

2.6: *Shari'a* Law in Afghanistan

Summary

This chapter provides an overview of *shari'a* law and its role in Afghanistan.

Introduction

The primary sources of Islam, the *Qur'an* and the *Sunnah*, “provide the unifying basis of shared principles and example to all Muslims.”¹ Islamic law, *shari'a*, developed from the primary sources, but different interpretations and practices developed into different schools of jurisprudence.² While the community of believers, the *ummah*, is unified in faith the expression of *shari'a* is diverse and shaped by each country's own history.³ This chapter provides a brief overview of the origins of *shari'a* law and then focuses on *shari'a* law in Afghanistan.

History of *Shari'a*

Islam was founded in Arabia in the seventh century AD by the Prophet Muhammad. “In Islam Muhammad is considered the last of a series of prophets (including Adam, Noah, Abraham, Moses, Jesus, and others), and his message simultaneously consummates and completes the ‘revelations’ attributed to earlier prophets.”⁴ Islam is the Arabic word for “surrender” – it expresses the founding principle that believers must surrender to the will of Allah (Arabic for God).⁵ The will of God is known through the *Qur'an*, which was revealed to Muhammad by the Archangel Gabriel.⁶

Shari'a, Islamic law, is Arabic for “the path to follow” and governs almost every aspect of life from worship to personal hygiene.⁷ *Shari'a* is often defined as law derived from the *Qur'an*, the *Sunnah*, and the classic schools of Islamic jurisprudence (*fiqh*). The primary sources of doctrine for all schools of Islamic law are the divine, revealed law: the *Qur'an*, then the *Sunnah* and the *Hadith* (or *ahadith*). *Sunnah* is the Arabic term for the Prophet's customary practice or deeds of

¹ The Encyclopaedia Britannica Guide to The Islamic World: Religion, history, and the future, Encyclopedia Britannica, Inc. 2009, p.XIV (hereinafter The Islamic World).

² *Ibid*, pp. XIV- XV.

³ *Ibid*, pp. X-XI.

⁴ *Ibid*, p. 4.

⁵ *Ibid*, p.3.

⁶ *Ibid*, p. 9

⁷ See *ibid*, p. 100-101; see also Islamic Criminal Law and Procedure, An Introduction, by Matthew Lippman, Sean McConville, and Mordechai Yerushalmi, Preager Publishers, 1988, p. 25.

the Prophet.⁸ The *Sunnah* technically embraces the Prophet's sayings, or *Hadith*, as well as the silent approval of the Prophet⁹

Following the Prophet Muhammad's death, "a committee of Muslims known as the shura elected Abu-Bakr, a prominent disciple, as his successor. He was given the title of khalifa or deputy. Later, when the Umayyads and the 'Abbasids established dynasties, they kept the title khalifa (or caliph, as it is usually rendered in European transliteration)."¹⁰ Disagreement over the rightful successor to Muhammad led to the lasting division in the Islamic community between the Sunni and Shia.¹¹ The Sunnis believe the Prophet did not designate a successor so it was up to the *ummah*, the Muslim community, to elect a leader.¹² The Shias, however, believe the Prophet designated 'Ali, his cousin and son-in-law (husband to Fatimah) and father to the Prophet's only surviving grandsons, Hasan and Husayn, as his successor.¹³ Shias believe the rightful leadership of Islam passes "through an apostolic succession of imams, starting with 'Ali and carrying on in the male line."¹⁴

During the time of the first four caliphs the "secular was not separated from the sacred, as the caliph exercised the authority both as a worldly leader and as an imam, the religious leader. Caliphate and imamate resided in one and the same person."¹⁵ The caliphs interpreted the *Qur'an* and *Sunnah* using *ijtihad* (individual thought) or *ijma'* (scholarly consensus) to find legal or doctrinal solutions not addressed by the primary sources.¹⁶ "In Islamic literature, *ijtihad* carries two distinct meanings. In its more general meaning, *ijtihad* is associated with the expansion and renewal of Islamic law. In its more specific meaning, *ijtihad* is a juristic tool - a process of reasoning - used to interpret the... *Qur'an* and the *Sunnah*."¹⁷

For a number of political and historical reasons beyond the scope of this primer, the authority to engage in *ijtihad* drifted away from the caliph to the scholar.¹⁸ The geographic reach of Islam

⁸ 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/shari'ah.html>.

