islamic rules of evidence were observed.[98] All village residents, including Bibi Amina's mother, reportedly supported the decision. On April 21, 2005 a group of men buried Amina up to her neck in the ground. Reportedly, seventy people took part in the stoning, among them her father and husband.[99]

News of the killing of Bibi Amina quickly spread beyond the valley. The police headquarters in Faizabad sent a large squad to the scene of the incident, provisionally arrested eighteen suspects, and finally transferred Bibi Amina's husband, her father, and three cousins, who jointly accepted responsibility for the

95. The husband's temporary financial viability, however, does not suffice; under article 192 of the Civil Code, the court can grant him a three-month period, after which divorce is granted only if he is still unable to provide support. A divorce might also have been granted under article 194 of the Civil Code for extended absence of the husband without reason. Kabeh Rastin-Tehrani, Das afghanische Familienrecht und Grundzü ge anderer islamischer Familienrechtsordnungen (working title), chapter E.IV.c (forthcoming 2009).

96. This punishment of married adulterers derives from the sunna.

97. This punishment for unmarried adulterers can be found in the Qur'an, sura 24:2.

98. In conversation with the author on July 23, 2008, Nadjibullah, chief prosecutor in Badakhshan and investigating prosecutor in the case of Bibi Amina, expressed doubt on this point. Shari'a indeed envisions the punishment for adultery, but it can only be executed if four males witnessed the act. If a husband accuses his wife of fornication, no further witnesses are necessary. He must repeat the accusation four times and on the fifth repetition call the curse of God down onto himself if he is lying (li'an). The accused wife can reject the accusation in the same way. Khoury/Hagemann/Heine, Islam-Lexikon A-Z, entry: Strafrecht.

99. Here, accounts of the incidents conflict. The account detailed here comes primarily from Bernabé . In contrast, representatives of state institutions reported an honour killing by relatives, suicide, or a fainting spell as the cause of death. None, however, could satisfactorily explain why village residents punished Bibi Amina's lover with 100 lashes - the punishment for an unmarried adulterer - or why 18 suspects were arrested shortly after her death. Bernabé 's version is also more credible because it was investigated directly after the incidents.

incident, to the prosecutor's office. They were sentenced to three years in prison for manslaughter by the provincial court.[100]

In northern Afghanistan, the case - which constituted a rare exception - led to heated controversy. For the present analysis it is interesting because rural interpretations of *sharì a*, applied by a group of villagers, and the state's claim to a monopoly on criminal sanctions collided with full force. Under Afghan law, the husband could, at most, have reported the alleged adultery to the police or to prosecutors. According to the constitution and the laws of the country the *shura* was not authorized to deal with the case at all. It could have been reported to the police or to prosecutors. Employees of the local *huquq* office would certainly have referred the case to the state authorities, too. However, the *shura* or the influential Mullah Mohammad Yousuf apparently meant to circumvent the state justice system - which was easily accessible, given the proximity to the provincial capital Faizabad. Presumably, the punishment was to be agreed upon and immediately and locally executed to prevent the honour implications from spreading beyond the valley.

A regular court would probably have based a case against Bibi Amina and her lover, who were apparently accused of extramarital sexual relations (*zina*), on Articles 426 et seq. of the Criminal Code, which permitted a maximum penalty of life imprisonment. It would have had been obliged to uphold the Constitution's fair trial guarantees, particularly the right to legal counsel, although awareness of these rules and the capability to comply with them were still limited at the time of the case.[101] However - to be realistic - a court might also have based the case on *sharì a* and tried to punish the alleged acts as *hudud*[102], ignoring the *nullum crimen* principle and other constitutional barriers as in the proceedings against Abdul Rahman.

The prosecution of the perpetrators in the state justice system is remarkable because the rules of Afghan law were followed without conflicts between the police, prosecution, and judiciary. They were convicted in accordance with articles 394 et seq. of the Afghan Criminal Code. The court, however, declined to recognize murder - which was, in theory, a possibility.[103] Instead, it found them

100. IRIN report, May 3, 2005, http://www.irinnews.org/report.aspx?reportid=28576.

101. Fabrice Defferrard, L'Afghanistan et le procès pénal equitable, Recueil Dalloz (2006), 1997–2001.

102. Opinion of Nadjibullah, chief prosecutor in Badakhshan and investigating prosecutor in the case of Bibi Amina, expressed in conversation with the author on July 23, 2008.

