Legal Authorities in the Afghan Legal System (1964-1979)

Bruce Etling

INTRODUCTION

The Bonn Agreement states that Afghanistan's judicial system shall be rebuilt in accordance with Islamic principles, international standards, the rule of law, and Afghan legal traditions.[1] Much has been written about the need to apply international standards and the issue of human rights in Afghanistan, but there has been far less in-depth analysis of Afghanistan's legal tradition, practice of Islamic law, and Islamic legal authorities. This paper attempts to fill this gap by identifying elements that determine Afghanistan's legal tradition, focusing on the legal system that developed in the period after the 1964 Constitution until the Soviet invasion in 1979. Analysis of this period is crucial: during this time the last legal system created by Afghans themselves was formed, in relative peace and stability. Furthermore, the 1964 Constitution is being used as the baseline for constitutional reform today. It makes sense, then, to understand the legal system that emerged after the 1964 Constitution and to learn who the legitimate authorities were within that system. This paper will show that Afghanistan's legal tradition has been impacted by its multi-ethnic composition, near universal observance of Islam, and historical legal reform efforts.

This paper begins with some hypotheses about the factors that define Afghanistan's legal tradition. It next examines the models of secular, semi-secular, and traditional Islamic legal systems in Turkey, Egypt and Saudi Arabia, respectively, to help describe Afghanistan's system. It then identifies the place of Islam and Islamic law in Afghanistan's 1964 Constitution. Next, particular attention is paid to the legal system that developed after 1964, where it is shown how dual legal authorities impacted the law, the court structure, and the education of legal elites. The paper concludes with an explanation for the acceptance of the post-1964 legal system in Afghanistan. This paper will show that Afghanistan's legal system allowed space for commercial and administrative laws applicable in contemporary times, and that it was accepted by both the traditional rural population and urban elites.

THE AFGHAN LEGAL TRADITION

A legal tradition is defined as "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal

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[1] Bonn Agreement (Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions), Art. II (2) available from: http://www.unama-afg.org/docs/bonn/bonn.html, accessed on August 4, 2003.

system to the culture of which it is a partial expression. It puts the legal system into cultural perspective."[2]

Afghanistan's legal tradition is influenced by its culture, its multi-ethnic population, and its history. Afghanistan is a highly segmented society that is split along tribal and clan lines. The country is 99% Muslim, and Islam has historically been used as a unifying force by rulers attempting to establish control over religious and tribal leaders. The legal system that applied in this multi-ethnic state had two sources of law: customary law and Islamic law. The legal authority for customary law were tribal elders, who deliberated in tribal councils (*jirga*s).[3] The legal authority in Islamic law, which can be further divided into the scholars' law and the ruler's law, was comprised of, respectively, the scholars of Islamic law and the ruler.

This paper focuses on Islamic law, the authorities in the Afghan legal system, and the competing jurisdictions between scholars and rulers; it also focuses on the formal legal system that developed after the 1964 Constitution. To help define that system, let us first define some models of Islamic legal development and the place of authorities in those models.

1. *Islamic Legal Development: Turkey, Egypt, and Saudi Arabia*

In order to understand Afghanistan's legal development process, it is important to recognize the appearance of diverse legal systems in the Muslim world throughout history. Turkey, Egypt, and Saudi Arabia demonstrate a range of legal systems found in Muslim countries. Turkey is an example of a secular Islamic legal system, Egypt that of a semi-secular legal system, and Saudi Arabia an example of a religious-based legal system.

In Turkey, Kamal Ataturk initiated top down, secular reforms of the political and legal systems. Religious legal authorities were marginalized, the Shari'a was eliminated from the legal system, and a Western legal system adoped. The Turks took over almost verbatim the Swiss Civil Code and Code of Obligations, and closed any loopholes that might have allowed the reentry of Islamic law. These reforms were backed up by military force, have generally been accepted by the population, and, according to some scholars, have worked well.[4] Turkey serves as a model of a secular legal system operating in a Muslim country.

One can determine whether a country has a semi-secular or a religious legal system based on jurisdiction. Areas of law fall either under the jurisdiction of Islamic legal scholars or under the jurisdiction of the ruler. The categories of law over which each has jurisdiction are not formally defined, and the relative power and legitimacy of the scholars in relation to the rulers help determine the area of law each controls.

One way to look at the jurisdiction question is to think of all laws in the state falling along a continuum. On the left are the scholars and on the right the rulers. The areas of law on the left that normally belong to scholars include religious rituals and

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[2] John Henry Merryman, David S. Clark, and John O. Haley, *The Civil Law Tradition: Europe, Latin America and East Asia* (Charlottesville: Michie Co., 1994), 3-4.

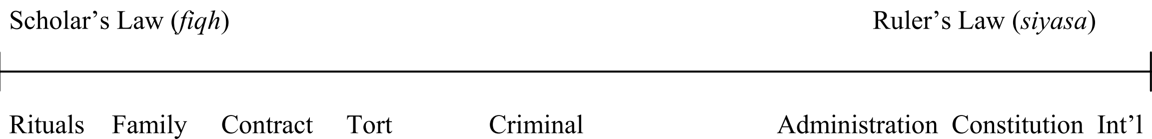
[3] Customary law is a vital part of the legal system in Afghanistan, but it is beyond the scope of this paper to discuss its impact; this is done in other papers in this series. See, for instance, the papers by Kakar and Nojumi on this website.

