

4TH EDITION

AN INTRODUCTION TO THE
LAWS OF AFGHANISTAN

Stanford Law School
Rule of Law Program
Afghanistan Legal Education Project

An Introduction to the

Laws of Afghanistan

Fourth Edition
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ALEP – STANFORD LAW SCHOOL

Fourth Edition

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PREFACE & ACKNOWLEDGEMENTS

Stanford Law School's Afghanistan Legal Education Project (ALEP) began in the fall of 2007 as a student-initiated program dedicated to helping Afghan universities train the next generation of Afghan lawyers. ALEP's mandate is to research, write, and publish high-quality legal textbooks, and to develop a degree-granting law program at the American University of Afghanistan (AUAF). The AUAF Law Department faculty and Stanford Law School students develop curriculum under the guidance of ALEP's Faculty Director and Executive Director with significant input from Afghan scholars and practitioners.

In addition to *An Introduction to the Laws of Afghanistan (4th Edition)*, ALEP has published introductory textbooks about: *Commercial Law of Afghanistan (2nd Edition)*; *Criminal Law of Afghanistan (2nd Edition)*; *Constitutional Law of Afghanistan (2nd Edition)*; *International Law for Afghanistan (1st Edition)*; *Law of Obligations of Afghanistan (1st Edition)*; *Property Law of Afghanistan (1st Edition)*; and *An Introduction to Legal Ethics in Afghanistan (1st Edition)*. Textbooks addressing Legal Methods: Thinking Like a Lawyer, Legal Methods: Legal Practice, and new versions of Public International Law and Commercial Law are forthcoming. Many of the ALEP textbooks have been translated into the native Dari and Pashto languages and are available for free at alep.stanford.edu. Additionally, ALEP has published professional translations of the Afghan Civil Code and Afghan Commercial Code, and business guides authored by Afghan students in the business law clinic. All are available on ALEP's website.

ALEP would like to acknowledge the individuals and institutions that have made the entire project possible. ALEP benefits from generous and dynamic support from the Bureau of International Narcotics and Law Enforcement (INL) at the U.S. Department of State. Current Stanford Law School Dean Elizabeth Magill, former Dean Larry Kramer, and Deborah Zumwalt, General Counsel of Stanford University and member of AUAF's Board of Trustees, have provided important continuing support to ALEP. ALEP's partnership has deepened over the last ten years with AUAF's extraordinarily supportive leadership: Dr. Sharif Fayeze (Founder), Dr. Kenneth Holland (President), David Sedney (former President), Dr. Mark English (former President), Dr. Michael Smith (former President), and AUAF's Board of Trustees.

As with all ALEP textbooks, the content of *An Introduction to the Laws of Afghanistan (4th Edition)* is the product of extensive collaboration. We thank the ALEP authors: Kristina Alekseyeva, Stephanie Birndorf, Joe DeMott, Shannon Galvin, Mehdi J. Hakimi, Juan Pablo Perez-Sangimino, Tara Rangchi, and Michael Talent for their work researching, drafting, and revising the chapters. Ghizaal Haress, AUAF Professor and Chair of Law Department, was instrumental in providing the initial insights and structure for the book and subsequent review of the materials. Rohullah Azizi, ALEP Curriculum Advisor, provided substantial guidance and feedback to the students throughout the process. Rolando Garcia Miron, ALEP Program Advisor, played a key role in supporting the entire team on programmatic aspects of the project. Finally, Mehdi J. Hakimi, Executive Director of the Rule of Law Program, deserves special acknowledgment for the innumerable tasks both large and small that he undertook in shepherding this textbook from inception to completion.

ALEP looks forward to continuing the collaboration that made this book possible. Please share your feedback with us on our website, alep.stanford.edu.

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CHAPTER 1: INTRODUCTION

The Afghan legal landscape has changed considerably since 2001. The 2004 constitution ushered in a wave of legal and regulatory reforms in the country. Key legal institutions have been revamped and new bodies, such as the Afghanistan Independent Bar Association, have been established. Numerous laws and regulations have been passed at an unprecedented rate. Afghanistan has entered into an increasing number of agreements with regional partners. The country has also joined major international bodies such as the World Trade Organization. These recent legal developments necessitate a fresh and critical examination.

This book is designed to provide you with an introduction to the laws of Afghanistan. You will acquire a solid general foundation in key legal concepts which will be helpful in your subsequent studies in law. In addition to increasing your knowledge of legal concepts, you will understand how the law impacts your daily life. This book will also emphasize the importance of thinking critically about new ideas and legal issues, which will be a crucial skill in your studies and professional career. Rather than passively reading the concepts, you will learn to critically analyze and evaluate new concepts and the law.

This book is replete with examples, case studies, discussion questions, and other instructional tools to help you better understand the materials. You will have ample opportunities to apply newly acquired knowledge to various exercises. Moreover, through comparative cases and examples, you will learn about other legal systems and approaches. This comparative perspective is important as Afghanistan becomes increasingly connected to the wider global community.

The chapters in the book build on each other. Before starting our discussion of Afghan law, you will learn some fundamental and preliminary legal concepts which will be revisited in subsequent chapters. Next, you will learn about the sources of Afghan law as well as Afghanistan's legal history. We will also examine Afghanistan's major legal institutions under the current constitution. Moreover, you will be introduced to Afghanistan's substantive laws and procedural laws. While the entire book contains many instructional tools to enhance critical thinking, the final chapter will delve deeper in improving this foundational skill. Let's look a bit more closely at what each chapter will entail.

Chapter Two begins with some key preliminary topics in law. It introduces the concept of "law" and its importance. You will learn how law is different from other types of rules such as morality and social norms. You will also learn about the similarities and overlap among these notions. Moreover, you will be introduced to the types of behavior governed by law; laws may require a person do something, forbid a person from doing something, or simply describe something without any mandatory or prohibitory aspect. You will also be introduced to two broad categories of law – substantive laws and procedural laws – which will be explored further in subsequent chapters. A key feature of law is enforceability by government which will be discussed as well. Law serves two important purposes: promoting order and promoting justice. You will learn about these two key objectives of law and how they may sometimes conflict with each other.

You will also become familiar with a number of other core legal concepts that will be revisited throughout the book. A major distinction is made between rights and obligations. While a right is something that a person is legally entitled to have, an obligation is something that a person is legally required to do or not to do. Moreover, you will learn how law distinguishes between two types of persons: natural and legal persons. A natural person is a human being. A legal person is an abstract, non-physical entity that can have rights and obligations. You will also learn the related but different concepts of rules and standards. A legal rule clearly explains conduct that is prohibited and conduct that is not prohibited. A legal standard, on the other hand, is less clear and leaves room for debate about whether or not a certain type of conduct is prohibited. You will learn about these concepts through various examples and

exercises. In addition to these core legal concepts, you will be briefly introduced to some major theories of law including divine revelation, natural law theory, and legal positivism.

As you will learn, a legal system is distinct from a legal tradition. We will examine three major global legal traditions in this chapter: the Islamic legal tradition, the Romano-Germanic legal tradition, and the common law tradition. You will become familiar with the key aspects of each legal tradition and how they have influenced Afghanistan's present legal system. Finally, the chapter will conclude with a brief discussion of the concept of the rule of law. In addition to examining the key components of the rule of law, we will explore the significance of the rule of law by considering the purposes it serves.

Building on the previous chapter, Chapter Three focuses on the rule of law in Afghanistan and Afghan legal sources. You will learn about some of the challenges to implementing the rule of law in Afghanistan including resource constraints, corruption, access to justice, and shortage of qualified legal professionals. We will also examine efforts undertaken to promote the rule of law in the country including initiatives involving the Ministry of Justice, the Supreme Court, the Attorney General's Office, and the Afghanistan Independent Bar Association.

You will also develop an understanding of the sources of Afghan law and their hierarchy in this chapter. Afghanistan has a pluralistic legal system with various sources of law interacting with one another. Overall, the 2004 constitution is the foundation of Afghanistan's legal system. The constitution reflects Islam's foremost importance and explains the hierarchy of laws. You will learn how the Supreme Court influences the interpretation and enforcement of the constitution. Moreover, the chapter will discuss the interplay between the constitution, international law, statutory law, regulations, Shari'a law, and customary law. In addition, we will also explore other sources of law including executive decrees, bylaws, guidelines and manuals, and secondary sources.

This chapter will also introduce you to two broad categories of law. First, we will examine the distinctions between private law and public law. Private law aims to recognize and enforce private parties' rights. On the other hand, public law governs the relations between the government and its citizens. Second, the differences and interplay between domestic law and international law will be discussed. Domestic law governs individual citizens and corporations within a country. However, international law governs legal disputes and transactions between citizens or governments of different states.