⁹ Sunni Islam limits the Hadith to the sayings of the Prophet. Shia Islam distinguishes the Hadiths between prophetic Hadith (*al-hadith al-nabawi*) and the sayings of the Imams (*al-hadith al-walawi*). Hadiths transmitted from the Prophet are of greater authority, but the two are included in a single collection for Shias.

¹⁰ *Islamic Criminal Law and Procedure*, *supra* note 7, p. 10. Sunnis consider the first four caliphs as the "Rightly Guided Caliphs."

¹¹ *Ibid*, p. 17; see also *The Islamic World*, *supra* note 1, p. 39. Adherents of Shia Islam are called Shi'ites or Shias.

¹² *The Islamic World*, *supra* note 1, p. 39.

¹³ *Ibid*, pp. 39-40.

¹⁴ *Islamic Criminal Law and Procedure*, *supra* note 7, p. 17. With the exception of the Zaydis who believe that anyone in the house of 'Ali is eligible for the Imamate.

¹⁵ *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. 347 (hereinafter *The Second Era of Ijtihad*): http://works.bepress.com/cgi/viewcontent.cgi?article=1057&context=abu_kashif.

¹⁶ *The Islamic World*, *supra* note 1, pp. 26-27.

¹⁷ *The Second Era of Ijtihad*, *supra* note 15, p. 345.

¹⁸ For a full discussion of this transition see *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*). During

also expanded outside Arabia to Iraq, Syria, Palestine, Persia, Egypt and further to India, Northwest Africa, and Spain. “In the early period there was an abundance of conflicting and chaotic opinions.”¹⁹ By the eighth century, “Islamic law was extensive but uncoordinated, reflecting differing local needs and tastes. Schools [began] to form around various recognized masters. . . . all of whom used some combination of local custom, personal reasoning, *Qur’an*, and *Hadith*.”²⁰ It was during this time that Abu ‘Abd Allah ash-Shafi’i, developed a hierarchical method of resolving conflicting texts, which is considered the basis for Islamic jurisprudence.²¹ “Al-Shafi’i relied on the literal meaning of the *Qur’an*, then on the authentic *Sunnah*. He strongly argued for the acceptance [of] *ahadith* provided they were authentic. He considered following and applying the *Sunnah* as equally important as following the *Qur’an*. He supported the use of consensus [*ijma’*] and discouraged the use of one’s personal judgment without relying on the *Qur’an*, the *Sunnah*, the consensus or the juristic reasoning by analogy (*Qiyas*).”²²

Al-Shafi’i’s system “was widely influential in controlling divergence and in limiting undisciplined forms of personal reasoning.”²³ *Qiyas*, reasoning by analogy, replaced *ijtihad*, individual thought.²⁴ In addition, “[f]rom the ninth century, points on which consensus [*ijma’*] was reached in practice were considered closed and further substantial questioning of them prohibited.”²⁵ Al-Shafi’i’s system “also stimulated the collecting and testing of *hadith* for their unbroken traceability to Muhammad or a companion.”²⁶ During the ninth century, six *hadith* collections were compiled and are regarded as authoritative by the Sunnis.²⁷ The *hadith* literature as accepted by Shias is not limited to the sayings of the Prophet, but also includes those of the Imams.²⁸ “The transformation of *ijma’* [consensus] into a conservative mechanism and the acceptance of a definitive body of *Hadith* virtually closed the ‘gate of *ijtihad*’ in the Sunni tradition.”²⁹ Some reformists argue for the use of *ijtihad* to enable the application of *shari’a* to modern society.³⁰ Many scholars have held that *ijtihad* should be utilized when new issues that have not been previously addressed arise. In 1983, King Fahad declared the gates of *ijtihad* open again in Saudi Arabia.³¹

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.

¹⁹ *The Islamic World*, *supra* note 1, p. 27.

²⁰ *Ibid*, pp. 99-100.