[4] Herbert J. Liebesny, "Stability and Change in Islamic Law," in idem, *The Law of the Near & Middle East: Readings, Cases and Materials* (Albany: State University of New York Press, 1975).

personal law. On the right are utility-based rules that typically belong to the State, legislated by the ruler. The breadth of law under the jurisdiction of scholars (or rulers) determines the model (see below).

Islamic Law Continuum

Jurisdiction

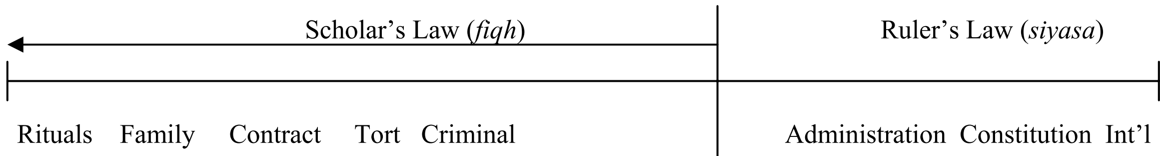


Type of Law

Saudi Arabia is an example of a scholar-dominated system, where the scholars have claimed jurisdiction over a fairly large body of law in society. This starts at the left of the continuum with areas of law that are fairly well defined in the Quran such as rituals and family law. The scholars in Saudi Arabia, due to their legitimacy and power within society, have expanded their jurisdiction rightward into the areas of civil and criminal law. The scholars continue to adapt prescriptions from the Quran, the actions or sayings of the Prophet (Sunna), consensus (*ijma'*), and analogy (*qiyas*), the pillars of Islamic legal theory, to develop the law and to adjudicate; in other areas, the ruler enacts laws based on expediency and utility.

Saudi Arabia on the Islamic Law Continuum

Jurisdiction

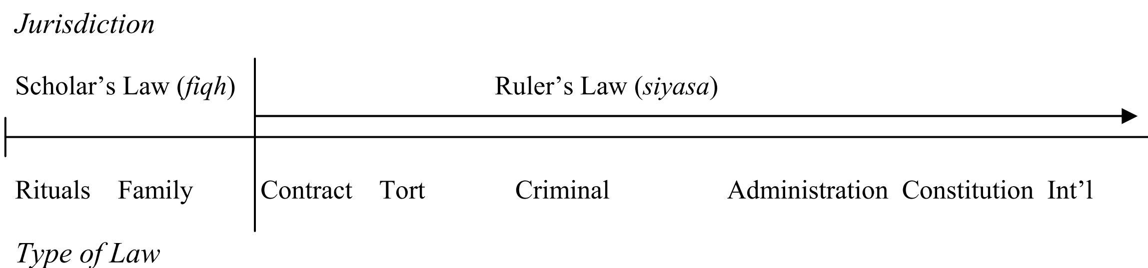


Type of Law

The Egyptian model is one in which the rulers have gained jurisdiction over a large body of law. They start from the right of the continuum with laws that are utility-based and are required for the public good, but nowhere discussed in the Quran or other recognized sources of Islamic law. For example, government administration, traffic laws, and international law fall squarely within the realm of the ruler's law. In Egypt, society, scholars, and rulers have adapted to a legal system where the ruler's law encompasses more law in the middle of the continuum. Rituals and family law have been left to the

scholarly body, with the caveat that complete independence of legal interpretation even in these fields has been curtailed by reforms of the positive law. The ruler's laws tend to be codified, to require less interpretation by scholars, to have set punishments, and generally to be more easily understood by a Westerner familiar with a positive legal system. However, since the right of the ruler to make laws is derived from the Quran and cannot violate the principles of Islamic law, as set forth by the scholars, the legal system derived from this model is semi-secular.

Egypt on the Islamic Law Continuum



An analysis of legal authorities in Afghanistan and their areas of jurisdiction will help determine which model best describes the legal system after 1964. As we have just seen, the jurisdiction of scholars and rulers determines which legal model is in place. Legal authority is important to understand for more than just descriptive purposes, however. Its legitimacy determines the success of legal reforms and the efficacy of laws that are implemented. Furthermore, with whom jurisdiction lies, with scholars or the ruler, impacts which laws are applied, whether those laws are codified, the structure of court systems, and the way legal elites are educated. In sum, it impacts every aspect of the legal system.

2. *Islamic Legal Authorities*

2a. Scholars

Islamic legal scholars (*'ulama*) are respected and recognized as legitimate authorities by the community of believers based on their level of knowledge and piety. In Afghanistan, they include instructors of Islamic law in madrasas (religious schools), judges (*qazi*s), and attorneys. The 'ulama have the authority to interpret Islamic law based on their status as scholars of Islamic law, not on any official or formal role that they fill as a judge or educator. Therefore, training in Islamic law under a scholar at a madrasa is a prerequisite for anyone who claims the authority to interpret and apply Islamic law.