You will learn about Afghanistan's legal history in Chapter Four. This chapter is divided into three main parts: the pre-constitutional period, the constitutional period, and the post-2001 developments. The chapter begins by examining the period 1880-1919. This period marked the formation of the Afghan state and the evolution of the legal system under Abdul Rahman Khan. Important legal developments in this period included establishing a court system, creating the "fundamentals for judges" (asasul quzat), and installing the "boxes of Justice" (sanduq-i 'adalat).

Afghanistan's constitutional period commenced in 1919 under Amanullah Khan's reign. Amanullah Khan undertook an ambitious centralization effort and established a four-level court system. Modification of state institutions continued under King Nader Shah who created a new constitution in 1931. The new constitution established a legislative body with two houses and prioritized Shari'a principles. King Zahir Shah's reign saw the evolution of a modern constitutional state; the 1964 constitution expanded individual rights and the Supreme Court was given the right of judicial review. You will also learn about developments during the communist era. We will explore the new state structure under Daud Khan as well as the new constitutions and initiatives undertaken by Babrak Karmal and Dr. Najibullah. Changes in the legal system under the Taliban's rule will also be examined.

Afghanistan's political and legal history took a major turn in the post-2001 era. In this section, you will learn more about the Bonn Agreement and its objectives. The Afghan Interim Administration (AIA) was established soon after the fall of the Taliban. Pursuant to the Bonn Agreement, an emergency Loya Jirga was held in 2002 which elected Hamid Karzai as the leader of the Afghan Transitional Administration (ATA). You will also learn about two other significant developments in 2004: the passage of Afghanistan's constitution and the presidential election.

Following the discussion of the Afghan constitutions in the prior chapter, Chapter Five will examine the legal actors and institutions of Afghanistan created by the 2004 constitution. You will first learn how the constitution was drafted and the big-picture design the constitution envisioned for Afghanistan. Key steps before the passage of the constitution included creating the Constitutional Commission in 2002 and convening the Constitutional Loya Jirga in 2003. You will also learn about the public consultation process and the ratification mechanisms before the final passage of the constitution in 2004.

You will be introduced to the concept of separation of powers and how the 2004 constitution provides checks and balances between the main three branches of the Afghan government: the legislature, the executive, and the judiciary. Starting with the legislature, you will learn about the three main actors in the legislative branch: the Wolesi Jirga, the Meshrano Jirga, and the Loya Jirga. The lawmaking process will also be briefly discussed. While the legislative branch is responsible for making the laws, the executive branch must enforce them. You will learn about the composition of the executive branch and the duties and authorities of its actors. Key actors include the president, the ministries, and the law enforcement.

The judiciary, as the third branch of the government, applies and interprets the laws. In other words, the judiciary adjudicates legal disputes. You will understand the organization of the judiciary and, in particular, the country's three-tier court system. Moreover, the duties and authorities of the courts will be examined. In the final section of this chapter you will learn about alternative dispute resolution (ADR) mechanisms. Formal ADR processes – arbitration and mediation – will be introduced. Moreover, we will briefly discuss the informal ADR mechanisms – jirgas and shuras – which are widely practiced in Afghanistan.

Chapter Six will focus on substantive laws. Substantive laws are the body of rules that determine the rights and obligations of individuals and collective bodies. Substantive laws are different from procedural laws which govern the process for determining the rights and obligations of parties. Specific substantive law areas that will be introduced in this chapter include criminal law, civil law, administrative law, and commercial law.

Substantive law is written in bodies of code. For example, the laws that govern criminal conduct are covered, relatively thoroughly, in Afghanistan's penal code. In addition, principles in the constitution inform areas of substantive law, and we will discuss some constitutional provisions that confer legal rights. In this chapter, you will understand what codes govern each area of substantive law, and some of the rights and relationships that each body of law governs. Moreover, you will learn why these areas of substantive law are important for Afghan society, and think critically about improvements that can be made to areas of the law.

This chapter begins with an introduction of criminal law. The legislative sources of criminal law will be discussed including the Afghan penal code. Moreover, we will introduce the elements of a crime including the material element, the moral element, and the legal element. You will also learn about the different types of crimes: felonies, misdemeanors, and petty offenses. Another major substantive law area is civil law. Within civil law, we will briefly discuss some foundational concepts in the law of obligations, family law, and property law. You will also be introduced to two other rapidly evolving substantive law areas: administrative law and commercial law.

After learning about substantive laws in Chapter Six, we will explore procedural laws in Chapter Seven. Procedural laws regulate the process for determining the rights and obligations of parties in a dispute. In other words, procedural laws govern proceedings in a court, tribunal, or decision-making body. You will learn why procedural laws are important and become familiar with key legal concepts such as due process and equality before the law. You will also be introduced to the following procedural laws: criminal procedure, civil procedure, administrative procedure, and commercial procedure.

Criminal procedure refers to rules that courts follow when adjudicating criminal cases. Some foundational principles of criminal procedure include the presumption of innocence, the principle of legality, and the right to counsel. The Criminal Procedure Code governs proceedings in criminal cases. It specifies how investigators, the prosecutor, and the court must conduct a criminal investigation and trial.

Civil procedure refers to the rules that regulate the process of a litigation in civil disputes. Civil litigation typically involves disputes between private parties. The Civil Procedure Code governs all phases of the legal process including how to bring a case to court, how to file court documents, how to determine which courts have authority to hear a particular case, and how to file an appeal. The final section of the chapter will briefly introduce you to two other procedural laws: administrative procedure and commercial procedure.

In Chapter Eight you will develop some basic, but crucial, skills that will help you in your studies and professional career in any field, including law. In the first seven chapters, you not only expanded your legal knowledge, but also had the opportunity to apply that knowledge to various problems and exercises to enhance your understanding. In this chapter, we will focus more specifically on cultivating and sharpening some key skills that will help you excel as students and aspiring defense lawyers, prosecutors, judges, and professionals generally. These key practical skills are as follows: critical thinking, reasoning, and analysis.

The chapter's primary focus is on critical thinking as it is the most foundational skill. Indeed, without strong critical thinking skills, one's reasoning and analysis are deficient. Critical thinking can be defined as close analysis and judgement of the thinking of yourself and others. In developing your critical thinking, you will learn how to effectively evaluate arguments – yours and others'. You will be introduced to a number of important practical points including identifying assumptions, assessing assumptions, evaluating evidence, understanding facts and opinions, assessing causality, and other helpful considerations in structuring and evaluating arguments.

After learning how to improve your critical thinking skills, we will introduce legal reasoning and analysis. Legal reasoning is how legal professionals consider facts and issues in order to reach a conclusion. Legal analysis explains and communicates that conclusion. You will be introduced to rule-based reasoning, which is arguably the most important form of legal reasoning in civil law jurisdictions such as Afghanistan. You will learn the components of rules and how they are structured. You will also learn how to break rules down to apply them to facts. You will be introduced to a particular system of legal analysis: the IRAC method. This model consists of four parts: issue, rule, analysis, and conclusion. Ultimately, you will develop some important skills. However, as with all chapters in this book, you must continuously apply and practice your newly gained knowledge and skills in order to become experts and competent professionals in the future.

CHAPTER 2: PRELIMINARY CONCEPTS IN LAW

INTRODUCTION

When you think of “law,” what comes to mind? Maybe you think of the police, who enforce the criminal law. Maybe you think of the courts, which resolve disputes about whether someone has violated the law. Maybe you think of Islamic law, which holds an important place in the Afghan legal system. Or maybe you think of the National Assembly, the democratically elected body that makes statutory law for Afghanistan.

As these various answers suggest, “law” can refer to many different things. In this introductory chapter, we will consider what law is, where it comes from, and what purposes it serves. Part 1 provides a simple definition of “law” and considers how law differs from other types of rules, what types of behavior law governs, and how law is enforced. Part 2 introduces several key legal concepts and terms. Part 3 contains a brief overview of three major legal traditions—Islamic law, Romano-Germanic law, and the English common law—that have influenced the development of Afghan law. Finally, Part 4 introduces the “rule of law”: the ideal that everyone, even ruling officials, should be governed by clear, publicly accessible laws that are applied impartially.

