



Afghanistan: Country Study

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LAW LIBRARY OF CONGRESS**AFGHANISTAN****COUNTRY STUDY****I. A Brief History**

The country of Afghanistan, a crossroad of civilizations and religions, is of great strategical importance; it borders Pakistan in the east; China in the northeast; Tajikistan, Uzbekistan and Turkmenistan in the north; and Iran in the west. This landlocked area, which covers 251,823 square miles, is dominated by the mountainous core of the Hindu Kush, the westernmost extension of the Karakorum Mountains and the Himalayas, which extend from the Pamir Knot into central Afghanistan.

Most of the mountainous region is a desolate wilderness. Occasionally, where soil and water come together, there are fertile valleys. The major rivers, which rise from the snows of the central mountains, flow into the plateau in the northern, western, and southern borderlands. The country has dry summers and cold winters. The vast part of the country is desert extending to the west and southwest.

Where rivers intersect major trade routes, cities have developed, among them the ancient towns of Herat, Balkh, Kandhar, Ghazni, and the capital Kabul.

The word "Afghanistan" simply means "the Land of the Afghans." Amir Abdur Rahman, who reigned the country from 1880 to 1901, referred to his country as "Yaghistan," or "the land of rebels and the land of insolence."

II. Tribalism

The country's physical environment and geography have contributed to the survival of tribalism in Afghanistan. Great mountain ranges cover approximately three-fourth's of the nation's total land area. The Hindu Kush Mountain Range cuts the country virtually in half, running from east to west, from east to west, a 700-mile course which has proved to be a barrier to the political and economic integration of northern and southern Afghanistan. South of the Hindu Kush is mainly inhabited by the Pashtuns, while north of the mountain range is inhabited Tajik and Turkmen.

Afghanistan is not a self-contained ethnic unit, and its national culture is not uniform. All Pashtuns are not Afghan citizens. Almost an equal number live in the North-West Frontier of Pakistan. People living in the western part of Afghanistan are known as Farsiwan who are culturally an extension of the Iranian people. Baluchis speak their own language. Generally there are six main ethnic groups in Afghanistan: , namely the Pashtun,¹ Tajik, Hazara, Uzbek, Turkemen, and Aimaq. With the exception of about three million Tajiks and one million Uzbeks who are no longer tribal, all each of the other groups are divided into numerous tribes , that are largely independent of each other.

The Pashtuns are the largest group and constitute about half of the estimated population of seventeen seventeen million; the Hazara account for about two million; and the Turkomen and Aimaq for the rest. There are diverse is a diversity of ethnic and tribal groups who use more than twenty twenty languages and dialects, but only Pashtu and Dari are recognized as official languages of Afghanistan.

¹ In this report, Pashtun and Pushtun are used interchangeably.

The Pashtuns represent the main bastion of tribalism in Afghanistan. Most of the country's rulers have come from Pashtuns. Their traditional code of conduct, known as *Pushtunwali*, sets the standards of acceptable behavior both within the tribes and between the tribes, and continues to dominate social relations in marriage, divorce, property disputes, and punishment for crimes.²

III. Islam in Afghanistan

Islam is the most important unifying force within Afghan society, and the teachings of Islam have profoundly influenced the social and cultural characteristics of the Afghans. The Muslims constitute over ninety-nine percent of the population, the remaining population being Hindu and a few thousand Jews. About four-fifths of the Muslims of Afghanistan are followers of the orthodox Sunni Islam and most of the remaining are followers of the Shi'a sect. The leading religious groups of Afghanistan are *Mullahs*, *Qadis*, *Sadat* (descendants of the Prophet Muhammad, real or alleged), *Khwaja*, *Sahibzada*, *Pir*, and *Fuqara*. Learned among them are the Islamic scholars (*Ulema*) who consist of the *Mullahs*, *Wadis*, and *Muftis* (jurisconsults). There is no organized system to determine the power and influence of the religious leaders; Afghanistan is almost wholly governed by local patterns and the personal attributes of the *Alamo* and *Mullahs*.

In studying the constitutions of Afghanistan two predominant factors are apparent. The constitutional process operates in two diverging directions, on the one hand towards initiating modern reform, and on the other towards preserving the religious and traditional values of the Afghan society.

Between 1923 and 1977, four constitutions were promulgated in Afghanistan all of which demonstrate the coexistence of these two influences with varying degrees of emphasis placed on either the traditional or modernist ideals.

Whereas modernization in Afghanistan is largely identifiable with the ideals of Western democracy and liberalism, tradition is dominantly Islamic in nature with a bias, perhaps, toward tribalism. Although not necessarily antithetic, they have tended to acquire the characteristics of two opposing trends. An over-emphasis on modernization has led to an over-reaction on the part of the traditionalists, thus leading them to take excessively reactionary measures in response.

Enacting a constitution is itself an inalienable part of the history of modernization, for, after all, constitutional government is a product of modern times. Constitutional changes have often led to the adoption of extra-Sharia laws and institutions whose integration in the socio-legal fabric of Afghanistan has not been free of tension. In the constitutions of Afghanistan, departure from the Sharia principles is usually implicit, thus making a direct clash with the principles of Islam less visible to the observer.

Before the modernization of Afghanistan under Amir Abdur Rahman Khan in the 19th century, the Muslim religious establishment was in charge of administering justice. Islamic religious judges (*Qa'zis* or *Mullahs*) used to apply Islamic criminal and civil laws. These Muslim judges enjoyed economic self-sufficiency and were in charge of education, the interpretation of the Sharia, and the supervision of public morality through the office of *Muhtasib* or court attendant who checked religious observances. Muslim clerics often acted as intermediaries or served as peacemakers for feuding tribes. This role gave them considerable social and political power.

² Dupree, *Afghanistan*, Princeton University Press, 1973, 57.

The Islamic penal system provides for three kinds of punishment. Six major offenses call for fixed punishments (*Hudud*) as prescribed in the Holy Quran. Those offences are: adultery, drinking of alcohol, theft, armed robbery, slanderous accusation of unchastity, and apostasy.; homicide and injuries inflicted upon others which call for retaliation (*quisas*); and lesser offences which invites discretionary punishments.

II. Independence of Afghanistan

As an independent state, Afghanistan was founded by Ahmad Shah Abdali (later renamed Durrani) a Pashtun chief known to his countrymen as Ahmad Shah B_b_, or the father of modern Afghanistan. Ahmad Shah was an army general under Nadir Shah of Persia who conquered India. After Nadir Shah was assassinated in 1747, Ahmad Shah was elected by a tribal council (*Jirga*) and the kingdom which he established was basically a confederation of tribes rather than a centralized monarchy. During the twenty-six years of Ahmad Shah's rule, the Durrani Pashtuns not only succeeded in establishing an independent state but also in building an empire which extended beyond the borders of the present day Afghanistan.

Ahmad Shah was a man of very strong character who did not allow himself to be led by any one particular party. He worked hard and lived the life of an active statesman, as well as that of a soldier. His generosity, impartiality, and love of literature were well known to his countrymen. He died in 1773, and was succeeded by his eldest son, Timur Shah, in the same year. Timur Shah moved his capital from Qandahar to Kabul. Under Ahmad Shah the his kingdom had extended from Mashad in Persia, to Lahore in the Pakistan today.

The Mhammadzay dynasty, another lineage of the Darien (Durrani) Pashtuns, came into power in 1836. The founder was Amir Dost Mohammad. By this time, there was a the growing awareness that close identity with a particular tribe had led to isolation., had gained ground. Islam offered the obvious alternative and a greater potential for national unity of the Afghans. As a result, Amir Dost Mohammad proclaimed himself as *Amir ul Mumenin* (Commander of the faithfuls). It was during the reign of Amir Dost Mohammad and his son Amir Shir Ali in the second half of the 19th nineteenth century that Afghanistan emerged as a unified state.³

A. British and Russian Rivalry

During the 19th century Afghanistan, as well as Iran, caught between the Russian and British empires, became the focus of the ‘ ‘Great Game.’’. When the Durrani empire was disintegrating, the Russian and British empires sought control over Afghanistan. In 1835, when the Sikhs attacked Peshawar, the religious leaders declared a Islamic Holy War (*ji had*) and won the war. The n the British invaded Afghanistan in 1839, but were defeated .

The British, however,, however, invaded Afghanistan in 1878, and in 1879, the war ended with by the Treaty of Gandamak, through which the British retained the control of Afghanistan's foreign affairs. However, in 1919, under King Amanullah Afghanistan proclaimed its full independence both in internal and external affairs.

³ For a general source of the introductory materials, we relied on the works of R. Newell, *The Politics of Afghanistan* (1972), and L. Dupree, *Afghanistan* (1973).

At the end of British control of Afghanistan in 1919, the Afghan government made determined efforts to ally with the West; thus, in addition to treaties of friendship in the 1920s, Afghanistan started a number of commercial agreements with European countries. German business interests helped to build up a market for Karakul, wool and cotton, while Germany sold electrical equipment, built bridges, roads, power plants, and textile factories and opened a Lufthansa air link to Kabul.⁴

B. Toward Centralization

In the second part of the 19th nineteenth century, Amir Abdur Rahman, the “Iron Amir,” consolidated the power of the central government through the use of force. Abdur Rahman forced tens of thousands of Pashtun tribesmen to migrate from the south to the north of the Hindu Kush.. The creation of Pashtun colonies amidst other ethnic groups led to an erosion of the territorial exclusiveness of both.

Amir Abdur Rahman’s policy was to solidify the central government’s rule and to replace tribalism with a centrally administered provincial authority. He increased the number of provinces from thirteen to twenty-eight. Abdur Rahman’s successor, Amir Habibullah (1901-1919) followed his father’s reforms closely. Yet he had to adapt his rule to Islamic law and tribal customs. Moreover, British and Russian power plays dominated his foreign policy. It was during his reign that the British separated a part of Pashtunistan from the Punjab region to form the Northwest Frontier Province.

When Habibullah was murdered in 1919, he was succeeded by his son Amanullah Khan who fought the Third War of Independence against Britain. A treaty signed in Rawalpindi in 1919 left Afghanistan free to conduct its own foreign affairs. During Amanullah’s reign the first Russo-Afghan Friendship Treaty was signed in 1921, and the Soviets promised to provide technical and economic assistance. Thus, Amir found a diplomatic counterweight to British domination

C. Amir Amanullah’s Proposed Social Reforms

In 1928, after a tour of India, the Middle East, and Europe, Amir Amanullah started a broad range of modernization programs in a highly religious and conservative society. Amanullah ordered that women could remove their veil and opened co-educational schools; he also allowed all Afghans wearing Western clothing to be permitted to enter Kabul. The King also instituted a program for the education of the nomads, and actually sent a limited number of teachers to travel with some of the larger groups.

The first constitution of Afghanistan, promulgated in 1923 under King Amanullah, was formulated in a spirit of enthusiasm for modernization and reform. It was expressive of Amanullah’s somewhat radical views which aimed at creating, in a tradition-bound society, a modern state governed by statutory law of a dominantly secular nature.

⁴ Sayed Hassan Amin, *Law, Reform and Revolution in Afghanistan*,. By Sayed Hassan Amin, Glasgow, 1993., at 38.

As the reform programs increased in momentum, resentment grew among the conservative religious leaders, tribes, and dissident members of the royal family. Amir convened the Grand National Assembly (*Loya Jirga*)⁵ and summoned some 1,000 notables from all over the kingdom to hear the report of his tour and his plans to bring about some drastic changes in the laws of the country. He outlined his ambitious programs both in government structure and social reforms to turn the government into a democratic, parliamentary monarchy. The Grand National Assembly accepted the king's constitutional reforms, but resisted his proposed social program in general and the minimum age rule for marriage in particular. The Grand National Assembly revolted against changes in family relations that deprived men of their full authority over wives and daughters. The Assembly also opposed the introduction of modern, Western dress. The King's stance on social reforms were met with strong opposition from the religious and tribal circles and resulted in an uprising.

After a long and bloody war between government forces and rebels, the Amir was forced to abandon his modernization plan. In 1928, violent anti-government demonstrations resulted in the abdication of Amanullah Khan and his flight from the country.⁶

D. Cautious Modernization by Nadir Khan

In 1929, Nadir Khan came to power, and the Grand National Assembly ratified his right to rule Afghanistan as founder of the Mushiban dynasty. Nadir Khan reversed the course of modernization. He rejected Amanullah's secularist theory of legitimacy, made concessions to the religious authorities, and reinstated Islamic laws.

In 1931, Nadir Shah promulgated a new constitution patterned after the Turkish, Iranian, and French constitutions and the 1923 Constitution of Amanullah. Although the new constitution allocated authority to various government offices, actual power remained with the royal family. Nadir made significant concessions to the religious establishment in the legal field. He rescinded most of Amanullah's secularist measures, so that civil and criminal law were once again based wholly on Islamic law. Justice was administered through 105 lower or prefectural courts (*mahkame ye ibtidaieh*), courts of appeals, and a Supreme Court in Kabul. The executive councils, district and provincial assemblies, and tribal jirgas also had some juridical responsibilities, but their main function was one of counsel and arbitration. In effect, all justice was administered through religious courts. The Society of Learned Muslim Interpreters of Law (*Jamiyat-ul Ulama*) was entrusted with the interpretation of existing law. All proposed government regulations and laws were also to be submitted to the society in order to ascertain their compatibility with Islamic law.

The Nadir administration also made a few attempts to correct the archaic and inhuman practices in the Afghan prisons. A central prison was built near Kabul. The rebel leader known as son of a water-bearer (*Bacha-i Saqao*) came to power as a new King of Afghanistan known as The Bandit Amir and ruled the country from January 17 to October 13, 1929 when he was defeated by Nadir Khan who was related to both Afghan royal dynasties.

⁵ Traditionally, a National Council of Notables, Tribal Chiefs, and Mullahs (religious scholars). The Council votes on important state matters referred to it by the Head of the State. It has the power to approve or disapprove the head of the state's plans and programs to bring about any major change in the laws and the constitution.

⁶ *Id.* at 227-274.

IV. The Constitution of 1931

Nadir made a major attempt to restructure the entire legal framework of the Afghan state. In this area, his most noteworthy contribution was a constitution (The Fundamental Laws of the Government of Afghanistan) which was promulgated on October 31, 1931. This constitution was mostly based on the Constitution of 1923. One important change was elimination of the provision of 1923 Constitution requiring that the Hindus and the Jews, as non-Muslims (*dhimmis*), pay a special tax and wear distinctive emblems. The new constitution dropped all mention of such discriminations against non-Muslims.

The new Constitution proclaimed that Afghanistan's religion and the religion of her monarch was the Hanafite rite of the "sacred religion of Islam." Non-Muslims were assured of religious tolerance and protection, provided they did not infringe upon the ordinary rules of conduct, propriety, and public customs (article 1). By implication articles 2 and 3 abolished tribal claims to territorial or regional sovereignty.⁷

As Nadir Shah pursued a cautious modernization program at home, he followed a delicate foreign policy, a policy that was more or less molded by the traditional Afghan attitude toward Russia and Britain. Nadir was assassinated on November 8, 1933. Despite his many achievements, Nadir, like previous Afghan rulers, was faced with the problem of modernizing without jeopardizing the dynastic rule, Durrani domination, and Afghan ethnic preponderance, and without encroaching on the vested interests of the powerful Afghan tribes and the religious establishment or disturbing the precarious strategic balance in the area. Though many of his measures were important, they were limited in scope and were generally confined to the Kabul-Kandahar-Ghazni triangle. Following the assassination of Nadir on November 8, 1933, his only son, Zahir Shah, the heir apparent, ascended the throne when he was nineteen years old. The real power, however, lay in the hands of his three paternal uncles: Shah Mahmud Khan, Shah Wali Khan, and particularly Muhammed Hashim Khan, who as Prime Minister assumed complete control of the country's affairs.

Under the Hashim administration, the Afghan nationalists and modernists continued to formulate the tenets of Afghan nationalism. The process of centralizing the judicial power in Kabul, bringing uniformity to the application of laws, and codifying state and religious laws continued under the Hashim administration. The monarchy's long-time hope of having commercial disputes placed in a separate civil category, as a way to avoid applying Islamic law to Jews, Hindus, and Europeans, became a reality.

V. Relations with the United States

In Foreign policy field, Afghanistan joined the League of Nations and settled a frontier dispute with Iran. Afghanistan also concluded Saadabad Pact, an alliance between Iran, Iraq, Turkey and Afghanistan. The four powers declared that "they were actuated by the common purpose of ensuring peace and security in the Near East by means of additional guarantees within the framework of the League of Nations." Outside the Muslim world, the Afghans reaffirmed their friendship agreements with Estonia, Lithuania, Finland, Austria, Denmark, Holland, Hungary, Sweden, Norway, Spain, and Brazil. The desire to formalize and broaden their relations with the United States remained a major preoccupation. Continuing the efforts of Nadir, the Hashim government attempted to obtain more than token U.S. recognition of Afghanistan, pressing for an exchange of diplomatic missions and an increase in trade. The search for a suitable formula for the investment of private American capital in Afghanistan and for the employment of American experts was intensified. To the gratification of the Afghans, in 1935, the United States officially recognized King Zahir's government and appointed the American minister to Iran to act also as the accredited U.S. representative to

⁷ V. Gregorian, *The Emergence of Modern Afghanistan*, Stanford University Press, 1969, 297-300.

the Afghan court. Soon after, in 1936, a provisional agreement, with clauses on friendship and diplomatic representation, was concluded between the two countries.

The Afghans continued to make special efforts to attract American capital and experts. In May 1937, the Afghan government granted its first concession to a foreign company, giving the American Inland Exploration Company a seventy-five-year option on the exploration and exploitation of the oil resources of the entire country. The company was also granted the right to explore the kingdom's mineral deposits and, subject to further negotiations, concessions to any discoveries.⁸

In 1945, the Afghan government and Morrison Knudson, of the United States and the Afghan government reached an agreement for construction of a dam on the Hilmand river, the longest river in Afghanistan.

