

2.4: The Hierarchy of Laws in Afghanistan

Summary

This chapter examines the framework set forth in Afghanistan's Constitution regarding the hierarchy of statutory law, *shari'a* law and international law. It also reviews the role of traditional dispute resolution mechanisms and their application of customary law.

Introduction

The sources of law in Afghanistan include the Afghanistan Constitution, statutory law, Islamic (*shari'a*) law, international law, and customary law. The Constitution of Afghanistan contains what appear to be contradictory clauses relating to the hierarchy of laws in Afghanistan. It contains a repugnancy clause establishing Islam as the highest authority in the country, but at the same time establishes the primacy of the Constitution and statutory laws in court proceedings. The Constitution mandates the application of *shari'a* law when statutory provisions do not exist but, forbids the punishment of acts not defined as crimes at the time the act is committed. The application of *shari'a* law is further complicated by the use of traditional dispute resolution (TDR) mechanisms and the blending of customary law with the TDR members' understanding of *shari'a*. International treaties to which Afghanistan has joined must be observed, but are subject to review by the Supreme Court.

The result is a “fragmented *mélange* of secular, customary and religious law variously applied according to local acceptance of central legislation and modified by shifting conditions of governmental authority. Legal pluralism is the hallmark of legal reality in Afghanistan.”¹ This chapter explores the provisions of the Constitution that set forth a framework for the application of statutory, *shari'a*, and international law. It also addresses the role and impact of the TDR mechanisms and their application of customary law.

¹ Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present, (Jan Michiel Otto, ed. 2010), Chapter 7: *Sharia and National Law in Afghanistan*, by Nadjma Yassari and Mohammad Hamid Saboory (hereinafter Sharia Incorporated), p. 313. Book available for purchase:

<http://www.press.uchicago.edu/ucp/books/book/distributed/S/bo8930448.html>; Chapter 7 available on google books:

http://books.google.com/books?id=8ep7cX3ma0sC&pg=PA273&lpg=PA273&dq=sharia+and+national+law+in+afghanistan,+in+sharia+incorporated:+a+comparative+overview+of+the+legal+systems+of+twelve+muslim+countries+in+past+and+present&source=bl&ots=1oRnKEwwmM&sig=Yu_OZfw_K2LfUx1V701KgLIPmqU&hl=en&ei=vYRmTueSOYqSgQfEurzFCg&sa=X&oi=book_result&ct=result&resnum=3&ved=0CCQ6AEwAg#v=onepage&q&f=false

The Constitution and *Shari'a* Law

Afghanistan's Constitution establishes the country as an Islamic Republic and Islam as the official religion of the country.² Moreover, the President of the country is required to be Muslim.³ The Constitution also provides:

Article 3

No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.⁴

Article 149

The principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism shall not be amended.

Article 130 of the Constitution, however, establishes the supremacy of the Constitution and statutory law over Islamic law in court proceedings providing, "In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws."⁵ The article continues stating:⁶

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.

For *Shi'i* followers, the Constitution provides:⁷

The courts shall apply the *Shi'i* jurisprudence in cases involving personal matters of followers of the *Shi'i* sect in accordance with the provisions of the law. In other cases, if no clarification in this Constitution and other laws exist, the courts shall rule according to laws of this sect.

Pursuant to this provision, the Shi'ite Personal Status Law was passed in 2009 regulating disputes regarding the personal status of *Shi'i* followers.⁸ Other disputes not regulated by law, are governed by *shi'i jafari*. Law on the Organization & Jurisdiction of the Courts of the

² 2004 Constitution of Afghanistan (Translated by Sayed Shafi Rahel for the Secretariat of the Constitutional Commission) (hereinafter Constitution), Articles 1 and 2:

http://supremecourt.gov.af/Content/Media/Documents/constitution2004_english3012201016726844.pdf.

³ Ibid, Art. 62.