Perhaps the most important legal resource for contemporary 'ulama is *fiqh*. Fiqh can be described as the textually-based rules of one of the Islamic schools of law, which developed over the life of Islam up to late medieval times based on the interpretations of the most revered scholars of Islam (from which the names of the schools are derived). This scholarly law is found in books handed down from hundreds of years ago, but that

law is subject to reinterpretation in modern times. In Afghanistan, the Hanafi school has been dominant.

There is no system of judicial precedent (stare decisis) in Islamic law. Judges do not need to follow the decisions of previous judges, or even their own decisions in similar previous cases. Instead, scholars are supposed to use their vast knowledge of Islamic law and its authoritative sources, or the accepted sources of their legal school (*madhhab*), to strive for truth in each case put before them based on the facts of the case.[5]

Historically, the ‘ulama have jealously guarded their right to interpret Islamic law and have resisted attempts to codify the law, in stark contrast to most Western legal systems, which are based on formal positive laws.[6] The ‘ulama resist such reforms because an ideal Islamic legal system is epitomized in the unique decision of an individual judge’s interpretation (*ijtihad*) applied to the evaluation of a concrete act, not in a system of objective, formal, generally available, public, compulsory rules.[7]

2b. Rulers

Rulers are also authorities in Islamic legal systems. They are granted the right to create policy and issue decrees which are in the public good, provided that the laws are not in violation of Islamic law, as set out by the ‘ulama (*fiqh*); through this mechanism the ‘ulama remain influential in the ruler’s body of law.

Saudi Arabia is a good example of such an Islamic legal system. The King has wide discretion to create laws for the public good and for expediency’s sake; these laws cater to the demands of a modern world not foreseen in the Quran, such as laws regulating traffic. In Saudi Arabia, the ‘ulama are consulted in the process of law-making by the King, but they resist the application of his laws in Shari‘a courts; the application of the King’s laws and determination of administrative penalties are left to administrative courts. The ‘ulama argue that Islamic judges should decide every case through individual interpretation. But for every traffic violation to go to an Islamic judge who decides the outcome based on his interpretation of Islamic law, would be a cumbersome procedure for a traffic ticket. An alternative for the King would be to wait for the ‘ulama to reach consensus in their interpretation of what Islamic law says about traffic offenses, also a time-consuming procedure.[8]

In Islamic legal systems, then, the learned scholars and rulers rely on each other for the system to function and can complement each other, but they also compete over jurisdiction and, therefore, influence in the system and society. There have been periods in history when their collaboration was less than amiable. For example, under the Ottomans, the Sultan codified some areas of Islamic law and created a positive system with written codes, stripping the ‘ulama of their authority to interpret independently.

3. *Afghan Rulers and Legal Reform in Historical Perspective*

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[5] Frank Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Leiden: Brill, 2000), 15.

[6] Vogel, *Islamic Law and Legal System*, 22: “A favorite contemporary western concept of law is that it is a system of formal, objective, publicly known, generally applicable, compulsory rules, whether determined from general, published legislation, from the decisions of courts interpreting legal materials and applying them, or from authoritative scholarly analyses of legislation, court decision, and other sources of law. So far we have seen little in Islamic law that resembles this concept.”

[7] Vogel, *Islamic Law and Legal System*, 23.

[8] Vogel, *Islamic Law and Legal System*, 173-177.

Afghan rulers have traditionally initiated and led the legal reform process. The two most influential legal reformers before 1964 were Abdur Rahman and Amanullah.

Abdur Rahman was the founder of the modern Afghan state, and significant for legal development in Afghanistan because he created a state-run court system and elevated Islamic law to the status of official state law. As the founder of the Afghan legal system, he has been described as the "Justinian of Afghanistan." Amin Tarzi, an historian of the judicial system under Abdur Rahman, defines Afghanistan as a "judicial state" during Abdur Rahman's rule, since he used the law and courts to centralize his rule and neutralize threats to his power. His interest in and oversight of the legal system were pervasive and unparalleled in any other branch of government.[9]

Although much of Abdur Rahman's success in this centralization effort was achieved by the use of force, he also relied on Islam to legitimize his rule. Since the state was multi-ethnic, he called for the tribes to unify under their common belief in Islam. Abdur Rahman claimed divine right to rule in Afghanistan and took the title of defender and champion of the Islamic faith. Vartan Gregorian, an historian of Afghan reform efforts, argues that Abdur Rahman effectively reduced the 'ulama and other religious leaders to mere bureaucrats in his government. To achieve this he usurped power from the 'ulama by claiming the sole right to interpret Islamic law, he made them economically dependent on the monarchy by taking over the religious charities that funded their activities, and reduced their numbers and thus collective power by forcing them to pass a procedural examination.[10] He also killed or jailed 'ulama who did not agree with his policies, but empowered those who did agree to enforce the law in the courts. Effectively, Abdur Rahman eliminated the *independent* power of the 'ulama.