VI. Pushtunistan: 1946-53; Durand Line

Before the 1947 Partition of India, Afghan governments in power reaffirmed their treaty obligations with the British. Habibullah, signed the Anglo-Afghan pact of 1905, which stipulated: "His said Majesty does hereby agree to this that in the principles and in the matters of subsidiary importance of the engagements which His Highness my late father (Abdur Rahman) concluded and acted upon with the Exalted British Government, I also have acted, am acting, and will act upon the same agreements and compacts, and I will not contravene them in any dealing."

Because the British were primarily concerned with Afghanistan as a buffer between India and Russia, their greatest interest lay in the definition of the Afghan boundary with Russia. On the other side, Afghanistan under Abdur Rahman who ruled the country between 1880 and 1901, the delineation of the boundary with India, through the Pashtun area, was far more significant, and it was during his reign that the *Durand Line* was drawn. By the early 1890s the situation in these areas was unsatisfactory, both to the British and to the Afghan Amir. In 1893, Abdur Rahman agreed to accept a mission headed by the British Foreign Secretary in India, Sir Mortimer Durand, to delineate the limits of British and Afghan control in the Pashtun areas. Afghanistan lost vast territories as a result of this agreement which was concluded in 1893 in Kabul between Mortimer Durand, Foreign Secretary to the British government in India, and Amir Abdur Rahman.

The first mention of the Durand Line as a "frontier" occurs in the 1919 Treaty of Rawalpindi, signed at the conclusion of the Third Anglo-Afghan War. Because the British were primarily concerned with Afghanistan as a buffer between India and Russia, their greatest interest lay in the delineation of the boundary with India through the Pashtun area, which was far more significant, and it was during his reign that the Durand Line was drawn. By the early 1890s the situation in these areas was unsatisfactory both to the British and to the Afghan ruler. By this agreement the core of the original Afghanistan came to be regarded as within the British sphere of influence. This loss of territory led to the rise of a strong irredentist movement inside Afghanistan that ever since has strained her relations with her eastern neighbors.

⁸ *Id.* at 378-381.

VI. Daoud Period (1953-63)

On September 2, 1953, Daoud Khan, a member of the royal family and Commander of Central Forces in Kabul, was appointed as Prime Minister by King Zahir Shah. Several factors encouraged the 43-year-old Daoud Khan to become Prime Minister: a simple desire for power; the sluggishness of the Hilmand Valley Project (launched by the United States); the apparent tendency of the Shah Mahmoud's government to lean more and more towards the West politically, as well as economically, in spite of traditional Afghan neutrality; softness toward the "Pushtunistan" problem with Pakistan; and slowness in pushing social and economic reforms.

In 1953, Lt. Gen. Mohammad Daoud became Prime Minister and returned to a path of autocratic modernization. He denounced the 1921 Anglo-Afghan treaty, which had endorsed the frontier line between Afghanistan and Pakistan. He aligned himself with the irredentist movement calling for abolition of the Durand Line. He summoned the *Loya Jirga* to pass a resolution in support of his policy that part of the Pushtunistan ceded from Afghanistan as a result of Durand Line be returned to Afghanistan. This policy brought Afghanistan and Pakistan to the brink of war.

In March 1963, King Zahir Shah asked Daoud for his resignation on the basis that the country's economy was deteriorating because of Daoud's Pushtunistan policy. This set the tone for the ten years to follow, in which Zahir Shah ruled, as well as reigned.

VII. The Constitution of 1964

In 1964, King Zahir Shah ushered in the "Decade of Democracy" with the adoption by a *Loya Jirga* of a new Constitution that was considered among the most progressive in the Islamic world. The drafters drew on Western models, such as the U.S. Bill of Rights and the Universal Declaration of Human Rights, in granting protections for fundamental freedoms of speech, press, and association, and for due process. The Constitution also provided for the country's first independent judiciary. While the legal reforms launched by the 1964 Constitution took hold among educated elites in urban areas, they had little impact in the countryside, where the central government's authority was more limited and varied considerably in different areas.

The years between 1969 and 1973 saw a critical downturn in Afghan politics. Public dissatisfaction over the lack of stable government reflected the fact that there were five Prime Ministers in the decade. The King, although still personally popular, came under increasing criticism for not supporting his own Prime Ministers. It was in this atmosphere of external instability and internal dissatisfaction that Daoud executed a *coup d'état* that he had been planning for more than a year in response to the inability of the regime. While the King was out of the country, in Italy for medical treatment, Daoud and a small military group took power with strong resistance only from the regent, Abdul Wali. The stability Zahir Shah had sought through limited democracy under a constitution had not been achieved, and there was a generally favorable popular response to the re-emergence of Daoud.

VIII. The End of Monarchy and Beginning of Republican Regime

The coming to power of Daoud at this time as the first President of the Republic of Afghanistan, in 1973 after in 1973, after fifty years of constitutional monarchy, was welcome, particularly as an appealing figure to military officers.

Although the form of government was changed from a monarchy to a republic, the substance of the

political and legal system did not change. The tribal-based Afghan society never developed into a nation state that with which all ethnic and sectarian communities could identify. By contrast, a constant conflict between state and tribe was kept at bay only by traditional diplomacy in which a chief's authority is coupled with responsibility.

The circumstances which brought Daoud to power made him indebted to the Parcham Marxists faction which had a major hand in planning and carrying out the coup by infiltrating the army and air force units. The Parcham leaders who had little public support choose to ally with Daoud in the belief that he could win public acceptance. In plotting with the Parchamites, Daoud committed himself to the socialist program and pro-Soviet posture of the Marxists. Daoud's growing determination to gain total control, on the other hand, led to his isolation and loss of support with the liberals who had served under the monarchy, and with the religious conservatives who were being persecuted under Daoud.⁹ In 1975, Daoud established a political party known as "the National Revolutionary Party," which was to be the focus of all political activity.

IX. The First Republican Constitution

In January 1977, a *Loya Jirga* approved Daoud's constitution, which established a presidential, one-party system of government. Daoud, thus, denounced the 1964 Constitution as "pseudo-democratic, but the alternative which he offered was outright undemocratic." In January 1977, Daoud convened a *Loya Jirga* to discuss and approve a new constitution which provided for a one-chamber house and invested enormous powers in Daoud as the head of state, chief executive, commander-in-chief of the armed forces, and leader of the sole political party.¹⁰

A. Daoud's Legal Reforms

During the Daoud Khan's rule as President (1974-78), a criminal code, based on Western models, but slightly modified to take note of the Afghan traditions, was drafted. This new code was to replace the uncodified Sharia law and the ad hoc secular legislation which had earlier prevailed.

Daoud favored a state-centered economy and launched a seven-year economic plan that included major schemes and would have required a major influx of foreign aid. Daoud's turn away from the left in domestic politics was matched by moving away from the steadily increasing reliance on the Soviet Union for military and economic support. He began a military training program with India and started talks with Iran on economic development aid. He also turned to other Muslim nations for economic assistance, such as Saudi Arabia, Iraq, and Kuwait.

The Pashtunistan issue was no longer an important issue with Daoud, as he backed away from his previous stance and paid a visit to Islamabad in 1978, where he reached an agreement with Pakistan President Zia-ul-Haq on border issues.

Daoud's initial visits to the Soviet Union in 1974, and again in 1975, did not remove the Soviet Union's unhappiness with his purge of the communist elements at home and his diversified foreign policy. The mysterious murder of Akbar Khyber, a key ideologue of the Parcham faction of the communist party on April 19, 1978, was a turning point in the brief history of the first president of Afghanistan. His funeral on April 19 served as a major rally for Afghan communists. Estimates of the crowd ranged from 10,000 to 30,000

⁹ Mohammad Has him Kamal, *Law in Afghanistan*, Mohammad Has him Kamal, Leiden, EJ Brill, 1985.

¹⁰ Dupree, *Afghanistan*, Princeton, 1973, at 499.

of pro-communists who showed on the streets of Kabul, to which Daoud showed a reaction by taking the communists more seriously. He arrested Taraki and placed Amin under house arrest. On April 27, 1978, the coup began with troop movements at the military base at Kabul International Airport. The rebels battled units loyal to Daoud in and around the capital. Daoud and most of his family were shot and killed in the Presidential Palace on April 28, 1978.

B. The Communist Era

On April 27, 1978, a bloody coup was staged by a small group of Soviet-trained army officers whose cooperation had been secured by the Khalq faction of the People's Democratic Party of Afghanistan (PDPA) which led the Communist uprising in Afghanistan. This established the People's Republic of Afghanistan, governed by a Revolutionary Council with Nur Muhammad Taraki as its president. The officers responsible for the takeover who cooperated with the Communist PDPA Party were dissatisfied with the Daoud regime for a variety of ideological, sociological, and political reasons. These officers advocated a military dictatorship, but the Khalq faction of the Communist Party put their own government, presided by Nur Muhammad Taraki, a novelist of peasant background and a political moderate. In September 1979, Taraki was relieved of his party and government offices and was succeeded by Hafizullah Amin who was an educationalist by training and had been acting as Prime Minister since March 1979. Amin was a high official in the Khalq faction of the ruling PDPA party. Amin planned to uproot feudalism in order to pass directly from a feudal society to a communist society.

The new regime embarked on a program of scientific socialism which included land reform, compulsory education, and further emancipation for women. These plans, coupled with the new regime's ideological promotion of Communism and heavy doses of Marxist propaganda, brought the Marxist leadership in conflict with the strong Islamic-minded population. Indeed, the Islamic movement was elevated to a popular resistance and nationwide struggle supported by the traditionalist Muslims throughout Afghanistan. By March 1979, much of the countryside was controlled by armed resistance activists and Islamic guerrillas.

The coup leaders were liberated from prison the following day and it was announced from Afghanistan radio Afghanistan that Daoud was murdered. Amin who led the coup later admitted at a press conference that it had occurred two years ahead of the PDAPA's schedule for revolution. Amin alleged that Daoud's determination to exterminate the left, Amin alleged, had forced the PDAPA to act immediately.

Within two days of Daoud's murder, however, the armed forces' revolutionary council ceded power to a thirty-five member PDAPA-controlled civilian body, the Revolutionary Council (RC) of the Democratic Republic of Afghanistan.

The army was the first target of the leftist movements in Afghanistan. The leftist elements first infiltrated the ranks of the young army officers, then staged a military coup and came to power. The society was very conservative and religious and naturally not receptive to communist ideology. Taraki, Amin, and Karmal played a central role in the evolution of the Afghan left and the fortunes of the People's Democratic Party of Afghanistan (PDAPA). Taraki, the oldest, was born in a semi-nomadic family, traveling frequently between Ghazni Province and British India. Despite his family's poverty, Taraki was able to attend a provincial elementary school and a middle school in Qandahar.

Amin was born in 1929 in Baghman, a town near Kabul. His father was a minor civil servant. Amin studied mathematics and physics at Kabul University. He became a high school teacher and principal. In

1957, he won a scholarship to study at the Teachers' College at Columbia University in New York.

After living briefly in Washington as a member of the Afghan embassy staff, he was recalled to Kabul because of his outspoken criticism of Prime Minister Daoud. He ran his own translation agency between 1958 and 1962 and in the latter year was hired by the United States embassy in Kabul as a translator, and on completion of his course he returned home to administer teacher-training courses. Returning to Columbia University to complete his doctorate in 1962, Amin became involved in the politics of the Associated Students of Afghanistan. In 1965, he returned to Afghanistan without his doctorate and accepted a teaching post at a girls' high school.

Karmal, born in 1929, was a member of the social and political elite. His father, General Muhammad Hussain Khan, had served as governor of Paktia Province and enjoyed close ties with the royal family. Karmal, an indifferent student in high school and in the law school of Kabul University, quickly gained a reputation as an orator and activist in the university's student union. In 1951 for his political activities he was imprisoned for a time for his political activities, and later he held posts in civil service.

Karmal and Taraki had been planning to organize a party and took preliminary steps in this direction in 1963. The PDAPA held its first congress on January 1, 1965, at Taraki's house in Kabul, and elected Taraki as secretary general and Karmal deputy secretary general. They approved a party program advocating a national front of democratic and patriotic forces and progressive reforms. The program's avoidance of Marxist-Leninist terminology reflected fears that its use would invite official repression.

PDAPA formally divided into two factions, whose rivalry would be a decisive, and often deadly in the party's fortunes and misfortunes. Karmal and Taraki differed in their perceptions of Afghanistan's revolutionary potential. Taraki believed that revolution could be achieved in the classical Leninist fashion by building a tightly disciplined working-class party. Karmal felt that Afghanistan was too undeveloped for a Leninist strategy. Karmal sought, unsuccessfully, to persuade the PDPA Central Committee to censure Taraki's excessive radicalism. Taraki tried to neutralize Karmal by appointing his own supporters as new members to the committee who were his own supporters. Karmal offered his resignation which, to Karmal's surprise, was accepted to Karmal's surprise. Karmal brought with him about half of the members of the Central Committee. Subsequently, the two groups operated as separate political parties, each with its own secretary general, central committee, and membership. Taraki's faction was known as *Khalq*, and Karmal's as *Parcham*. Taraki appealed to a rural, lower-middle class constituency of Pashtuns, and to the oppressiveness of the old order; they tended, however, to be conservative in matters such as the separation of the sexes.

Both parties were consistently pro-Soviet. They accepted financial and other forms of aid from the Soviet embassy. In March 1977, a formal agreement on unity was achieved, and in July the two factions held their first joint conclave in a decade. In light of Daoud's growing repression of the left at that time, one of the questions discussed was the removal of his dictatorial regime.

The PDPA and its supporters constituted only a tiny percentage of the total population when the PDPA's cadres in the military seized power. The merger of *Parcham* and *Khalq* rapidly collapsed, and before the year was over, populations in large areas of the country had revolted against the regime's hasty and ill-considered reforms.

The first cabinet was a careful balancing act of *Parcham*, *Khalq*, and military personalities. Taraki, as prime minister, and Karmal, as senior deputy prime minister, occupied the highest and second highest places in a well-defined hierarchy. The third-ranked position, minister of foreign affairs, was awarded to

Amin, a *Khalqi* . On July 19, Taraki boasted that there was no such thing as a *Parcham* party in Afghanistan. A wave of political arrests continued from August to November. Taraki became the most powerful figure in Afghanistan by the close of 1978.

The measures relating to marriage and land reforms had ample precedent in modern Afghan history. As early as 1884 , Amir Abdur Rahman had sought to curb excessive bride-prices and improve the status of rural women . Daoud also had announced a land reform program in 1975. All such efforts failed, because the organizers failed to understand the traditional patterns and ways of life and many believed such reforms as attacks on Islam.

X. Interim Constitution of 1980

A major new development by the communist regime was the promulgation of an interim constitution named the *Assassi'i Jumhuri'i Demokrati'i Afghanistan* (the Provisional Basic Principles of the Democratic Republic of Afghanistan). This constitution stated that in the absence of *Loya Jirga*, the Revolutionary Council was to issue decrees and laws; adopt state economic and social development plans; approve the state budget; establish the Presidium of the Revolutionary Council, the Council of Ministers, the Supreme Court; and appoint the attorney general to set down guidelines for domestic and foreign policies, refer matters to a referendum, elect members of the Grant National Assembly, declare war, and approve or cancel international agreements.

The President of the revolutionary Council was also to act as Prime Minister as long as no Prime Minister was appointed.

In contrast with its predecessors, who designated Islam as the state religion, the Constitution of 1980 only called for the respect and protection of Islam. The provisional Constitution of 1980 did not explicitly mention either communism or Marxism by name . The party itself was named the People's Democratic Party. Once the party seized power, it put forward a brief outline of its program. entitled *Basic Lines of the Revolutionary Duties of the Democratic Republic of Afghanistan* . Nor was there any mention of Marxism or Communism in the 1978 manifesto which indicated the absence of public support for Communism. A theme which frequently occurred in the provisional constitution is the Saur Revolution and its lofty objectives.¹¹

XI. Communist's Legal Reforms

The Communists' major goal was to develop a Socialist legal and penal system. In March 1982, the People's Democratic Party of Afghanistan held a National Conference which, *inter alia*, resolved a Program of Action for the PDPA ruling party. This reflected the general policy of the party and indicated its strategy and tactics in the course of building a socialist state. This Program of Action determined and defined the basic directions of the development of society in various political, economic, and social spheres, as also the basic principles of the foreign policy of the ruling party and the revolutionary state. In practice it was in line with the objectives of the Program of Action which was based on, theoretically, democracy, and social justice. In practice this meant the widening of the power of the state in a line similar to the Eastern Bloc.

¹¹ Saur is the second month of Afghanistan calendar equal to April.

In areas of criminal law, the Kabul authorities were more influenced by Soviet law and practice than in areas of private law. For example, the criminal system could directly punish the government opponents and reward its supporters. This was obvious in the Afghan criminal justice after the Soviet invasion of 1979. In particular, the arrest, detention, interrogation, trial, and sentencing of opposition activists and anti-Communist elements made a mockery of criminal justice. Held by secret service KHAD¹² agents, the political prisoners were investigated, tortured, and imprisoned without access to a lawyer or member of their family. If found guilty, the prisoner was tried by the revolutionary court trials in which mostly took place *in camera*. Cases assigned the death penalty had to be confirmed by the Revolutionary Court, which was the final recourse. The communist government refused to admit the U.N. Commission on Human Rights' rapporteur entry into Afghanistan.

In the field of family laws the Communists issued a decree on October 17, 1978, which granted equal rights to women and reformed certain aspects of the law of marriage. i.e. the dowry system. It retained the marriage portion (*mahr*) which is necessary under the Sharia, but abolished extra payments made by bridegrooms to the father of the bride, called *walwar* and *shirbaha*.