⁴ Ibid, Art. 3. All of Afghanistan's Constitutions, except the 1980 Constitution, have contained a similar repugnancy clause.

⁵ Ibid, Art. 130.

⁶ Ibid. The majority of Muslims in Afghanistan are *Sunni*, however, a small minority are *Shi'i*. *Hanafi* jurisprudence is one of the four primary legal schools for Sunni Muslims. The other three schools are: *Maliki*, *Shafi'i*, and *Hanbali*. *Jafari* jurisprudence is one of the legal schools for *Shi'i* Muslims. See Chapter 2.6: *Shari'a* Law in Afghanistan.

⁷ Ibid, Art. 131.

⁸ Shi'ite Personal Status Law (2009), unofficial English translation available at:

<http://www.unhcr.org/refworld/pdfid/4a24ed5b2.pdf>

Islamic Republic of Afghanistan (Law on Courts), reinforces the primacy of statutory law stating that the Court can apply Islamic law in accordance with the Constitution, “if there is no clear legal provision for the case.”⁹ Similarly, the Civil Code provides: “In instances where the law contains no provisions on a case under consideration, the court shall issue its decision in accordance with the basic principles of the *Hanafi fiqh*.”¹⁰

The application of Islamic law in criminal cases, however, raises concerns about criminalizing acts that are not defined as crimes under the Constitution or statutory law. *Shari’a* law recognizes three main categories of crimes: 1) *hudūd* – God’s rights or Society’s rights include adultery, slander, drinking alcohol, theft, apostasy, brigandage, and transgression; 2) *qiṣāṣ* – individual rights includes voluntary homicide, involuntary homicide, intentional injuries against a person, and unintentional injuries against a person; and 3) *ta’zīri*. *Hudūd* crimes and their punishments are prescribed by the *Qur’ān* and the *Sunnah* (deeds or sayings of the Prophet Muhammad). *Qiṣāṣ* crimes are derived from the *Qur’ān*, but the victim or his/her family can pardon punishment. *Ta’zīri* crimes and their punishments are defined by the governor, ruler, or legislator.

The principle of legality, that is the principle that individuals are only responsible for an act that is recognized as a crime under the law at the time the crime is committed, is accepted in *shari’a* law as well as in Afghanistan’s Constitution and Penal Code.¹¹ The Constitution provides:¹²

Art 27

No act is considered a crime, unless determined by a law adopted prior to the date the offense is committed.

No person can be pursued or detained but in accordance with the provisions of law.

⁹ Law of the Organization and Authority of the Courts of the Islamic Republic of Afghanistan, Official Gazette No. 1109, 19 June 2013 (1392/4/9), Art. 28 (translation provided by UNAMA) (hereinafter Law on Courts).

¹⁰ Civil Law of the Republic of Afghanistan, Official Gazette No. 353, published 1977/01/05 (1355/10/15 A.P.), Art. 1(2) URL link available on Legislation Afghanistan (Lexadin):

<http://www.lexadin.nl/wlg/legis/nofr/oeur/lxweafg.htm>. *Fiqh* are the practical rules derived from the two major sources of *shari’a* law: divine revelation and legal reasoning (*Ijtihad*) by qualified jurist (*Mujtahid*). See Chapter 2.6: *Shari’a* Law in Afghanistan.

¹¹ See *The Concept of Crime in the Afghan Criminal Justice System: The Paradox between Secular, Tradition and Islamic Law, A Viewpoint of an International Practitioner*, International Criminal Law Review, Volume 9, Number 4, 2009 (hereinafter *The Concept of Crime*), p. 668; Afghanistan Penal Code (1976), Official Gazette No. 347, published 1976/10/06 (1355/07/15 A.P.)(hereinafter Penal Code), Articles 2 and 3: [http://www.cicr.org/ihl-nat.nsf/6fa4d35e5e3025394125673e00508143/845809a497304d8fc12571140033ac69/\\$FILE/Penal%20Code%20-%20Afghanistan%20-%20EN.pdf](http://www.cicr.org/ihl-nat.nsf/6fa4d35e5e3025394125673e00508143/845809a497304d8fc12571140033ac69/$FILE/Penal%20Code%20-%20Afghanistan%20-%20EN.pdf); or URL link available on Legislation Afghanistan (Lexadin):

<http://www.lexadin.nl/wlg/legis/nofr/oeur/lxweafg.htm>; Constitution, *supra* note 2, Art. 27.