²¹ *Ibid*, p. 100. Al-Shafi’i wrote *Risala* (Treatise on Islamic Jurisprudence) establishing the hierarchical methods for deducing the law from the *Qur’ān* and the *Sunnah*.

²² Imam Ash-Shafi’i, *Shafi’i Fiqh*, <http://shafifiqh.wordpress.com/>; see also *The Islamic World*, *supra* note 1, p. 100.

²³ *The Islamic World*, *supra* note 1, p. 100.

²⁴ *Ibid*, p. 27.

²⁵ *Ibid*.

²⁶ *Ibid*, p. 100.

²⁷ *Ibid*, p. 26.

²⁸ *Ibid*.

²⁹ *Ibid*, p. 27.

³⁰ See *Second Era of Ijtihad*, *supra* note 15.

³¹ See *Islamic Criminal Law and Procedure*, *supra* note 7, p. 107.

Islamic law coalesced into distinct legal schools (*madhabs*).³² “[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*).”³³ “[F]iqh consists of substantive law and legal methods that the first-era jurists formulated to solve legal problems for which no answers were directly available in the [*Qur’ān* or *Sunnah*].”³⁴ Among Sunnis, four principal schools of jurisprudence developed: *Hanafi*, *Hanbali*, *Maliki*, and *Shafi’i*.³⁵ Among Shias, the largest sect, the Imamiya or “Twelvers” follow the *Ja’fari fiqh*.³⁶ “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.”³⁷ Each school of jurisprudence also codified its own variations of the legal methodology established by Al-Shafi’i. For example, the *Maliki fiqh* is considered the most conservative and is reluctant to rely on *ijma’* (consensus) as a basis for lawmaking.³⁸ The *Hanafi fiqh* is considered the most moderate and the most focused on reason and analogy.³⁹ The *Shafi’i fiqh*, obviously, follows the hierarchical system established by its founder, Al-Shafi’i. The *Hanbali fiqh* generally accepts the Shafi’i hierarchical system of deduction, but strictly observes the *Qur’ān* and the *Sunnah*.⁴⁰ The Shias do not approve of *ijma’* (consensus) as a valid legal methodology and still rely on *ijtihad*.⁴¹

Modern Islamic law tends to relay on the schools of law, legal precepts (*qawa’id*), and precedent (*taqlîd*). “The distinctions [in the schools of law] have more impact on the legal systems in each country, however, than on individual Muslims, as many do not adhere to one school in their personal lives.”⁴²

³² Ibid, p. 14; see also The Islamic World, *supra* note 1, p. 26.

³³ Shari’ah Law: An Introduction, by Mohammad Hashim Kamali, Oneworld Publications, April 2008, p. 3: [http://images.saharaman.multiply.multiplycontent.com/attachment/0/SMER@AoKCCOAADSNIoE1/Shari’ah%20Law.pdf?key=saharaman:journal:84&nmid=114004816](http://images.saharaman.multiply.multiplycontent.com/attachment/0/SMER@AoKCCOAADSNIoE1/Shari'ah%20Law.pdf?key=saharaman:journal:84&nmid=114004816).

³⁴ Second Era of Ijtihad, *supra* note 15, p. 355.

³⁵ Ibid.

³⁶ The two other main sects of Shia include the Zaydis, which is the official school in Yeman, and the Isma’ilites, which divided into four different branches; two are considered beyond the boundaries of Islam. See Islamic Criminal Law and Procedure, *supra* note 7, pp. 17-19.

³⁷ The Second Era of Ijtihad, *supra* note 15, p. 348.

³⁸ Islamic Criminal Law and Procedure, *supra* note 7, p. 26.

³⁹ Islam: A Primer, by Clyde Mark, Congressional Research Services (CRS) Report for Congress, RS21432, Feb. 19, 2003 (hereinafter CRS Primer on Islam), p. 3: <http://www.fas.org/sgp/crs/misc/RS21432.pdf>.

⁴⁰ What is Shari’a?, by Toni Johnson and Lauren Vriens, Council of Foreign Relations, Background, Islam: Governing under Shari’a, October 24, 2011: <http://www.cfr.org/religion/islam-governing-under-shari'a/p8034>.