XII. U.S. Ambassador Kidnaped and Killed

On February 14, 1979, U.S. ambassador, Adolph Dubs IIIII was kidnaped and killed. The mysterious death of the U.S. ambassador resulted in the sharp reduction of the U.S. operations in Afghanistan. The Soviets were left with a clear field. On March 27, 1979, he took over the office of Prime Minister from Taraki, although Taraki remained president of the RC and PDPA Secretary General. The popular insurrection intensified, and more soldiers joined or attempted to join the rebels during the spring and summer months; there were major mutinies in Kabul and Jalalabad. Soviets were major targets of violence. Soviets blamed Amin for the chaotic situation in the country. By the summer of , 1979, the Soviets were virtually running the country as Amin stubbornly refused to go along with their policy recommendation. The Soviets enlisted Taraki in their attempt to liquidate Amin. Two attempts against the life of Amin failed and Taraki was killed.

XIII. The Soviet Invasion

Afghanistan became a key Cold War battleground after thousands of Soviet troops intervened in the country. To prop up a pro-communist regime in Afghanistan the Soviet army invaded Afghanistan in December 1979. Amin was killed while defending the Soviet invaders in Darulaman Palace. On December 27, 1979, a Soviet radio transmitter located in Terez, just across the Amu Darya from Afghanistan, broadcast a statement by Karmal castigating the intolerable violence and torture by the bloody apparatus of Hafizullah Amin and announcing a “national *jihad* ... A holy war of the Afghan people for true democratic justice, for respect for the holy Islamic religion ... for implementation of the aims of the glorious April revolution.” Further broadcasts transmitted from Kabul once Soviet troops controlled Radio Radio Afghanistan, named Babrak Karmal President of a new fifty-seven-member evolutionary Revolutionary Councilouncil, and Prime Minister of the government, and secretary general of the People's Democratic Pary Parcham faction. Early in the morning of December 28, an announcement was disseminated claiming that the government had requested “ political, moral, and economic assistance, including military aid “ from the Soviet Union because of the provocation of Afghanistan's foreign enemies.” Specifically, it recalled the December 5, 1978, friendship treaty as the basis for such a request.

¹² This acronym stands for the Persian title of the Afghan secret service i.e. State Information Services(*Khadamat-i Ettilla'at-i Dawlati*).

Anti-Soviet regime resistance intensified and various Mujahedin groups fighting the Soviet forces. China, Iran, Pakistan, Saudi Arabia, and the United States supplied money and arms to Mujahedin. In 1985, new Soviet leader Mikhail Gorbachev declared that Russia would withdraw troops from Afghanistan. In 1986, Babrak Karmal replaced by Najibullah as head of the Soviet-backed regime. In 1988, the Soviet Union began pulling troops out of Afghanistan; the last troops left in 1989. But Mujahedin pushed to overthrow the Soviet-installed regime in Kabul. In 1991, the United States and the Soviet Union agree to end military aid to both sides. In 1992, Mujahedin occupied Kabul and Najibullah falls. Mujahedin agreed to form a government with ethnic Tajik, Burhanuddin Rabbani as President which was recognized by the United Nations. Factional contests continued among Mujahedin fighters, and in 1994, the Pushtun-dominated Taliban emerged as a major power.

XIV. Withdrawal of Soviet Troops from Afghanistan

The overwhelming majority of the Muslim population of Afghanistan was opposed to the post-1979 political regime which identified with the Soviet Union. The outside world clearly rejected the claims made by the Soviet Union that it was defending the interest of the people of Afghanistan and that it sent armed forces into this country on the basis the Soviet-Afghan Treaty of Friendship and Cooperation signed in December 1978. The other countries called for the Soviet withdrawal from Afghanistan.

A diplomatic process was initiated by the Secretary General of the United Nations with the support of all governments concerned, and on November 13, 1985, the U.N. General Assembly overwhelmingly approved a resolution calling for the withdrawal of foreign troops without specifically mentioning the Soviet Union. In April 1988, under the Geneva accords, the governments of the United States and the Soviet Union guaranteed the national integrity and non-alignment of Afghanistan. The withdrawal of the Soviet troops from Afghanistan started in May 1988, and was completed by mid 1989.

XV. Islamic Fundamentalists

Islamic party, (*Hezb-e-Islamior*) the largest fundamentalist émigré party led by Gulbuddin Hikmatyar, was organized in 1985, by the youthful “Leninist,” who was bitterly opposed the more moderate Rabbani. In 1977, the two leaders went separate ways. Rabbani retained control over the original *Jamiat-i Islami*. In 1979, a second split occurred. Yunis Khaled, one of the few traditional *ulama* to become involved in the fundamentalist movement, broke with Hikmatyar and formed his own *Hezb-e Islami*. His group, however, was small, estimated to comprise between 5,000,000 and 7,000 armed adherents. Despite its size, it had a reputation for good organization and fighting effectiveness. The *Ittehad-e-Islami* of Abdul Rasool Sayyaf had an undetermined number of adherents. Sayyaf had access to arms and funds from Arab countries; by virtue of this he was named head of the coalition of four major and three minor fundamentalist parties, known as the Islamic Alliance of Afghan Mujahedin (*Ittehad-i-Islami Mujahiddin-i Afghanistan*),

The *Hazaraajat*, the region covering portions of the central provinces of Bamian, Oruzgan, and Ghowr that was the home the minority Hazaras, contained three important *Shia* parties connected to Khomeini’s Islamic Revolution.

A. Emergence of Taliban

Afghanistan was in a state of virtual disintegration just before the Taliban emerged at the end of 1994. The country was divided into warlord fiefdoms, and all of the warlords had fought, switched sides, and fought again in a bewildering array of alliances, betrayals, and bloodshed.. The predominantly Tajik government of President Burhanuddin Rabbani controlled Kabul, its environ, and the north-east of the

country, while three provinces in the west centering on Herat were controlled by Ismael Khan. In the east on the Pakistan border three Pashtun provinces were under the independent control of a council or *Shura* or council of Mujahidin commanders based in Jalalabad. A small region to the south and east of Kabul was controlled by Gulbuddin Hikmetyar. In the north the Uzbek warlord General Rashid Dostum, the Uzbek warlord, held sway over six provinces, and in January 1994, he had abandoned his alliance with the Rabbani government and joined with Hikmetyar to attack Kabul. In central Afghanistan the Hazras controlled the province of Bamiyan.

In Kandahar the situation was chaotic and international aid agencies were fearful of even working in Kandahar. The warlords sold off everything to Pakistani traders, stripping down telephone wires and poles, cutting trees, and selling off factories and machinery to scrap merchants. The warlords seized homes and farms, threw out their occupants, and handed them over to their supporters.

For those Mujahedin who had fought the Najibullah regime (installed by the Soviet Union) and had then gone home to their studies at *Madrassa* (religious schools) in Quetta and Kandahar, the situation was particularly galling. Mullah Mohammed Ghaus, the one-eyed Foreign Minister of the Taliban said: “We would sit for a long time to discuss how to change the terrible situation. Before we started we had only vague ideas of what to do and we thought we would fail. Many of Mujahedin were searching for a solution.” After much discussion these divergent but deeply concerned group of Islamic resistance fighters chalked out an agenda which framed Taliban’s declared aims, - to: restore peace, disarm the population, enforce Sharia law, and defend the integrity and Islamic character of Afghanistan. As most of them were part-time or full-time students at *Madrassas*, the name they chose for themselves was natural. A *talib* is an Islamic student, one who seeks knowledge, as compared to the *mullah* who is one who gives knowledge. By choosing this name the Taliban distanced themselves from the party politics of the Mujahedin and signaled that they were a movement for cleansing society, rather than a party trying to grab power.

Some Taliban say Omar was chosen as their leader, not for his political or military ability, but for his piety and his unswerving belief in Islam. Others say he was selected to lead this movement, because he was the first amongst equals. Omar was born sometime around 1959 in Node village near Kandahar to a family of poor, landless peasants who were members of the Hotak tribe, the Ghilzai branch of Pashtuns. The Hotaki chief, Mir Wais, had captured Isfahan in Iran in 1721, and established the first Ghoul Afghan empire in Iran only to be quickly replaced by Ahmad Shah Durrani. Omar’s tribal and social status was non-existent and notables from Kandahar say they had never heard of his family. During the *jihad* of the 1980s, his family moved to Tarinkot in Urozgan province, - one of the most backward and inaccessible regions of the country where Soviet troops rarely penetrated. His father died while he was a young man, and the task of fending for his mother and extended family fell upon him.

Looking for a job, he moved to Singesar village in the Mewand district of the Kandahar province, where he became the village *mullah* and opened a *Madrassa*. His own studies in *Madrassas* in Kandahar were interrupted twice, first by the Soviet invasion and then by the creation of the Taliban. Omar joined Khakis’s *Hizbe-e Islami* and fought under Nek Mohammad against the Najibullah regime between 1989 and 1992. He was wounded four times, once in the right eye which is now permanently blinded.

After the collapse of the Soviet Union in 1991, successive Pakistani governments were desperately keen to open up direct land routes for trade with the Central Asian Republics. The major hindrance was the continuing civil war in Afghanistan, through which any route passed. Pakistan’s policy, was thus faced with a strategic dilemma. Either Pakistan could carry on backing Hikmetyar in a bid to bring a Pashtun group to power in Kabul, which would be friendly with Pakistan, or it could change direction and urge a power-sharing agreement between all the Afghan factions at whatever the price to the Pashtuns, so that a

stable government could open the roads to Central Asia.

The Pakistani military was convinced that other ethnic groups would not do their bidding and continued to back Hikmetyar. Some twenty percent of the Pakistan army was made up of Pakistani *Pashtuns*. When Benazir Bhutto was elected as Prime Minister in 1993, she was keen to open a route to Central Asia. The shortest route was from Peshawar to Kabul, across the Hindu Kush mountains to Mazar-e-Sharif, and then to Tirmez and Tashkent in Uzbekistan. But this route was closed due to the fighting around Kabul. A new proposal was from Quetta to Kandahar, Herat and on to Ashkhabad, the capital of Turkmenistan. On October 28, Bhutto met with Ismael Khan and General Rashid Dostum in Ashkhabad and urged them to agree to open a southern route, where trucks would pay a couple of tolls on the way and their security would be guaranteed. \ However, before that meeting a major event had shaken the Kandahar warlords. On October 12, 1994, some 200 Taliban arrived at the small Afghan border post of Spin Baldak on the Pakistan-Afghanistan border just opposite Chaman. Hikmetyar's men held all trucks that which picked up goods from Pakistan trucks, which were not allowed to cross into Afghanistan, and fuel was smuggled in from Pakistan to feed the warlords' armies. They had already donated several hundred thousand Pakistani *rupees* to Mullah Omar and promised a monthly stipend to the Taliban, if they would clear the roads of chains and bandits and guarantee the security for truck traffic.

The Taliban force attacked Hikmetyar's garrison and defeated them. Pakistan then helped the Taliban by allowing them to capture a large arms dump outside Spin Taldak that had been guarded by Hikmetyar's men. This dump had been moved across the border from Pakistan into Afghanistan in 1990, when the terms of the Geneva Accords obliged Islamabad not to hold weapons for Afghans on Pakistani territory. At the dump the Taliban seized some 18,000 Kalashnikovs, dozens of artillery piece, large quantities of ammunition, and many vehicles.

The capture of Spin Baldak worried the Khandahar warlords and they denounced Pakistan for backing the Taliban, but they continued bickering amongst themselves rather than uniting to meet the new threat. A test convoy of thirty trucks was ordered by Pakistan to travel to Ashkhabad with a load of medicines. On October 29, 1994, the convoy drawn from the army's national Logistics Cell, which was originally set up to funnel U.S. arms to the Mujahedin, left Quetta with 80 Pakistani ex-army drivers and two young Taliban commanders. The convoy was held up by a group of local Afghani commanders who demanded money, a share of the goods, and a termination in Pakistani support for the Taliban. Pakistan considered all the military options to rescue the convoy which were considered to be too dangerous. It was at this time that Pakistan asked the Taliban to free the convoy. On November 3, 1994, the Taliban moved in to attack those holding the convoy. The commanders, thinking this was a raid by the Pakistani army, fled. Mansur Achakzai who controlled the airport was chased into the desert by the Taliban, captured, and shot dead with ten ten of his body guards. His body was hung from a tank barrel for all to see.

The same evening, the Taliban moved on Kandahar where, after two days of sporadic fighting, they routed the commanders' forces. Mullah Naquib, the most prominent commander inside the city, who commanded 2,500 men, did not resist. The Taliban enlisted his men and retired the *Mullah* to his village outside Kandahar. The Taliban captured dozens of tanks, armored cars, military vehicles, weapons, and most significantly at the airport six Mig-21 fighters and six transport helicopter left over from the Soviet occupation..

In just a couple of weeks this unknown force had captured the second largest city in Afghanistan with the loss of just a dozen men. In Islamabad no foreign diplomat doubted that they had received considerable support from Pakistan. The fall of Kandahar was celebrated by the Pakistan government. Yet, the Taliban demonstrated their independence from Pakistan, indicating that they were nobody's puppet.

The Taliban cleared the chains from the roads, set up a one-toll system for trucks entering Afghanistan at Spin Baldak, and patrolled the highway from Pakistan. The transport mafia was ecstatic, and in December the first Pakistani convoy of 50 trucks carrying raw cotton from Turkmenistan arrived in Quetta, after paying the Taliban 200,000 *rupees* (US\$5,000) in tolls. Meanwhile thousands of young Afghan Pashtuns studying in Baluchistan and the North-West Frontier Province of Pakistan rushed to Kandahar to join the Taliban. They were soon followed by Pakistani volunteers who were inspired by the new Islamic movement in Afghanistan. By December 1994, some 12,000 Afghan and Pakistani students had joined the Taliban in Kandahar.

The Taliban immediately implemented the strictest interpretation of Sharia law ever seen in the Muslim world. They closed down girls' schools and banned women from working outside the home, smashed TV sets, forbade a whole array of sports and recreational activities, and ordered all males to grow long beards. In the next three months the Taliban took over to take control of twelve of Afghanistan's thirty-one provinces, opening the roads to traffic and disarming the population. As the Taliban marched north to Kabul, local warlords either fled or surrendered to them waving white flags. Mullah Omar and his army of students were on the march across Afghanistan. Thousands more Afghan Pashtuns had joined them in their march northwards. The majority were incredibly young, - between fourteen and twenty-four years old, - and many had never fought before; although like all Pashtuns, they knew how to handle a weapon. Many had spent their lives in refugee camps in Baluchistan and the in Pakistan across the border from Afghanistan. These boys were a world apart from the Mujahedin. Moreover, they had willingly gathered under the all-male brotherhood that the Taliban leaders were set on creating.

The *mullahs* who had taught them stressed that women were a temptation, an unnecessary distraction from being of service to Allah. So when the Taliban entered Kandahar and confined women to their homes by barring them from working, going to school, and even from shopping, the majority of these *madrassa* boys saw nothing unusual in such measures.

Reinforced by their new recruits, the Taliban moved north into Urozgan and Zabul provinces, which they captured without a shot being fired. The marauding Pashtun commanders, unwilling to test their own supporters' uncertain loyalty, surrendered by hoisting Pashtun commanders, unwilling to test their own supporters' uncertain loyalty, surrendered by hoisting white flags and handing over their weapons in a mark of submission.. The Taliban occupied the Helmand province and its lucrative opium poppy fields in January 1995. They moved north towards Kabul, easily slicing through the Pashtun belt where they met with more mass surrenders.

In January 1995, all the opposition groups had joined hands to attack President Rabbani's government in Kabul. Hikmatyar had allied with the Uzbek warlord General Rashid Dostum in the north and the Hazaras of central Afghanistan who had a portion of Kabul. Pakistan had helped broker the new alliance, as Hikmatyar was still Islamabad's clear favorite, and at the beginning of the year he had received large quantities of Pakistani supplied rockets to bombard the capital.

The Taliban launched massive rocket attacks against Kabul, which killed hundreds of civilians and destroyed large tracts of the city. Hikmatyar was worried by this rival Pashtun force sweeping up from the south and tried to halt it.. On February 2, 1995, the Taliban captured Wardak, just thirty-five miles n south of Kabul, and Hikmatyar's bases around Kabul came under threat for the first time.

In February 1995, the Taliban captured Hikmatyar's headquarters at Charasyab, creating panic among his troops and forcing them to flee eastward towards Jalalabad. Later, however, they suffered a defeat as

they faced Masud's force in Kabul.¹³ The Taliban had won over the unruly Pashtun south because the exhausted, war-weary population saw them as saviors and peacemakers, if not as a potential force to revive Pashtun power which had been humiliated by the Tajiks and Uzbeks. Many surrenders had been facilitated by pure cash, bribing commanders to switch sides, - a tactic that the Taliban were to turn into a fine art form in later years, which was sustained by the growth in their income from the drugs trade, the transport business, and external aid from Pakistan and Saudi Arabia. The defeat in Kabul came as a major blow to the Taliban's prestige, but not to their determination. The Taliban then turned their attention to the west in a bid to capture Herat. They captured Nimroz and Farah, two of the provinces controlled by Ismael Khan, and advanced on the former Soviet airbase at Shindand, south of Herat.

.B. Mullah Omar Assumes Islamic Title

Traveling by jeep, truck, and horseback hundreds of Afghan *mullahs* began to descend on Kandahar in the cool spring weather of 1996. By March 20 more than 1,200 Pashtun religious leaders from south, west, and central Afghanistan had arrived in the city. It was the biggest gathering of *mullahs* that had ever taken place in modern Afghanistan history. Significantly absent were local military commanders, traditional tribal and clan leaders, political figures from the war against the Soviets, and non-Pashtun representatives from northern Afghanistan. Only religious leaders had been summoned by Mullah Omar to debate a future plan of action, but more importantly to legitimize the Taliban leader as the all powerful leader of the Muslims.

The ten-month Taliban siege of Kabul had failed to crack the city and as Taliban casualties mounted, there was growing unrest in their ranks. There were also broad divisions within the Pashtuns. The Kandaharis grouped around Omar wanted the war to continue, while those representing Pashtun areas recently conquered by the Taliban wanted peace and an end to the conflict. The gathering met for more than two weeks discussing issues, such as the political and military future, how best to impose Sharia law, and the future of girls' education in Taliban-held areas. The discussions were all held in secrecy and foreigners were banned from Kandahar for the duration. However, Pakistani officials were there to monitor the *Shura*, including the Pakistani Ambassador to Kabul, Qazi Humayun, and several ISI officers.