¹² Constitution, *supra* note 2, Art. 27.

Art. 27 (con't)

No person can be punished but in accordance with the decision of an authorized court and in conformity with the law adopted before the date of the offense.

The Penal Code further stipulates that it regulates *ta'zīri* crimes.¹³ Crimes of *hudūd* or *qiṣāṣ* “shall be punished in accordance with the provisions of Islamic religious law (the *Hanafi* religious jurisprudence).”¹⁴ The Penal Code, however, also provides punishment for many *hudūd* and *qiṣāṣ* crimes.¹⁵

There is an on-going debate on how the repugnancy clause and the principle of legality are applied. Specifically, there remains disagreement regarding whether “the ethical values of Islam govern the interpretation of the laws, or [] the constitution and state-enacted law set the framework within which Islamic law must operate.”¹⁶ International experts argue that the principle of legality set forth in the Constitution and the Penal Code dictate that a “crime” is defined exclusively by statutory law. Further, *shari'a* law is viewed as a subordinate source of interpretation limited by the Constitution based on Articles 130 and 121.¹⁷ Article 130 arguably limits the application of *shari'a* law within the confines of the Constitution (“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” (emphasis added)).¹⁸ Article 121, authorizes the Supreme Court to review laws for their compliance with the *Constitution*, not with *shari'a* law.¹⁹ Moreover, the former Law on Courts granted the Court the power to review the conformity of laws with the principles of Islam.²⁰ The current Law on Courts does not grant the same authority.²¹ Pursuant to these provisions, the position is that if an act is not defined as a crime under the statutory law, it cannot

¹³ Penal Code, *supra* note 11, Art. 1.

¹⁴ *Ibid.*

¹⁵ For example, the Penal Code punishes murder (Articles 394 and 400), theft (Art. 454), highway robbery (brigandage)(Art. 447), defamation (Art. 436), use of alcohol (Art. 349), adultery (Art. 427).

¹⁶ *Sharia Incorporated*, *supra* note 1, p. 298.

¹⁷ For a fuller discussion of this position, see Max Planck Institute for Comparative Public Law and International Law, Max Planck Manual on Afghan Constitutional Law, Volume One: Structure and Principles of the State, Amended 3rd Edition, by Ramin Moschtaghi (March 2009), p 30. MPI Manuals on the Law of Afghanistan (accessed January 29, 2014):

http://www.mpil.de/en/pub/service/globaler_wissenstransfer/afghanistan_project/publications/max_planck_manuals_on_the_law.cfm.

¹⁸ Constitution, *supra* note 2, Art. 130.

¹⁹ *Ibid.*, Art. 121.

²⁰ See Law of the Organization and Authority of the Courts of the Islamic Republic of Afghanistan, Official Gazette No. 851 Published 31 Sawar 1384 (May 21, 2005) (Supreme Court’s Final Draft /Checchi/ Translation/Fayeq, May 19, 2005), Art. 24:

http://supremecourt.gov.af/Content/Media/Documents/Law_on_Org_juris_courts_English112011121448474.pdf.

²¹ Law on Courts, *supra* note 9, Art. 28.

be punished by statutory law or *shari'a* law. *Shari'a* law must operate within the framework of the Constitution and statutory law.