⁴¹ See Islamic Criminal Law and Procedure, *supra* note 7, p. 32.

⁴² What is Shari’a?, *supra* note 40.

***Shari'a* in Afghanistan**

Afghanistan is an Islamic Republic. The first three articles of the Constitution establish the country as an *Islamic* Republic, Islam as the official religion of the country, and prohibits any law from contravening the tenets of Islam.⁴³

2004 Constitution

Article 1

Afghanistan shall be an Islamic Republic, independent, unitary and indivisible state.

Article 2

The sacred religion of Islam is the religion of the Islamic Republic of Afghanistan. Followers of other faiths shall be free within the bounds of law in the exercise and performance of their religious rituals.

Article 3

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

The President of the country is required to be Muslim.⁴⁴ The President is required to take the following oath to obey and protect Islam:⁴⁵

In the name of God, Most Gracious, Most Merciful, I swear by the name of God Almighty that I shall obey and protect the Holy religion of Islam, respect and supervise the implementation of the Constitution as well as other laws, safeguard the independence, national sovereignty and territorial integrity of Afghanistan, and, in seeking God Almighty's help and support of the nation, shall exert my efforts towards the prosperity and progress of the people of Afghanistan.

Ministers are required to take a similar oath:⁴⁶

In the name of God, Most Gracious, Most Merciful, I swear in the name of God Almighty that I shall protect the Holy religion of Islam, respect the Constitution and other laws of Afghanistan, safeguard the rights of citizens as well as independence, territorial integrity and the national unity of the people of

⁴³ 2004 Constitution of Afghanistan (Translated by Sayed Shafi Rahel for the Secretariat of the Constitutional Commission) (hereinafter Constitution), Articles 1, 2 & 3:
http://supremecourt.gov.af/Content/Media/Documents/constitution2004_english3012201016726844.pdf.

⁴⁴ Ibid, Art. 62.

⁴⁵ Ibid, Art. 63.

⁴⁶ Ibid, Art. 74.

Afghanistan, and, in all my deeds consider the Almighty's presence, performing the entrusted duties honestly.

The Supreme Court Justices' oath of office similarly provides:⁴⁷

In the [name] of God, Most Gracious, Most Merciful, I swear in the name of God Almighty to attain justice and righteousness in accordance with tenets of the Holy religion of Islam, provisions of this Constitution as well as other laws of Afghanistan, and to execute the judicial duty with utmost honesty, righteousness and impartiality.

The national insignia on the flag reads, "There is no God but Allah and Mohammad is his Prophet, and Allah is Great."⁴⁸ The national anthem is required to include the declaration "God is Great."⁴⁹ Political parties are allowed to the extent that their manifesto and charter do not "contravene the Holy religion of Islam and principles and values enshrined in [the] constitution."⁵⁰ The State is required to develop and implement "a unified educational curricula based on the tenets of the sacred religion of Islam, national culture as well as academic principles, and develop religious subjects [sic] curricula for schools on the basis of existing Islamic sects in Afghanistan."⁵¹ The State is required to protect the family, including the physical and spiritual health of the family and eliminate "traditions contrary to the principles of the sacred religion of Islam."⁵² Additional constitutional provisions provide that the calendar year for the country is the *Hijra* calendar (based on the migration of the Prophet Mohammad from Mecca to Medina), and the calendar for the State offices is the Islamic solar calendar (*Hejrah-e Shamsi*).⁵³ Perhaps most profound is the constitutional provision stipulating that, "The principles of adherence to the tenets of the Holy religion of Islam as well as Islamic Republicanism shall not be amended."⁵⁴

"Islam is a central, pervasive influence throughout Afghan society."⁵⁵ *Shari'a* law is a vital component of the Islamic Republic of Afghanistan's justice sector. Afghanistan's legal tradition is rooted in *shari'a* law.⁵⁶ *Shari'a* is considered the highest law of the land.⁵⁷ The formal

⁴⁷ Ibid, Art. 119. Judges must take a similar oath upholding the tenets of Islam. See 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) (translation provided by UNAMA), Art. 82.

⁴⁸ Constitution, *supra* note 43, Art. 19.

⁴⁹ Ibid, Art. 20.