To patch over their differences, the core group of Kandaharis around Mullah Omar nominated him to become the *Amir-ul Momineen* or 'Commander of the Faithful,' an Islamic title that made him the undisputed leader of the *jihad* and the Emir of Afghanistan. The Taliban were later to rename the country as the *Emirate of Afghanistan*. On April 4, 1996, Omar appeared on the roof of a building in the center of the city, wrapped in the Cloak of the Prophet Mohammed, which had been taken out of its shrine for the first time in sixty years. As Omar wrapped and unwrapped in the Cloak around his body and allowed it to flap in the wind, he was rapturously applauded by the assembled throng of mullahs in the courtyard below, as they shouted *Amr-ul Momineen*.

This oath of allegiance or "*bai'at*" was a procedure similar to when Caliph Omar was confirmed as leader of the Muslim community in Arabia after the death of the Prophet Mohammed. The meeting ended with a declaration of *jihad* against the Rabbani regime in Kabul. The Taliban vowed not to open talks with any of their adversaries and declared that a final decision on allowing women to be educated could only be tackled when there was a legitimate government in Afghanistan.

But for many Afghans and Muslims elsewhere it was a serious affront to propriety that a poor village

¹³ Masud was a leading anti-Soviet occupation warlord all through the years the country was invaded and occupied by the Soviet Union.

mullah with no scholarly learning, tribal pedigree, or connections to the Prophet's family should presume so much. No Afghan had adopted the title since 1834, when King Dost Mohammed Khan assumed the title before he declared *jihad* against the Sikh kingdom in Peshawar. But Dost Mohammed was fighting foreigners, while Omar had declared *jihad* against his own people. Moreover, there is no sanction for such a title in Islam.¹⁴

C. Taliban Occupy Kabul

Taliban columns swept into Kabul on the evening of 26 September 26, 1996, just a few hours after Masud had ordered a general withdrawal to evacuate the city.¹⁵

The Taliban's first act was to hang former President Najibullah, then aged fifty, who had ruled Afghanistan from 1986 to 1992. President Najibullah had been staying in a U.N. diplomatic compound in central Kabul since 1992, when a U.N. peace plan to set up an interim government fell apart. Just before the Mujahedin were to capture Kabul, Najibullah was due to be taken out of Kabul by the U.N. mediator Benin Seven, but they stopped at the last moment. All the warring Afghan factions respected the diplomatic immunity of the U.N. compound. Najibullah's wife Fatana and three daughters had lived in exile in New Delhi since 1992.

Within twenty-four hours of taking Kabul, the Taliban imposed the strictest Islamic system in place anywhere in the world. All women were banned from work, even though one quarter of Kabul's civil service, the entire elementary educational system, and much of the health system were run by women. Schools and colleges were closed down affecting more than 70,000 female students and a strict dress code of head-to-toe veils for women was imposed. There were fears that 25,000 families which were headed by war widows and depended on working women and U.N. handouts would starve. Every day brought fresh pronouncements. "Thieves will have their hands and feet amputated, adulterers will be stoned to death, and those taking liqill be lashed," " said an announcement on Radio Kabul on 28 September 28, 1996.¹⁶

TV, videos, satellite dishes, music, and all games including chess, football, and kite-flying were banned. Taliban soldiers stood on main streets arresting men without beards. The Taliban set up a six-man *Shura* to rule Kabul, which was dominated by Durrani Pashtuns and did not include a single Kabuli. Headed by Mullah Mohammed Rabbani, the *Shura* included Mullah Mohammed Ghous, as Foreign Minister; Mullah Amir Khan Muttaqi, as Information Minister; Mullah Syed Ghayasuddin Agha; Mullah Fazil Mohammed; and Mullah Abdul Razaq.

None of the *Sbura* members had ever lived in a large city, but they were now running a vibrant, semi-modern, multi-ethnic city of 1.2 million people in which Pashtuns were only a small minority. It appeared that all that lay in the way of a total victory for the Taliban was Ahmad Shah Masud, dubbed the "Lion of Panjshir" after his birthplace in his Tajik homeland of the Panjshir valley north of Kabul. Soviet generals termed him unbeatable and a master of guerrilla warfare.

On October 10, 1996, deposed President Rabbani, Masud, Dostum, and the Mazara leader Karim Khalili met in Khin Jan on the highway and formed a "Supreme Council for the Defense of the Motherland" to

¹⁴ Ahmed Rashid, *Taliban, Militant Islam, Oil and Fundamentalism in Central Asia*. Yale University Press. pp. 41-42.

¹⁵ AHMED RASHID, *Taliban, Militant Islam, Oil and Fundamentalism in Central Asia*, YALE UNIVERSITY PRESS, 2000.

¹⁶ *Id.* at 41.

counter the Taliban. It was the beginning of a new anti-Taliban alliance that would perpetuate the civil war.

In their rapid advance northwards, the Taliban had spread themselves too thin and Masud took advantage of this, launching a major counter-attack along the highway on 12 October 12, 1996. He captured several towns, killing and capturing hundreds of Taliban soldiers as they fled back to Kabul in panic. The heavy fighting resulted in thousands of civilian casualties and forced thousands of people to flee their homes in villages along the Salang highway.

Faced with rising casualties, the Taliban began to suffer from manpower shortages, and they started conscripting young men from Kabul into their army, entering mosques and seizing worshipers. Thousands more volunteers arrived from Pakistan where the Pakistan government waived all passport and visa requirements for them. Bolstered by this fresh support, the Taliban launched an attack in western Afghanistan, moving northward from Herat into Baghdis province. By the end of October 1996 Ismael Khan and 2,000 of his fighters, who had been in exile in Iran, were flown into Maimana on Dostum's aircraft to defend the front line against the Taliban in Baghdis, Iran had rearmed and re-equipped Ismael Khan's forces in a provocative and deliberate attempt to bolster the new anti-Taliban alliance.

Despite heavy snowfall, the Taliban pushed Masud back from the outskirts of Kabul and regained nearly all the territory they had lost along the Salang highway, retaking the Bagram airbase and Charikar. Masud retreated into the Panjshir as the Taliban pushed up the highway to confront Dostum. The fall of Kabul and the intense fighting that followed created serious apprehensions in the entire region. Iran, Russia, and the four Central Asian Republics warned the Taliban not to move north and publicly declared they would help rearm the anti-Taliban alliance. Meanwhile Pakistan and Saudi Arabia sent diplomatic missions to Kabul to see what help they could offer the Taliban. Appeals from the U.N. and other international bodies for a cease-fire and mediation failed to receive any hearing from the belligerents.

D. Fall of Mazar-e-Sharif, 1997

Mazar-e-Sharif, the last stronghold in northern Afghanistan of the anti-Taliban alliance, was under the control of General Rashid Dostum and his Uzbeks. Once a bustling stop on the ancient Silk Route, it had regained its pre-eminence as a key staging post in the now massive smuggling trade between Pakistan, Central Asia, and Iran. Dostum had inaugurated his own "Balkh Airlines" which bought in smuggled goods from Dubai, while the truck traffic continued to the border with Central Asia. Dostum ran an efficient administration with a functioning health and educational system. Some 1,800 girls, attended Balkh University in Mazar, the only operational university in the country. Mazar provided opportunities for thousands of refugees from Kabul. It was a city of pilgrimage. Thousands came every day to pray at the blue-tiled Tomb of Imam Ali, who was the cousin and son-in-law of the Prophet Mohammed and the fourth *Khalif* of Islam, in whom Shia had in particular reverence. Near Mazar lie the ruins of Balkh, called "The Mother of all Cities" by invading Arabs in the seventh century. Here, Zoroaster preached nearly 3,000 years ago, Alexander the Great set up camp, and the Persian poet Rumi was born.

Dostum was revered for the simple fact that his city had not been touched in the past eighteen years of war. But there was a fire under the ash in Mazar which changed the destiny of the city and Dostum. There was a bitter feud between Dostum and his second-in-command General Malik Pahlawan.— Dostum was accused of murdering Malik's brother General Rasul Pahlawan, who had been killed in an ambush along with fifteen bodyguards in June 1996. This feud, together with the together with fears that Dostum had already ordered Malik's murder, and helped along by Taliban bribes and promises of power, prompted Malik's betrayal of Dostum on 19 May 19, 1997, when Malik called on the Taliban to help him oust his leader.

The Taliban moved north swiftly from Herat, and the northern provinces fell one after another to this unlikely alliance of Pashtuns and Uzbeks from Malik's power base in Faryab province, Dostum fled with 135 officers and men, first to Uzbekistan and then to Turkey..

Heavily armed Taliban troops rolled into Mazar in their trucks pick-ups under Mullah Abdul Razaq. They declined to share power with Malik and offered him the insignificant post of Deputy Foreign Minister in the Kabul government.

E. Pakistan Recognizes Taliban

Soon after the Taliban took over Mazar, the government of Pakistan recognized the Taliban as the legitimate government of Afghanistan and persuaded Saudi Arabia and the United Arab Emirates to follow suit. The Uzbeks had been led to believe that this was a power-sharing agreement, and now they realized it was a Taliban takeover. Malik was caught in the middle and his betrayal of Dostum which was made worse when he also handed over Ismael Khan to them, who had been fighting against the Taliban in Faryab.

XVI. Swift Turn of Events

On the afternoon of May 28, 1997, a squabble broke out as a group of Hazaras resisted being disarmed. Then all hell broke loose. First Mazar's Hazaras and then the rest of the population rose in revolt. Untrained in street fighting and not knowing the maze of city alleyways, the Taliban were easy victims as they drove their trucks pick-ups into dead ends, trying to escape the withering fire from houses and roof tops. Taliban leaders were either killed or captured.

Malik's troops swiftly retook four northern provinces (Teacher, Faryab, Jowzjan, and Sair Pul) which the Taliban had captured only five days earlier. With their escape routes closed, thousands of Taliban troops and hundreds of Pakistani students were captured, and shot dead, and buried in mass graves. In the south, Masud seized the opportunity to launch his own counter-attack, once again capturing Jabal ul Seraj at the southern entrance of the Salang tunnel. He blew up the entrance of the tunnel, trapping the Taliban that who were still in the north and were trying to escape down the road to Kabul. It was the worst ever Taliban defeat since they had emerged just thirty months earlier to conquer the country. In ten weeks of fighting between May and July the Taliban suffered over 3,000 casualties, killed or wounded, and some 3,600 men were taken prisoner..

Mullah Omar gave an urgent call for students in Pakistan to come and help the Taliban. Once again Pakistani *madrassas* were closed down as 5,000 new recruits, - both Pakistani and Afghan, - arrived to enlist with the Taliban. The situation for the Taliban was deemed so serious that even the reclusive Mullah Omar was forced to leave his sanctuary in Kandahar and visit Kabul for the first time to meet his commanders and raise morale amongst his troops.

The Taliban were also forced to recruit increasing manpower from the Ghilazi Pashtun tribes of eastern Afghanistan and Pakistan. But they demanded a political price which the Taliban were not prepared to pay. The Ghilzais who had dominated the anti-Soviet war effort were not prepared to be used as cannon fodder by the Durrani-dominated Taliban. They would come if they were given a share of power. After the Mazar defeat, the Taliban gave Jalaluddin Haqqani, the leading eastern Pashtun commander with the Taliban, a large sum of money to recruit 3,000 Ghilzai tribesmen. Haqqani arrived with his men on the Kabul front, but being powerless to make military decisions and being that they were led by Kandahari officers at the front led to mass desertions.. More disturbing was that villages around Kandahar were refusing to send their sons to enlist with the Taliban. For the first time the Taliban had a recruitment problem and a manpower shortage.

For the Central Asian states the bloodshed on their doorstep created a paranoid reaction as they considered the specter of the war crossing into their territories and the thousands of Afghan refugees fleeing across their porous borders. In an unprecedented move, military security was heightened throughout the region: , Some 3,000 Russian troops on the Uzbekistan-Afghanistan border and, 25,000 Russian troops on the Tajikistan boarder closed their borders with northern Afghanistan. At Termez, Uzbek helicopter gun ships flew patrol, as troops laid tank traps and fortified the bridge that crosses the Amu Darya river, which divided Afghanistan from Central Asia.

Russia offered to send ten ten battalions of troops to Kyrgyzstan after an appeal by Kyrgyz President Askar Akayev, even though his country had no border with Afghanistan. Russia and Kazakhstan organized an emergency meeting of the Commonwealth of Independent States (CIS) to discuss the crisis, where Russian Foreign Minister Yevgeny Primakov promised "very tough and effective actions by Russia," if the Taliban advanced further. Turkmenistan, a self-declared neutral state which bordered western Afghanistan, had developed working relations with the Taliban, but the Turkmen were unnerved by the fighting around Mezar. For the first time 9,000 Afghan Turkmen crossed the border into Turkmenistan seeking shelter from the fighting.

Iran said it would continue to support anti-Taliban alliance and appealed to Russia, India, and the Central Asian states to help them also.. Iranian Foreign Minister Ali Akbar Velayati urged the U.N. to intervene. The Taliban were furious with all of their neighbors and accused Iran and Russia of interfering and supporting the opposition. However, the arrival of the Taliban in the north did have a salutary effect on the four years of civil war in Tajikistan, as it forced both sides in the conflict to quicken the pace of negotiations out of fear of the Taliban. A peace settlement between the Tajik government and the Islamic opposition, brokered by Russia and the U.N., was finally reached in Moscow on June 1997. The settlement provided a major boost to Masud, as Russia could now re-supply him from bases inside Tajikistan. Masud was given the use of the airport in Kuliab in southern Tajikistan where he received and Iranian supplies which he then flew into the Panjshir valley.

On June 13, 1997, the anti-Taliban alliance set up the "United Islamic and National Front for the Salvation of Afghanistan" and declared Mazar as their capital. They reappointed Burhanuddin Rabbani as President and Masud as the new Defense Minister and promised to form a new government which would include tribal and Islamic leaders as well as technocrats. But the pact was doomed to failure as again differences between Malik, Masud, and Khalili prevented the Uzbeks, Tajiks, and Hazras from working together.

At the root of the split was the other leaders' suspicions of Malik after his series of betrayals. Malik had been unable to prevent a force of some 2,500 Taliban, who had remained behind in the north, from capturing the city of Kunduz which had an airport. The Taliban reinforced this enclave with daily flights of men and materials from Kabul. While Malik could not or would not drive the Taliban out of the north, Masud was moving closer to Kabul.

In mid-July, Masud broke the military stalemate north of Kabul, by recapturing Charikar and the Bagram airbase, killing hundreds more Taliban troops. By September, Masud's forces were once again positioned only twenty miles from Kabul. As the Taliban retreated from the Shomali, they poisoned wells and blew up small irrigation channels and dams in a bid to ensure that the local Tajik population would not return in a hurry.

As the Taliban advanced on Mazar, heavy fighting broke out between Uzbek troops loyal to Malik and others loyal to Dostum, who had just returned from exile in Turkey and rallied his troops to defeat Malik's

supporters and push the Taliban out of the Mazar region. Malik fled to his base in the Faryab province and then escaped to Turkmenistan and later on to Iran. Mazar descended into chaos as the Uzbeks again looted parts of the city and the offices of U.N. aid agencies forcing humanitarian aid-workers to abandon Mazar for the second time in a year.

As the Taliban retreated, they massacred hundreds of Shia Hazaras in Qazil Abad, a village south of Mazar. Mazar was now virtually taken over by Hazaras, and Dostum was forced to abandon the Uzbek capital and set up his base in Shiberghan. Acute tension between the Uzbeks and the Hazaras undermined the anti-Taliban alliance, and Dostum still had to win over Malik's supporters. He did so by exposing the atrocities committed by Malik. Dostum's troops unearthed 20 mass graves near Seberghan in the Dasht-i-Laili desert in Jowzjan province where more than 2,000 Taliban prisoners of war had been massacred and buried. Dostum accused Malik of the massacres, offered the Taliban help to retrieve the bodies and called in the U.N. to investigate. He released some 200 Taliban prisoners as a gesture of goodwill.

The country was now virtually split along north-south lines and also along Pashtun and non-Pashtun lines. All sides had carried out ethnic cleansing and religious persecution. The Taliban had massacred Shia Mazara villagers and forced out Tajik farmers from the Shomali valley. The Uzbeks and Hazaras massacred hundreds of Taliban prisoners and killed Pashtun villagers in the north and around Kabul. The Shia Hazaras had also forced out Pashtuns on the basis of their Sunni beliefs. Moreover, the divisions inside Afghanistan were manipulated and exacerbated by its neighbors, as all countries stepped up aid to their various Afghan proxies.

Apart from the suffering civilians, the biggest casualty of the stepped-up fighting was the U.N. The Taliban leadership, unversed in U.N. procedures and even the U.N. Charter, proved to be the greatest obstacle. Mullah Omar refused to meet the U.N. mediator, Norbet Holl. Other Taliban leaders publicly mocked U.N. efforts at promoting a cease-fire. Taliban resentment against the U.N. increased after the debacle in Mazar and more so after the U.N. Security Council refused to take action against the Mazar massacres or hand over Afghanistan's seat at the U.N., which was still occupied by President Rabbani.

The Taliban harbored several unrealistic suspicions about the U.N. which no amount of diplomacy could dispel. They were convinced that the U.N., in league with Western powers, was conspiring against Islam and their imposition of Sharia law. The crisis within the U.N. came at a time when it faced dwindling funds from wealthy donor countries for aid programs, because of donor fatigue over the continuing war. Donations were decreasing further, because the Taliban discriminated against Afghan women.

Moreover, Taliban hardliners were doing their utmost to promote a crisis with U.N. humanitarian agencies so that they could kick them out of the country under the pretext that the agencies were imparting Western secular ideas to the population. At the end of September, heads of three U.N. agencies in Kandahar were ordered to leave the country after they protested that a female lawyer for the U.N. High Commissioner for Refugees (UNHCR) was forced to talk to Taliban officials from behind a curtain so her face would not be visible. In November the UNHCR suspended all its programs when the Taliban arrested four Afghan staff of UNHCR. It was becoming impossible to provide humanitarian aid to the population anywhere, even though winter was approaching and there were growing food shortages.