After reading this chapter, you should be able to:

- Define “law” and explain two purposes that it serves in a society
- Identify a given rule as an example of law, morality, a social norm, or some combination of these
- Explain the difference between a right and an obligation; a natural person and a legal person; and a rule and a standard
- Describe major events in the development of Islamic law, Romano-Germanic law, and the English common law
- Compare and contrast key features of Islamic law, Romano-Germanic law, and the common law
- Predict how a judge from each of these three legal traditions would approach a given case
- Define “rule of law,” explain three purposes that the rule of law serves in a society, and discuss the extent to which you believe the rule of law exists in your own society

1. PRELIMINARY TOPICS

In this section, we will consider what law is. First, we will distinguish law from other types of rules, examine what sorts of behavior that law governs, and learn about how law is enforced. Second, we will consider two central goals of law—promoting order and promoting justice—and the tension that sometimes exists between these goals.

1.1. What Is Law?

Consider your daily routine. You may be surprised how often you come into contact with some form of law. Before leaving the house, you probably eat breakfast. The food you eat is governed by various laws meant to ensure its safety. For example, the Afghan Ministry of Agriculture, Irrigation and Livestock regulates plant and animal products, while the Ministry of Public Health inspects processed foods.¹ When you leave for work or school, you might take a taxi. Afghan law requires your taxi driver to have passed a road test, received a license, and registered his vehicle. Your taxi driver must obey traffic safety laws. For example, he must stop to allow pedestrians to cross the street.

¹ Sayed Mohammad Naim Khalid, “Food safety and quality management regulatory systems in Afghanistan: Policy gaps, governance and barriers to success,” *Food Control* 68 (2016): 192-199.

After arriving at work, you encounter still other laws. The Labor Code governs your relationship with your employer. For example, it says that you should ordinarily work not more than forty hours per week and that you are entitled to periodic breaks for eating and prayer.² The money you earn at work is subject to another type of law—the tax code. Afghan tax law may require you to pay approximately ten percent or twenty percent of your income to the government, depending on how much you earn.³ After you leave work, you are still subject to the law. One type of law that follows us everywhere is the criminal law. The Penal Code governs a wide range of offenses including robbery, destruction of public property, and mistreatment of domestic animals.⁴

These examples show just how many different types of activities are subject to some sort of law. There are laws governing food safety, transportation, employment, financial transactions, family relations, and much more. Thinking about what these examples have in common can help us articulate a simple definition of **law**: a body of rules that regulate human behavior and are enforced by the government. We will explore each part of this definition in the subsections that follow.

Be careful not to get confused by the different ways that the word “law” is used in English. “Law” can refer to an entire body of rules (huqūq). But a particular rule or statute is also called “a law” (qanūn). For example, law (in general) governs all sorts of activities, including relationships between husbands, wives, and children. A (particular) law called the Law on the Elimination of Violence Against Women prohibits sexual assault, child marriage, and other forms of domestic abuse. Finally, you should be careful not to confuse “law” with “right/rights,” another legal term that is often translated as “haqq/huqūq.” (Rights are defined and discussed in Section 2.1.1, below).

1.1.1. Law Compared with Other Systems of Rules

At its core, law is a body of rules. We all encounter rules on a daily basis. Some rules require a particular behavior. For example, a rule might require you to pay taxes, attend school, or stand when a professor enters the classroom. Other rules forbid a particular behavior. For example, a rule might forbid stealing, drinking alcohol, or eating without first washing your hands. Still other rules describe the manner in which an activity must be carried out. For example, a bus driver must obtain a license, drive only on the right side of the road, and not drive faster than 90 kilometers per hour on the highway. These are just a few examples of the massive number of rules that regulate human behavior. How do we determine which of these rules are law?

Law can be distinguished from two other types of rules: morality and social norms. **Morality** refers to beliefs about the difference between behavior that is virtuous and behavior that is evil. A **social norm** is a type of behavior that is seen as usual and appropriate within a particular society.

Morality is often rooted in religious beliefs. For example, you probably believe that it is morally right to respect your parents. If you are a Muslim, you recognize that this duty is found in the Qur’an, which commands believers: “[B]e kind to your parents. . . . [S]ay no word that shows impatience with them, and do not be harsh with them, but speak to them respectfully and lower your wing in humility towards them”⁵ Similar commands about respecting parents are found in many religions, including Judaism and Christianity.

² Labor Code, Articles 30, 39, OG # 966 (6 February 2008).

³ Income Tax Law, Article 4, Section 3, OG # 976 (18 March 2009).

⁴ Penal Code, Article 344; Article 447, Section 1; Article 510, Section 1, OG # 347 (7 October 1976).

⁵ Qur’an 17:23-24, trans. M. A. S. Abdel Haleem (New York : Oxford University Press, 2004).

Moral standards usually have logical justifications, too. Apart from any religious belief, one reason to honor your parents is to show gratitude for the fact that they cared for you as a child. Another reason is because you will probably be a parent yourself someday and will want to be similarly treated with respect by your children. A third reason for honoring your parents is to promote peace and stability within the family.

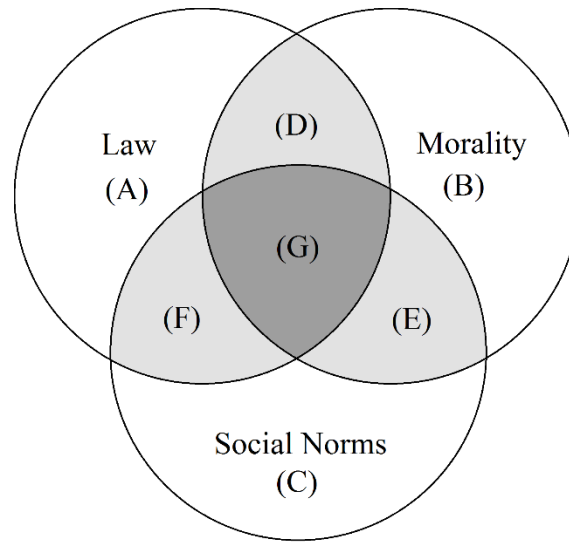
Morality is often thought of as a set of universal rules. Consider the prohibition on stealing—another command that is found across world religions. Most people agree that it is morally wrong for *anyone* to steal, no matter which religious or ethnic group they belong to. It would be difficult to find someone who believes that it is evil for an Afghan to steal, but not evil for an Australian to steal. Thus, the prohibition on stealing applies universally.

In contrast, social norms are linked to a particular society. In Afghan society, for example, students are expected to stand when a professor enters the classroom. In some African countries, it is customary to only eat food with the right hand and to only use the left hand for tasks that are considered unclean. In many East Asian countries, people are expected to remove their shoes when entering a house. None of these customs are universal, however. And a person who eats only with his right hand would not consider it *evil* for a person from a different society to eat with his left hand (or with a fork and knife), although he might consider it strange or even rude.

Social norms tend to be more specific than moral beliefs. People from different societies agree that it is morally right to respect one's parents, but they express that respect through different social norms. In the United States, for example, it is considered respectful to look an elder directly in the eyes when he is speaking to you. In parts of China, however, it is considered respectful to avoid making eye contact in such situations. As another example, people from different religions agree that it is morally good to show respect for holy sites, but have different ways of expressing their respect. For example, Muslim men take off their shoes when they enter a mosque but do not remove their hats. By contrast, Christian men take off their hats when they enter a church but do not remove their shoes. Thus, the same moral belief can be expressed through different social norms in different communities.

As you may have noticed, there is a good deal of overlap between law, morality, and social norms. Many things that are immoral are also illegal—stealing, for instance. Some moral duties, however, such as giving alms, are not required by law. And some legal rules are not matters of morality. In Afghanistan, vehicles are required by law to use the right side of the road, while in Pakistan vehicles are required by law to use the left side of the road. These laws are purely a matter of established local practice, not morality. Some social norms have a basis in morality, such as the Afghan practice of having men and women sit in separate sections of a wedding hall for the purpose of modesty. Others do not, however, such as norms governing which utensils you should eat with.

This diagram may help you visualize the relationship between these three categories:



Application Exercise

In which lettered segment of the above diagram would you place the following examples?

A rule requiring you to:

Use only your right hand when eating
Bow when the king enters the room
Give money to a beggar

Wear a headscarf outside the home (for women)
Pray after a meal
Allow elders to speak first in a meeting

A rule prohibiting you from:

Killing another person
Using tobacco
Attending a dogfight

Driving more than 90km/hour on a highway
Gambling
Cheating in a game of chess

Discuss with your classmates where you placed each example, and why. Do you think a law student from Russia would place some of the examples in different segments of the diagram than you did? If so, which ones?

1.1.2. Types of Behavior Governed by Law

As discussed above, law governs an extremely wide range of human behavior. Some laws forbid certain acts, such as committing adultery; other laws describe how a government activity, such as an election, must be carried out. There are laws dictating how a husband and wife must behave toward each other, how a bus driver must behave on the road, and how a business must behave toward customers, employees, and other business.

