

2.5: Legal Traditions and the Afghan Model

Summary

This chapter provides a comparative overview of civil law, common law, and Islamic law legal traditions and examines the Afghan model.

Introduction

A legal system is “an operating set of legal institutions, procedures and rules.”¹ Legal systems are generally classified into legal traditions. “Legal tradition” refers “to a set of deep rooted, historically conditioned attitudes about the nature of law, about the role of law in the society...about the proper organization and operation of a legal system, and about the way the law is or should be made, applied, studied, perfected and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.”² Most legal systems are a hybrid of legal traditions and many countries have more than one legal system.

Earlier chapters of this Primer provide an overview of the formal Afghan legal system as well as the informal dispute resolution mechanisms and explore the state of legal pluralism in Afghanistan.³ This chapter looks at the legal traditions inherent in common law, civil law, and Islamic law, and examines the Afghan model. This chapter admittedly provides a simplistic and generalized overview of the legal traditions. Comparative legal study is a complex subject, which cannot be comprehensively covered in this Primer. The intent is not to have a detailed comparative law primer, but rather to establish a basic understanding and framework for examining Afghanistan’s legal tradition and current legal system.

Legal Traditions

Legal traditions are generally classified as civil, common, chthonic (indigenous or tribal), or theonomic (religious - Islamic, Talmudic, Hindu, Confucian, etc.). Legal traditions are characterized by historical attitudes toward the law, which are reflected in the legal system.

¹ The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America, 2nd Ed., by John Henry Merryman, Stanford: Stanford University Press, 1985, p. 2.

² Ibid.

³ Chapters 2.1, 2.2, and 2.3 provide an overview of the formal legal systems and informal dispute resolution mechanisms in Afghanistan; Chapter 2.4 discusses the hierarchy of laws and the state of legal pluralism in Afghanistan.

Understanding the legal tradition “allows an understanding of how the system operates, where it comes from, and how it is likely to respond to new developments in law and society.”⁴

The civil law tradition is rooted in the *Corpus Juris Civile*, the codification of Roman law including family, inheritance, property, and contracts.⁵ The common law tradition is rooted in William the Conqueror’s establishment of a corps of loyal adjudicators to resolve local disputes following the conquest of England by the Normans.⁶ Islamic law tradition is rooted in the *Qur’ān*. The fundamental differences between legal traditions can be seen by examining the sources of law, the court structure, the role of the justice actors, and the legal training for professionals.

A. Sources of Law

Civil Law

“At the heart of the civil law lies a belief in codification as a means to ensure a rational, logical, and systematic approach to law.”⁷ Not surprisingly, “legislation is the principal source of law in civil law countries.”⁸ Civil law countries have a hierarchy of laws with the constitution as premier, followed by codes and other legislation, executive decrees, regulations and then ordinances, and at the very bottom customs -albeit rarely used by the courts.⁹ Case law is traditionally not a source of law in civil law countries.¹⁰ Commentaries, however, are heavily relied upon.¹¹ International treaties and conventions, if ratified, automatically become part of domestic law.¹²

Common Law

Common law, with its roots in resolving individual disputes at the local level, gives primacy to judicial opinions.¹³ Case law as the authoritative source of law led to the development of precedents and the principle of *Stare Decisis*.¹⁴ “Historically, laws or statutes were viewed as a

⁴ *International Law’s Mixed Heritage: A Common/Civil Law Jurisdiction* by Colin B. Picker, Vanderbilt Journal of Transnational Law, Vol. 41: 1083, 1094: http://www.vanderbilt.edu/jotl/manage/wp-content/uploads/Picker_final_7.pdf.

⁵ *A Primer on the Civil-Law System*, by James G. Apple Chief, Interjudicial Affairs Office Federal Judicial Center and Robert P. Deyling Judicial Fellow Administrative Office of the U.S. Courts, 1994–1995, Federal Judicial Center, p. 6: [http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/\\$file/CivilLaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf).

⁶ *Practitioner’s Guide, Common Law and Civil Law Traditions*, by Dr. Vivienne O’Connor, International Network to Promote the Rule of Law (INPROL), March 2012 (hereinafter INPROL Common Law and Civil Law Traditions), p. 11: <http://inprol.org/publications/common-law-and-civil-law-traditions>

⁷ *Ibid*, p. 12.

⁸ *Ibid*, p. 11.

⁹ *Ibid*.

¹⁰ *Ibid*, p. 12.

¹¹ *Ibid*, p. 13.

¹² *Ibid*, p. 12.

¹³ *Ibid*, p. 14.

¹⁴ *Ibid*.

secondary source of law, their role being to correct judicially-created rules.”¹⁵ International treaties and conventions must be converted or adopted by the legislature before they become part of domestic law.¹⁶

Islamic Law

In the Islamic law tradition, “the *shari’a* was an uncodified body of legal doctrines, principles, values and opinions. It was the province of the scholarly class to use interpretation and discern the requirements of the law.”¹⁷ *Shari’a* is often defined as law derived from the *Qur’ān*, the *Sunnah*, and the classic schools of Islamic jurisprudence (*fiqh*). Muslim jurists, however, distinguish between the divine, revealed law and jurisprudence.¹⁸ The primary sources of doctrine for all schools of Islamic law (*shari’a*) are the divine, revealed law: the *Qur’ān*, then the *Sunnah* and the *Hadith*. *Sunnah* is the Arabic term for the Prophet’s customary practice or deeds of the Prophet.¹⁹ The *Sunnah* technically embraces the Prophet’s sayings or *Hadith* as well as the silent approval of the Prophet.

“[*F*]iqh refers mainly to the *corpus juris* that is developed by the legal schools (*madhhabs*), individual jurists, and judges by recourse to legal reasoning (*ijtihad*) and issuing of legal verdict (*fatwa*).”²⁰ “Each *madhab* developed detailed rules and regulations of family law, decedents’ estates, trusts, contract law, commercial law, taxes, property, secured transactions, payment systems, and criminal law. These rules put together constitute classical *fiqh*. However, classical *fiqh* is not a monolithic corpus but contains the rules, some at odds with each other, developed by the five schools.”²¹ It was the scholars who interpreted the *shari’a* and developed the content of law.