If we return to the Islamic Law Continuum in order to understand the Afghan legal system under Abdur Rahman, we see that jurisdiction belonged almost entirely to the ruler and his law. Abdur Rahman took jurisdiction over all law, codified that law, interpreted it, and issued very detailed and specific guidance to judges on how to interpret the law and determine punishments. He even moderated the most severe punishments, including the amputation of hands for theft and death by stoning for adultery.[11]

Abdur Rahman's legal reforms formalized the division of the sources of law in Afghanistan at the time. He divided them into three categories: Islamic law, customary law, and statutory law (administrative and civil laws called *qanun*). He also established three types of courts: Islamic law courts, which dealt with civil and religious affairs; criminal courts, which were administered by the chiefs of police and religious judges but which applied Islamic law; and a board of commerce, which was made up of merchants

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[9] Amin Tarzi, "The Judicial State: Evolution and Centralization of the Courts in Afghanistan, 1883-1896," unpubl. Ph.D. diss., New York University, 2003.

[10] Vartan Gregorian, *The Emergence of Modern Afghanistan: Politics of Reform and Modernization, 1880-1946* (Stanford: Stanford University Press, 1969), 134-136.

[11] Amin Tarzi argues, in a personal communication on August 12, 2003, that these *hudud* punishments were rarely carried out in Afghanistan until the Taliban period because of Abdur Rahman's policy**.** For example, the 1964 Constitution (Article 101) required that the King must first approve any execution in writing before it was carried out. The severe *hudud* punishments under the Taliban that most outsiders saw as representative of application of Islamic law were actually atypical of the punishments in the Afghan legal system throughout most of its history.

and dealt with commercial law and settled business disputes.[12] This court structure is similar to the one that emerged after 1964.

The Islamic law courts in each province were the highest courts in the region. Civil cases could be appealed to the next level up, district courts, which were staffed by the district governor or his deputy. Each province had a Supreme Court which settled marital and inheritance cases and was staffed by a chief judge and a number of Islamic law judges (*qazi*s). However, Abdur Rahman's eldest son served as a court of appeals for any case, and Abdur Rahman himself was the court of last resort. In particular he had exclusive jurisdiction over cases punishable by death, political disputes, offenses against the throne, cases of high treason, and matters related to government revenue.[13] Although the jurisdiction over these areas of law falls typically into the ruler's law (*siyasa*), claiming exclusive jurisdiction over them is not typical.

Abdur Rahman's legacy in the legal field is significant. He formalized the division of law in Afghanistan and began codifying the law. He put the court system and 'ulama under state control and divided the courts according to jurisdiction. He also took jurisdiction over and moderated the *hudud* punishments. Finally, he left a legacy of issuing guidance to judges on how to apply law and define punishments for specific crimes. The legal system remained much the same under Abdur Rahman's son, Habibullah, but reforms were carried much further by his grandson Amanullah.

Amanullah, who ruled Afghanistan from 1919-1929, wrote Afghanistan's first modern constitution in 1923 and attempted major social and legal reforms through a series of codes and decrees. He was influenced by Kamal Ataturk and the reforms that took place in Turkey during the late nineteenth century. Although initially well respected by the 'ulama and religious elite of Afghanistan for his use of pan-Islamism to push the British out of Afghanistan, Amanullah's reforms soon encroached on the power of the 'ulama and were seen as anti-Islamic. This led to major amendments of the 1923 Constitution through a Loya Jirga in 1924, and finally to the overthrow of Amanullah by an alliance of 'ulama and tribal leaders after even more radical reforms were attempted in 1928.

The 1923 Constitution recognized two sources of law—Islamic law and statutes. Reform of the legal system was attempted through statutes (codes), which reduced the number of posts for the 'ulama in the judiciary, introduced a new hierarchy of courts, brought in secularly-trained judges, and began a process of further codifying Islamic law. Following Abdur Rahman, Amanullah also attempted to prescribe set punishments for specific crimes. Amanullah claimed this authority when he said, "It is for the ruler to specify the Sharia penalties of Tazir [a class of punishments which the ruler has the discretion to prescribe, BE] which are flexible and have remained undefined." He ordered the 'ulama to collect and compile the authoritative opinions of the scholars' law and to publish them in Farsi, the official spoken language of Afghanistan at that time.[14] This codification process resulted in the Penal Code of 1924-25. The code split crimes into three categories according to the class of punishments imposed. The code prescribed punishments explicitly articulated in Islamic law for crimes such as adultery, alcohol

[12] Gregorian, *The Emergence of Modern Afghanistan*, 136.
[13] Ibid., 136-139.
[14] Mohammad Hashim Kamali, *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary* (Leiden: E.J. Brill, 1985), 214.

consumption, and theft. Major and intentional bodily harm belonged to another class of crimes that warranted retalitory punishments. For lesser crimes, judges determined discretionary punishments.[15]

Amanullah's reforms failed in part because he attempted to take too much power and jurisdiction from the 'ulama. They also failed because he taxed the tribal leaders and attempted to curb their powers. Not only did the elite reject the reforms, but so did the largely rural, traditional Afghan population. Religious and tribal leaders formed an alliance against Amanullah, easily mobilized the population against him and his radical reforms, and overthrew him.[16]

Although Amanullah's reforms failed, he left important legacies for Afghanistan's legal system and legal tradition. First, each successive constitution was based, at least in part, on the 1923 Constitution. Second, Amanullah's codification of Hanafi criminal law endured so that secular judges and bureaucrats could access and interpret it. Third, Amanullah introduced educational reforms that continued after his removal. Educational reforms that led to the training of the first judicial officials outside the 'ulama included establishment of the first school of administrators in Kabul.[17]