To try and make sense of all these laws, we organize them into categories. One way of doing this is to describe laws as either substantive or procedural. **Substantive laws** determine the rights and obligations of individuals and collective bodies. For example, a law banning heroin use would be substantive. By

contrast, **procedural laws** regulate the manner in which people—such as politicians, bureaucrats, policemen, prosecutors, lawyers, and judges—make the law, enforce the law, and adjudicate possible violations of the law. For example, a law stating that driver’s licenses are issued by a certain government office would be procedural. Another way of categorizing laws is to organize them based on the types of behavior they govern. Criminal law punishes behavior that is considered an offense against society; administrative law deals with the actions of government ministries; civil law governs interactions between private individuals; and commercial law regulates businesses and their activities.

Let’s consider some more detailed examples:

- (1) Criminal law deals with behavior that is considered so objectionable that it is an offense against society and should be punished by the state. Substantive criminal laws explain what kinds of behavior will be punished. For example, Afghan criminal law substantively forbids the use of alcohol or narcotic substances.⁶ It also prohibits abortion, adultery, and kidnapping.⁷

The law of criminal procedure governs the behavior of police officers, prosecutors, lawyers, and judges during criminal investigations and trials. For example, a judge is forbidden from deciding a case if it involves a crime that was committed against him or his relatives or if he previously worked on the side of the prosecution or defense on the same case.⁸ Procedural requirements are an important way of safeguarding individual rights. Some procedural laws are considered so important that they are enshrined in the Constitution; for example, police officers conducting a criminal investigation may only enter a house if they have permission of the resident or authorization from a court.⁹

- (2) Administrative law deals with government ministries. As an example, the Civil Servants Law substantively regulates the behavior of government employees, stating that civil servants must “[r]efrain from using functional authorities for discharge of personal affairs” and “[r]efrain from using official working hours for personal affairs.”¹⁰ The Civil Servants Law also contains procedural rules about how government employees can be disciplined for subpar performance: for the first offense, an employee will be advised that there is a problem with his performance; for the second offense, he will receive a warning; for the third offense, he will lose five days’ salary; and for the fourth offense, he may be replaced.¹¹
- (3) Civil law governs all sorts of interactions between private persons. One part of civil law is the law of obligations, which includes rules that hold people responsible when they injure others or damage others’ property. Another part of civil law is family law, which governs issues of marriage, divorce, and inheritance. Civil law also includes contract law, which governs private agreements in which one party agrees to do something for another party in exchange for something else (often money).

The law of civil procedure contains detailed rules that must be followed in civil lawsuits. For example, the Civil Procedure Code requires a person who is unsatisfied with a court’s decision to present her objection to the superior court within twenty days.¹² The Code also states that if a

⁶ Penal Code, Article 349.

⁷ *Id.*, Articles 402-406; Articles 418-425; Articles 426-429.

⁸ Criminal Procedure Code, Article 16, OG # 1132 (May 5, 2014).

⁹ Constitution of Afghanistan, Article 38, OG # 818 (28 January 2004).

¹⁰ Civil Servants Law, Article 13, Sections 14-15, OG # 951 (6 July 2008).

¹¹ *Id.*, Article 30, Section 1.

¹² Civil Procedure Code, Article 23, OG # 722 (22 August 1990).

person summoned to court is illiterate, he may certify his appearance using a fingerprint instead of a signature.¹³

- (4) Commercial law regulates the behavior of businesses. One important topic in commercial law is the formation of entities such as partnerships and corporations. Another important topic is the commercial contract. For example, the Commercial Code contains rules about how a court should interpret unclear language in a commercial contract.¹⁴

Under Afghan law, special commercial courts have jurisdiction over all disputes between businesses (although in many parts of the country these courts are not operational). The procedural rules for these courts are laid out in the Commercial Procedure Code. To facilitate quick, efficient resolution of commercial disputes, the Code does not require commercial parties to be represented by attorneys, and it instructs the commercial courts to try and help the parties to reach an agreement through mediation before holding an actual trial.¹⁵

We will examine these various types of law in more detail in Chapter 6, which deals with substantive law, and Chapter 7, which deals with procedural law. For now, it is enough to have an awareness of just how many types of human behavior—everything from family affairs to multinational business transactions—are governed by law.

1.1.3. Laws as Enforced by the Government

Law, as we have defined it, is enforced by the government. Parents have rules for their children, universities have rules for their students, and companies have rules for their employees, but we do not call these rules “law.” Law is the set of rules that a government has for the people it governs.

Criminal laws are directly enforced by the government. It is the duty of the police to detect crimes and investigate crimes reported by citizens. When a crime occurs, the police open an investigation in order to identify the perpetrator. Sometimes, the police ask a court to issue a **warrant**, a document that authorizes the police to search an individual’s place of residence.¹⁶ For example, a court might issue a search warrant if there is evidence that items related to a crime are hidden in a certain person’s home. Once the police have sufficient evidence that the person committed the crime, they may arrest him.

After the police arrest a suspected **perpetrator** of a crime, the **prosecutor** decides what criminal offense should be charged against that person. For example, if the person is suspected to have attacked someone using a knife, he will likely be charged with a crime of laceration. If the victim was injured badly enough to miss one month of work, the prosecutor could bring charges under Article 408 of the Penal Code, which provides “short imprisonment of not less than three months” as the penalty for a laceration that causes idleness of twenty days or more. If the laceration was so severe that it caused permanent disability, the prosecutor would likely bring charges under Article 407(1), which provides “medium imprisonment of not less than three years” for such an offense.

After the prosecutor has filed charges accusing the person of a crime, the case proceeds to trial. Trials are held in court and are usually open to the public.¹⁷ First, the charges are read aloud, and the accused person—known as the **defendant**—is asked whether he admits his guilt. If the defendant says he is not

¹³ *Id.*, Article 135.

¹⁴ Commercial Code, Articles 619-623, Osulnama # 115 (13 December 1955).

¹⁵ Commercial Procedure Code, Articles 26, 40, 128, OG # 1, 2, 3 (7 March 1965).

¹⁶ Criminal Procedure Code, Article 119.

¹⁷ Criminal Procedure Code, Article 213.

guilty, then both the prosecutor (representing the government) and the defense attorney (representing the defendant) present evidence to the court. For example, if the crime is robbery of a convenience store, the prosecutor might call eyewitnesses to testify that they saw the defendant commit the crime. The defense attorney, however, might introduce evidence that the defendant was at home with his family at the time when the crime occurred, to show that he could not have committed the crime.

After both sides have presented their evidence, the judge issues his **verdict**—his determination that the defendant is either guilty or not guilty. If the judge finds the defendant not guilty, the defendant is immediately released. If the judge finds the defendant guilty, however, he sentences the defendant either to serve a term of imprisonment or to pay a monetary fine. In most cases, either party may **appeal** the ruling, arguing that the Primary Court judge made a mistake and asking the Appellate Court judge to overrule his verdict.

Civil and commercial laws are also enforced by the government, but in a different, less direct manner. As we have just seen, government officials such as the police and prosecutors initiate lawsuits to enforce criminal laws. By contrast, private parties (individuals or corporations) initiate lawsuits to enforce non-criminal laws. A private party who initiates a civil lawsuit is known as the **plaintiff**. The party accused of misconduct is known as the defendant, just like in a criminal case.

Consider several provisions of the Civil Code that require a husband to provide certain things to his wife. First, a husband must provide a suitable residence for his wife, proportionate to his financial ability.¹⁸ In addition, a husband to provide his wife with alimony—that is, food, clothing, residence, and appropriate medical treatment, proportionate to his financial ability.¹⁹ If a husband refuses to provide alimony, the court shall compel him to do so.²⁰

Now, imagine a young Afghan couple named Karim and Laily. After they get married, these provisions of the Civil Code apply to them. What happens if Karim stops providing Laily with the things she needs to live? The police will not investigate Karim because he has not violated a criminal law. However, Laily can bring a civil lawsuit to force Karim to fulfill his legal obligations toward her.

To initiate the lawsuit, Laily goes to court and files a claim against Karim. In her claim, Laily—the plaintiff—identifies herself, declares that she is seeking alimony under Articles 117-119 of the Civil Code, and describes the amount and type of compensation that she is seeking. Next, Karim—the defendant—is notified of Laily’s claim and has an opportunity to respond in writing. After that, each side has an opportunity to present evidence in court to support their position. Finally, the judge decides whether or not Karim actually breached his obligations to Laily under the Civil Code.