In the traditional Islamic state the *shari’a* existed alongside a body of administrative regulations as well as tribal, customary laws that regulated daily life.²² Administrative regulations were developed by the Caliph “to fill the gaps and cover those areas where the *shari’a* did not lay

¹⁵ Ibid, p. 14.

¹⁶ Ibid, p. 15.

¹⁷ The Fall and Rise of the Islamic State, by Noah Feldman, A Council on Foreign Relations Book, Princeton University Press 2008 (hereinafter The Fall and Rise of the Islamic State), p. 62.

¹⁸ “Shariah versus Secular Law?” by Kilian Bälz, p. 122, *Islam and the Rule of Law, Between Sharia and Secularization*, Birgit Krawietz Helmut Reifeld (Hrsg.), Konrad-Adenauer-Stiftung e.V., Sankt Augustin/Berlin, 2008: http://www.kas.de/wf/doc/kas_13008-544-2-30.pdf.

¹⁹ See The University of Georgia, Department of Religion, Islam and Islamic Studies Resources Website, *The Sunnah: Practice and Law (shari’ah)*: <http://islam.uga.edu/shariah.html>

²⁰ Shari’ah Law: An Introduction, by Mohammad Hashim Kamali, Oneworld Publications, April 2008, p. 3: <http://images.saharaman.multiply.multiplycontent.com/attachment/0/SMER@AoKCC0AADSNIoE1/Shariah%20Law.pdf?key=saharaman:journal:84&nmid=114004816>. The four Sunni *madhhabs* are *Hanafi*, *Maliki*, *Shafi*, *Hanbali*. The major *Shi’a fiqh* is *Jafari*. Although the schools of Islamic law differ on doctrinal questions, they all remain valid. See The Fall and Rise of the Islamic State, *supra* note 17, p. 66.

²¹ *The Reopening of the Islamic Code: The Second Era of Ijtihad*, by L. Ali Khan, University of St. Thomas Law Journal, Vol. 1:1, October 2003, p. 348 (hereinafter *The Second Era of Ijtihad*): http://works.bepress.com/cgi/viewcontent.cgi?article=1057&context=abu_kashif.

²² The Fall and Rise of the Islamic State, *supra* note 17, pp. 61 & 13.

down the mandatory rule.”²³ Administrative regulations covered a broad range of subjects including: weights and measures, taxation, and criminal affairs.²⁴ Administrative regulations “were understood by one and all to derive from the authority of the ruler that was recognized by the *shari’a*. A regulation could never contradict or supersede the *shari’a*...the complex of administrative regulations was subordinate to the authority of the *shari’a*.”²⁵

Traditional Islamic law also accepted local cultural practices as a source of law. Cultural practices were considered permissible and valid as long as they did not contradict the ethical and moral precepts of the *Qur’ān*.²⁶ The existence of plural types of law in the traditional Islamic state was authorized by the *shari’a* because the laws “could under no circumstances contradict the *shari’a* as [the scholars] interpreted it.”²⁷ Ultimate authority resided with the *shari’a* – “and hence to the authority of the scholars who were uniquely in control of its content.”²⁸

B. Court Structure

Civil Law

Civil-law systems “favor specialty court systems and specialty courts to deal with constitutional law, criminal law, administrative law, commercial law, and civil or private law.”²⁹ “A case falling within the jurisdiction of one court generally is immune from jurisdiction in all others. ... [T]he typical civil-law judicial system would be represented as a set of two or more distinct structures with no bridge between them. As a general matter, a system of “ordinary” courts, staffed by “ordinary” judges, adjudicates the vast majority of civil and criminal cases. ... The ordinary courts apply the law found in the civil, commercial, and penal codes, and in legislation supplementing those codes.”³⁰ Decisions of the ordinary courts can be appealed to an appellate court and further appealed to a court of cassation, which decides only on questions of law.³¹

Traditionally, jurisdiction over administrative law and constitutional law matters is separate from the private law matters dealt with by the ordinary courts.³² “The creation of administrative courts grew out of the strong tradition of separation of powers ... that established the legislature as the preeminent source of law. Within that tradition, the judiciary was not viewed as competent to render decisions on the legality of administrative action.”³³ A government body, as opposed to a

²³ Ibid, p. 43.

²⁴ Ibid, p. 42.

²⁵ Ibid, p. 43.

²⁶ See The Encyclopaedia Britannica Guide to The Islamic World: Religion, history, and the future, Encyclopedia Britannica, Inc. 2009, Introduction, p. XIII.

²⁷ The Fall and Rise of the Islamic State, *supra* note 17, p. 13.

²⁸ Ibid, pp. 43-44 & 64.

²⁹ A Primer on the Civil-Law Systems, *supra* note 5, p. 37.

³⁰ Ibid, p. 24.

³¹ INPROL Common Law and Civil Law Traditions, *supra* note 6, p. 16.

³² Ibid.

³³ A Primer on the Civil-Law Systems, *supra* note 5, p. 25.

court, traditionally acts as the administrative court of last resort.³⁴ Similarly, a government body traditionally acts as the court of last resort in reviewing the constitutionality of a law.³⁵

Common Law

In contrast, common law systems “favor integrated court systems with courts of general jurisdiction available to adjudicate criminal and most types of civil cases, including those involving constitutional law, administrative law, and commercial law.”³⁶ “Common law courts are unified, meaning that there is generally one Appeals Court and one Supreme Court in which any case may be subject to final scrutiny. The jurisdiction of inferior courts, which deal with criminal and civil matters, is limited geographically and according to the nature of the subject-matter.”³⁷