The judicial reforms of the 1960s—under Zahir Shah—were more moderate than those under Amanullah, and covered subjects that were more open to legal innovation since they did not traditionally fall within the purview of the 'ulama, such as child marriage, polygamy, and female education.[18] The tension between the scholars' law and the ruler's law was limited since the state no longer attempted to encroach on the 'ulama's realm of personal law, in contrast to the Amanullah period. As a class the 'ulama during this period also moved closer to the state and endorsed its policies as Islamic.[19]

The impetus for writing the 1964 Constitution was the resignation in 1963 of Prime Minister Daoud, who ran the government for Zahir Shah. The Interim Government after Daoud promulgated a new constitution, which Louis Dupree has called one of the finest in the Muslim world at the time.[20]

The 1964 Constitution made Islam and Islamic law an important part of the government and the legal system. This is partly a result of the influence of 'ulama in the drafting process and in the Loya Jirga which ratified it, but it is also a reflection of the importance of Islam in Afghanistan. The following articles of the 1964 Constitution deal specifically with Islam: Article 2, which states that Islam is the sacred religion of Afghanistan and that the Hanafi school prescribes the state's religious rituals; Article 64, which states that there shall be no law repugnant to the basic principles of the sacred religion of Islam; and Article 69, which defines a law as one passed by both Houses of

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[15] Gregorian, *The Emergence of Modern Afghanistan*, 248-252.
[16] Leon Poullada, *Reform and Rebellion in Afghanistan, 1919-1929* (Ithaca: Cornell University Press, 1973), 143-159.
[17] Kamali, *Law in Afghanistan*, 207.
[18] Ibid., 204.
[19] See my paper "Afghan 'Ulama in the Legal Reform Process" on this website.
[20] Louis Dupree, "Constitutional Development and Cultural Change, Part I: Social Implications of Constitution Making," American Universities Field Staff Report, South Asia Series, IX/1 (1965), 5. Dupree defended his lengthy analysis of constitutions because he saw them as cultural as well as legal documents, especially in Muslim societies such as Afghanistan and Pakistan.

Parliament and signed by the King, and that in areas where no law exists, Hanafi jurisprudence of the Shari'a shall be considered as law.[21]

While many have claimed that the 1964 Constitution was a triumph for statutory law, this is not entirely correct. Far from disappearing, Islamic law remained the primary body of law in most areas of civil and criminal law. Until the civil and criminal codes were enacted in the late 1970s, Hanafi fiqh was applied by judges in all cases that were not under the statutes. Hanafi fiqh covered a more significant body of law than the hierarchical ordering of law implies. If a statute existed, it was superior to fiqh, but few statutes were passed that covered an area of law normally covered by fiqh. Furthermore, statutes mirrored the body of law that traditionally fell under siyasa. The dichotomy of law between fiqh and siyasa has been seen since at least the time of Abdur Rahman, and it continued under the 1964 Constitution.

Dupree argues that the 'ulama who took part in the Loya Jirga limited their comments to technical points, which he called surprisingly modernist and objective.[22] He observed that conservative 'ulama opposed the creation of an independent judiciary, to be set up by the State and thus still a government institution, and wanted to retain the old system of administering justice according to Islamic law. A group of more liberal 'ulama sided with the State, however, and defended the creation of an independent judiciary and other legal reforms. Nevertheless, the bulk of the Loya Jirga attacked the old system and its inequities and argued for a new system with expanded individual rights. Complaints revolved around the taking of bribes by Islamic judges (who were poorly paid) and the rendering of dissimilar decisions in similar cases.[23] Dupree argued that the limited and quiet role played by the 'ulama was due to former Prime Minister Daoud's use of military power to smash any opposition to his modernization plans, including resistance from religious leaders.[24] It is also possible, however, that the 'ulama were comfortable with the areas of law under their jurisdiction and the important place that Islam continued to occupy in society. As we will see, the 'ulama retained control over significant areas of law, most laws in the country stemmed from Hanafi fiqh, and the 'ulama kept their position as the best trained legal elites to apply the law.

THE AFGHAN LEGAL SYSTEM (1964-1979)

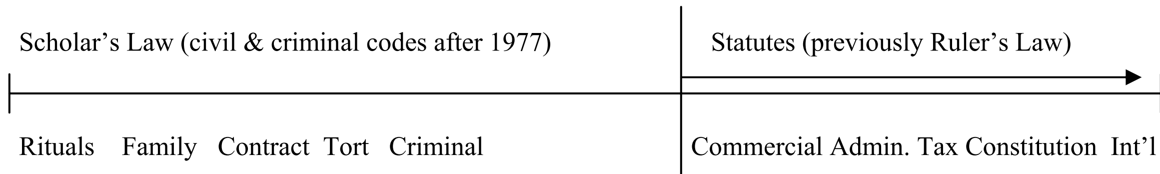
The Afghan legal system and elites within that system are the outcome of legal reform efforts. The duality of legal systems created two almost completely separate legal elites. Many scholars argue that Afghan reformers attempted to secularize the legal system through the creation of an independent judiciary that was intended to work as an equal branch alongside the legislative and executive. This was considered a major overhaul of the system since the 'ulama and qazis would then no longer control the legal system, but be subject to statutory law. However, the legal system in Afghanistan after 1964 was similar to the Saudi model: a model where the 'ulama had jurisdiction over most laws, coexisting with statutes that covered areas normally under the ruler's jurisdiction.