Let’s imagine that the court finds that Karim breached his duty to provide for Laily. The judge will direct a law enforcement officer to take from Karim’s property the amount of alimony that he owes and give it to Laily. Thus, the state enforces the civil law—but only after a private citizen brings and wins a lawsuit.

Finally, you should be aware of the different types of governmental entities that can create and enforce law. Laws created by the national government apply to all Afghans, no matter where they live. For example, everyone who earns more than 5,000 afghanis per month must pay the national income tax.²¹ Smaller units of government, such as provinces and cities, create regulations and administrative policies that have the force of law. For example, large cities like Kabul often have zoning laws that permit certain

¹⁸ Civil Code, Article 115, OG # 353 (5 January, 1977).

¹⁹ *Id.*, Articles 117-118.

²⁰ *Id.*, Article 119.

²¹ Income Tax Law, Article 4, Section 3.

land to be used for factories, other land to be used for shops and restaurants, and still other land to be used for housing. Small towns in the provinces, however, will have different zoning laws (or none at all).

Application Exercise

Complete the story by filling in the blanks with the seven vocabulary words that we learned in the previous subsection:

warrant *prosecutor* *perpetrator* *defendant*
verdict *appeal* *plaintiff*

Latif is an apple farmer in Wardak. One day while inspecting his farm, he finds that almost all of the apples are missing from many of the trees on the eastern part of his property. He calls the police and asks them to investigate. Based on footprints and tracks left by a donkey and cart, the police suspect a neighboring farmer, Inzир, as the _____ of the crime—that is, the person who stole Latif’s apples.

The police want to search for the stolen apples on Inzир’s farm. Before they are allowed to search the farm, however, they must approach a court with evidence that Inzир committed a crime and obtain a _____ that authorizes the search.

The police find 85 bushels of stolen apples in Inzир’s possession. Next, a government official called a _____ decides to charge Inzир with larceny under Article 459(3) of the Penal Code. In the trial that follows, Inzир is known as the _____. At the end of the trial, the Primary Court judge issues a _____ finding that Inzир is guilty, and sentences him to a long imprisonment of seven years. Inzир decides to _____ to the Appellate Court, arguing that he should receive only a medium imprisonment or a monetary fine.

Once Latif learns that Inzир was the one who stole his apples, he has the opportunity to file a civil lawsuit against Inzир seeking to make him return the stolen apples or pay him their market price, as required by Article 769(1) of the Civil Code. In this civil lawsuit, Latif would be known as the _____. In the end, though, Latif doesn’t file the lawsuit because Inzир voluntarily agrees to return the stolen apples.

1.2. Purposes of Law

Why do we need so many rules? Broadly speaking, law serves two important purposes: promoting order and promoting justice.²² In this context, **order** refers to security, organization, and stability; order is the opposite of chaos.²³ **Justice** refers to fairness, reasonableness, and equality; it means treating each person as he or she deserves to be treated. As we will see, these two purposes sometimes conflict with each other.

1.2.1. Promote Order

Even a small, simple association, such as a family or a soccer club, has rules that its members agree to follow. A large, complex society, such as a city or state, needs a tremendous number of rules if it is to operate effectively.

²² Raymond Wacks, *Law: A Very Short Introduction* (Oxford, UK: Oxford University Press, 2015) 19-26.

²³ See Merriam-Webster’s Dictionary, <http://www.merriam-webster.com/dictionary/order>, defining order as “the state of peace, freedom from confused or unruly behavior, and respect for law or proper authority.”

Try to imagine a world in which there was no law. Would you feel safe walking down the street? What would prevent someone from attacking you and taking your belongings or forcing you to do something against your will? Perhaps shared moral beliefs and social norms would be enough to maintain a limited degree of order, but the criminal law provides an added element of security. You feel safer walking down the street because if someone attacks or robs you, the police will try to find him, arrest him, and punish him for breaking the law.

In a world without law, would you be able to start a business, such as a grocery store? When you made contracts with farmers to buy fruits and vegetables to sell in your store, how would you know that they would uphold their side of the bargain? Again, shared moral beliefs and social norms would help. A farmer might be true to his word because he believes it is the right thing to do and because he wants to have a good relationship with you so that you will continue buying from him in the future. But the law provides an added degree of security. You know that *if* the farmer cheats you, you can bring a lawsuit to recover the money you lose. Also, the law provides a point of reference against which you—as well as the farmers you buy from and the customers who buy from you—can evaluate whether you have been treated fairly. Thus, law promotes order and security within a society.

1.2.2. Promote Justice

Maintaining order and security is not the only purpose of law, however. Imagine a rule prohibiting anyone from leaving his home before 8:00 or after 17:00. This rule might help maintain order because keeping *everyone* off the streets after dark would be an easy way to prevent crime. Similarly, imagine a law saying that no one may talk about politics. This might help maintain order because prohibiting all such discussion would silence lots of disagreement and criticism. But would you want to live in a society that enforced strict laws like these?

As these examples show, we don't just want laws that promote order; we also want laws that promote justice. The difficulty is that people often disagree about exactly what justice is. Consider the issue of taxation. The law could say that everyone must pay exactly the same amount of money in taxes—10,000 afghanis per year, for example. This would be orderly and in a sense, equal. But most of us would probably feel that it is unjust for a four-person family earning only 50,000 afghanis per year and a single businessman earning 2,000,000 afghanis per year to each pay 10,000 afghanis in taxes. Alternatively, the law could say that everyone must pay 10% of their income as taxes. Now, the four-person family would pay 5,000 afghanis, and the single businessman would pay 200,000 afghanis. Some might argue that this is unfair to the businessman, since he is paying so much more. Others might argue that this is still unfair to the family, since the businessman is so much richer than the family and has no children to care for. Maybe the businessman should pay 30% of his income, and the family should pay only 5% of its income? There's no easy answer to what justice requires here.

Consider another example: a law against stealing property. We can all agree that such a law promotes both order and justice. But what should be the punishment for stealing? One way of promoting order would be to impose a strict penalty on anyone who steals—a year in prison, perhaps. But would this rule be just in every case? For a person who steals only a loaf of bread, it might seem far too harsh. For a person who steals millions of afghanis, it might seem too lenient. Should it matter *who* is stealing, and *why* he steals? Many of us probably think that a poor person who steals bread to feed his starving children should be punished much less severely than a wealthy person who steals out of greed. Later on in this book, you will learn that some laws—particularly in criminal law—give judges flexibility in selecting a just punishment based on the specific details of the individual case. Even so, reasonable people can and do disagree about what justice requires.

Our discussion about a law against stealing also shows that there is tension between the goal of promoting order and the goal of promoting justice. A law imposing a year’s punishment on anyone who steals is very effective at promoting order, but we find that it will treat certain individuals—like the poor man stealing bread for his family—unjustly. On the other hand, if we create lots of exceptions to the law in order to account for who stole, how much he took, and why he did it, the law becomes very long and complicated. It may achieve more just results, but it becomes less clear and orderly. As you read this textbook, keep in mind these two purposes of law, and consider how well the specific laws we encounter succeed in promoting one or both of them.

Comparative Study Exercise

The Islamic legal tradition—which we will explore in Section 3.1, below—identifies several purposes of Islamic law (*maqāṣid al-sharī‘a*). The Qur’an describes Islamic law as “a teaching from [the] Lord . . . a healing for what is in [human] hearts, and guidance and mercy for the believers.”²⁴ According to Afghan scholar Mohammad Hashim Kamali, Islamic law provides healing, guidance, and mercy for mankind by serving three main purposes²⁵:

(1) Providing Moral Education

- The Qur’an and Sunna provide a moral education by promoting values such as honesty, sincerity, reliability, good manners, cooperation, and courage.
- Islam requires its followers to perform acts of prayer and devotion as a means of “purifying the mind and heart from corruption, selfishness, and over-indulgence in material pursuits.”²⁶

(2) Establishing Justice

- Islamic law attempts to establish justice by resolving disputes, punishing wrongdoers, and compensating those who are harmed.
- Islamic law also attempts to create a just society—a community in which people treat one another fairly and equitably, and where the poor, sick, orphaned, and elderly are cared for.

(3) Promoting the Public Interest (*Maṣlaḥa*)

- Islamic law aims at promoting the public interest by safeguarding life and property, promoting education and family relationships, and preventing unfair business practices.
- Islamic law is guided by the principle that harm should be eliminated when possible. For example, Islamic laws about fasting are relaxed with respect to travelers and sick people to avoid causing harm.

Compare and contrast these objectives of Islamic law with the two general objectives of law (promoting order and promoting justice) that we discussed in Sections 1.2.1 and 1.2.2, above. What similarities and differences do you identify? In your opinion, what are the most important purposes of law?