Islamic Law

“Although Islamic law was a ‘jurists’ law’ in that its content was determined by the jurist-scholars, and not the state, it was also state law in that it had a mechanism for being enforced by the state.”³⁸ That mechanism was the judiciary drawn from the scholarly class and appointed by the Caliph.³⁹ The *shari’a* courts handled cases with reference to the principles of *fiqh*. “[P]arallel to the *Shari’a* court, a secular court known as the *mazalim* (complaints) court... implemented the ruler’s decrees and settled fiscal and penal disputes.”⁴⁰ In addition to the courts, administrative institutions were established “in order to supplement and assist the *qadi* [judge] in *Shari’a* and *mazalim* courts.”⁴¹

C. Role of Justice Actors in Criminal Cases

Civil Law⁴²

In the civil law tradition the police inform the prosecutor of an alleged crime. The prosecutor conducts a preliminary investigation to determine if there is enough evidence to open a judicial investigation. The prosecutor defines the scope of the crimes to be investigated. An investigating judge is responsible for leading the criminal investigation. In countries without an investigating judge, prosecutors are responsible for the criminal investigation. The prosecutor

³⁴ INPROL Common Law and Civil Law Traditions, *supra* note 6, p. 16. Some countries today have a supreme administrative court.

³⁵ *Ibid.* Many countries have since established Constitutional Courts instead of the traditional government body/council.

³⁶ *A Primer on the Civil-Law Systems*, *supra* note 5, p. 37.

³⁷ INPROL Common Law and Civil Law Traditions, *supra* note 6, p. 17.

³⁸ *The Fall and Rise of the Islamic State*, *supra* note 17, p. 27. During the era of the four caliphs and the subsequent century most of the rulers of the Islamic state were also religious scholars and recognized as *Shari’a* experts.

³⁹ *Ibid.*

⁴⁰ *Islamic Criminal Law and Procedure, An Introduction* by Matthew Lippman, Sean McConville, and Mordechai Yerushalmi, Preager Publishers, 1988, p. 96.

⁴¹ *Ibid.*, p. 99.

⁴² The summary of the role of justice actors in the civil law tradition is taken from INPROL Common Law and Civil Law Traditions, *supra* note 6, pp. 17-22 ; *see also A Primer on the Civil-Law Systems*, *supra* note 5.

and investigating judge are often assisted in the investigation by judicial police. Judicial police typically do not have any independent authority, but act on orders from the investigating judge.⁴³ Historically, during the investigation defense counsel is not present when the suspect is being interviewed. Although this is changing, defense counsel may not participate or interfere with the investigation. Their role is only to make sure the suspect is treated legally, not to advocate for their client. Defense counsel may review the case file and evidence, but are not allowed to contact witnesses.

At the conclusion of the investigation, the case file is passed from the investigating judge to the sitting judge(s) for adjudication. The civil law judge acts as an inquisitor questioning witnesses, experts, and calling evidence. The prosecutor will present the case at trial, but the judge is responsible for interviewing the witnesses. Defense counsel can advise his/her client on how to respond to the proceedings, may call certain matters to the attention of the court, and request the judge to ask a particular question of a witness, but may not do so directly. Cases are determined by a judge or panel of judges, which may include lay judges. Juries are atypical in civil law tradition.

Common Law⁴⁴

In the common law tradition, police have independent authority to investigate a crime. The police are responsible for collecting and securing evidence. Investigative oversight is indirectly provided by a judge if the police action requires a warrant or order because it is coercive or interferes with the rights of a person (e.g. arrest warrants, search, and seizure). Defense counsel plays an active role during the investigation. They can be present during the questioning of their client and can advise their client on how to respond during the interview. Defense counsel can independently gather evidence, question witnesses, and hire experts.

At the conclusion of the investigation, the police turn the case file over to the prosecutor. The prosecutor determines if there is enough evidence to proceed to trial and will file an indictment accordingly. If the indictment is approved the prosecutor presents the case at trial. The prosecutor is responsible for questioning witnesses, experts, and presenting evidence. Defense counsel has the same rights in court and can question witnesses and experts called by the prosecutor, call their own witnesses and experts, and present evidence. The judge acts as a referee between the prosecutor and defense. Judges interpret the law and instruct a jury who play a major role in determining the facts of a case.

⁴³ There may be exigent circumstances that give judicial police the authority to search premises, collect preliminary evidence, or arrest suspects.

⁴⁴ The summary of the role of justice actors in the common law tradition is taken from INPROL Common Law and Civil Law Traditions, *supra* note 6, pp. 22-25.

Islamic Law

In the Islamic law tradition, criminal acts are divided into three main categories: 1) *hudūd*; 2) *qiṣāṣ*; and 3) *ta'zīri*. *Hudūd* offenses are crimes against God and their punishments are prescribed and required by the *Qur'ān* and the *Sunnah* (deeds or sayings of the Prophet Muhammad).⁴⁵ The State, as God's agent, initiates prosecution of *hudūd* offenses.⁴⁶

Qiṣāṣ crimes are derived from the *Qur'ān* and are offenses against the person including physical assault and murder.⁴⁷ The victim or heirs initiate the prosecution of *qiṣāṣ* crimes, which are punishable by retaliation.⁴⁸ The victim or his/her family may waive punishment and ask for compensation or pardon the offender.⁴⁹

Ta'zīri crimes and their punishments are defined by the governor, ruler, or legislator. *Ta'zīri* crimes are also offenses against the person, however, the State initiates the prosecution of *ta'zīri* crimes “as part of the ruler's responsibility to maintain public order and welfare.”⁵⁰ The victim may request the ruler pardon the offender.⁵¹

The role of defense counsel is generally recognized as an extension of the Islamic theory of “protected interests.”⁵² “The theory of ‘protected interests’ recognizes the right to receive the assistance of others in safeguarding one's interests. This right of assistance forms the basis of the right to counsel.”⁵³ The different schools of jurisprudence disagree whether the right to counsel is a privilege granted at the ruler's discretion or an absolute right.⁵⁴ Many *madhabs* believe counsel is not required for *hudūd* crimes, while some schools of jurisprudence would allow counsel for theft or defamation, but not other *hudūd* offenses.⁵⁵ Almost all *madhabs*, however, permit counsel in the cases of *qiṣāṣ* and *ta'zīri* offenses.⁵⁶

In its purest form, *shari'a* courts are religious courts “in which faith, rather than adversarial or inquisitorial procedure, is the path to a fair and equitable result.”⁵⁷ The judge (*qadi*) acts as a moderator and enforcer. Decisions by the court are binding on the parties, but not considered binding precedent.⁵⁸ There are no juries.⁵⁹ Evidence is limited to “three types that are thought to

⁴⁵ *Islamic Criminal Law and Procedure, An Introduction*, *supra* note 40, p. 38. *Hudūd* offenses include adultery, slander, drinking alcohol, theft, apostasy, brigandage (highway robbery) and transgression (rebellion).