The Taliban's treatment of women drew enormous adverse publicity and international criticism when Emma Bonino, the European Commissioner for Humanitarian Affairs and nineteen Western journalists and aid workers were arrested and held for three hours by the Taliban religious police in Kabul on September 28, 1997. They had been touring a female hospital ward funded by the European Union when journalists accompanying Bonino were arrested taking photographs of women patients; - all photography was banned by

the Taliban.

XVII. The Taliban's Perspective of Islam

Islam has always been at the very center of the lives of ordinary Afghan people. Whether it is saying one's prayers five times a day, fasting in Ramadan, or giving *Zakat*, an Islamic contribution to the poor. Islam has been the bedrock for the unity of Afghanistan's diverse and multi-ethnic people, while *jihad* has frequently provided the principal mobilizing factor for Afghan nationalism, during the resistance against the British and the Russians.

Traditionally, Islam in Afghanistan has been immensely tolerant- of other Muslim sects, other religions, and modern lifestyles. Until recently Hindus, Sikhs, and Jews played a significant role in the country's economy. After 1992, the brutal war destroyed this age-old Afghan tolerance and consensus. The civil war divided Islamic sects and ethnic groups in a way that before was unimaginable to ordinary Afghans. Masud's massacre of the Hazaras in Kabul in 1995, the Hazaras' massacre of the Taliban in Mazar in 1997, and the Taliban massacres of Hazaras and Uzbeks in 1998 have no precedent in Afghan history and perhaps have irreparably damaged the fabric of the country's national and religious soul.

Ninety percent of Afghans belong to the Sunni Hanafi sect, the most liberal of the four Sunni schools of thought. The Taliban's deliberate anti-Shia program has denigrated Islam and the unity of the country as minority groups tried to flee the country *en masse*.. For the first time in Afghanistan's history the unifying factor of Islam became a lethal weapon in the hands of extremists and , a force for division, fragmentation, and enormous blood-letting.

The minority sects were few and scattered among the fringes of the country. Shi'a Islam is predominant amongst the Hazaras in the Hazarajat, a handful of Pashtun tribes, a few Tajik clans and some Heratis. The Ismaelites, the followers of the Agha Khan, follow a branch of Shiism. They have always lived in the inaccessible Pamir mountains which today constitute eastern Tajikistan and Pakistan's northern areas. The Afghan Ismaeli leader Syed Nadir Shah Hussain, who died in 1971 was made a head of the community by the Agha Khan. His sons have led the Ismaeli community since then, playing a prominent role in the anti-Taliban alliance. The Sunni Hanafi creed is essentially non-hierarchical and decentralized, which has made it difficult for 20th twentieth century rulers to incorporate its religious leaders into strong centralized state systems.

Traditional Islam in Afghanistan believed in minimum government, where state interference was as little and as far away as possible. Every decision was carried out by the tribe and the community. Among the Pashtuns, village *mullahs*, although largely uneducated, ensured that the mosque was the center of village life. Students or Talibs studied at the small *madrassas* that were scattered through the tribal areas. In medieval times Herat was the center of Afghanistan's *madrassa* system but from the 17th seventeenth century Afghan scholars traveled to Central Asia, Egypt, and India to study at more renowned *Madrassas* in order to join the ranks of Ulema.

Islam was also deeply rooted in Afghanistan because Sharia law governed the legal process until 1925, when King Amanullah first introduced a civil legal code and the state took on the role of training *ulema* to become *Qazis* (Islamic judges). In 1946, a Sharif Faculty was set up in Kabul University, which became the main center for integrating the new civil code with the Sharif. This merging of the traditional with the modern was epitomized by Mohammed Musa Shafiq, the last Prime Minister under the monarchy, which was overthrown in 1973. Shafiq studied at a *madrassa* and at the Sharif Faculty in Kabul and then went on to take another degree from Columbia University in New York. When he was executed by the communists in 1979,

his death was widely mourned.

Thus, it was not surprising that in 1979, the *mullahs* did not join the radical Islamic Mujahedin parties, but the more traditional tribal-based parties such *Harakat Inquilabi Islami* headed by Maulana Mohammed Nabi Mohammedi and *Hizb-e-Islami* led by Maulvi Younis Khakis. Both men were Maulvis who had studied for a time at the Hackney *madrassa* in Pakistan and then established their own *Madrassas* inside Afghanistan.

After the Soviet invasion, they set up loose organizations which were decentralized, unideological, and non-hierarchical, but they rapidly lost out as the CIA-ISA¹⁷ arms pipeline supported the more radical Islamic parties. Sufism in Afghanistan

Another moderating factor for Islam in Afghanistan was the enormous popularity of Sufism, the trend of mystical Islam, which originated in Central Asia and Persia. *Sufi* means “wool” in Arabic and the name comes from the rough woollen coats worn by the early Sufi brethren. The Sufi order or *Tariqah* (which means the way) was a medieval reaction against authority, intellectualism, the law, and the *mullah* and, thus, was immensely appealing for poor, powerless people. The Sufis build their faith on prayer, contemplation, dances, music, and sessions of physical shaking or whirling in a permanent quest for truth.

The two main Sufi orders in Afghanistan of of Naqshbandiyah and Qaderiyah, played a major role in uniting the anti-Soviet resistance, as they provided a network of associations and alliances outside the Mujahedin parties and ethnic groups. Leaders of these orders were equally prominent. The Mujaddedi family were leaders of the Naqshbandiyah order and had been king-makers in Kabul for centuries. In a brutal act, the communists killed seventy-nine members of the Mjaddedi family in Kabul in January 1979, to eliminate potential rivals. Nevertheless, one survivor, Sibghatullah Mujaddedi, set up his own resistance party in Peshawar, the Jabah-i-Najat Milli Afghanistan, National Liberation Front of Afghanistan, and became a fierce critic of the radical Islamic parties. He was appointed President of the Afghan interim government in 1989, and then became the first Mujahedin President of Afghanistan in 1992.

XVIII. Saudis in Afghanistan

Before the Taliban, Islamic extremism had never flourished in Afghanistan. Within the Sunni Hanafi tradition were the Wahabbis, followers of the strict and austere Wahabbi creed of Saudi Arabia. Begun by Abdul Wahab (1703-1792), as a movement to cleanse the Arab *bedouin* from the influence of Sufism, the spread of Wahabbism became a major plank in Saudi foreign policy after the oil boom in the 1970s. The Wahabbis first came to Central Asia in 1912, when a native of Medina, Sayed Shari Mohammed, set up Wahabbi cells in Tashkent and the Ferghana valley. From here and from British India the creed traveled to Afghanistan where it had minuscule support before the war.

However, as Saudi arms and money flowed to Saudi-trained Wahabbi leaders amongst the Pashtuns, a small following emerged. In the early stages of the war, the Saudis sent an Afghan long settled in Saudi Arabia, Abdul Rasu Sayyaf, to set up a Wahabbi party, the *Ittehad-e- Islami* (Islamic Unity) in Peshawar. The Wahabbi Afghans who are also called Salafis, became active opponents of both the Sufi and the traditional tribal-based parties but they were unable to spread their message, because they were immensely disliked by ordinary Afghans, who considered it a foreign creed. Arab Mujahedin including Osama Bin Laden, who joined the *jihad*, and won a small Pashtun following, largely due to the lavish funds and weapons

¹⁷ Pakistan Interservices Intelligence.

at their disposal.

XIX. Pakistan Plays a Leading Role in Afghanistan

Thanks to the CIA-ISI arms pipeline, the engine of the *jihad* was the radical Islamic parties. Hikmetyar and Masud had both participated in an unsuccessful uprising against President Mohammed Daud in 1975. These Islamic radicals had then fled to Pakistan where they were patronized by Islamabad as a means to pressurize future Afghan governments. Thus, when the Soviets invaded Afghanistan in 1979, Pakistan already had effective Islamic radicals under its control who could lead the *jihad*.

The Taliban interpretation of Islam, *jihad*, and social transformation was an anomaly in Afghanistan because the movement's rise echoed none of the leading Islamicist trends that had emerged through the anti-Soviet war. The Taliban were neither radical Islamicists inspired by the Ikhwan, nor mystical Sufi, nor traditionalists. They fitted nowhere in the Islamic spectrum of ideas and movements that had emerged in Afghanistan between 1979 and 1994. It could be said that the degeneration and collapse of legitimacy of all three trends (radical Islamicism, Sufism, and traditionalism) into a naked, rapacious, power struggle created the ideological vacuum which the Taliban were to fill. The Taliban represented nobody but themselves and they recognized no Islam except their own.

As Mullah Omar became more powerful and introverted, declining to travel to see and understand the rest of the country and meet the people under his control, the movement's power structure developed all the faults of the Mujahedin and communist predecessors. Moreover, after 1996, the Taliban made known their desire to become the sole rulers of the Afghanistan without the participation of other groups.

The Taliban's apex decision-making body was the Supreme *Shura* which continued to be based in Kandahar, a city which Mullah Omar had left only once to visit Kabul in 1996. The *Shura* was dominated by Omar's original friends and colleagues, mainly Durrani Pashtuns, who came to be called the '*Kandahris*.'. The original *Shura* was made up of ten members, but military commanders, tribal elders, and *ulema* took part in *Shura* meetings with as many as fifty people often participating taking part.. It soon became impossible for the Kabul *Shura*, which acted as the government of Afghanistan, to make take any decision without lengthy consultations with Kandahar.

After the Mazar defeat in 1997, there was growing criticism from Ghilzai Pashtun commanders that they were not being consulted on military and political issues, despite the fact that they provided the bulk of the military manpower. In Mazar the Taliban lost some 3,000 of their best troops, 3,600 were taken prisoner, and 10 ten leaders were killed or captured. Thus, the Taliban were forced to draw upon new recruits from the Ghilzai tribes of eastern Afghanistan.

The Taliban never gave an indication to how and when they would set up a more permanent representative government , whether they would set up a more permanent representative government,, whether they would have a constitution or not, and how political power would be divided. To implement his decisions Mullah Omar relied less on the Kabul government and increasingly upon the Kandahari *ulema* and the religious police in Kabul. Mulavi Said Mohammed Passion, the Chief Justice of Kandahar's Islamic Supreme Court, who had taught Omar the basics of Sharia law during the *jihad*, became a key advisor to Omar.

The Kandahar Islamic Supreme Court became the most important court in the country because of its proximity to Omar. The Court appointed Islamic judges, Qazis, and Assistant Qazis in the provinces, and once or twice a year assembled them all in Kandahar to discuss cases and the application of Sharif law. A parallel system existed in Kabul where the Justice Ministry and the Supreme Court of Afghanistan were based.

The Kabul Supreme Court handled about forty cases a week and comprised eight departments which dealt with laws related to commerce, business, criminal, and public law, but it clearly did not have the same powers as the Kandahar Supreme Court. According to Attorney General Maulvi Jalilullah Maulvizada, a. All the laws were being Islamicized. Any law repugnant to Sharia had to be removed. The Attorney General expected that it would take many years to liquidate all the non-Islamic laws.

On September 18, 1997, just five days after the Taliban occupied Bamiyan, the Taliban exploded the head of the small Buddha colossus, blowing its face away. They fired rockets at the Buddha's groin, damaging the luxurious folds of the figure and destroying the intricate frescoes in the nichel, where the statue stood. The two Buddhas, Afghanistan's greatest archaeological heritage, had stood for nearly 2,000 years and had withstood the assault of the Mongols. Now the Taliban were destroying them. It was a crime that could not be justified by any appeal to Islam.

For the Iranians the fall of Bamiyan was the last straw. Iran said it had the right of self-defense under international law and the U.N. Charter to take all necessary action against the Taliban. A week later Iran's Supreme Leader, the Ayatollah Ali Khomeini, warned of a huge war which could engulf the entire region. He accused Pakistan of using troops and aircraft in the capture of Bamiyan, which was denied by Islamabad. Iran amassed 70,000 seventy thousand Iranian Revolutionary Guards, backed by tanks and aircraft, and began the largest military exercises ever along the Iran-Afghanistan border. In October 1998, some 200,000 regular Iranian troops began another series of exercises along the border as the Taliban mobilized some 5,000 fighters to prevent an expected Iranian invasion.

As the U.N. Security Council expressed fears of an all-out Iranian attack, it sent Lakhdar Brahimi back to the region. The military tensions between Iran and the Taliban only subsided when Brahimi met with Mullah Omar in Kandahar on October 14, 1998. It was the first time that Omar had ever met with a U.N. official or foreign diplomat who was not Pakistani. Omar agreed to release all the Iranian truck drivers, return the dead bodies of the Iranian diplomats, and promised to improve relations with the U.N.

The Taliban's confrontation with Iran had given Masud the time and space to regroup his forces and the remaining Uzbek and Mazara fighters who had not surrendered. At the same time, increased arms supplies, including vehicles and helicopters, reached him from Russia and Iran. Masud launched a series of well-co-ordinated lightning attacks in the north east, capturing a huge amount swathe of territory back from the Taliban. The collapse of the Mazara and Uzbek leadership had left Masud and his Tajiks supreme and the commanders, who included several prominent Pashtuns, to appoint Masud as the military commander of all anti-Taliban forces.

The Taliban offensive, the massacre of Hazaras, and the confrontation with Iran, along with the U.S. cruise-missile attack dramatically undermined the fragile balance of power in the region. The international community remained frustrated with the Taliban's intransigence in refusing to form a broad-based government, change its stance on the gender issue, and accept diplomatic norms of behavior. U.N. aid agencies were unable to return to Kabul. Washington was now obsessed with Bin Laden's capture and the Taliban's refusal to hand him over. Even close ally Saudi Arabia, which felt insulted by the protection that the Taliban were giving Bin Laden, pulled out its diplomatic representation in Kabul and ceased all official funding of the Taliban, leaving Pakistan as their sole provider.

The worsening economic situation and political alienation in Taliban-controlled areas along with the massive military losses they suffered, led to increasing internal divisions. In January 1997. In January 1997, the Taliban faced a revolt from within the Kandahar heartland over forced conscription. At least four Taliban recruiters were killed by villagers who refused to join the army. The Taliban were driven out from several

villages around Kandahar after gunfight in which there were casualties on both sides. Lack of food and rising prices led to growing discontent.

In the winter of 1998-99 there were several acts of looting and robbery by Taliban soldiers, reflecting the growing discontent and indiscipline caused by economic hardship. The soldiers were caught, and ordered their hands cut and hung in public places. In Kabul, Maulvi Qalamuddin who was in charge of the Department of Promotion of Virtue and Prevention of Vice, did not allow women to enter the building he occupied. Orders had been issued banning women from wearing high heels, making a noise with their shoes while they walk, or wearing make-up. Stylish dress and decoration of women in hospitals was forbidden.. Women were duty-bound to behave with dignity, to walk calmly, and refrain from hitting their shoes on the ground, which makes noises. The new edict formalized previous restrictions that prevented women from working, including for Western humanitarian aid agencies, except in the medical sector. No Afghan woman had the right to be transported in the same car as foreigners.. Education for boys had come to a standstill in Kabul, because most of the teachers were women who could not work.¹⁸

Islamic punishments, such as public executions of convicted murders and amputations of those charged with thefts, were introduced.

Television, music and cinema were banned after being adjudged as frivolities.

Girls aged 10 and above were forbidden from going to school; working women were ordered to stay at home.

Men were required to grow beards and women had to wear the burqa (cover from head to toe).

The Taliban's religious police earned notoriety as they tried to implement these restrictions.

Taliban policies, particularly those concerning human and women's rights, also brought them into conflict with the international community.

XX. Legal History

Pre-Islamic era extends from the early times until 662 AD when Islam was firmly established in eastern Persia and central Asia. For thousands of years, the area which is now known as Afghanistan had been part of various empires, e.g., Persian, Greek, Mongol, Indian, Turkik, and others. The main cultural and political influences were those of Iran, although others from Greece, India, and Central Asia were present. The Kushans of northern India ruled for four centuries and introduced Buddhism to Afghanistan.

Afghanistan has historically operated under two parallel legal systems - a Kabul based, formal system, and a tribal, customary law-based system administered by tribal or village elders. Both were based on Islamic law, or Sharia. Customary law has been predominant in some rural areas. Before the Soviet invasion of 1979, a civil code-based legal system borrowed largely from the Egyptian model (which in turn was borrowed from the French) was extensively developed. While over the course of the twentieth century the country had a number of constitutions, the constitution adopted in 1964 under Zahir Shah was regarded at the time of its adoption as one of the most progressive in the Islamic world. Following the Soviet invasion and installation of socialist regimes, the country's laws were changed to meet the objectives of the leftist regimes. In 1966,

¹⁸ Ahmed Rashid, *Taliban, Militant Islam, Oil and Fundamentalism in Central Asia*, Ahmed Rashid, Yale University Press, New Haven, London, 2000

when the Taliban came to power, there was a swift turn to Islamic fundamentalism as they declared invalid all the existing laws and reintroduced laws based on their own interpretation of Sharia.

The real impact of Islamic faith and Islamic law in Afghanistan began with the foundation of the Ghaznavid dynasty in the 10th tenthcentury AD. Under Sultan Mahmud Ghazni, Islam flourished in Afghanistan and the last influences of Buddhism were removed. Afghanistan, thus, culturally, received influences from Iran, India, Greece, and Turks over a long period of its history.

Before the introduction of the first Constitution of Afghanistan in 1923, the principal source of law was the Sharia. Other sources were tribal, customs, and decisions taken by the community assemblies (provincial Jirga).¹⁹ Even at present, decisions reached by deliberation and open vote of the community assembly are still an effective vehicle for instituting change. Once a vote is taken, the local assembly's decision becomes absolutely binding on all members of the community.