2. LEGAL CONCEPTS AND THEORIES

2.1. Core Concepts and Terminology

Now that we have defined “law” and briefly considered its purpose in society, let’s turn our attention to some key legal concepts and terms that we will continue to use throughout the rest of this book. These

²⁴ Qur’an 10:57, trans. M. A. S. Abdel Haleem (New York : Oxford University Press, 2004).

²⁵ Mohammad Hashim Kamali, *Shari‘ah Law: An Introduction* (Oxford, UK: Oneworld Publications, 2008), 27. The discussion in this comparative study box is drawn from Kamali, *supra*, at 27-37.

²⁶ *Id.* at 28.

terms appear frequently in Afghan law, so it is impossible to understand the law without learning them. A person who misuses these terms will probably cause confusion or error, and at the very least will send the message that he does not know the law very well. Therefore, it is important to become familiar with these terms and to learn to use them properly.

2.1.1. Rights and Obligations

Two of the most basic legal concepts are rights and obligations. A **right** is something that a person is legally entitled to have. As an example, consider the following provisions of the Constitution:

2004 Constitution of Afghanistan

Article 23: Life is the gift of God as well as the natural right of human beings. No one shall be deprived of this except by legal provision.

Article 24: Liberty is the natural right of human beings. This right has no limits unless affecting others' freedoms as well as the public interest, which shall be regulated by law. . . .

Life and liberty are examples of human rights. Normally, every human being possesses these rights. However, as both of the above articles suggest, a person may lose one of these rights if he engages in certain conduct that is prohibited by law. For example, a person who commits premeditated murder loses his right to life—he is subject to the death penalty.²⁷ A person who commits a less grave crime, such as cutting down a tree in a public park, may temporarily lose his right to liberty—he is subject to short imprisonment of not more than three months.²⁸

Property rights are another type of right. These rights are associated with ownership. For example, imagine that you own a bicycle. You have the right to possess it; no one else is allowed to use it without your permission. You have the right to use it. You can ride it to university, if you wish. You also have the right to modify it. For example, you could paint it a different color. You even have the right to sell it—but if you do, you will agree to hand over all of your rights of ownership to the person who buys it from you.

By contrast, an **obligation** is something that a person is legally required to do or not do. Obligations can be thought of as the counterpart to rights. That is, when one person has an obligation, another person usually has a corresponding right. Consider the following provisions from the Civil Code of Afghanistan. What rights and obligations do they create?

Civil Code of Afghanistan

Article 256: A father shall have to provide all kinds of alimony [that is, that is, food, clothing, residence, and appropriate medical treatment] of a minor son until he acquires ability to work and those of a minor daughter until her age of marriage.

Article 257: A father shall have to provide alimony [that is, that is, food, clothing, residence, and appropriate medical treatment] of adult son who is not able to work and is poor and also that of adult daughter who is poor until her marriage.

²⁷ Penal Code, Article 395.

²⁸ *Id.*, Article 345.

Under Article 256, a father has an obligation to provide his children with the basic necessities of life until they become old enough to provide for themselves. This means that the children have a right to receive these necessities from their father. Similarly, under Article 257, the father has an obligation to continue providing the basic necessities of life for an adult son who is unable to work or an adult daughter who is not yet married. This means that these adult children have a right to continue receiving such necessities from their father.

In the previous example, the father has a special obligation to his children because he is related to them by blood. A second way that rights and obligations are created is through a contract—an agreement between two or more people. Let’s again imagine that you own a bike. You agree to lend your bike to Faqir for two weeks, and in exchange he agrees to pay you 300 afghanis. You have temporarily given up your right to use your bike, and Faqir has gained a temporary right to use your bike. However, you have also gained the right to receive 300 afghanis, and Faqir has taken on an obligation to pay you that amount.

A third way that an obligation can be created is when one person commits a civil offense against another person. This time, imagine that you are riding your bike down the road, and Parviz recklessly drives into you on his scooter. You suffer a broken arm, and your bike is badly damaged. By behaving recklessly, Parviz has incurred an obligation to you: he must pay for your medical care and bike repair.²⁹

In most cases, people voluntarily fulfill their obligations toward one another. When they do not, however, a person may file a claim in court demanding a right from another person.³⁰ Hopefully, Parviz will voluntarily agree to pay for your medical care and bike repair. If he does not, however, and you file a legal claim asserting your right, the court should force him to fulfill his obligation toward you.

2.1.2. Natural and Legal Persons

The law distinguishes between two types of persons. A **natural person** is a human being. A **legal person** is an abstract, non-physical entity that can have rights and obligations. Consider the following definition of legal personhood from the Civil Code:

Civil Code of Afghanistan

Article 337: A legal person is an abstract personality that has legal capacity and is established, for certain objectives, in the form of organization, company or association.

Article 341: A legal person shall have all those rights that are determined by law, except those rights that are exclusive to real [that is, natural] persons.

Article 342(1): A legal person shall have the following characteristics:

- 1 – Independent financial rights and obligations
- 2 – Legal capacity that is stipulated in its charter and that the law has recognized as permissible
- 3 – The right to file a lawsuit or defend against claims
- 4 – Independent domicile, that is, the place wherein its central administration is located

Business corporations are legal persons. As an example, let’s think about the Coca-Cola Corporation. Although it is not a natural person, it has a variety of rights. For one thing, it has property rights: if someone damages a Coca-Cola factory, the corporation has the right to receive monetary compensation.

²⁹ Civil Code, Article 776 (“If harm is inflicted on another due to mistake or fault, the perpetrator shall be obligated to pay compensation.”).

³⁰ See Civil Procedure Code, Article 5 (“A claim is demanding a right from another in front of a court of law.”)

Like other persons, Coca-Cola has the ability to bring lawsuits to demand its rights. The company also has various obligations. By entering into contracts with its employees, Coca-Cola takes on an obligation to pay them wages in exchange for their work. Other laws impose additional obligations on Coca-Cola: the Labor Code requires it to give its employees adequate breaks and holidays, and the Tax Code requires it to pay taxes on its corporate profits.

As this example shows, abstract entities such as businesses function as persons in the legal system. In many cases, they have the same rights and obligations as natural persons, but sometimes they are treated differently. For example, legal persons are taxed at a rate of 20% in Afghanistan,³¹ but natural persons who earn between 12,501 and 100,000 afghanis per month are taxed at a rate of only 10% (plus a fixed sum of 150 afghanis).³² And as Article 341 suggests, certain rights belong only to natural persons. The rights to life and liberty are obvious examples. Since a corporation is not physically alive, it cannot have a natural or God-given right to life.

2.1.3. Rules and Standards

In Section 1.1.2, we explored one way of categorizing the law: the distinction between substantive law and procedural law. Another way of classifying laws is to distinguish rules from standards. A legal **rule** draws a clear distinction between conduct that is prohibited and conduct that is not prohibited. As an example, consider a law stating: “no one may drive a car faster than 90 km/hour.” It is easy to tell whether or not a person has violated this rule. If he was driving 92 km/hour, he did; but if he was driving only 88 km/hour, he did not. Once his actual speed is known, it is obvious whether or not he broke the law.

By contrast, a legal **standard** is less clear and leaves room for debate about whether or not a certain type of conduct is prohibited. For example, consider a law that states, “No one may drive a car dangerously fast.” It can be hard to tell what is dangerous, and a judge deciding the question will consider a variety of factors: Was the person an experienced driver? Was the person driving on a paved road? Was the weather good? Were there lots of other cars on the road? Were there pedestrians in the area? You can imagine that for an experienced driver using a paved highway on a clear day with few other cars around, it would not be dangerous to drive 120 km/hour. At the same time, for an inexperienced driver driving through a crowded street market on a snowy day, it would be dangerous to drive even 40 km/hour.

Legal rules and legal standards have different strengths. Rules provide people with certainty about whether a particular action is legal, and are easy—and therefore cheap—for a judge to apply. However, rules often outlaw some conduct that is acceptable while failing to outlaw some that is unacceptable. For example, under the rigid 90 km/hour speed limit in the above example, the person going 120 km/hour can be punished for speeding, but the person going 40 km/hour cannot—even though the second person is much more likely to harm others. By comparison, standards may leave people confused about whether a particular action is legal. It is more difficult for a judge to tell whether or not a standard has been violated, which means that it takes more time and money for him to reach a decision. However, standards tend to more accurately prohibit unacceptable conduct without prohibiting more conduct than necessary.