103. Brutality, as a legal element of murder under article 395(3) of the Afghan Criminal Code, could possibly be fulfilled by a stoning. Because this punishment is widely considered divinely ordained in certain circumstances,

guilty of manslaughter and issued a lenient sentence. Article 396 contemplates "long imprisonment" for manslaughter; three years is certainly not considered a long sentence in Afghanistan. However, it does not appear that the court granted leniency because the homicide aimed at protect the family's "honour"; it can only be granted for acts in the heat of the moment, for which the possible sentence is limited to two years.

The case leaves a bitter aftertaste not only because of the human tragedy, but also because Mullah Mohammad Yousuf was not prosecuted. In accounts of the case, he appears to have been the driving force behind the stoning.[104] Nonetheless, the marked reaction of state justice, along with the prosecution of individual perpetrators, can be read as a restoration of the power structure in the area of criminal law. The normative disruption and its sanction serve to stabilize the order. It can be assumed that the case was understood in the valleys of Badakhshan as a warning, as well. Yet the problem for those communities living far from provincial capitals remains unresolved: in winter, they are cut off from the outside world for up to eight months and during this time have to resolve their conflicts among themselves.

4. Law in Secrecy: The Parallel World of Taliban Courts

The last piece in the Afghan "normative patchwork" of the country's legal pluralism can only be described cursorily because information on the Taliban courts is still scarce.[105] Due to its relevance in some parts of the country, however, this phenomenon must be mentioned.

Since about 2005 the Taliban have established judicial structures parallel to the Afghan state in territories that they control at least to some degree.[106] One important way to exercise power is through courts that make decisions based on their own interpretations of *sharì a*. These are called "mobile" courts as the Taliban judges usually appear and depart on motorcycles. Only in some districts they maintain permanent facilities as courthouses and prisons.[107] The Taliban

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Afghan jurists do not - at least, not often - define it as "brutal" for criminal law purposes.

104. This is the case in both Bernabé 's article and oral reports.

105. Antonio Giustozzi, Claudio Franco, Adam Baczko, Shadow Justice: How the Taliban Run their Judiciary, Kabul, Integrity Watch Afghanistan, 2012; Antonio Giustozzi, Claudio Franco, Adam Baczko, The Politics of Justice: The Taliban's Shadow Judiciary, Kabul, Afghan Analysts Network, 2014.

106. On the beginnings of Taliban justice structures, see Theo Farrell and Antonio Giustozzi, The Taliban at War: Inside the Helmand Insurgency, 2004–2012, International Affairs, 84 (4), 2013.

107. E.g. in Kandahar province (until 2010). Adam Baczko, Juger en situation de guerre civile. Les cours de justice Taleban en Afghanistan (2001–2013), Politix 2013/4 (No. 104), 25–46

also employ local mullahs who officially fulfil other functions and secretly act as judges. Candidates need the approval of the Judicial Council of the Taliban, which is based in Quetta with a branch in Peshawar, and for this purpose must pass an exam in Islamic law. In order to mitigate the risk of corruption the judges are deployed to provinces other than those where they stem from, and rotate to different locations every few months. Provincial commissions of the Taliban supervise the judges and collect their decisions. Even appeals courts exist in areas of strong Taliban presence, such as in Helmand's Nawzad district which is located close to the border of Pakistan and thus allows swift retraction across the border into if necessary.[108]

The courts deal mostly with criminal and private law matters but also with disputes between citizen and the Taliban.[109] Criminal sentences are carried out immediately. There are known cases of Taliban convictions of members of the Afghan armed forces, adulterers,[110] and alleged prostitutes.[111] However, the majority of cases belong to areas of private law. For several reasons the demand of their services is high: they are accessible, fast and inexpensive, decisions are considered legitimate as they are based on Islamic law and can be enforced even against the losing party of a dispute, if only for fear of their fighters. Even citizens who politically oppose the Taliban turn to their judges to have their cases resolved.[112]