⁴⁶ *Ibid*, p. 41.

⁴⁷ *Ibid*, p. 38. *Qiṣāṣ* crimes include murder, voluntary killing, involuntary killing, intentional physical injury or maiming, and unintentional physical injury or maiming. *Ibid*, p. 49.

⁴⁸ *Ibid*, pp. 38 and 41.

⁴⁹ *Ibid*.

⁵⁰ *Ibid*, p. 41.

⁵¹ *Ibid*.

⁵² *Ibid*, p. 64.

⁵³ *Ibid*.

⁵⁴ *Ibid*, p. 65

⁵⁵ *Ibid*.

⁵⁶ *Ibid*.

⁵⁷ *Ibid*, p. 121.

⁵⁸ *The Second Era of Ijtihad*, *supra* note 21, p. 361.

possess a high degree of reliability: eyewitness testimony, confessions, and religious oaths.”⁶⁰
The trial process has been described as follows:⁶¹

At trial, the judge question[s] the defendant about the claim made against him. If the defendant denie[s] the claim, the judge then ask[s] the accuser, who [has] the burden of proof, to present his evidence. Evidence almost always [takes] the form of the direct testimony of two male witnesses of good character (four in adultery cases). Circumstantial evidence and documents [are] usually inadmissible. Female witnesses [are] not allowed except in cases where they [hold] special knowledge, such as childbirth. In such cases, two female witnesses [are] needed for every male witness. After the accuser finish[s] with his witnesses, the defendant [can] present his own.

If the accuser [can] not produce witnesses, he [can] demand that the defendant take an oath before Allah that he [is] innocent. "Your evidence or his oath," the Prophet Muhammad taught. If the defendant [swears] he [is] innocent, the judge dismis[s]e[s] the case. If he refuse[s] to take the oath, the accuser [wins]. The defendant [can] also confess to a crime, but this [can] only be done orally in open court.

In all criminal cases, the evidence [has] to be "conclusive" before a judge [can] reach a guilty verdict.

If a judge does not know the law, he can refer the inquiry to a jurist-scholar who answers in the form of a *fatwa* (legal opinion).⁶² A party engaged in a case can also make a legal inquiry to a jurist-scholar.⁶³ A *fatwa* is not considered binding and “it remain[s] for the judge to decide among competing *fatwas* should they exist on a question.”⁶⁴ “The role of both the judge and jurist [is] carefully defined by law and by custom.”⁶⁵ The judge is to resolve a dispute by applying the law while the jurist-scholar maintains the exclusive right to interpret God’s law.⁶⁶

⁵⁹ Ibid.

⁶⁰ *Islamic Criminal Law and Procedure, An Introduction*, *supra* note 40, p. 68

⁶¹ *The Second Era of Ijtihad*, *supra* note 21, p. 361. The statement that an accuser wins if the defendant refuses to take an oath is contested by others holding that regardless the accuser still has the burden of proof.

⁶² *The Fall and Rise of the Islamic State*, *supra* note 17, p. 22.

⁶³ Ibid, p. 51.

⁶⁴ Ibid, p. 52.

⁶⁵ Ibid, p. 22.

⁶⁶ See *ibid*, pp. 22-23.

D. Legal Training for Professionals

Civil Law⁶⁷

In the civil law tradition, law degrees are undergraduate university degrees. Students study the codes and commentaries in a lecture format. Upon graduation, a graduate must decide their career path as a judge, prosecutor, advocate, notary, or scholar and once decided career paths are rarely changed. Judges and prosecutors typically attend specialized training courses and are required to pass an exam before being selected/appointed to a position. Advocates typically go through an apprenticeship under an experienced lawyer. Becoming a scholar is usually the most difficult career path because of the value placed on legal commentaries in the civil law system.

Common Law⁶⁸

In the common law tradition, law degrees can be undergraduate university degrees or post-graduate degrees. Students study case law in the Socratic method. Graduates are not required to select a career path and can change careers at will. Traditionally, lawyers were divided between barristers and solicitors. Both required an apprenticeship and additional training courses. This division is no longer made in many common law countries where a graduate is required to pass a bar examination in order to qualify as a lawyer and can then undertake any professional legal role. Judges and prosecutors are not required to attend specialized schools. Judges typically must have a certain level of experience before they are appointed or elected. Prosecutors apply for a position directly with the prosecuting authority of the state. Almost all teachers at a university are referred to as “professors” although some countries distinguish between “lecturers” and “professors,” with professors reserved for a limited number of Ph.D. graduates awarded a faculty chair.

Islamic Law

In the Islamic law tradition, jurist-scholars are a self-regulating community. Traditionally, “[t]hey became scholars by education and deportment, and their status was determined by the reputation they enjoyed among their follow scholars.”⁶⁹ The jurist “earned the title *mufiti*, conferring the right to issue *fatwas*, after a rigorous education at the hands of more senior scholars who reserved the right to authorize their students to engage in the formal legal practice.”⁷⁰ “Scholars ranked jurists, in accordance with their level of theoretical knowledge, skill in reasoning, and command of the sources.”⁷¹ Judges were required to have an

⁶⁷ The summary of the legal training for professionals in the civil law tradition is taken from INPROL Common Law and Civil Law Traditions, *supra* note 6, pp. 30-31.