In contrast, Afghan jurists utilize the repugnancy clause along with the broad definition of “crime” observed by *shari'a* law, which includes *ta'zīri* crimes defined by statutory law as well as *hudūd* and *qiṣāṣ* crimes defined by the *Qur'ān* and *Sunnah*. Under this perspective, Islamic Law is the highest law and governs the interpretation of statutory law. Statutory law is viewed as a codification of the substantive *shari'a* rules because pursuant to Article 3 of the Constitution no law can contravene Islamic law. Furthermore, the Supreme Court’s right to review the constitutionality of a law includes its compliance with Article 3 of the Constitution – i.e. the tenants and provisions of Islam. Accordingly, if an act is defined as a crime under *shari'a* law it is punishable. Article 130 of the Constitution merely recognizes the application of *shari'a* law where statutory law has failed to criminalize the act. The Supreme Court has used Article 130 to criminalize and punish a defendant to death for apostasy pursuant to *hanafi* jurisprudence.²²

The application of *shari'a* law by the courts to “fill in the gaps” left by statutory law results in a system that is uncertain and unpredictable. This is due in part to the lack of uniformity as it relates to judicial education, training, and experience. Judges are required to have a degree in *either* secular law or Islamic law.²³ The majority of judges have a degree in Islamic law.²⁴ Consequently, the lack of legal education on statutory law results in greater application of *shari'a* law. But, there is also discrepancy in the application of *shari'a* based upon the individual judge’s education, understanding, and interpretation. Often, elements of customary norms are co-mingled or confused with *shari'a* law principles.

Customary Law

The co-mingling or confusion of customary laws and *shari'a* principles is more pronounced when disputes are handled by a local traditional dispute resolution (TDR) mechanism outside the formal court system.²⁵ As discussed in Chapter 2.3, the majority of disputes in Afghanistan are heard by TDR mechanisms. The TDR members use a combination of customary law and their understanding of Islamic religious principles in resolving disputes.²⁶ Customary laws vary depending on the ethnic, geographical, and religious traditions of a community. The communities’ understanding and application of *shari'a* law also varies across the country. The result is a dispute heard in the eastern part of the country will be resolved differently than a

²² *Mol v Abdul Rahaman* (2006) 2267 ASC (Afghanistan Supreme Court). For a full discussion of the case and the debate on the legality of the judgement, see *The Concept of Crime*, *supra* note 11, pp. 676-681.

²³ See, e.g. Constitution, *supra* note 2, Art. 118(3). See also Volume 3, Chapter 3.1 for a discussion of the legal education and training of justice professionals.

²⁴ In 2007, 44% of judges were trained in Islamic law and 11% in secular law. *Justice in Afghanistan: Rebuilding Judicial Competence After the Generation of War*, by Livingston Armytage (Heidelberg Journal of International Law Vol. 67, 2007), p. 190: http://www.mpil.de/shared/data/pdf/armytage-justice_in_afghanistan.pdf.

²⁵ See Chapter 2.3 for a review of the TDR mechanisms in Afghanistan.

²⁶ *Ibid.* See also USIP, *The Politics of Dispute Resolution and Continued Instability in Afghanistan*, Special Report by Noah Coburn (Aug. 2011), p. 1: <http://www.usip.org/files/resources/sr285.pdf>.

dispute heard in the western part of the country. In general, however, customary laws have been criticized for violating human rights standards and failing to protect the rights of women and children. Some customary practices, such as *baad*, have been condemned for being in conflict with *shari'a* law, but remain in practice as legitimate resolution to a dispute.²⁷ The impact is a judicial system that lacks legal certainty on the national level.

Although several studies and reports have been conducted on TDR mechanisms in Afghanistan, the ability to track decisions and the reasoning used in making decisions is challenging.²⁸ Most TDR decisions are made orally. The Afghan Government's national policy/draft law on TDR seeks to link TDR decisions with the formal court system by having TDR decisions written and registered with the courts or local *huquq* office.²⁹ The draft law is unclear, however, regarding how (and if) the *huquq* or court should evaluate whether a resolution was made in compliance with Afghan statutory law, *shari'a* law, and human rights obligations.³⁰

The Constitution and International Law

Article 7 of the Afghan Constitution provides:³¹

Art. 7

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.