Dr. Abdul Malik Kamawi, then General Director of the Afghan Supreme Court, told the present author as early as in 2007 that adverse parties turned to the state's justice system to appeal Taliban judgments. These cases were accepted and decided based on state law in order to re-establish peace the authority of the state.[113] This connection between the two normative orders is, at first, surprising because

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108. Adam Baczko, Juger en situation de guerre civile. Les cours de justice Taleban en Afghanistan (2001-2013), Politix 2013/4 (N° 104), 38.

109. Muhammad Munir, The Layha for the Mujahidin: An Analysis of the Code of Conduct for the Taliban Fighters Under Islamic Law (in Dari), Yearbook of Afghan Legal Studies (YALS) 1 (1394) 429 es seq.

110. For similar cases in the province of Ghazni, see id., 14.

111. Freelance Associated Press reporter Rahmatullah Naikzad secretly filmed the sentencing and execution of two women for alleged prostitution in the province of Ghazni. After the video footage appeared on the Internet, the Afghan domestic intelligence agency, the National Directorate of Security, arrested him on suspicion of supporting the Taliban. An Associated Press spokesperson confirmed these reports. Nahal Toosi, Taliban Justice, AP Archive, Aug. 6, 2008; Ahmad Shuja, Photographer detained after filming Taliban execution of two women in Afghanistan, Fox News, July 18, 2008.

112. Adam Baczko, Juger en situation de guerre civile. Les cours de justice Taleban en Afghanistan (2001-2013), Politix 2013/4 (N° 104), 40 et seq.

113. Author's conversation with Dr. Abdul Malik Kamawi in Kabul on July 12, 2007.

the respective normative authorities are simultaneously battling for territorial rule in Afghanistan. Tactics in this war include the obliteration of the opposing jurisprudence. Since 2001, the Taliban have assassinated dozens of state justice officials.[114] At the same time, their own judges are have many times been targeted not only by the Afghan security forces but also by U.S. special forces and drones.[115]

From the Afghan state's perspective, Taliban judges - whose decisions are unilaterally corrected by state judges - are no more empowered to make decisions than *shura*s, *jirga*s, and *maraka*s. Their convictions and sentences are considered murder, assault, and other crimes under the Afghan Criminal Code. The Afghan justice system also cannot abide by Taliban civil law decisions - as opposed to dispute resolution of the *shura*s, *jirga*s, and *maraka*s. Whereas the tribal institutions - despite the questionable nature of numerous specific decisions - serve to maintain the domestic social order using traditional means, the Taliban courts intend precisely to displace state justice and impose their own normative sense of justice on society. Law represents only one of many weapons in the struggle for ideological and political hegemony. Under such circumstances, a conflicts regime - which would go along with mutual recognition - is inconceivable.

5. Conclusions

Attempts to retrace the lines of conflict between Afghanistan's normative orders produce as complicated a picture as expected. The Constitution regulates the relationship between state-made law and Islamic *sharī a*, at least in their basic application. Putting this into practice, though, has seen little success so far. The legislature has shown itself to be deeply uncertain and divided about which sources of law it should, or must, use as orientation. In this sense, the *Loya Jirga* found a compromise that could function well as a regime for resolving conflicts of law. One can envision a legal order shaped by Islam that simultaneously protects human rights, if article 3 of the Constitution is taken on its own terms. It does not, as is often asserted, demand that all laws be consistent with *sharī a* but only seeks to avoid contradictions between law and faith or the provisions of Islam. For instance, the Afghan legislative branch may in no case declare seventeen-year-olds criminally responsible under the law or permit marriage of minors simply because a widespread legal doctrine condoned it a millennium ago. Even

114. See, e.g., Abdul Waheed Wafa, Bodies of 4 Kidnapped Afghan Judges Are Found, The New York Times, Aug. 2, 2007.

115. Adam Baczko, Juger en situation de guerre civile. Les cours de justice Taleban en Afghanistan (2001-2013), Politix 2013/4 (N° 104), 40.