[21] 1964 Constitution of Afghanistan, available online from the UNAMA website: http://www.unama-afg.org/docs/Constitution/THE%20CONSTITUTION%20OF%20AFGHANISTAN%201964.doc, accessed August 13, 2003.
[22] Louis Dupree, *Afghanistan* (Princeton: Princeton University Press, 1980), 579.
[23] Ibid., 580-581.
[24] Ibid., 579.

Whatever the reformers' intentions, the legal system that emerged was not radically different from that in the past. The Afghan model on the Islamic law continuum demonstrates that the scholars had jurisdiction over a significant amount of law, and that in the place of ruler's law we have statutes.

Afghanistan on the Islamic Law Continuum

Jurisdiction



Type of Law

1. *Afghan Constitution and Laws*

There were two types of laws in the Afghan legal system from 1964-1979: scholar's law and statutes. Most of the scholar's law was eventually codified into the civil and criminal codes in 1977. Therefore, as said above, the Afghan legal system was similar to a traditional Islamic legal system where jurisdiction was divided between the scholars' law and ruler's law. The ruler's law (statutes) was not derived from Islamic legal sources, but the *authority* given to the ruler to create laws and policies for the public good is based in Islam. Most academics who have analyzed these laws refer to the statutes as secular laws; however, the authority to make such laws and policies is firmly grounded in Islam and this is an important reason why they were recognized as legitimate by the 'ulama.[25]

The exception to ruler's law being considered legitimate was if the State passed a specific statute that encroached on or took jurisdiction away from the scholar's law. In practice, the statutes covered only those specific areas of law that traditionally belonged to the ruler's law, that is, law enacted for the public good. Some examples of the types of law that the statutes covered included administrative law, civil tax law, commercial law,[26] and crimes committed against the public interest—such as forgery, smuggling, embezzlement and bribery. The commercial code is an example of a foreign law that was adapted to the Afghan context. It was copied from the Turkish Commercial Code of 1926, which itself was a copy of the German Commercial Code.[27] Some statutes also

[25] H.L.A. Hart, *The Concept of Law* ([2]New York: Oxford University Press, 1994). A Western parallel might be Hart's differentiation between primary rules and secondary rules. Primary rules are the content of laws themselves, secondary rules refer to authority to make or change primary rules.

[26] M.Q. Hashimzai and R.C. Csaplar, Jr., *The Judiciary in Afghanistan* (Kabul 1975), 12.

[27] When laws were borrowed from abroad, the Turkish or Egyptian models were borrowed more often than European laws. Cf. *Compiled Translations of the Laws of Afghanistan*, United Nations Development Program (Kabul 1975), 4.

covered international law and international obligations, such as the Law of Civil Aviation in Afghanistan (1956), which was enacted as part of Afghanistan's participation in the Chicago Convention on Civil Aviation (1944).[28]

Unless a specific statute was created that took jurisdiction away from the scholars' law, the scholar's law was applied; thus, a large body of Afghan law still fell under the jurisdiction of scholars. The 'ulama retained significant power in the legal system as judges since their training made them the best qualified to interpret and apply the scholar's law. Mohammad Kamali, an expert on Afghan law and judiciary, analyzed the Guiding Rules on Criminal Affairs and the 1977 Civil Codes and found that they were essentially a codification of the scholar's law (Hanafi fiqh). The Penal Code of 1977 was also very close to the codification of scholars' law.[29] Showing the importance of the scholar's law and its deep roots in the Afghan legal system, Associate Justice of the Supreme Court in 1971 Walid Hoqoqi, argued that even the statutes were an explanation, commentary, and interpretation of the scholars' law,[30] instead of a body of secular laws. Scholar's law had jurisdiction over family relations, inheritance, property, and most areas of criminal law.

2. *The Afghan Court System*

A dual court system also emerged following the 1964 Constitution as a result of the duality of law between the scholars' law and statutes. Jurisdiction of the courts was split between courts that applied the scholars' law and courts that applied statutes and republican decrees.

The scholars' courts were the primary courts of general jurisdiction; that is, these courts had the authority to hear a wide range of civil and criminal cases. A dispute relating to a statute went to the statutory courts.[31] The scholars' courts and statutory courts were organized hierarchically, beginning with primary courts, then provincial, appellate, and, finally, the Court of Cassation.

Reforms in the 1960s attempted to create a sense of uniformity in the judicial system. Even though the laws applied in the court system were from different authorities, they were unified under the umbrella of the Court of Cassation, the highest court in the land. The scholars' and statutory courts were similar in their numbers of judges, and in their procedure for appointment of judges. Like the Ottoman courts, each court in Afghanistan was made up of three to seven judges who met as a panel and came to a decision based on majority vote. True to the Islamic legal system, there were no jury trials in Afghanistan. Judges were appointed by the King (after 1973, the President) on the recommendation of the Minister of Justice.