XXI. The Pushtunwali

The *Pushtunwali* is the acceptable behavior within the community and governs the relations between Pashtun ethnic groups. In theory, the system of tribal law is complete; in cases of doubt it allows only interpretation. Some positive injunctions are the Nanawatai or right of asylum and intercession, the obligatory acceptance of a truce offer; the Milmasti'a or right of hospitality and protection of guests, and the Badragh'a, or right of safe conduct, which are moral restraints. The following is a summary of the code:

Tureh , sword, bravery

Meranah, manhood, chivalry.

Isteqamat, persistence, constancy, and resistance.

Sabat, steadfastness.

Imandari, righteousness, strong belief.

Ghayrat, defense of property and close relatives particularly women..

Namus, reputation, esteem, honor, dignity of women of a family such as wife, mother and sisters in particular.

To avenge blood.

To fight to the death for a person who has taken refuge with me no matter what his lineage. (Example: If a man, rich or poor, kills a man of another lineage, he can force anyone outside the slain man's lineage to help him simply by killing a sheep in front of the individual's hut or tent.)

To defend to the last any property entrusted to me.

To be hospitable and provide for the safety of the person and property of guests.

To refrain from killing a woman, a Hindu, a minstrel, or a boy not yet circumcised To pardon an offence on the intercession of a woman of the offender's lineage, a *Sayyid* (known to be a descendant of the Prophet Mohammad's family), or a *mullah* (a Muslim religious scholar) - an exception is made in the case of murder; only blood or blood-money can erase this crime.

To punish all adulterers with death.

To refrain from killing a man who has entered a mosque or the shrine of a holy man so long as he remains there.²⁰

This is a stringent code, a tough code for tough men, who, out of necessity, live tough lives. Honor and hospitality, hostility and ambush, are paired in the Afghan mind. The values of the Pashtun and of the Muslim religion, modified by local custom, permeate in varying degrees all Afghan ethnic groups.

Afghan village and nomadic society has little room for dissidence. The folk tales emphasize this. Some tales describe what happens when a coward returns home: his mother disowns him. It is always the mother who rejects the coward—again emphasizing the importance of woman in the rural society. A coward killed running away from a fight will not be buried in the Muslim rites. He becomes a ghost, never to reach Paradise.

This Baluch folk tale illustrates many of the themes mentioned in most virtue and morality tales:

The tents had been pitched and the women prepared the evening meal. As dusk approached, so did a rider out of the desert. He rode to the tent of the Khan and threw himself from his horse, prostrated himself at the Khan's feet, and demanded protection. He was being followed, he claimed, by a large band of horsemen with whom his family had a blood feud. The old Khan, wise beyond years, and as pure as his white beard, granted the supplicant asylum. The man was led to the guest tent and there fed, and told to prepare himself for the evening.

The Khan's young son came to his father and cried, "Oh my father, that is Badshah Gul, who but two months ago slew my brother and your son."

"Yes, my son, but now he is a guest in our camp. He has asked for asylum. We have given him asylum and remember, my son, even if it takes a hundred years, your brother's death, my son's death, will be avenged."

The young son inflamed, left his father's tent and, taking his brother's dagger from its honored place, crept to the guest tent and buried the dagger into the breast of the guest, as they had buried his brother two months before.

The next morning, amid cries and lamentations, the body of the guest was discovered. Tearing his clothing, ripping his turban in agony, the old Khan cried, "Who could have done this? Who could have brought dishonor on the name of our family? The camps of the tribe will forever condemn us for this dishonor."

The young son threw himself at his father's feet and begged forgiveness, saying that in a moment of blind rage, he had dishonored the group.

The old Khan took the knife which had killed the guest and plunged it into the heart of his son.

²⁰ Louis Dupree, *Afghanistan*, Princeton University Press, New Jersey. at 126-127.

XXII. Role of Customary Law

Customary law or *Rawaj* is an institution which resists the process of social, political, and economic integration. This type of law varies from tribe to tribe and from region to region; in general, it institutionalized local socioeconomic interests. It often not only circumvents the laws of the country, but also modifies certain tenets of Islamic law, especially in matters of marriage, inheritance, and women's rights. For instance, though Islamic law prescribed that all sons were to inherit equally and that daughters and widows had the right to inherit, some tribes by custom favor the eldest son and deny inheritance rights to women and others divided the inheritance into as many equal parts as there were wives who had borne sons, and the divided it among the sons on this basis. Customary or informal law as dispensed by *Shuras* (village councils) or tribal elders play a significant role in resolving disputes and meting out justice in Afghanistan. It is widely recognized that, outside of the major city centers, the customary system predominates over the formal system. There are indications that the customary system, which varies in form and substance around the country, has been to some extent subverted and manipulated by local power-holders during wartime and continuing to the present, but to what extent and to what effect has not yet been closely examined.

Some actors within the formal justice system take the view that, through the development of the formal system, customary mechanisms ought to be marginalized. The weight of opinion appears to regard this approach as unrealistic, unnecessary, and probably undesirable. However, though the issue has not been greatly considered in the context of reform and development of the justice sector, there is broad agreement that some legal limitations should be placed on the scope of authority of customary law mechanisms; for example, at least some areas of criminal justice should be off-limits, and results that violate international human rights law or *Sharia* should be forbidden. Some also believe that it will be important to design ways to draw connections between the formal and informal systems, perhaps by crafting procedures by which courts may confirm results reached under customary law.

Given the very dispersed and decentralized nature of customary law practices, any effort to define and impose limitations, or otherwise shape such practices, will be extremely challenging- indeed, more so than institutions and processes in Afghanistan presently can bear. Efforts to repair and build the formal system will need to make headway first. In the meantime, however, it will be constructive to read closely the nature and current state of customary law practices in order to provide an informative base for future action.²¹

The Constitution of January 2004 of Afghanistan makes no reference to the customary laws or village councils. It places heavy emphasis on a centralized justice system without leaving any room for application of the customary law which is deep-rooted in the history of Afghanistan..

Political and economic interests, disputes over water rights, the exigencies of tribal honor, and traditional feuds kept a wide range of rivalries and vendettas alive among the Afghan tribes; the result was constant tribal warfare. Most of the disputes, if not solved by the bullet, were mediated. Within a tribe the community sometimes interceded in the form of a *jirga*.

The tribes vigorously resist any regulation that threatens their traditional privileges, especially their property rights. Thus, customary law may modify Islamic tenets, especially in the field of marriage, inheritance, and women's rights. For instance, Islamic law prescribes that all sons inherit equally and that

²¹ LAUREL MILLER AND ROBERT PERITO, *Establishing the Rule of Law in Afghanistan*, RULE OF LAW PROGRAM UNITED STATES INSTITUTE OF PEACE.

daughters and widows also have the right to inherit. However, some of the tribes let the eldest sons inherit a greater portion; some deny inheritance rights to women; others divide the inheritance equally among all the wives who have borne sons.

Influence has also been exerted by the *Loya Jirga*, which may be compared to a constituent assembly. It ratified all of Afghanistan's constitutions before 1980 and debated momentous issues such as the election of a new king or the arrangements for ending a civil war

Since the Grand National Assembly includes tribal chiefs, it is the only surviving tribal authority involved in legitimizing policies of a new ruler. For instance, the declaration of neutrality of Afghanistan in World War II and the acceptance of Amanullah Khan's radical social changes had been occasions for its convocation. The Constitution of 1980 provided that without the Grand National Assembly's consent no new taxes could be imposed.

Sharia courts had held complete jurisdiction over civil and criminal matters until Amir Dost Mohammad Khan (1826-63) decreed that serious crimes had to be referred to him. He brought religious courts under the control of the central government.

XXIII. Legal Reforms by Amir Abdur Rahman

A. The First Criminal Code

Amir Abdur Rahman Khan (1880-1901) took further steps in the direction of modernization. He made important reforms in the legal field, reforms that contributed significantly to his firm grip and control over the kingdom in general and the religious establishment in particular. An elaborate criminal code was drawn up. It gave great authority to the *Kotwal* who combined the duties of a district chief of police and a judge of petty sessions. The new criminal code prescribed harsh punishments for cases threatening the welfare of the Afghan people or disrupting the peace and stability. In cases involving robbery and theft, the hand of the criminal was amputated. Notorious highwaymen were often placed in iron cages fixed on the top of a mast along the roadside and were left to die of starvation.

Along with these harsh criminal laws, which had some success in pacifying the turbulent Afghan kingdom, the Amir enacted new laws and modified existing ones, in an attempt to effect a degree of social reform. He abolished a long-standing customary law, which in violation of Islamic law bound a wife not only to her husband but to his entire family as well; widows who wanted to remarry had to marry their husbands' next of kin., often against their will. Abdur Rahman decreed that the moment a husband died his wife was to be set free. He also decreed that marriages should be registered. He modified a law pertaining to child marriages, permitting a girl who had been given in marriage before she had reached the age of puberty to refuse or accept her marriage, when she attained full age. Another law allowed women to sue their husbands for alimony or divorce in cases involving cruelty or non-support.

B. Abdur Rahman Abolished Slavery

Another social ill that concerned Abdur Rahman was slavery, a practice that was common place when he ascended the throne. There were many slave markets in the northern and northwestern regions of the country, especially in the regions inhabited by the Uzbeks and Turkomans. The majority of the slaves of the Central Asian Khanates, where slavery was a widely practiced and accepted institution before the Russian conquest., were drawn from northeastern Persia and Afghanistan. The Shi'ah Muslims, mostly Hazaras, and the poor sectors of the population of Badakhshan were especially subject to the raids of Uzbek and Turkoman slavers

Abdur Rahman abolished slavery in 1895, prohibiting any further use and abuse of human beings (slaves had sometimes been emasculated) as a violation of the tenets of Islam.

He ordered the *Kitabchi'a Hukumati*, a new court procedure, to be drawn up. He divided the existing laws of his kingdom into three categories: Sharia or Islamic laws proper, *quanun* or administrative laws, and tribal laws. Consequently, he established three types of courts: religious courts, which dealt with religious and civil affairs; criminal courts, which were administered by *kotwals* (chiefs of police) and judges; and a board of commerce made up of merchants, which settled business disputes. He drew up an elaborate criminal code, which gave authority to the police chiefs to serve as police force and as judges of petty sessions. The interpretation of law remained with religious officials appointed by the ruler.

Although the decisions of the court were based on Islamic law, the Amir retained the powers of a supreme court in his hands.

A new legal institution, the *Panchayat* or council of five elders, came into existence during the reign of Amir Habibullah Khan (1901-1919). This council had jurisdiction over disputes among merchants and traders and over most civil suits. Habibullah divided the country into six provinces and granted judicial powers to the provincial governors to preside over provincial courts. These provincial courts in turn controlled the religious courts.

Amir Amanullah Khan (1919-1929) issued a new administrative code, which transferred jurisdiction in family matters from the religious courts to civil courts. A penal code based on Islamic law was drawn up in 1925. It brought the entire administration of justice under the direct control of the king. The Amir also tried to institutionalize part of the Pushtunwali and to bring it into line with the Sharia.

The second constitution of Afghanistan, approved by the Grand National Assembly and proclaimed by King Nadir Khan in 1931, provided for the establishment of a bicameral Parliament for the first time in the history of Afghanistan. In the domain of the judiciary, the Constitution of 1931 deviated from the first Constitution by making concessions to the religious authorities. It recognized the Hanafi school of Islam and granted the religious courts complete autonomy and jurisdiction over civil matters except commercial disputes. The Constitution of 1931 provided that arrest and punishments had to comply with Islamic or state law.

XXXIV. The Constitution of 1964

In 1964, King Zahir supported the movement for a new constitution to promote greater democratization and modernization. The 1964 Constitution balanced judicial power to match the executive and legislative branches. For the first time the country had a Supreme Court. The King appointed its members for indefinite terms. The Supreme Court had total administrative, operational, and appellate powers.

The institution of an Attorney General's office and of a nine-member Supreme Court indicates that the drafters of the new constitution were influenced by, the U.S. Constitution.

President Daud declared the First Constitution of the Afghanistan Republic in 1977. It announced the formation of a the *Melli Jirga*,²² a special Grand National Assembly, as the supreme body empowered to amend the constitution, to appoint a president, and to serve as the lawmaking body of the Republic. The judiciary consisted of nine justices appointed by the president for a term of five years. The new Supreme Court was to advise the competent authorities on the formation of the lower courts, their location, and budget. It also supervised administrative affairs of the lower courts.

A. Judiciary under the Leftist Rule

The leftist coup and political upheaval of April 1978 were the turning point in the legal history of Afghanistan and alienated the present from the past legal system, which had been mainly religious and partly based on tribal and customary laws.

In 1979, the Revolutionary Council announced the Law on the Discovery and Investigation of Crimes under the Control of the Public Prosecution Office. In 1980, following new political trends, the Revolutionary Council passed a law on the Organization and Jurisdiction of the Courts. The Revolutionary Council abolished the Constitution of 1977 and instituted the Basic Law of the Democratic Republic of Afghanistan in April 1980.

B. Form of Government and Constitutional Provisions

The Grand National Assembly, which traditionally had approved any new constitution, was not called to endorse the Constitution of April 1980. This interim constitution, the *Usul'i Assassi'i Jumhiri'i* Democratic Afghanistan the Provisional Basic Principles of the Democratic Republic of Afghanistan, merely states in its preamble that the election and functions of the Grand National Assembly 17²³ will be determined by law. It also provides that in the absence of the Grand National Assembly, the Revolutionary Council is empowered to issue decrees and laws; adopt state economic and social development plans; approve the state budget; establish the Presidium of the Revolutionary Council, the Council of Ministers, the Supreme Court; and appoint an Attorney General. The Revolutionary Council sets the guidelines for domestic and foreign policies, refers matters to a referendum, elects members of the Grand National Assembly, declares war, and approves or cancels international agreements. The President of the Revolutionary Council also acts as Prime Minister, as long as no Prime Minister has been appointed.

The Constitution of 1980 formally recognized the PDPA as the single political party under the all-embracing Fatherland's National Front.

Although Afghanistan had established Islam as the state religion, the Constitution of 1980 merely called for respect and protection of Islam. It also granted followers of other religions to freely observe their own rites, unless they represent a threat to the peace of security of the society. Since Soviet-influenced regimes usually frowned on religious beliefs, this outright departure from Afghanistan's previous constitutions was an expected result of the PDPA's domination.

²² *Melli Jirga* is a Socialist-oriented term used in the 1977 Constitution for the Grand National Assembly (*Loya Jirga*).

²³ RASMI JARIDAH DA ADLI VIZARAT, Official Gazette., Ministry of Justice. NO. 450 of April 21, 1980 (Kabul 1980).

In the field of foreign policy the Constitution of 1980 proposed peaceful coexistence and positive nonalignment. It emphasized, however, that Afghanistan should develop and strengthen its comprehensive friendship and cooperation with the Soviet Union, as well as with other countries of socialist alliance.”

In the domestic field, this constitution declared all mineral, agricultural, and energy resources; banks; insurance companies; heavy industries; and communication networks to be state property. In turn, it proposed the protection of private ownership if “legitimately” established.

The Constitution of 1980 also required the formation of local councils in the provincial cities and towns to supervise the enforcement of laws, decrees, and regulations; to maintain order, security, and protection of the rights and liberties of the citizens; to implement the state plans in the economic, social, and educational fields; and to coordinate the activities of local agencies (article 52).

C. Courts

Although the Constitution of 1980 did not make any specific reference to the separation of power, articles 54 and 55 established the judiciary with the Supreme Court as the highest judicial organ. The Supreme Court, however, must submit regular reports of its activities to the Revolutionary Council, representing both the Executive and Legislative powers of the State. All judges had to be appointed by the Revolutionary Council.

Before the modernization of Afghanistan under Amir Abdur Rahman Khan in the 19th century, the Muslim religious establishment was in charge of administering justice. Islamic religious judges (*qazis* or *mullahs*) used to apply Islamic criminal laws. These Muslim judges enjoyed economic self-sufficiency and were in charge of education, the interpretation of, the Sharia, and the supervision of public morality through the office of a muhtasib or court attendant who checked religious observances. Muslim clerics often acted as intermediaries or served as peacemakers for feuding tribes. This role gave them considerable social and political power.

The Islamic penal system provides for three kinds of punishment. Six major offenses call for 1) fixed punishments (*hudud, pl. of hadd*), as prescribed in the revealed texts: drinking of alcohol, theft, armed robbery, illicit sexual relations, slanderous accusation of unchastity and apostasy; homicide and injuries inflicted upon others call for 2) retaliation (*quisas*); and lesser offenses for 3) discretionary punishments (*tazir*).

D. Tribal Law

Each tribe has its own code of conduct regulated by a local assembly of elders (provincial *Jirga*). The Pushtunwali, the most famous and important code of conduct, is applied by the Pashtuns. The following are the major, generally accepted principles of this code:

- to avenge blood;
 - to fight to the death for the defense of a refugee under one’s protection;²⁴
 - to defend to the last any property in one’s trust;
 - to be hospitable and provide for the safety of the person and property under one’s protection;
-

- to refrain from killing a woman, a Hindu, a minstrel, or a boy not yet circumcised;
- to pardon an offense at the intercession of a woman of the offender's lineage, a descendant of the Prophet Mohammad (*sayyidi*), or a religious leader (*mullah*);²⁵
- to punish all adulterers with death;
- to refrain from killing a man who has entered a mosque or the shrine of a holy man; and to spare a man engaged in battle who begs for shelter.

The Pushtunwali is a severe code for men who of necessity live under harsh circumstances. Honor and hospitality, hostility and ambush go together in the minds of many Afghans. The values of the Pashtun and of the Muslim religion, modified by local custom, influence in varying degrees the lives of all Afghan ethnic groups.

For example, if a man kills someone outside his own lineage, he can request of any other party outside the slain man's lineage to help him by killing a sheep in front of his own (i.e., the third party's) house. This signifies that the third person promises by this sacrifice to defend the slayer and that the third person's house is a sanctuary for the slayer's protection against the slain man's family's vengeance.

For Pashtuns pardon does not apply to murder; only blood or blood money can erase this crime.

To illustrate the prevalent feeling for justice and punishment, an official who had raped a woman was stripped naked in mid-winter and placed in a hole on top of a hill outside Kabul. After water had been poured on him and the man turned into an icicle, the Amir remarked that the man would never be too hot again.