⁶⁸ The summary of the legal training for professionals in the common law tradition is taken from INPROL Common Law and Civil Law Traditions, *supra* note 6, pp. 32-33.

⁶⁹ The Fall and Rise of the Islamic State, *supra* note 17, p. 22.

⁷⁰ *Ibid.*

⁷¹ LEGAL REASONING 1. *Ijtihad* (Independent Legal Reasoning) and its Relationship to the Four Canonical Sources of Law in Sunni Jurisprudence, by Bernard Freamon, Seton Hall University, Association of American Law Schools, Workshop on Islamic Law 2004: <http://www.aals.org/am2004/islamiclaw/legalreasoning.htm>.

understanding of the law.⁷² They were traditionally appointed by the Caliph, but drawn from the scholarly class.⁷³

Saudi Arabia is “one of the only countries in the whole of the Muslim world that preserves some recognizable version of the classical Islamic constitutional order – and the one Arab country where executive power is today counterbalanced by the scholars.”⁷⁴ Scholarly qualifications in Saudi Arabia include a degree from a State sponsored educational institution as well as the “informal judgment of the scholarly community and the granting of formal permission by more senior *muftis* to issue *fatwas*.”⁷⁵ In line with the Islamic law tradition, judges are drawn from the pool of qualified scholars.⁷⁶

The Afghan Model

Afghanistan’s legal tradition is rooted in *shari’a* law. Afghanistan’s formal criminal justice system is a mixed civil law and *shari’a* based system. Afghanistan’s unique history of successive regimes that imported respective ideologies and systems plays a critical role in the current status of its justice system.⁷⁷ Understanding Afghanistan’s legal tradition and its historical development helps put the criminal justice system in context.

“From the 1880’s until the 1960’s, Afghanistan essentially had a dual judicial system consisting of *Shari’a* and government courts.”⁷⁸ The founder of the modern Afghan state was Amir Abdur Rahman (1880-1901). Rahman “created a state-run court system and elevated Islamic law to the status of official state law.”⁷⁹ Rahman established three types of courts formalizing the division of the sources of law: Islamic courts, criminal courts, and a board of commerce.⁸⁰ The Islamic courts handled civil and religious affairs.⁸¹ The criminal courts applied Islamic law and were administered by the chiefs of police and religious judges.⁸² Merchants made up the board of

⁷² *The Fall and Rise of the Islamic State*, *supra* note 17, p. 28.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, p. 92. Saudi Arabia subscribes to the *Hanbali* school of law.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ See Appendix A: History of Afghanistan Timeline 1919-2001:

<http://www.afghanmagazine.com/afghanhistory/afghistorytimeline.pdf>.

⁷⁸ *Reestablishing the Judicial System in Afghanistan*, by J. Alexander Their, Center on Democracy, Development, and the Rule of Law, Stanford Institute for International Studies, Number 19, 1 September 2004, (hereinafter *Reestablishing the Judicial System in Afghanistan*), p. 5. PDF file available at:

http://cddrl.stanford.edu/publications/reestablishing_the_judicial_system_in_afghanistan.

⁷⁹ *Legal Authorities in the Afghan Legal System (1964-1979)*, by Bruce Etling, p. 6:

<http://www.law.harvard.edu/programs/ilsp/research/etling.pdf>.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

commerce, which handled commercial and business disputes.⁸³ Rahman placed the court system under state control.⁸⁴

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 (*qazis*). 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.

Rahman's grandson, King Amanullah (1919-1929) wrote Afghanistan's first modern constitution (1923).⁸⁵ The 1923 Constitution recognized two sources of law – Islamic law and statutory law. Amanullah also ordered the codification of *hanafi* criminal law creating the first Penal Code (1924-25).⁸⁶ Although it is asserted that Amanullah was overthrown in part because of his legal reforms and attempt to take too much power away from the scholars, he left a legacy of a constitution, educational reform that led to the training of the first judicial officials outside the scholarly class, and a codified criminal law.⁸⁷

Shortly after Amanullah was overthrown, Zahir Shah became King and ruled Afghanistan for 40 years from 1933-1973. Reforms in the legal system continued during this time. In 1964, a new constitution was passed establishing Afghanistan as a constitutional monarchy and changing the judicial system.⁸⁸ The 1964 Constitution set forth a unified judicial system, independent from the State and on par with the legislative and executive branches.⁸⁹ The “unification” was in the hierarchical organization of the court system. The Law of the Jurisdiction and Organization of the Courts (1967) established a four-tiered system “beginning with primary courts, then provincial, appellate, and, finally, the Court of Cassation.”⁹⁰ “Within these courts, there [were] specialized benches to handle different areas of law such as criminal law, civil law, personal law, and commercial law.”⁹¹ Despite the organizational change, the justice system remained a dual

⁸³ Ibid, pp. 6-7.

⁸⁴ Ibid, p. 7, emphasis added.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid, p. 8.

⁸⁸ 1964 Constitution of Afghanistan 1964: <http://www.afghan-web.com/history/const/const1964.html>; see also *Legal Authorities in the Afghan Legal System (1964-1979)*, supra note 79, p. 9; *Reestablishing the Judicial System in Afghanistan*, supra note 78, p. 6

⁸⁹ Ibid

⁹⁰ Ibid; *Legal Authorities in the Afghan Legal System (1964-1979)*, supra note 79, p. 11; *Reestablishing the Judicial System in Afghanistan*, supra note 78, p. 7.

⁹¹ *Reestablishing the Judicial System in Afghanistan*, supra note 78, p. 7.

system divided between Islamic courts and statutory courts.⁹² The Islamic courts were the primary courts of general jurisdiction, while the statutory courts dealt with disputes relating to a statute or decree.⁹³ “A case going through one of these dual court systems would never come into the hands of legal experts of the other court system.”⁹⁴ Even the Court of Cassation, the unifying apex of the system, was divided into chambers based on the type of law applied.⁹⁵

It has been argued that the 1964 Constitution was a triumph for statutory law because Article 102 arguably made the Constitution and statutes legally dominate stating:⁹⁶

The courts in the cases under their consideration shall apply the provisions of this Constitution and the laws of the State. Whenever no provision exists in the Constitution or the laws for a case under consideration, the courts shall, by following the basic principles of the *Hanafi* Jurisprudence of the *Shariaat* of Islam and within the limits set forth in this Constitution that in their opinion secures justice in the best possible way.