Application Exercises

(1) Tarana gives Zuhail ten blankets to sell at the market, and Zuhail agrees to give Tarana 80% of the money she receives for the blankets. What rights does this agreement create, and to whom do they belong? What obligations does it create, and to whom do they belong?

³¹ Income Tax Law, Article 4, Section 1.

³² *Id.*

(2) Consider Article 44 of the Constitution: “The state shall devise and implement effective programs to create and foster balanced education for women, improve education of nomads as well as eliminate illiteracy in the country.” What rights does this provision create, and to whom do they belong? What obligations does it create, and to whom do they belong?

(3) Give three examples of natural persons and three examples of legal persons.

(4) Can you explain why it makes sense to grant legal personhood to certain entities? Are there any rights that you think should belong to natural persons, but not to legal persons?

(5) Classify each of the following laws as a “rule” or a “standard”:

- “No individual shall be elected for more than two terms as President.”³³
- “A person in a city, town, or village washing himself in a manner repugnant to prudence [that is, modesty] . . . shall be imprisoned for a period not exceeding ten days”³⁴
- “If a contract is concluded . . . under unjust conditions, a court may modify its conditions or [invalidate it] as justice requires.”³⁵
- “A demand for exclusion/rejection of a judge must be submitted to the court in a written and documented form within three days prior to the commencement of proceedings of the case.”³⁶
- “On important national, political, social as well as economic issues the President can call for a referendum of the people of Afghanistan.”³⁷

(6) Imagine that you are a lawmaker. In recent weeks, several people walking in a large public park have been injured by people riding bicycles and motorcycles on the path at speeds of 30-40 kilometers per hour. Address this problem by drafting two laws—one rule and one standard—that regulate vehicle traffic in the park. Each law should be no more than three sentences in length.

Share the laws that you drafted with a classmate, and discuss the strengths and weaknesses of each suggested approach. Will your rule eliminate all undesirable conduct without banning any harmless conduct? Will your standard provide people with clear notice of exactly what is allowed and what is forbidden?

2.2. Theories of Law

Where does law come from? How is it created? Philosophers have wrestled with these questions throughout human history and developed many competing theories. In this subsection, we will briefly examine three of the most influential responses to these questions. Each of these theories can be connected to one or more of the major world legal traditions that have influenced the development of Afghan law—a topic that we will explore in more detail in Section 3, below.

2.2.1. Divine Revelation

Since ancient times, many people have believed that God is the source of the law. In the Jewish tradition, for example, God is said to have given the law to the prophet Moses (PBUH) on Mount Sinai. Similarly, the Hindu tradition contains numerous ancient writings that are said to contain divine decrees. Later on in

³³ Constitution of Afghanistan, Article 62.

³⁴ Penal Code, Article 511.

³⁵ Civil Code, Article 698, Section 1.

³⁶ Civil Procedure Code, Article 71.

³⁷ Constitution of Afghanistan, Article 65.

this chapter, we will examine the Islamic legal tradition, which is rooted in the divinely revealed text of the Qur'an and the ideal example of the Prophet Muḥammad (PBUH).

2.2.2. Natural Law Theory

Natural law theory contends that law can be discovered by reasoning from human nature. This theory is most closely associated with the Roman scholar Cicero and the medieval Catholic scholar Thomas Aquinas. According to Aquinas, humans are bound by the natural law because we are rational beings. Reason enables us to identify the content of the natural law—fixed moral norms that apply to all people at all times and places. For example, we can reason that life, knowledge, and society are good; and that lying, taking innocent life, and committing adultery are bad. Identifying and following the natural law will further the common good, allowing humans to flourish in community with one another. As we saw in the excerpts from the Constitution in Section 2.1.1, natural law theory is one source of the modern concept of human rights—the idea that all humans, by nature, are entitled to certain rights such as life and liberty.

2.2.3. Legal Positivism

Positive law is law that has been created by a legitimate authority of some kind, such as a state government. Legal positivism is the view that “all positive laws are valid law, and there is no valid law outside positive law.”³⁸ Legal positivists only recognize man-made law; they reject the idea of divinely revealed law and natural law. Unlike natural law theorists, who believe that a law is invalid if it violates fundamental moral principles, positivists do not believe that law has its basis in morality.

Discussion Questions

Which of these three theories makes the most sense to you? Do you have to accept only one of the theories, or is it possible that some law comes from God, some law can be understood through reason, and some law is created by the state? Do you see one or more of these theories reflected in Afghan law?

3. LEGAL TRADITIONS

As you know, the law varies from place to place. Throughout much of human history, individual tribes and ethnic groups developed their own **customary law**: traditional practices or modes of conduct that were followed from generation to generation within a particular community and eventually became mandatory within that community.³⁹ The Pashtunwali, with its emphasis on honor (nang), hospitality (melmastia), and observing gender boundaries (namus and purdah), is a good example of customary law.

In the modern world, the nation-state “has tended to become the unique source of law.”⁴⁰ In most nation-states, customary law has been almost entirely replaced by laws created and enforced by state governments. Some customary laws are adopted and incorporated into these state laws. Other customary

³⁸ Jaap Hage, “Philosophy of Law,” in *Introduction to Law*, ed. Jaap Hage and Bram Akkermans (Switzerland: Springer International Publishing, 2014), 318.

³⁹ The legal philosopher Lon Fuller described customary law as law that “is not declared or enacted, but grows or develops through time. The date when it first came into full effect can usually be assigned only within broad limits. Though we may be able to describe in general the class of persons among whom the custom has come to prevail as a standard of conduct, it has no definite author; there is no person or defined human agency we can praise or blame for its being good or bad. There is no authoritative verbal declaration of the terms of the custom; it expresses itself not in a succession of words, but in a course of conduct.” Lon L. Fuller, *Anatomy of the Law* (1968), 71.

⁴⁰ John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition* (Stanford, CA: Stanford Univ. Press, 2007), 21.

laws become social norms that are informally enforced in social interactions. And still other customary laws die out altogether.

Each nation-state has its own **legal system**—a set of laws and institutions that it uses to regulate human activity within its borders.⁴¹ Since there are about 200 nation-states in the world, and some of them include multiple legal systems (for example, each of the fifty states in the U.S. has its own legal system), there are probably more than 350 legal systems in the world today.

A legal system must be distinguished from a **legal tradition**—a set of historically rooted attitudes about what the law is, where it comes from, how legal institutions should be structured and operate, and what role the law plays in society. The hundreds of legal systems in the world today reflect just a handful of dominant legal traditions, each of which spread through imperial conquest and political influence. For example, the common law tradition originated in England and was then exported to British colonies such as the United States, Australia, and India. Thus, the legal systems of Britain, the United States, Australia, and India are all said to be part of the common law tradition.

In this section, we will examine three legal traditions that have had a major influence on the laws of Afghanistan. First, we will consider the Islamic legal tradition, which arrived in Afghanistan via the Islamic conquest of the seventh through ninth centuries and has been an important source of Afghan law ever since. Next, we will consider the Romano-Germanic legal tradition, which dominates Continental Europe. This is the tradition that inspired the constitutions and statutory codes adopted in Afghanistan during the twentieth century. Finally, we will consider the common law tradition, which has increasingly influenced certain aspects of Afghan law since the U.S.-led military intervention in 2001.

3.1. Islamic Law

Ninety-nine percent of Afghans identify as Muslim, so it is no surprise that Islamic law has a major influence on the Afghan legal system. The Constitution states that “[n]o law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.”⁴² It also instructs Afghan courts to apply the jurisprudence of the Hanafi school to cases that are not governed by another constitutional or statutory provision, and allows courts to “apply Shi‘ī jurisprudence in cases involving personal matters of followers of the Shi‘ī sect.”⁴³

This subsection contains a brief introduction to the history and key concepts of the Islamic legal tradition. Chapter Three will explain in more detail the role that Islamic law plays in the modern Afghan legal system.

3.1.1. Origins and History of Islamic Law

The Islamic legal tradition is rooted in the moral commands found in the Qur’an and the teachings and example of the Prophet Muḥammad (PBUH).⁴⁴ Toward the end of his life, Muḥammad (PBUH) succeeded in uniting many of the Arab tribes and creating a small state in the Arabian Peninsula that he governed according to the revelations of Islam. After Muḥammad (PBUH) died in 632 C.E., his successors—the four rightly guided caliphs—dramatically expanded the Islamic state through military conquests in Egypt, Syria, Iraq, and Iran.

⁴¹ John W. Head, *Great Legal Traditions: Civil law, common law, and Chinese law in historical and operational perspective* (Durham, NC: Carolina Academic Press, 2011), 6.

⁴² Constitution of Afghanistan, Article 3.

⁴³ *Id.*, Articles 130-131.