Afghanistan is party to a number of international and regional treaties, covenants, agreements, conventions, charters, etc., that obligate it to adhere to certain international standards of law.³² Some of the agreements have been entered into with reservations, which affects the application of certain provisions. It is important, therefore, to determine what reservations, if any, have been made by Afghanistan's accession to or ratification of a treaty.

Once Afghanistan is a party to a treaty, Article 7 of the Constitution prescribes the State's obligation to observe the terms of the treaty. Article 121 grants the Supreme Court the authority to review "international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law."³³ This raises the question

²⁷ *Baad* – giving of a female as compensation for wrong. See *Sharia Incorporated*, *supra* note 1, p. 312.

²⁸ See Chapter 2.3: Informal Dispute Resolution in Afghanistan.

²⁹ *Ibid*; see Draft Law on Dispute Resolution *Shuras* and *Jirgas*, 4 Oct. 2010.; See also USIP, Memorandum Re: Comments on Draft Law on Dispute Resolution *Shuras* and *Jirgas* (Jan., 20, 2010), p.3

³⁰ *Ibid*.

³¹ Constitution, *supra* note 2, Art. 7.

³² For example, Afghanistan has ratified the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (CESCR), the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) along with two optional protocols, the Convention on the Elimination of all Forms of Racial Discrimination (CERD), the Convention Against Torture and Other Cruel or Degrading Treatment (CAT), and many others.

³³ Constitution, *supra* note 2, Art. 121.

whether a treaty is self-executing creating an enforceable obligation that may be directly invoked or if it requires enabling legislation. The fact that international treaties are subject to review by the Supreme Court places them on par with domestic statutory law.³⁴ This is contrary to customary international law, which places international treaties on par with domestic constitutions.³⁵ In addition, international law recognizes the primacy of international treaties over domestic law, and many treaties have provisions explicitly stating its preeminence.³⁶

Conclusion

Afghanistan's legal landscape has been described as "a patchwork of various norms."³⁷ The Constitution sets forth a framework for the application of statutory, *shari'a*, and international law, but different interpretations of the provisions result in a different hierarchical structure. As a result, the debate over the primacy of the Constitution or the primacy of *shari'a* law continues. In reality, the majority of disputes are handled outside the formal justice system by local TDR mechanisms "using an ad hoc array of government officials, and local leaders" who apply a combination of customary law and their understanding of *shari'a* law.³⁸ Regardless of one's position, it has been noted that "any reform of the legal system to bring it in line with international human rights standards or with the provisions of the new constitution will require as an essential prerequisite the existence of a stable, functioning and capable state both able and willing to enforce laws."³⁹

³⁴ Ibid.

³⁵ See Vienna Convention on the Law of Treaties, Articles 26 and 27:

<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty1.asp>. Afghanistan signed the Vienna Convention in 1969, but has not ratified it. The provisions, however, are still applicable to non-contracting states because the Convention is considered a codification of international customary law. See also, Max Planck Institute for Comparative Public Law and International Law, Max Planck Manual on Afghan Constitutional Law, Volume Two: Constitutional Practice and Human Rights, by Mandana Knust Rassekh Afshar (July 2007), pp. 7-9. MPI Manuals on the Law of Afghanistan (accessed January 29, 2014): http://www.mpil.de/en/pub/service/globaler_wissenstransfer/afghanistan_project/publications/max_planck_manuals_on_the_law.cfm.

³⁶ See e.g. ICCPR, Art. 2, "each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."

³⁷ *Sharia Incorporated*, *supra* note 1, p. 313.

³⁸ *The Politics of Dispute Resolution and Continued Instability in Afghanistan*, *supra* note 26, pp. 1 & 2.

³⁹ *Sharia Incorporated*, *supra* note 1, p. 311.

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