Outside of these similarities, however, the court system that emerged was dual. The type of law applied in the two courts was different, and the judges and other legal elites were trained separately based on their specialization in scholars' law or statutes. The Court of Cassation was divided into chambers based upon the type of law applied; these chambers were presided over by judges who were experts in either scholars' law or

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[28] Law of Civil Aviation in Afghanistan (20 Assad 1335 [1956]), Chapter 1, Article 1.
[29] Kamali, *Law in Afghanistan*, 42.
[30] Walid Hoqoqi, *Judicial Organization in Afghanistan* (Kabul: Government Printing House, 1971), 3.
[31] The one exception was the Highway Traffic Law (1973), which was a statute but was applied in primary scholars' courts outside of Kabul.

statutes. A case going through one of these dual court systems would never come into the hands of legal experts of the other court system.

3. *Customary Law and its Interaction with the Courts*
A word on customary law and its interaction with primary courts, which applied scholar's law, is necessary here. Judges in primary courts were careful not to encroach upon the power of local religious or tribal leaders, and they often would refer matters to the village elders or tribal councils for resolution according to customary law, including enforcement of decisions. The judges would then incorporate the decision of tribal councils in their formal opinions. Only when resolution of a dispute was not possible at the village council level would a case then enter the primary courts. [32] This system of decision-making and conflict resolution at the local level according to customary law, later entered into formal court records by judges, appears to continue to this day.[33]

4. *The Education of Afghan Legal Elites*
The duality of the legal system naturally also affected the legal education system in Afghanistan. The duality of law meant that legal elites gravitated towards either Hanafi fiqh or statutes, tending not to study the other area of law in depth and thus remaining almost completely separate from one another. Marvin Weinbaum found that most Islamic legal experts were proud of their religious legal training and resentful of the emergence of the system of secular statutes. Conversely, those with secular training in statutes were defensive about their lack of knowledge about Islamic law, acknowledging that this was a drawback since Islamic law was so pervasive in the legal system. Weinbaum found that neither secular nor Islamic legal students were well trained in analytical thinking skills, which made them especially ill prepared for careers in a system that required innovation in order to reconcile the multiple sources of law.[34]

Those who studied Islamic law attended madrasas or the Faculty of Islamic Studies at Kabul University, while those who studied statutory law were primarily graduates of the Faculty of Law and Political Science at Kabul University. Many who graduated from this elite faculty typically sought to enter the diplomatic corps, and were thus less trained to work in law. Most of the graduates who did their concentration in law at the secular Faculty of Law and Political Science entered government service. They became judges in the courts that applied statutory law as well as prosecutors and officials in the Ministry of Justice.

A typical course of study for these students was broad, creating generalists. The first two years of the curriculum included courses in world history, contract law, political

[32] Marvin G. Weinbaum, "Legal Elites in Afghan Society," in *International Journal of Middle Eastern Studies*, 12 (1980), 51.
[33] Communication to the ALHP Working Group by Naz Modirzadeh in the summer of 2003, based on research in Afghanistan as part of the Harvard Program on Humanitarian Policy and Conflict Research (HPCR). Although dispute resolution of this sort is useful at the lowest level of the legal system, and can relieve the case load of courts, dispute resolution experts stress that it cannot take the place of a formal legal system. Cf. "Alternative Dispute Resolution Practitioners' Guide," USAID Technical Publication Series (PN-ACB-895), March 1998, p. 21, available from: http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacb895.pdf accessed on August 4, 2003.
[34] Weinbaum, "Legal Elites in Afghan Society," 41.

sociology, public finance, Islamic law, statistics, and Pashto.[35] The second two years allowed more focus in either public law, which usually led to a position with the Ministry of Foreign Affairs, or private law and the judicial section. No electives in the private law and judicial section were allowed, however.[36]

Those who studied law at the Faculty of Islamic Law at Kabul University were all products of a twelve-year madrasa education. According to Weinbaum, those with training in Islamic law were better prepared than their secularly-trained counterparts. The thrust of the program was on religious studies but also included courses in civil, international, and commercial law. English language studies were required and knowledge of Arabic was a prerequisite for entry into the faculty. Like the secular faculty, it also tended to produce generalists without specialization.[37] These graduates became government-appointed judges in the court system that applied Islamic law. They rarely were invited to serve as prosecutors in the statutory courts. Private attorneys in Afghanistan typically were trained in Shari‘a, and only a handful were well trained in statutory law.[38]

A Judicial Training Program was initiated to attempt to address some of the problems associated with legal education. It took the top graduates of both systems and gave them additional training in law and more practical legal skills; it also included a period of observation of functioning courts.[39]

5. *Afghan Perceptions of the Legal Elites and Legal System*

An important part of understanding the Afghan system during this period of legal reform is to understand the reputation of the legal elites and legal system. To begin with, private attorneys were not held in high regard and their roles were poorly defined and poorly understood by most Afghans. Family members or scribes often filled the roles required of private attorneys. Since the procedure in Afghan courts generally was informal, Afghans were not awed or intimidated by the legal system,[40] and this further reduced the demand for private attorneys.