Sentences passed by local authorities, even those in accordance with the Sharia, had to be confirmed by the Amir.

Before the introduction of the Penal Code of 1925, all Afghan subjects had been entitled by custom to come before a royal court (*darbar*) to present their grievances. In addition to the Amir Habibullah Khan, his brother and sons each held a separate *darbar*, and had a private prison and personal bodyguards who executed the *farmans* of the royal court.

The Penal Code of 1925 changed the situation. Influenced by the French Penal Code, the penal code of Afghanistan provided that persons under the age of fifteen were not responsible for their crimes and had to be turned over to their parents. Rehabilitation of criminals and commutation of sentences became acceptable. Officials resorting to torture to extract confessions were subject to dismissal. Forced labor, a recognized custom in Afghanistan and often imposed by government officials, became outlawed.

Despite noticeable changes in criminal justice, the monarchy retained the power to extend the death penalty to cover crimes, as for instance highway robbery, that were not punishable by death under the Sharia.

²⁵ V. Gregorian, *The Emergence of Modern Afghanistan*. 183 (1969)

The Penal Code of 1925 had 308 articles and divided offenses according to Islamic law into three categories. Serious crimes included adultery, consumption of alcoholic beverages, and theft, for which the code specified the punishment (the fixed punishments or *hadd*) already prescribed by Islamic law. Major crimes included those of murder and intentional bodily injury, for which specific punishments (retaliation or *quisas*) were provided. For simple²⁶ offenses, public and exemplary punishments (discretionary punishments or *tazir*) were to be imposed by judges.

XXXV. Modern Criminal Code

The Criminal Law of September 1976, as amended, dissociated itself further from Islamic criminal justice and came closer to the European criminal system. Article 1 of the Criminal Law of 1976 states:

This law regulates offenses that call for discretionary (*tazir*) penalties. Any person who commits an act calling for fixed punishments (*hudud*), retaliation (*quisas*), or the payment of a fine (*di'yat*) will be punished according to the principles of the Hanafi School of Islam.²⁷

A. Definition of Crimes

1. Criminal Offenses

Under articles 23-26 of the Criminal Law, criminal offenses are divided into three categories depending on the degree of punishment they carry:

- Felony is a major crime which carries the punishment of death, life imprisonment, or long-term imprisonment of five to fifteen years.
- Misdemeanor is a minor offense which carries a penalty between three months and five years in prison or a fine of over 3,000 Afghanis.

The Criminal Law of 1976 states two basic principles in articles 2 and 3.

Article 2. No act shall be considered a crime if not defined as such by law.

Article 3. No one can be punished unless in accordance with the provisions of the law in force prior to the commitment of the crime.

Adultery is the only crime which may fall within the category of Islamic law and thus call for stoning to death as a fixed penalty. If it does not meet the requirements of Islamic law, the punishment will be long-term imprisonment (article 426).

²⁶ V, Gregorian, *The Emergence of Modern Afghanistan*, (1969). 183.

²⁷ Official Gazette of Afghanistan No. 347, Oct. 7, 1976.

2. General Criminal Procedure

The Criminal Procedure Law of May 1965 of Afghanistan, as amended in 1974, is generally based on the French Penal Code and follows the same pattern regarding prosecution, arrest, search and seizure; discovering evidence; discharge of the defendant when the injured party received satisfaction; issuing a bill of indictment; presenting evidence to the court; trial, verdict, and sentence. According to this law, the discovery and investigation of crimes is the duty of the police and the public prosecutor, collectively known as law enforcement officers (article 24). The Law of 1965 empowers the law enforcement officer to make arrests in felonies and misdemeanors (article 26) detention, however, cannot exceed 24 hours unless authorized by the public prosecutor in charge, or not beyond one week unless authorized by a court (articles 26, 28, and 29).

The Law on the Discovery and Investigation of Crimes and Supervision of the Attorney General on Its Legal Enforcement of March 1979, as amended in 1981, however, introduces profound changes in the criminal procedure. Under the new law the Attorney General is given vast authority regarding the prosecution of offenses, arrest, and detention of accused persons without court approval. If deemed necessary, the Attorney General has the power to extend detention of the accused to more than six months. The local public prosecutor is allowed to keep the accused in custody for a period of two months (article 15).

B. Prosecuting Authorities

Prosecution of criminal offenses is carried out by the Attorney General in the name of the state (article 2). The armed forces and the Secret Service have their own independent prosecuting authorities. The Attorney General and the prosecution office of the Secret Service are placed under the supervision of the Prime Minister.

1. Discovery of Crimes

Article 1 of the amendment to the Law on the Discovery and Investigation of Crimes of 1981 (34) stipulates that the following persons are responsible for the discovery of crimes:

- a. the police;
- b. directors of the correctional institutions;
- c. commanders of the armed forces when a criminal offense is committed by officers, soldiers and employees of the army while engaged in the performance of their military duties;
- d. secret service officers within their jurisdiction.

2. Investigation of Crimes

The investigation of criminal offenses is conducted by investigating magistrates. Investigators of the office of the Attorney General have jurisdiction to investigate a series of crimes as listed under articles 21 and 22, such as embezzlement, misappropriation, misconduct of the public servants toward the public, ultra vires actions, crimes against religions (35).

3. Search and Seizure

Search of a residence is permitted only for the inspection and examination of things related to the crime under investigation. Search of a residence must be performed as far as possible in the presence of the accused or his legal representative. If the investigating officer comes across other materials the possession of which constitute a new crime or which are useful in the disclosure of another crime, the search officer can seize those materials.

The Law on the Discovery and Investigation of Crimes of 1979, as amended,²⁸ provides that the preliminary examination of a crime must be completed within a period of two months. If necessary, this period can be extended to six months with the approval of the provincial prosecuting attorney. Any further extension of this period must be approved by the Attorney General.

A report made upon completion of the preliminary examination contains the dates of the beginning and completion of the examination, the name of the examining authority, names of other persons involved, the subject of the examination, and the results obtained.

The Law on the Organization and Jurisdiction of the Courts of 1981 stipulates that the city and county (*wollesswali*) courts have general criminal jurisdiction and are courts of original jurisdiction (article 98).

Afghanistan has no jury system. Trials, therefore, are held either by a city court, composed of a presiding judge and judges whose numbers are not determined by law, or by a *wollesswali* court, which is composed of one judge (article 92).

The Criminal Procedure Law of 1974 and the Law on the Organization and Jurisdiction of the Courts of 1981 both provide for open trial. According to the Law of Criminal Procedure this rule applies when open trial is considered to be against public order or decency (article 218).

4. Rights of the Accused Before Trial

Under the heading “Basic Rights and Obligations of Citizens,” 44/ the Constitution of 1980 provides for the individual's rights as follows:

No person may be accused of having committed a crime unless the latter is defined in the provisions of the law.

No person may be arrested unless in accordance with the provisions of the law.

The accused has a right to defense.

The accused is considered innocent until found guilty by the final sentence of a court.

Torture and torment are prohibited.

²⁸ AFG 00 Nos. 424 and 498, *id.*

As a safeguard, the Criminal Procedure Law of 1974 requires investigators to inform the accused of the charge against him. It also declares as invalid any statement obtained by force from an accused or any other person (article 78).²⁹ The defense counsel may obtain information from investigation records and proceedings before the interrogation and confrontation (article 81).

The Law on the Discovery and Investigation of Crimes of 1979 46/ provides that the agents responsible for the discovery and investigation of criminal offenses must report the arrest of the suspect to the public prosecutor within 72 hours, and that the public prosecutor must make a decision within 72 hours whether to release or to arrest the suspect.

5. Rights of the Accused During Trial

a. Right to Counsel and Legal Aid

The Criminal Procedure Law of 1974 provides for the accused to have counsel (article 79).

b. Right to Open Trial

The right to public trial is guaranteed by the provisions of article 56 of the Constitution of 1980 as follows:

Cases shall be heard in all courts publicly. The law shall set rules for cases that have to be heard in camera.

The Criminal Procedure Law of 1965 set certain standards for cases to be tried in camera to protect public order and decency. For the same reasons the court may exclude certain persons for attending a hearing (article 218).

c. Right of the Accused to be Present at Trial

The right of the accused to be present at the hearing of his trial is stipulated in article 220 of the Criminal Procedure Law of 1965, which provides:

The accused attends the hearings under security guard. It is not permissible to expel the accused from the court hearing unless his presence causes disorder. If the accused person is expelled, the court proceedings are continued but the accused must be duly informed of the measures taken in his absence.

d. Right of the Accused to be Confronted with Witnesses

The right of the accused to be confronted with the witnesses and to question them is secured by articles 221-223 of the Criminal Procedure Law of 1965.

e. Right of the Accused to be Tried by an Impartial Court

Article 56 of the Basic Law of Afghanistan of 1980 provides that:

²⁹ *Supra* note 14, at 2-74.

In trying cases judges must be independent and follow the law only. They must hear cases and render judgments on the basis that all citizens are equal before the law and the court.

f. Right of the Accused to Appeal

The right of the accused to appeal from the judgment of a court to a higher court has been provided for in article 17 of the Law on the Organization and Jurisdiction of the Courts of 1981, unless otherwise provided for by law.

XXXVII. The Civil Code

A. Marriage

The Civil Code of Afghanistan of December 1976, as amended, is generally based on Islamic law and the Hanafi School of jurisprudence.³⁰

In addition, the Civil Code is also influenced by the French Civil Code in matters regarding the age of capacity for transactions, the requirement for registration of documents concerning marriage, divorce, and proof of parentage and relationships (article 48), regarding the authenticity of registered documents (article 50), and domicile (article 51).

To avoid conflicts with religious opinions and in the interest of uniformity, article 1 of the Civil Code provides that:

In cases where a provision of law exists, application of religious opinion is not allowed.... In cases where the law has made no provision, the court shall apply Islamic (Sharia) law in accordance with the Hanafi School of jurisprudence.

Article 60 of the Civil Code defines marriage as follows:

Marriage is a contract which legitimizes the association of a man and a woman with the purpose of creating a family, with rights and obligations for both parties.

A marriage contract is performed by an explicit offer and acceptance. If a marriage contract contains a condition against the law or inconsistent with the purpose of marriage, such condition becomes null and void, but the marriage remains valid (articles 66 and 68).

Males have the capacity to contract marriage at age eighteen. Females reach legal capacity to marry at age sixteen; a fifteen-year old girl may also marry according to the law, if she has the permission of her father or a competent court.

The marriage of a girl under fifteen years of age, however, is absolutely prohibited (articles 71-72).

1. Marriage by Proxy

Marriage by proxy is allowed for men and women. The law permits the same person to represent both parties to the marriage contract when both parties are under the proxy's guardianship (article 76).

³⁰ The Civil Law of the Republic of Afghanistan, 1977.

2. Conditions for a Valid Marriage

Article 77 establishes the following conditions for the validity of a marriage contract:

- a. performance of a valid offer and acceptance by the parties or their representatives.
- b. presence of two qualified witnesses.
- c. lack of any permanent or temporary impediment to a marriage between a man and a woman.

3. Prohibition of Marriage

The Civil Code of Afghanistan, following Islamic law, provides that marriage of a person to his parents is permanently forbidden. The law also prohibits marriage of a man to the wife of his father and the wives of his grandfathers, or to the wife of his own descendants. The same prohibition applies to the parents of his wife and his wife's descendants. Permanent prohibition is applicable to a marriage between an adulterer and his progenitress and the descendants of the adulterers. Marriage of an adulteress to the ancestors and descendants of the adulterer is also prohibited (articles 81-83).

Prohibition of marriage is equally applicable to foster parents and children and between persons of parental relationship, with some exceptions as defined by law (article 84).

Temporary prohibition of marriage is applied in the following cases:

- marriage to a married woman
- marriage by the same husband to a woman three times divorced by him, unless she was later married to and divorced by another man,
- marriage to a woman who does not believe in a Holy Book (Christian, Jewish, or Zoroastrian),
- remarriage to the woman who has been solemnly imprecated by denunciation (*Li'an*) through her husband unless she denies the allegation (article 85).

4. Polygamous Marriages

The Civil Code of Afghanistan allows a man to be married to more than one wife simultaneously under the following conditions:

- when there is no fear of injustice among the wives;
- when the man is financially able to provide for all his wives; and
- when there is a legitimate cause for another marriage, e.g., infertility or a fatal disease suffered by the first wife.

A woman whose husband has entered a marriage contract with another woman in violation of the conditions set forth in article 86 cited above may file a divorce petition with the court (article 87). Article 92 of the Civil Code declares a marriage of a Muslim woman to a non-Muslim man null and void. A Muslim man, however, can marry a woman who believes in a Holy Book.

5. Marriage Portion

Under Islamic law, the “marriage portion” is a consideration given to the woman in return for her acceptance of a man’s offer of marriage. The marriage portion becomes the property of the wife upon performance of the marriage contract. If the portion is not specified at the time of the marriage contract, the wife is entitled to a marriage portion commonly accepted (articles 98-100 of the Civil Code).

6. Maintenance

The husband is under the legal obligation to provide for his wife, including housing, clothing, food, and medical care commensurate with his financial ability. If the husband refuses to provide for the maintenance and support of his wife, the court can force him to pay the maintenance as required by law. The man’s duty to pay for the expenses of his wife extends to the waiting period after divorce (*idd'a*), which is three months and ten days or the time of three menstrual periods (articles 117-126).

B. Divorce

In conformity with religious jurisprudence, both the marriage act, as well as the act of divorce, must be accompanied by the utterance of words expressing the true intention of the parties. Under Islamic law, divorce, is the right of the husband. However, article 135 of the Civil Code also provides that a divorce decree may be issued by an appropriate court in accordance with the provisions of the Civil Code upon the request of the wife.

1. Types of Divorce

The Civil Code recognizes two types of divorce, one revocable (*raj'i*) and the other irrevocable (*ba'in*).

A divorce is generally revocable before the expiration of the prescribed waiting periods after the pronouncement of divorce, but becomes irrevocable under any of the following conditions:

- if the divorce formula was pronounced for the third time;
- if the divorce was pronounced before the consummation of marriage;
- if a divorce, known as *khol'a*, is granted in consideration of some property given to the husband by the wife;
- if a divorce is considered irrevocable (*ba'in*) under this law (article 146).

2. Prescribed Waiting Periods after Divorce

The waiting period (*idd'a*) is a period of time after the divorce pronouncement during which the marriage connection still exists between wife and husband. When this period elapses, all rights and obligations of the parties as a result of the marriage are terminated (article 198). During the waiting period a woman is not allowed to marry another man because of the husband’s right to revoke the divorce and to revive the marriage contract (article 199).

C. Child Care

The Civil Code in conformity with the Sharia principles of the Hanafi School provides for fosterage,

custody, and maintenance of children.

1. Fosterage of Children

The payment of a fosterage fee is the obligation of the father and, in the absence of the father, of the paternal grandfather. The mother is entitled to a fosterage fee when she fosters a child after an irrevocable divorce (articles 229-232).

2. Child Custody

It is the privilege of a mother to take care of and raise her children during the marriage and after the divorce, unless it is proven that she is lacking sanity or honesty. The father, on the other hand, is legally responsible for the cost of raising and caring for the children. A mother may not take her child on a trip without the father's permission (articles 236-245).

The mother's custody of a child ends when a boy reaches age seven and a girl age nine. The court, however, may extend the mother's custody right of her child for another two years (article 250).

3. Maintenance of Children

The father's legal responsibility for support of a boy exists until the age of eighteen and for a girl until she marries. This responsibility exists even if his children work and earn part of their expenses; he must bear the remaining part of their maintenance (articles 256-258).

4. Maintenance of Parents and Relatives

Maintenance of indigent parents and of grandparents, whether able to work or not, is the responsibility of any offspring of sufficient means, whether a son or daughter, a minor or adult (article 264).

5. Status of Illegitimate Children and Adoption

According to article 21S of the Civil Code, a child belongs to the husband if in a valid marriage with proper cohabitation between wife and husband the child is born after the minimum gestation period of six months after the marriage ceremony.

The Civil Code, however, is silent about the status of illegitimate children born out of wedlock or as a result of adultery. Islamic law does not recognize adoption. This principle is stated in article 228 of the Civil Code of 1980. However, providing support and maintenance for children of known or unknown parentage is an accepted practice of families having no children or of those motivated by philanthropic considerations.

6. Abandonment of Children or Disabled persons

To abandon a child under seven years of age or a disabled person in an uninhabited place is punishable by imprisonment of one to five years, as provided by article 358 of the Criminal Code of 1976. If the child or disabled person dies as a result of such abandonment, the person responsible for the abandonment will be prosecuted for manslaughter.

XXXVIII CONTRACTS

Following the Islamic law of contracts, article 497 of the Civil Code defines a contract as follows:³¹

A contract is the meeting of two minds with the purpose of creating, adjusting, transferring, or removing a right in accordance with the law.

Article 502 provides three conditions for a contract:

- the existence of the contracting parties;
- specific words expressing the intentions of the parties; and
- the existence of a subject for the contract.

The following requirements must be met for a contract to become valid:

- the contracting parties must have legal capacity;
- the subject matter must be exactly and clearly defined and suited to make the fulfillment possible and legal;
- the contract must serve a practical purpose;
- the contract must not violate public order and decency.

In conformity with Islamic law the Civil Code divides contracts into the following categories, contracts of transfer, comprising:

- Contracts of sale,
- Contracts of gift,
- Contracts of loan,
- Contracts of settlement.

Contracts for profit, comprising:

- Contracts of lease,
- Contracts of gratuitous lending.

Contracts of labor, including:

- Contracts of agency,
- Contracts of deposit,
- Contracts of protection,
- Contracts of labor.

³¹AFG. OG No. 347

Probable contracts, including:

- Contracts of gambling
- Contracts of insurance.

Contracts of surety, comprising:

- Contracts of bond,
- Contracts of transfer of obligations,
- Contracts of mortgage.