Following the adoption of the 1964 Constitution, however, in practice if a statute did not take jurisdiction away from *shari'a* law, *shari'a* law applied.⁹⁷ The Islamic courts retained jurisdiction over family matters, inheritance, property, and most areas of criminal law.⁹⁸ In 1971, the Associate Justice of the Supreme Court, Walid Hoqoqi, argued that the statutes “were an explanation, commentary, and interpretation of the scholars’ law, instead of a body of secular laws.”⁹⁹ Many Afghan jurists, in line with Islamic legal tradition, hold Islamic law as the highest law and the law that governs the interpretation of statutory law. Statutory law is viewed as a codification of the substantive *shari'a* rules, not as supreme law. As discussed in Chapter 2.4, the current Afghan Constitution retains a similar supremacy clause (along with a repugnancy clause) and the debate over the primacy of the Constitution or the primacy of *shari'a* law continues to this day.¹⁰⁰

⁹² *Legal Authorities in the Afghan Legal System (1964-1979)*, *supra* note 79, p. 11.

⁹³ *Ibid.*

⁹⁴ *Ibid.*, p. 12.

⁹⁵ *Ibid.*, p. 11.

⁹⁶ 1964 Constitution, *supra* note 88, Art. 102.

⁹⁷ *Legal Authorities in the Afghan Legal System (1964-1979)*, *supra* note 79, p. 11.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ See Chapter 2.4: The Hierarchy of Laws in Afghanistan. “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.” 2004 Constitution of Afghanistan (Translated by Sayed Shafi Rahel for the Secretariat of the Constitutional Commission), Article 130:

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

During the period from 1964 until 1979, several new laws were passed covering administrative law, civil tax, and commercial law. Many argue the legal reforms were an attempt to secularize the legal system. Others argue the new laws covered areas traditionally belonging to the ruler and, therefore, did not radically change the system. Even the civil code and criminal codes were viewed as codifications of *hanafi* jurisprudence.¹⁰¹ The Penal Code of 1976, which is still governing law today, is modeled on European principles of criminal law, but includes crimes as defined by *shari'a* law. The 1976 Penal Code stipulates that it regulates *ta'ziri* crimes and crimes of *hudud* or *qisas* "shall be punished in accordance with the provisions of Islamic religious law (the *Hanafi* religious jurisprudence)."¹⁰² The 1976 Penal Code, however, also provides punishment for many *hudud* and *qisas* crimes.¹⁰³ For the Islamic legal traditionalists, the definition of crime as defined by *shari'a* law is governing law. The Penal Code merely codifies certain crimes and reinforces the application of *shari'a* law where statutory law has failed to criminalize the act. The Criminal Procedure Code enacted in 1965 and amended in 1974 was patterned after the French Penal Code.¹⁰⁴

Despite the enactment of comprehensive legal codes during the 1960s and 1970s, the role of the court as an independent body, enforcing state law and acting as a counter-balance to the executive never developed. In 1973, King Mohammad Zahir Shah was overthrown by his cousin Mohammed Daoud Khan who declared Afghanistan a republic and himself as the president and prime minister. Daoud abolished the monarchy, dismissed parliament, suspended the constitution, and took executive control over the judiciary. Daoud ruled as a dictator until 1977 when a new constitution was passed establishing a one-party state (National Revolutionary Party), which elected Daoud as president. In 1979, Daoud was deposed in a bloody coup and a pro-Soviet Democratic Republic of Afghanistan was established.

During the time from 1964 until the Soviet invasion in 1979, judges had limited knowledge of statutory law or were reluctant to apply it.¹⁰⁵ In 1975 it was noted that the written laws remained "uncompiled" and "not widely distributed."¹⁰⁶ Afghanistan's courts continued to apply *shari'a* and customary laws.¹⁰⁷ As a result, until 1979 "the Afghan legal system was similar to a traditional Islamic legal system where jurisdiction was divided between the scholars' law and

¹⁰¹ See *Legal Authorities in the Afghan Legal System (1964-1979)*, *supra* note 79, p. 11.

¹⁰² Afghanistan Penal Code (1976), Official Gazette No. 347, published 1976/10/06 (1355/07/15 A.P.)(hereinafter Penal Code), Art. 1: [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>.

¹⁰³ For example, the Penal Code punishes murder (Articles 394 and 400), theft (Art. 454), robbery (brigandage)(Art. 447), defamation (Art. 436), use of alcohol (Art. 349), adultery (Art. 427).

¹⁰⁴ See *Islamic Law and the Afghan Legal System*, by Martin Lau, p.12: <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN018244.pdf>.

¹⁰⁵ See *ibid*, p. 4.

¹⁰⁶ *Ibid*, p. 11.

¹⁰⁷ *Ibid*, p. 3.