Judges with Islamic legal training were usually respected by Afghans for their religious knowledge. This is in line with the respect accorded to ‘ulama for their training, knowledge of Islam, piety, and standing in the community. An Islamic legal education often also led to social mobility, and since selection was based largely on merit and the education was paid for by the institution, diverse groups were attracted to study Islamic law. Notably, however, Hazara and other traditionally underrepresented groups were largely absent from the ranks of the legal elite.[41]

Several scholars have pointed out that there was a perception of corruption in the legal system, in particular by qazis, the judges who applied Islamic law in state courts. Dupree noted that some 40 members of the Loya Jirga to the 1964 Constitution

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[35] Kabul University General Catalog, Vol. II, 1973-75 (publ. by Education Press, Franklin Book Programs, Inc., Kabul: 1973), 168-181.

[36] Ibid., 159-167; Weinbaum, “Legal Elites in Afghan Society,” 43.

[37] Ibid., 44.

[38] Ibid., 41.

[39] Ibid., 47,

[40] Ibid., 41.

[41] See the piece on discrimination against the Hazara on this website; and Weinbaum, “Legal Elites in Afghan Society,” 46.

complained of corrupt and arbitrary decisions by qazis, and gave impassioned speeches against their role in the legal system.[42] Perceptions of corruption could certainly have been stoked by the fact that judges in a traditional Islamic legal system have to a certain extent a large discretion to determine the type of punishment to apply (*ta'zir*). This ties in to the demands for codification of Islamic law and set punishments by the reformers, hoping to stay what they saw as arbitrary decision-making. The low wages for judges also increased the likelihood of judges taking bribes, which is a problem common to many developing countries today as well. In a traditional Islamic legal system, which does not rely on stare decisis, there is also no formalized system of collecting and publishing the decisions of cases, for their use by judges to inform later decisions. This could also have led to a sense of arbitrariness among Afghans, especially if they compared themselves to civil law systems, which publish such decisions despite the fact that they have no rule of judicial precedent.[43]

The formal law that affected the typical Afghan most in the 1964-1979 period was primarily Hanafi fiqh, and to a much lesser extent statutory law.[44] Islamic law was transmitted to Afghans, the majority of whom were Muslim, through a variety of means including oral traditions, reaching even the illiterate.[45] In the legal system, Hanafi fiqh formed the core of civil and criminal law in Afghanistan and most Afghans respected the law, due to its base in Islam, and Islamic judges, whom they saw as learned religious figures. However, allegations of corruption negatively impacted judges and the court system. The statutes did not affect large numbers of the Afghan population, applying mostly to the urban elite, civil servants, and those involved in interational trade. The statutes performed the role of siyasa in Islamic legal systems.

Another problem that influenced the Afghan view of the legal system in this period was the undue influence of politically powerful or wealthy individuals in the courts. Judges were subject to influence from district officials, the executive branch, and other politicians. The courts also worked closely with the Ministry of Justice and senior police officials, especially following the 1973 coup in which the police played a leading role.[46] Following the coup the judiciary was put under the executive branch, reinforcing the view of an unindependent judiciary.

CONCLUSION

The legal system that emerged after the creation of the 1964 Constitution was a product of the Afghanistan's culture, religion, and historical legal reform efforts. Although certainly not immune to criticism, the system was stable and generally accepted by the urban elite and the more traditional rural population, since it met the need of both groups. One reason the legal system may have enjoyed such wide acceptance is because it allowed for the inclusion of different sources of law in Afghanistan: Islamic law,

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[42] Dupree, *Afghanistan*, 1980, 580-581.
[43] Weinbaum, "Legal Elites in Afghan Society," 53.
[44] This is not to minimize the significant role that customary tribal law had in the informal legal system, which probably affected the typical rural Afghan on a daily basis more than even Hanafi fiqh.
[45] M. Nazif Shahrani, "Local knowledge of Islam and Social Discourse in Afghanistan and Turkistan in the Modern Period," in Robert Canfield (ed.), *Turko-Persia in Historical Perspective* (Cambridge: Cambridge University Press, 1991) 161-188.
[46] Weinbaum, "Legal Elites in Afghan Society," 53.

statutory law, and, at the local level, customary law. It also allowed traditional legal authorities in Afghanistan, the rulers and ‘ulama, to interpret and apply laws over which each traditionally held sway.

Many Afghans and international experts who hope to impact the structure of the future legal system in Afghanistan see the process as a zero-sum game, which will result in either a completely secular or a completely Islamic system. This paper has shown that it is possible to mix Islamic and secular laws within one legal system, and that such a mixed system in Afghanistan increased the legal system's legitimacy and led to wide acceptance by the local population. Indeed, the Afghan system fell somewhere between the semi-secular Egyptian system and the traditionalist Islamic Saudi system on the Islamic law continuum. To avoid a replay of failed reforms by the Soviets and Afghan Marxists, who attempted to impose a secular and alien legal system on Afghanistan, legal reformers should continue to analyze Islamic law, traditional legal authority figures, and past legal reform efforts. The creation of a functioning, widely accepted legal system in Afghanistan is a prerequisite for lasting peace and security, and the post-1964 system may provide a good starting point for current reforms in that critically important effort.