A. Contracts of Sale

A contract of sale is defined in article 1035 of the Civil Code as follows:

A contract of sale is consumed at the transfer of a seller's property to the buyer in consideration of a property set as the price.

A sale is performed by offer and acceptance, which indicate the delivery of a property to the possession of a buyer and the taking possession of the property. It is a requirement of a contract of sale that both the property sold and the consideration be unambiguously and clearly known to both parties at the time of the contract. Moreover, the property must be of some value and in a deliverable state. When the property is not seen by the buyer at the time of the contract or before, the buyer has the option of revoking the contract (article 1043).

B. Contracts of Gift

Article 1176 of the Civil Code defines a contract of gift as follows:

A gift is the transfer of ownership of a property to another person with no consideration or with some consideration.

In a contract of gift the acceptance of the gift and taking possession of it by the donee is necessary. The contract of gift is revocable when the beneficiary fails to perform his obligation, when the donor becomes destitute after making the contract of gift, or when a child is born to the donor after the gift is made (article 1202).

When the contract of gift is made for a consideration it becomes irrevocable (article 1211).

C. Contracts of Lease

Article 1322 of the Civil Code defines a contract of lease as follows:

A contract of lease is the transfer of ownership of the profit from the thing being leased by the lessor to the lessee in return for a consideration that is substitutable.

1. Conditions

In addition to the general conditions of a contract, the following conditions must be met in a contract of lease:

- description of the thing to be leased;
- description of the profit;
- specification of the period of lease;
- specification of the amount of rental (articles 1208-1211).

2. Rescission of a Lease Contract

The lessee has the right to rescind the contract of lease if, subsequent to performing the contract, he finds that the object leased lacks the conditions specified in the contract.

If the object leased is delivered in a state lacking the possibility of making a profit as agreed, or taking profit is associated with great loss, the lessee can demand the rescission of the lease.

If the object leased is in a state causing damage to the health of the lessee or other persons living with him, he can demand rescission of the lease, even if he has already waived such a right (articles 1328-1348).

D. Contracts of Loan

Article 1288 of the Civil Code gives the following definition for a contract of loan:

A loan is a contract whereby one of the parties transfers ownership of some cash or a specified object to the other party with the understanding that the other party will return a object of the same kind, character and amount upon the expiration of a specified period.

Accepting delivery of the object borrowed by the borrower is a necessary condition for the Completion of the contract of loan. Thus, if the object borrowed is destroyed after performance of the contract and before accepting delivery by the borrower, the borrower cannot be held liable.

Interest is not permissible in a loan contract unless otherwise provided by law (articles 1289 and 1295).

XXXIX. Laws During Taliban Rule

The Taliban's apex decision-making body was the Supreme *Shura* (assembly) which continued to be based in Kandahar, a city which Mullah Omar has left only once to visit Kabul in 1966, and which he turned into the new power center for Afghanistan.. The *Shura* was dominated by Omar's original friends and colleagues, mainly Durrani Pashtuns, who came to be called the 'Kandaharis'. The original *Shura* was made up of ten members, but military commanders, tribal elders and *Ulema* (Islamic scholars) took part in *Shura* meetings so that it remained loose and amorphous with as many as 50 people often taking part

After 1996, power was entirely concentrated in the hands of Mullah Omar while the Kandahar *Shura* was consulted less and less. To implement his decisions Mullah Omar relied less on the Kabul government and increasingly upon the Kandahari Ulema and the religious police in Kabul; Maulavi Said Mohammed Pasanai, the Chief Justice of Kandahar's Islamic Supreme Court, who had taught Omar the basics of Sharia law

during the *jihad*, became a key advisor to Omar. He claimed responsibility for ending lawlessness in the country through Islamic punishments.

The Kandahar Islamic Supreme court became the most important court in the country because of its proximity to Omar. The Court appointed judges in the provinces and once or twice assembled them all in Kandahar to discuss cases and the application of Sharia law. A parallel system existed in Kabul where the Justice Ministry and the Supreme court of Afghanistan are based.

The Taliban declared invalid all non-Islamic laws enacted during the communist regime, and reintroduced Sharia in their place. *Mullahs* replaced professional judges, laws were strict, and punishments were based on Sharia.³²

A. Sample of Taliban Decrees

Issued in November 1996 in Kabul. The original decree in Dari language was handed to Western agencies to implement.

Women: you should not step outside your residence. If you go outside the house you should not be like women who used to go with fashionable clothes wearing much cosmetics and appearing in front of every man before the coming of Islam.

Islam as a rescuing religion has determined specific dignity for women; Islam has valuable instructions for women. Women should not create such opportunity to attract the attention of useless people who will not look at them with a good eye. Women have the responsibility as a teacher or coordinator for her family. Husband, brother, father have the responsibility for providing the family with the necessary life requirements providing the family with the necessary life requirements (food, clothes etc). In case women are required to go outside the residence for the purposes of education, social needs or social services they should cover themselves in accordance with Islamic Sharia regulation. If women are going outside with fashionable, ornamental, tight and charming clothes to show themselves, they will be cursed by the Islamic Sharia and should never expect to go to heaven.

All family elders and every Muslim have responsibility to this respect. We request all family elders to keep tight control over their families and avoid these social problems. Otherwise these women will be threatened, investigated and severely punished, as well as the family elders, by the forces of the Religious Police (*Munkerat*).

The *Munkerat* have the responsibility and duty to struggle against these social problems and will continue their effort until evil is finished.

Rules of work for the State Hospitals and private clinics based on Islamic Sharia principles, Ministry of Health, on behalf of Amir ul Momeneen Mullah Mohammed Omar, Kabul, November 1996.

48. Female patients should go to female physicians. In case a male physician is needed, the female patient should be accompanied by her close relative.
49. During examination, the female patients and male physicians both should be dressed with

³² Talihan, *Militant Islam, Oil and Fundamentalism in Central Asia*, Ahmed Rashid, Yale University Press, 2000, at 42 & 98.

Islamic veil (*hijab*).

50. Male physicians should not touch or see the other parts of female patients except for the affected part.
51. Waiting room for female patients should be safely covered.
52. The person who regulates turn for female patients should be a female.
53. During the night duty, in what rooms which female patients are hospitalized, the male doctor without the call of the patient is not allowed to enter the room.
54. Sitting and speaking between male and female doctors are not allowed, if there be need for discussion, it should be done with *hijab*.
55. Female doctors should wear simple clothes, they are not allowed to wear stylish clothes or use cosmetics or make-up.
56. Female doctors and nurses are not allowed to enter the rooms where male patients are hospitalized.
57. Hospital staff should pray in mosques on time.
58. The Religious Police are allowed to go for control at any time and nobody can prevent them.
59. Anybody who violates the order will be punished as per Islamic regulations.

General Presidency of *Amr Bil Maruf*. (To enjoin the Muslims to do what is approved) Kabul, December 1996.

60. To prevent sedition and female uncovers (*Bi Hejabi*). No drivers are allowed to pick up women who are using an Iranian cover (*burqa*). In case of violation the driver will be imprisoned. If such females are observed in the street, their house will be found and their husband punished. If the women use stimulating and attractive clothes and there is no accompany of close male relative with them, the drivers should not pick them up.
61. To prevent music from being broadcasted by the public information resources. In shops, hotels, vehicles and rickshaws cassettes and music are prohibited. This matter should be monitored within five days. If any music cassette found in a shop, the shopkeeper should be imprisoned and the shop locked. If five people guarantee the shop, it should be opened the criminal released later. If cassette found in the vehicle, the vehicle and the driver will be imprisoned. If five people guarantee the vehicle, it will be released and the criminal released later.
62. To prevent beard shaving and cutting. After one and a half months if anyone observed who has shaved and/or cut his beard should be arrested and imprisoned until their beard gets bushy.
63. To prevent keeping pigeons and playing with birds. Within ten days this habit/hobby should stop. After ten days, this should be monitored and the pigeons and any other playing birds should be killed.
64. To prevent kite-flying. The kite shops in the city should be abolished.
65. To prevent idolatry. In vehicles, shops, hotels, room and any other place, the monitors should tear up all pictures in the above places.

66. To prevent gambling. In collaboration with the security police the main centers should be found, and the gamblers imprisoned for one month.
67. To eradicate the use of addiction. Addicts should be imprisoned and investigation made to find the supplier and the shop. The shop should be locked, and the owner and user should be imprisoned and punished.
68. To prevent the British and American hairstyle. People with long hair should be arrested and taken to the Religious Police department to shave their hair. The criminal has to pay the barber.
69. To prevent interest on loans, charge or changing small denomination notes and charge on money orders. All money-exchangers should be informed that the above three types of money exchanging should be prohibited. In case of violation criminals will be imprisoned for a long time.
70. To prevent the washing of clothes by young ladies along the water streams in the city. Violator ladies should be picked up in the respectful Islamic manner, taken to their houses and their husbands severely punished.
71. To prevent music and dances in wedding parties. In the case of violation the head of the family will be arrested and punished.
72. To prevent the playing of music drum. The prohibition of this should be announced. If anybody does this then the religious elders can decide about it.
73. To prevent sewing ladies clothes and taking female body measures by tailor. If women or fashion magazines are seen in the shop, the tailor should be imprisoned.
74. To prevent sorcery. All the related books should be burnt, and the magician should be imprisoned until his repentance.
75. To prevent not praying and order gathering pray at the bazaar. Prayer should be done on their due times in all districts. Transportation should be strictly prohibited and all people are obliged to go to the mosque. If young people are seen in the shops they will be immediately imprisoned.

In a separate decree issued in May 2001, the Taliban ordered religious minorities to wear tags identifying themselves as non-Muslims, and Hindu women to veil themselves like other Afghan women.³³

B. Other Major Events

In 1998- US launches missile strikes at suspected bases in Afghanistan of militant Osama bin Laden, accused of bombing U.S. embassies in Africa.

1999- U.N. imposes an air embargo and financial sanctions to force Taliban to hand over Osama bin Laden for trial.

2001- January- U.N. imposes further sanctions on Taliban to force them to hand over Osama bin Laden.

³³ *Id.* appendix 1.

2001- March- Taliban blow up giant Buddha statues in Bamian Province of Afghanistan in defiance of international efforts to save them.

2001- October- United States and Great Britain launch air strikes on Taliban targets in Afghanistan, after Taliban refused to hand over Osama bin Laden, held responsible for the September 11th attacks against the United States.

2001- December 5- Opposition forces seize Mazar-e-Sharif and within days march into Kabul and other key cities and Taliban finally give up last stronghold of Kandahar, but Mullah Omar remains at large.

2001- December 5- Afghan groups agree deal in Bonn for interim government.

2001-December 22- Pashtun royalist Hamid Karzai is sworn in as head of a 30member interim power-sharing government.

2002-April- Former King Zahir Shah returns, but says he makes no claim to the throne.

2002 May- U.N. Security Council extends mandate of International Security Assistance Force until December. Allied forces continue their military campaign to find remnants of al-Qaeda and Taliban forces in the southeast.

2002- June- *Loya Jirga*, or Grand Assembly, elects Hamid Karzai as interim Head of State. Karzai picks members of his administration who are to serve until 2004.

2002- December- President Karzai and Pakistani and Turkmen leaders sign agreement paving way for construction of gas pipeline through Afghanistan, carrying Turkmen gas to Pakistan. Asian Development Bank resumes lending to Afghanistan after twenty-three-year gap.

2003-August- NATO takes control of security in Kabul. It is the organization's first operational commitment outside Europe in its history.

2004-January- *Loya Jirga*, Grand Assembly, adopts new constitution which provides for strong presidency.

2004-March- President Hamid Karzai announces Afghanistan's first post-Taliban elections are postponed until September.³⁴

XL. The Bonn Agreement

The starting point for an analysis of rule of law in Afghanistan is the Bonn Agreement which was hastily convened among Afghanistan's competing factions during December, 2001, in Bonn, Germany. The meeting produced a careful, precariously balanced agreement for a transitional government and a postwar future. The bitter rivals in attendance agreed on provisions for emergency and constitutional *Loya Jirga*, an interim power-sharing arrangement, and a schedule for new elections.

The Bonn Agreement stipulates that a new constitution shall be adopted by a constitutional *Loya Jirga*, which must be convened within eighteen months of the establishment of the Transitional Authority.

³⁴ Timeline: Afghanistan. A Chronology of Key Events. <http://news.bbc.co.uk/1/hi/world/south-asia/>.

The agreement states that a constitutional Commission shall be established by the Transitional Authority with the assistance of the United Nations. It is also agreed that “free and fair elections” to choose a “fully representative government” must be held no later than two years from the date of the convening of the emergency *Loya Jirga* (which was convened on 9 June, 2002). Given that the elections must be held under the new constitution, the constitution must be in place before the elections. ³⁵

A. Judicial System

The Bonn Agreement states that the Interim Administration shall include “a Supreme Court of Afghanistan, as well as such other courts as may be established by the Interim Administration.” The agreement specifies (under “Legal Framework and Judicial System”), “the judicial power of Afghanistan shall be independent and shall be vested in a Supreme court of Afghanistan, and such other courts as may be established by the Interim Administration.” Additionally, it provides that “ the Interim Administration shall establish, with the assistance of the United Nations, a Judicial Commission to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law, and Afghan legal traditions.”³⁶

The Security Council adopted the Resolutions 1378 (2001), 1383 (2001), and 1386(2001) endorsing the Bonn Agreement on provisional arrangements in Afghanistan.³⁷

On December 22, 2001, Pashtun royalist Hamid Karzai is sworn in as head of a 30-member interim power-sharing government. *Loya Jirga* elects Hamid Karzai as interim Head of State. Karzai picks members of his administration who are to serve until 2004. According to the U.N.-brokered plan that brought Mr. Karzai to power, Afghanistan’s next leader must be elected by the majority- not appointed.

Following three weeks of tense debate, long battles in the Assembly and committees right up the *Loya Jirga*, in which 502 delegates from all over Afghanistan assembled, adopted the new constitution on January 4, 2004.

The new bedrock of the government was welcomed by Afghan human rights and women’s activists as offering the prospect of the rule of law. The Constitution provides for setting up a democratic presidential system, with a directly-elected president and a two-chamber national assembly; elections are to be held in just six months. The Constitution provides for the establishment of an independent judiciary.

B. Highlights of the Constitution of the Islamic Republic of Afghanistan

The country will be renamed the Islamic Republic of Afghanistan, combining democracy and religion (article 1).

Islam will be the religion of Afghanistan (article 2).

There will be a system of civil law, but no law can be contrary to the sacred religion of Islam and the values of this Constitution (article 3).

³⁵ <http://www.constitution-afg.com>. Transitional Islamic State of Afghanistan, Constitutional Commission.

³⁶ International Human Rights Law Group.

³⁷ *Id.* March 2002.

The word *Afghan* applies to every citizen of Afghanistan (article 4).

Pashtu and Dari are the official languages of the state. But Uzbeki, Turkmani, Baluchi, Pashaei, Nuristani, and other languages spoken in the country can be used for publications, radio and television broadcasting and the state must adopt plans to develop and strengthen these language. (article 16).

The national anthem of the country will be in Pashtu (article 20).

Any kind of discrimination and privilege between the citizens of Afghanistan are prohibited. The citizens of Afghanistan have equal rights and duties before the law (article 22).

The state is required to provide the opportunity to teach native languages in the areas were they are spoken (article 43).

The state for the purpose of monitoring, observation of human rights in Afghanistan their protection, shall establish the Independent Human Rights Commission of Afghanistan (article 58).

The power and duties of the President are as follows:

76. Supervising the implementation of the Constitution.
77. Determining the fundamental policies of the state.
78. Being the Commander-in-Chief of the armed forces of Afghanistan.
79. Declaration of war and ceasefire with the approval of the National Assembly.
80. Taking the required decision during defending of territorial integrity and protecting of the independence.
81. Sending contingents of the armed forces to foreign countries with the approval of the National Assembly.
82. Convening *Loyan Jirga* except in a situation stated in article 68 of the Constitution.
83. Declaring the state of emergency and ending it with the approval of the National Assembly.
84. Inauguration of the National Assembly and the *Loya Jirga*.
85. Accepting resignation of the Vice President.
86. Appointing the Ministers and the Attorney-General with the approval of the *Wolesi Jirga* and acceptance of their dismissal and resignation.
87. Appointing the head and members of the Supreme court with the approval of the *Wolesi Jirga*.
88. Appointment, retirement, and acceptance of the resignation and dismissal of judges, officers of the armed forces, police, national security, and high-ranking officials in accordance with the law.
89. Appointment of heads of diplomatic missions of Afghanistan in foreign countries and international organizations.
90. Acceptance of the credentials of diplomatic missions in Afghanistan.
91. Signing of laws and legislative decrees.

92. Issuing credential letter for the conclusion of bi-lateral and international treaties in accordance with the provisions of law.
93. Reducing and pardoning penalties in accordance with law.
94. Awarding medals, and honorary titles in accordance with the provision of law.
95. Appointment of the Governor of De Afghanistan Central Bank with the approval of the *Wolesi Jirga*.
96. Establishing of commissions for the improvement of the administrative condition of the country, in accordance with law.
97. Executing other functions in accordance with the provisions of this Constitution.(article 64).

The National Assembly consists of two houses: *Wolesi Jirga* (the House of People) and *Meshrano Jirga* (House of Elders) (article 82).

The number of members of *Wolesi Jirga*, proportionate to the population of each region, shall be between 220 and 250 (article 83).

Members of the *Meshrano Jirga* are elected and appointed as follows:

98. From among the Members of each provincial council, the respective council elects one person for a period of four years.
99. From among the district councils of each province, the respective councils elect one person for a period of three years.
100. The President from among experts and experienced personalities appoint the remaining one-third of the members for a period of five years.

The President appoints fifty percent of these people from among women.(article 84). Judges are appointed upon the recommendation of the Supreme Court and approval of the President. The appointment, transfer, promotion, punishment, and retirement of the judges is within the authority of the Supreme Court in accordance with the law (article 132). (Unofficial Translation provided by the Aghganistan Embassy in Washington, D.C. Please refer to official Pashtu and Dari texts for accuracy. Year 1382).

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