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* [Islamic legal scholars]."¹⁰⁸

The Soviet-backed regime passed a new constitution (1980) and established the Attorney General's Office as a new branch of government. The 1980 interim constitution retained the unified court system.¹⁰⁹ "At the beginning of the communist era in Afghanistan under Babrak Karmal, all previous laws were suspended except the criminal justice system created under Daoud. The Constitutions of 1987 and 1990 similarly kept the criminal justice system intact."¹¹⁰ It wasn't until the Taliban seized power that the criminal justice system dramatically changed for the first time since 1964.¹¹¹ All courts became *shari'a* courts and applied *shari'a* law as interpreted by the Taliban through edicts.¹¹² All other laws were considered invalid.¹¹³ "*Shari'a* courts in each village and town adjudicated cases when the police brought criminals to them. The police announced the evidence, and the *ulema* rendered his decision. Many of these proceedings were not public, although some proceedings and punishments were conducted in public. In either case, the accused had no right to appeal, and the punishment was carried out immediately."¹¹⁴ As discussed in Chapter 2.3, the Taliban banned all customary law as well and interfered with the traditional way of forming village *jirgas* for resolving disputes.¹¹⁵

The Bonn Agreement in 2001 established an interim legal framework consisting of: "The existing laws and regulations, to the extent that they are not inconsistent with this agreement or with the international legal obligations to which Afghanistan is a party, or with those applicable provisions contained in the Constitution of 1964, provided that the Interim Authority shall have the power to repeal or amend those laws and regulations."¹¹⁶ The Ministry of Justice was assigned the responsibility of conducting a comprehensive legislative assessment. The task has been complicated by the fact that complete sets of laws do not exist. In addition, identifying the applicable law has proven to be difficult. "Statutory laws were enacted under the Constitution or Interim Constitutions of Afghanistan of 1964, 1977, 1980, 1990 and 1992. During all of these

¹⁰⁸ *Legal Authorities in the Afghan Legal System (1964-1979)*, *supra* note 79, p. 10.

¹⁰⁹ An Introduction to the Criminal Law of Afghanistan, Afghanistan Legal Education Project (ALEP), Stanford Law School (hereinafter ALEP Criminal Law) p. 19 <http://alep.stanford.edu/wp-content/uploads/2011/02/ALEP-CRIMINAL-1ST-EDITION.pdf>.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ See Chapter 2.3: Informal Dispute Resolution in Afghanistan.

¹¹⁶ Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (Bonn Agreement), 5 December 2001, II: <http://www.un.org/News/dh/latest/afghan/afghan-agree.htm>.

periods of constitutional rule new statutes were enacted and existing ones amended or superseded.”¹¹⁷ Although the Bonn Agreement recognized all existing law and regulations, “to the extent that they are not inconsistent with this agreement or the international legal obligations,” many of the laws passed over the years of upheaval are consistent with the constitution, international law, and the Bonn Agreement, but not with each other.¹¹⁸ Additional controversy exists due to the politics associated with when the law was enacted.¹¹⁹

In regards to the criminal justice system, the 1965 Criminal Procedure Code and the 1977 Penal Code were re-introduced. In 2004 a new constitution was enacted and an Interim Criminal Procedure Code (ICPC) was adopted.¹²⁰ The ICPC was developed by the Italian legal reform team by “streamlining” the 1974 criminal procedure from 500 articles to just 98 articles.¹²¹ The ICPC has proven controversial because “no Afghan or even Islamic jurists were consulted in the code’s drafting process, nor was Afghan customary law or Islamic law a fundamental source for this significant legal document.”¹²² Afghan officials even asked President Karzai not to sign the draft law.¹²³ In early February 2014, a new Criminal Procedure Code passed both houses of the National Assembly and was sent to the Presidential Office for signature. The 2004 Constitution remains the governing Constitution. The Ministry of Justice has submitted the Penal Code to the Criminal Law Reform Working Group for review and revision.

Elements of common law tradition are beginning to be introduced into Afghanistan’s laws. For example, the new Law of the Organization and Authority of the Courts of the Islamic Republic of Afghanistan (Law on Courts) provides that the Supreme Court shall have the responsibility and authority for the “assessment of instructions and presentations of explanations to courts for sound implementation of law and *ensuring unified legal precedence*.”¹²⁴

¹¹⁷ *Islamic Law and the Afghan Legal System*, *supra* note 104, p. 5.

¹¹⁸ Bonn Agreement, *supra* note 116. See *Reestablishing the Judicial System in Afghanistan*, *supra* note 78, p. 9.

¹¹⁹ See *Islamic Law and the Afghan Legal System*, *supra* note 104, p. 5.

¹²⁰ 2004 Constitution of Afghanistan (Translated by Sayed Shafi Rahel for the Secretariat of the Constitutional Commission):

http://supremecourt.gov.af/Content/Media/Documents/constitution2004_english3012201016726844.pdf; Interim Criminal Procedure Code, Official Gazette No. 820, published 2004/02/25 (1382/12/06 A.P.). Available on the Afghan Attorney General’s Office website: <http://ago.gov.af/en/documents>; or <http://www.asianlii.org/af/legis/laws/icc175/>.

¹²¹ See *Establishing the Rule of Law in Afghanistan*, United States Institute of Peace, Special Report No. 117, March 2004, p. 8: <http://www.usip.org/publications/establishing-rule-law-afghanistan>

¹²² *Afghanistan’s Reconstruction Five Years Later: Narratives of Progress, Marginalized Realities, and the Politics of Law in a Transitional Islamic Republic*, by Faiz Ahmed, 10 *Gonz. J. Int’l L.* 269, 287 (2007): <http://www.gonzagajil.org/pdf/volume10/Ahmed/Ahmed.pdf>; see also *Ibid*.

¹²³ *Negotiating justice sector reform in Afghanistan*, by Astri Suhrke & Kaja Borchgrevink, *Crime Law Social Change*, Vol. 50, Issue 3, p. 3:

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¹²⁴ 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)(hereinafter Law on Courts), Art. 31(6)(emphasis added) (translation provided by UNAMA).