⁵⁰ Ibid, Art. 35.

⁵¹ Ibid, Art. 45.

⁵² Ibid, Art. 54.

⁵³ Ibid, Art. 18.

⁵⁴ Ibid, Art. 149.

⁵⁵ Afghanistan: A Country Study, Federal Research Division, Library of Congress. Baton Rouge, LA : Claitor's Pub. Division, c2001 (hereinafter LOC Afghanistan: A Country Study), Chapter 2, Religion, Meaning and Practice: <http://lcweb2.loc.gov/frd/cs/aftoc.html>.

⁵⁶ See Chapter 2.5: Legal Traditions and the Afghan Model.

criminal justice sector accepts legal professionals educated in *shari'a* law.⁵⁸ The State court system, as well as the traditional dispute resolution (TDR) mechanisms in the country, continues to apply *shari'a* law.⁵⁹ Application of *shari'a* law is defined and protected in the Constitution:⁶⁰

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 Shia followers, the Constitution provides:⁶¹

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 Shia followers.⁶² Other disputes not regulated by law, are governed by laws of the Shia sect, which in Afghanistan is predominately *Ja'fari fiqh*. The Law on Courts reiterates the courts authority to apply *shari'a* law:⁶³

The courts shall resolve cases in accordance with the Constitution and other laws of the country. If there is no clear legal provision for the case, the case shall be handled in accordance with Articles 130 and 131 of the Constitution.

Afghanistan's 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)."⁶⁴

Afghanistan's population is majority Sunni Muslims (80%) with a Shia minority (19%).⁶⁵ "There is also a strong influence of Sufism among both Sunni and Shia communities."⁶⁶ The

⁵⁷ See Constitution, *supra* note 43, Art. 3; see also Chapter 2.3: Hierarchy of Laws in Afghanistan.

⁵⁸ See Chapter 3.1: Legal Education and Training in Afghanistan.

⁵⁹ See Chapter 2.2: Informal Dispute Resolution in Afghanistan

⁶⁰ Constitution, *supra* note 43, Art. 130.

⁶¹ *Ibid*, Art. 131.

⁶² Shi'ite Personal Status Law (2009), unofficial English translation available at:

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

⁶³ Law on Courts, *supra* note 47, Art. 13.

⁶⁴ Afghanistan Penal Code (1976), Official Gazette No. 347, published 1976/10/06 (1355/07/15 A.P.)(hereinafter Penal Code), Articles 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>. See Chapter 2.5: Legal Traditions and the Afghan Model for a brief description of crimes as defined by *shari'a* law.

Shia community is primarily Imami (Twelvers) with a smaller number of Ismaili (Seveners).⁶⁷ The Hazara and the Farsiwan make up the largest group of Imami Shia.⁶⁸ The Hazara are mainly concentrated in central Afghanistan, but Bamiyan Province has a mixed Sunni, Imami and Ismaili population.⁶⁹ The Farsiwan live primarily along the Iranian border in Herat, Ghazni, and Kandahar.⁷⁰ Imami Shia are also located in other urban centers such as Kabul and Mazar-i-Sharif.⁷¹ Three Sufi orders are prominent in Afghanistan – the Naqshbandiya, the Qadiriya, and the Cheshtiya.⁷² Herat and its surrounding areas have the largest number and greatest diversity of Sufi branches.⁷³ “Other Sufi groups are found all across the north, with important centers in Maimana, Faryab Province, and in Kunduz. The brotherhoods in Kabul and around Mazar-i-Sharif are mostly associated with the Naqshbandiya. The Qadiriya are found mainly among the eastern Pushtun of Wardak, Paktya and Nangarhar, including many Ghilzai nomadic groups. Other smaller groups are settled in Kandahar and in Shindand, Farah Province. The Cheshtiya are centered in the Hari Rud Valley. There are no formal Sufi orders among the Shia in the central Hazarajat, although some of the concepts are associated with Sayyids, descendants of the Prophet Mohammad, who are especially venerated among the Shia.”⁷⁴