in difficult cases such as those of physical crimes derived from the *Qur'an* itself, compromises can be found, for example, by suspending sentences that do not comply with human rights standards. The prerequisite for such a solutions is the still-absent political will to negotiate. After more than a century of discussion about the modernization of Islamic law, and, by extension, Islamic society, the gates to *'ijtihad*, or a reinterpretation of Islamic sources, are still rusted and just barely ajar.[116]

Meanwhile, Afghan justice seeks to make proper decisions within the conflicts regime set up by article 130 of the Constitution. The Afghan justice system, however, cannot escape the tension between the Constitution's assertion of the rule of law and the call of conscience to affirm and fulfil *shari'a*. Changes will require much time, during which Afghan legal scholars in particular must absorb ideas from other moderate Muslim countries and adapt them to their own context.[117] Western observers and followers of this process should thus be careful not to harbour unrealistic expectations or make overly hasty demands.[118]

The institutional relationship between state mechanisms and local or tribal mechanisms for dispute resolution is no less precarious. There are neither formal rules for conflicts of law nor any political decision as to who is authorized to resolve disputes. Where state justice is absent, the traditional *shura*s, *jirga*s, and *maraka*s fulfil its function. However, the legitimacy of these tribal councils is doubtful in light of their purely male compositions and their disregard of the rights of especially women and minors. The state tolerates them in civil law matters. In parts of the country, the *huquq* offices successfully fulfil the role of mediator between the two normative orders and their institutions, so the *huquq* office system seems ripe for formalization and expansion. In the long term, however, it is imperative that the state justice system be built up to offer viable, comprehensive alternatives to the tribal institutions and to make the protection of the rights of all citizens possible.

The reports discussed above permit only very limited insight into the legal

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116. 'Ijtihad is the independent interpretation of the Qur'an and sunna. Since approximately the 10th century, Sunni Islam has rejected these methods as inappropriate and error-prone. Only interpretations of the sources by recognized schools of law were considered legitimate. Wael Hallag, Wurde das Tor des Idschtihad geschlossen?, in: Int'l J. Middle East Studies 16/1 (1984), 3 et seq.

117. The fundamental issues are similar in, for example, Egypt. See Kilian Bälz, Shari'a and Qanun in Egyptian Law: A Systems Theory Approach to Legal Theory, Yearbook for Islamic and Middle Eastern Law 2 (1995), 37 et seq.

118. This is not meant to discourage calls to protect human rights. Foreign political pressure contributed to the serious efforts to find ways of avoiding the death sentence in the case of Abdul Rahman.

pluralism in Afghanistan. The multi-ethnicity of the country permits one to gain only a sense of the myriad traditional orders. The current post-war circumstances complicate the "normative patchwork" significantly: Foreign combat forces are required to operate on the basis of international law and, for instance, treat their prisoners according to specific norms. Many foreign aid organizations orient themselves more toward the law of their home countries than toward Afghan laws when, for example, hiring Afghan employees. Financial institutions like the World Bank are restricted by internal rules and development strategies when disbursing funds, and these rules and restrictions are passed on to recipients such as the Afghan government. At the same time, international organizations such as the United Nations Assistance Mission in Afghanistan are developing new normative systems to coordinate reconstruction. The patchwork is becoming more and more diverse.

Around the globe, human rights constitute an important homogenizing force in heterogeneous legal contexts. In Afghanistan, however, a balance between the competing values of cultural diversity on the one hand and the protection of human rights on the other has never been found. Here, human rights based solutions are hard to reach due to the uncompromising normative views of the majority of religious dignitaries and tribal elders.

Paradoxically, the conclusion that can be drawn from this enormous diversity and complexity is not that Afghan society is completely normatively unstable. In day-to-day life, the lack of legal certainty is mitigated by a certain shared sense of morality. For many Afghans, the disregard for the common understanding of fairness and justice suffered in daily experiences with corruption and the arbitrary misuse of power is more worrisome than the lack of harmonious, unequivocal legal rules.