Conclusion

As explored in previous chapters, legal pluralism is the hallmark of legal reality in Afghanistan.¹²⁵ Afghanistan's formal criminal justice system is a mixed civil law and *shari'a* law system with recent introductions of common law elements. Civil law elements within Afghanistan's formal legal system can be seen in the court structure, the role of justice professionals in criminal cases, and in the criminal procedure code.¹²⁶ But Afghanistan's legal tradition is firmly rooted in *shari'a* law. *Shari'a* law is still considered the highest law of the land.¹²⁷ The Constitution provides, "No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan."¹²⁸ The development of the Penal Code is a direct result of the codification of *hanafi* criminal law. The court structure, although unified under a Court of Cassation in the 1960s, remained in practice a dual court system divided between Islamic courts and statutory courts until the Taliban abolished all courts except *shari'a* courts. The court structure today is a unified hierarchical three-tiered system with specialized courts of jurisdiction.¹²⁹ There are no official *shari'a* courts, although *shari'a* law is applied and, arguably, the Supreme Court's right to review the constitutionality of a law includes its compliance with Article 3 of the Constitution – i.e. the tenets and provisions of Islam.¹³⁰ Additionally, legal professionals can be trained in *shari'a* law or statutory law.¹³¹

Understanding the legal tradition of Afghanistan as a *shari'a* law tradition "allows an understanding of how the system operates, where it comes from, and how it is likely to respond to new developments in law and society."¹³² Understanding the legal tradition informs the debate regarding the Constitution's repugnancy clause and supremacy clause and sheds light on the application of *shari'a* law absent statutory law. The legal tradition helps explain the role of justice professionals, the executive branch (ruler), as well as the role of the victim or his/her heirs in a criminal case. Understanding the legal tradition also provides a different perspective on the role of traditional dispute resolution mechanisms. In order to understand Afghanistan's current legal system and help inform the legal development process, one must understand Afghanistan's legal tradition.

¹²⁵ See Chapter 2.4: Hierarchy of Laws in Afghanistan.

¹²⁶ See Chapter 2.1: Afghanistan's Formal Justice Institutions; see also Chapter 3.2: The Process of a Criminal Justice Case in Afghanistan.

¹²⁷ Ibid.

¹²⁸ 2004 Constitution, *supra* note 120, Art. 3.

¹²⁹ See Law on Courts, *supra* note 124; see Chapter 2.1: Afghanistan's Formal Justice Institutions for more information on the court structure and jurisdiction.

¹³⁰ See Chapter 2.4: Hierarchy of Laws in Afghanistan.

¹³¹ Ibid; see also Chapter 3.1: Legal Education and Training in Afghanistan.

¹³² *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, *supra* note 4, p. 1094.

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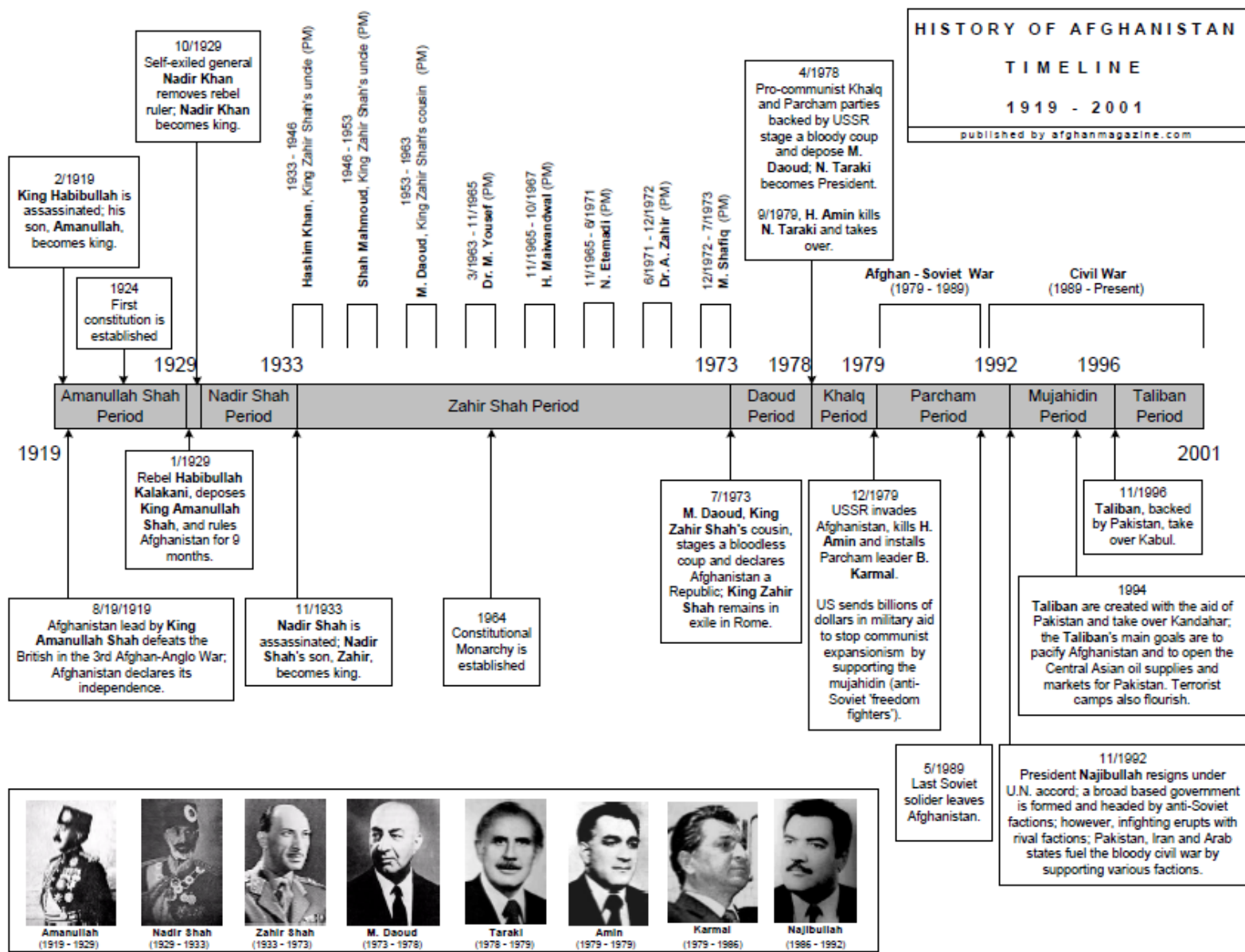
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APPENDIX A: HISTORY OF AFGHANISTAN TIMELINE 1919-2001¹³³



¹³³ <http://www.afghanmagazine.com/afghanhistory/afghistorytimeline.pdf>.