Accordingly, the majority of the population is subject to *shari'a* law as articulated in the *Hanafi fiqh*. *Hanafi fiqh* held a privileged position under the first 'Abbasid caliphs.⁷⁵ But it was during the Ottoman Empire that the *fiqh* became the only authoritative code of law in the public life and official administration of justice in all the provinces of the empire even in countries where the population followed another *madhhab*.⁷⁶ Abu Hanifa an-Nu‘man ibn Thābit, the founder of the *Hanafi fiqh*, “separated belief from practice, elevating belief over practice.”⁷⁷ As mentioned in the previous section, *Hanafi fiqh* is considered the most moderate and the most focused on reason and analogy.⁷⁸ Principally, *Hanafi fiqh* holds to the al-Maturidi theology that knowledge of God’s existence and the ability to discern good and evil can be derived through reason, as

⁶⁵ CIA World Factbook, Afghanistan, People, Religions, October 5, 2012:

<https://www.cia.gov/library/publications/the-world-factbook/geos/af.html>

⁶⁶ LOC Afghanistan: A Country Study, *supra* note 55, Chapter 2, Religion, Sufis.

⁶⁷ *Ibid*, Chapter 2, Religion, Ithna Ashariya (Twelver or Imami) Shia & Ismailis.

⁶⁸ *Ibid*.

⁶⁹ *Ibid*.

⁷⁰ See *Conflict in Afghanistan: A Historical Encyclopedia*, by Ludwig W. Adamec and Frank A. Clements, ABC-CLIO, Incorporated, Dec. 2003, p. 86. Farsiwan are an ethnic group of Farsi-speaking Shia Muslims.

⁷¹ LOC Afghanistan: A Country Study, *supra* note 55, Chapter 2, Religion, Ithna Ashariya (Twelver or Imami) Shia & Ismailis.

⁷² *Ibid*, Chapter 2, Religion, Sufis.

⁷³ *Ibid*.

⁷⁴ *Ibid*.

⁷⁵ See Hanafiyyah, University of Cumbria, Division of Religion and Philosophy, Philosophy, Theology and Religion (hereinafter PHILTAR): <http://www.philtar.ac.uk/encyclopedia/islam/sunni/hana.html>.

⁷⁶ *Ibid*.

⁷⁷ LOC Afghanistan: A Country Study, *supra* note 55, Chapter 2, Religion, Sunnis of the Hanafi School.

⁷⁸ CRS Primer on Islam, *supra* note 39, p. 3.

opposed to only by revelation through the prophets.⁷⁹ *Hanafi fiqh* is known for being very tolerant of differences within Muslim communities.⁸⁰

In the formal criminal justice system in Afghanistan, judges use *shari'a* law to “fill in the gaps” left by statutory law.⁸¹ The lack of uniformity as it relates to judicial education, training, and experience, however, results in a discrepancy in the application of *shari'a*.⁸² Often, elements of customary norms are co-mingled or confused with *shari'a* law principles. Under *Hanafi fiqh*, custom (*al-urf*) is an acceptable source of law as long as it does not run counter to the principles of *shari'a*.⁸³

Disputes are often resolved outside the formal justice sector through traditional dispute resolution (TDR) mechanisms.⁸⁴ As described more fully in Chapter 2.3, a range of respected individuals from government officials, such as district governors or district police, and local leaders including religious and tribal leaders may act as mediators to a dispute.⁸⁵ The TDR members use a combination of customary law and their understanding of Islamic religious principles in resolving disputes.⁸⁶ 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. Mullahs – a male religious leader or teacher - are responsible for ensuring their community is knowledgeable of Islamic practice and have authority to arbitrate local disputes based on Islamic legal principles.⁸⁷ Sunni communities do not have a clerical hierarchy.⁸⁸ Accordingly, any man who can recite the *Qur'an* from memory can be a mullah.⁸⁹ The mullah is not necessarily literate and often memorizes the *Qur'an*, which is in Arabic, without understanding the words or meanings.⁹⁰ TDR mechanisms often resolve

⁷⁹ The two orthodox Sunni theological schools are Maturidiyya and Ash'ariyyah. Most of the Hanafi schools follow al-Maturidi theology, including Afghanistan. See Maturidiyyah, PHILTAR: <http://www.philtar.ac.uk/encyclopedia/islam/sunni/matur.html>.

⁸⁰ See LOC Afghanistan: A Country Study, *supra* note 55. See also Afghanistan Country Study, Richard F Nyrop and Donald M Seekins, Foreign Area Studies, The American University, 5th ed. Washington, D.C.: The Studies, 1986 (hereinafter FAS Country Study), p. 96: <http://www.gi.iit.edu/govdocs/afghanistan/Afghanistan-Chapter2.pdf>.

⁸¹ See Chapter 2.4 Hierarchy of Laws in Afghanistan.

⁸² See Chapter 3.1: Legal Education and Training in Afghanistan.

⁸³ See Hanafiyyah, PHILTAR, *supra* note 75; see also *The Fall and Rise of the Islamic State*, *supra* note 18, p. 13.

⁸⁴ See Chapter 2.3: Informal Dispute Resolution in Afghanistan.

⁸⁵ Ibid.

⁸⁶ 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>.

⁸⁷ LOC Afghanistan: A Country Study, *supra* note 55, Chapter 2, Religion, Meaning and Practice.

⁸⁸ Ibid.

⁸⁹ The mullah also conducts the Friday sermon and prayers, marriages, and funerals. Ibid; see Afghanistan, Afghanistan’s Website, Religion: <http://www.afghanistans.com/Information/People/Religion.htm>; see also FAS Country Study, *supra* note 80, p. 100.

⁹⁰ Ibid.

disputes using community consensus based on a mixture of the community's custom and understanding of *shari'a*.⁹¹

Afghanistan does not have a *shari'a* court to make a determination of what is properly *shari'a* law - either *Hanafi fiqh* or the applicable Shia jurisprudence. The Supreme Court has maintained that the 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. The former Law on Courts granted the Court the power to review the conformity of laws with the principles of Islam.⁹² The current Law on Courts, however, does not grant the same authority.⁹³ The authority to determine what constitutes *shari'a* law remains an open question. In the meantime the law remains uncertain and unpredictable as courts and local TDR mechanisms apply their understanding of the law including statutory, *shari'a* and customary law.

Conclusion

“Afghanistan is an example of an older form of Islamic society in which religion is not an ideology but remains an all-encompassing way of life....When religion is a way of life, it permeates all aspects of everyday social relations, and nothing is separate from it. This is the state of Islam in Afghanistan. Its influence is ever present in people's everyday conversations, business transactions, dispute resolutions, and moral judgments.”⁹⁴ Islam is a unifying factor in a multi-tribal and multiethnic country. Islam is the one constant element throughout Afghanistan's history of successive regimes and *shari'a* has been the principle source of Afghan law.⁹⁵ Today the law in Afghanistan 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.”⁹⁶ Given Afghanistan's history along with the provisions of the Constitution, *shari'a* law will continue to play a role as a primary source of law

⁹¹ See Chapter 2.3: Informal Dispute Resolution in Afghanistan.

⁹² 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.

⁹³ Law on Courts, *supra* note 47, Art. 28.

⁹⁴ *Afghanistan, A Cultural and Political History*, by Thomas Barfield, Princeton University Press, 2010, pp. 40-41.

⁹⁵ See Chapter 2.5: Legal Traditions and the Afghan Model.

⁹⁶ *Shari'a Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, (Jan Michiel Otto, ed. 2010), Chapter 7: *Shari'a and National Law in Afghanistan*, by Nadjma Yassari and Mohammad Hamid Saboory (hereinafter *Shari'a 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=shari'a+and+national+law+in+afghanistan,+in+shari'a+incorporated:+a+comparative+overview+of+the+legal+systems+of+twelve+muslim+countries+in+past+and+present&source=bl&ots=1oRnKEwwmM&sig=Yu_0Zfw_K2LfUx1V701KgLIPmqU&hl=en&ei=vYRmTu_eSOYqSgQfEurZFCg&sa=X&oi=book_result&ct=result&resnum=3&ved=0CCQQ6AEwAg#v=onepage&q&f=false

in the development of the country's justice sector. Determining what Islamic law means in Afghanistan and how the law is applied is a key factor for moving forward.

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