⁴⁴ Section 3.1.1 is based on Wael B. Hallaq, *Origins and Evolution of Islamic Law* (New York: Cambridge University Press, 2005), 29-101.

During this early period, the caliphs acted not only as military and political leaders, but also as judges. In this role, they enforced commands from the Qur'an, such as the prohibitions on alcohol, adultery, and theft. As the empire expanded, the caliphs saw a need to instill Islamic teachings and values in the communities of Muslim soldiers in far-off cities like Damascus (Syria) and Basra (Iraq). The second caliph, 'Umar ibn al-Khaṭṭāb, appointed judges (*quḍḍāt*, singular *qāḍī*) to govern these distant Muslim communities. In addition to their judicial function, these early judges wielded police power and had administrative duties such as tax collection. To resolve disputes, they relied on the Qur'an, decrees by the caliphs, established Arab customs, their knowledge of the Prophet's example, and their own personal reasoning (*ra'y*). The early Islamic judges did not resolve disputes among the conquered, non-Muslim groups, however, who were mostly permitted to follow their own legal customs.

As time passed and many people across the empire became Muslim, Islamic societies became more complex. In response, the role of Islamic judges became more specialized. Judges stopped acting as tax collectors and police chiefs, and instead focused on the increasingly important business of the court. By the early ninth century, the Islamic empire had created a centralized judicial hierarchy. The caliph appointed (and paid) provincial judges, who then appointed deputy judges as needed. These judges' responsibility was to decide cases and hand down verdicts, but they also managed charitable trusts, supervised orphans, kept important records (relating to marriage, divorce, and inheritance, for example), and served various other public and religious functions. All of this required a staff to maintain order, deal with witnesses, and record the transactions of the court.

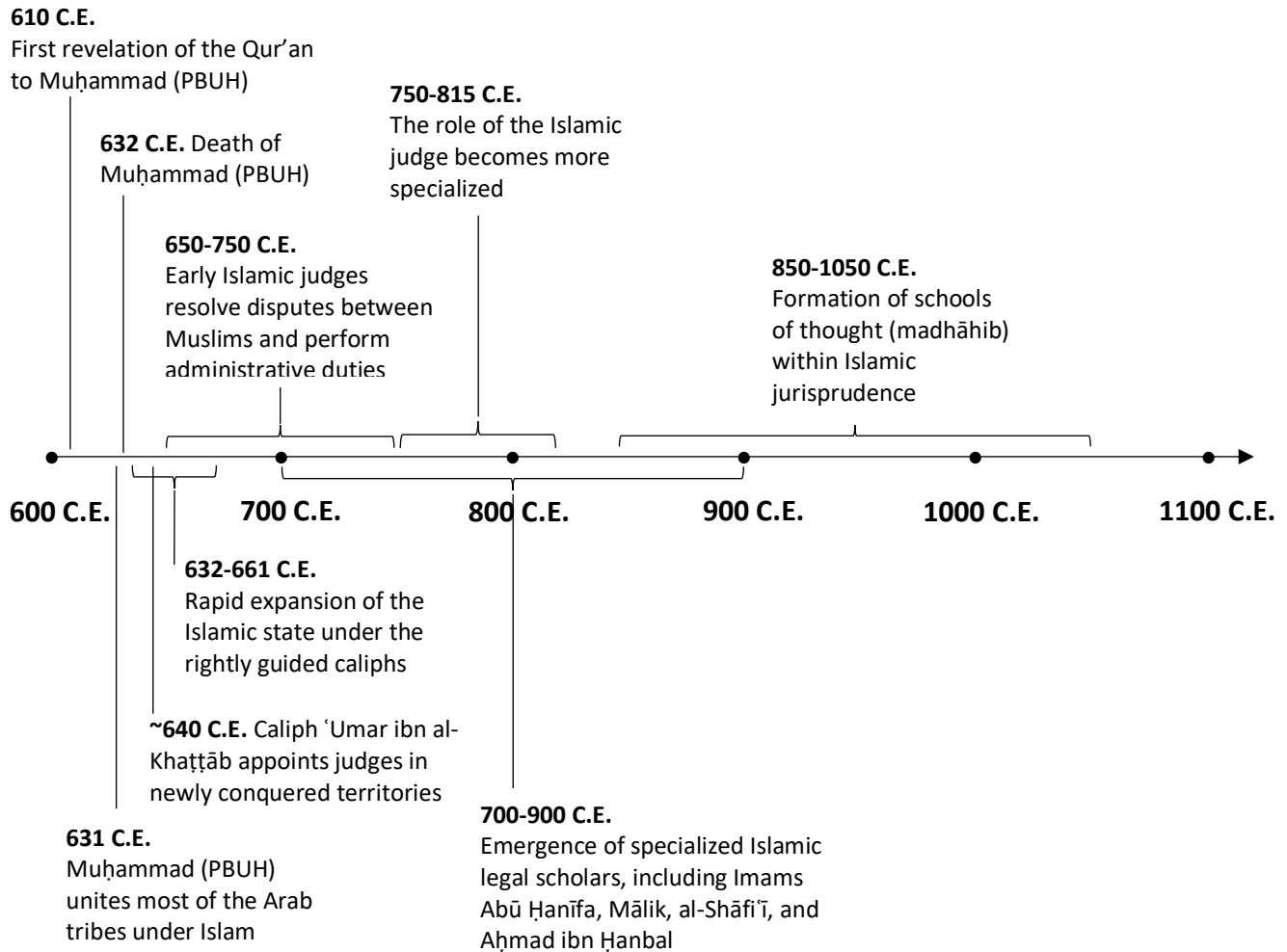
As Islamic societies became more complex and the judiciary became more structured, a class of specialized Islamic legal scholars emerged. These scholars studied and taught the Qur'an, and collected and distributed reports of the sayings and deeds of the Prophet Muḥammad (PHUB). They devoted themselves to the study of Islamic jurisprudence, striving to apply the Qur'an and the Prophet's example to the specific legal questions that confronted them.

During the eighth and ninth centuries C.E., groups of Islamic judges and students of the law began to adopt the teachings of some of the foremost Islamic legal scholars. By about the eleventh century, these groups had developed into organized jurisprudential schools (**madhāhib**, sing. **madhhab**) of Islamic legal scholarship, each bearing the name of a famous scholar from the eighth or ninth century. At one point, there were at least nineteen of these jurisprudential schools.⁴⁵ Today, five major schools survive, four of them Sunnī and one Shi'ī:

- (1) The Ḥanafī school: Named for Imam Abū Ḥanīfa (702-767 C.E.), who was born in Iraq to Afghan parents, this school is primarily followed in Afghanistan and other central Asian countries, as well as India, Pakistan, Iraq, Syria, and Turkey.
- (2) The Mālīkī school: Named for Imam Mālīk ibn Anas (717-801 C.E.), this school is known for giving special weight to the customs and practices of the early Muslims from the Arabian city of Medīna, where Imam Mālīk was born and spent most of his life. Today, this is the dominant school throughout North Africa.
- (3) The Shāfi'ī school: Named for Imam Muḥammad Idrīs al-Shāfi'ī (769-820 C.E.), who was a student of Imam Mālīk. The Shāfi'ī school is followed in Egypt, East Africa, and Indonesia.
- (4) The Ḥanbalī school: Named for Imam Aḥmad ibn Ḥanbal (778-855 C.E.), this school is primarily followed in Saudi Arabia.
- (5) The Ja'fari school: This is the primary Shi'ī school, and is named for the fifth and sixth Shi'ī imams. It is followed by Shi'ī Muslims, who are concentrated in Iran, Iraq, and Lebanon.

⁴⁵ Based on Irshad Abdal-Haqq, "Islamic Law: An Overview of Its Origins and Elements," in *Understanding Islamic Law*, ed. Hisham M. Ramadan (Oxford, UK: Altamira Press, 2006), 24.

Timeline: Origins of Islamic Law



3.1.2. Islamic Legal Theory

In the Islamic legal tradition, the term **sharī'a** refers to God's law. In Arabic, "sharī'a" literally means "the path leading to water."⁴⁶ In the context of the Arabian desert, where Islam was born, this meant the way to the source of life. Sharī'a is closely associated with divine revelation. It is revealed through two sources: (1) the text of the Qur'an; and (2) the **Sunna**, which is the life, deeds, and sayings of the Prophet Muḥammad (PBUH).⁴⁷ Muslims believe that the sharī'a is perfect, eternal, and unchangeable.

According to Afghan scholar Mohammad Hashim Kamali, the majority of the Qur'an is concerned not with law, but with "moral and religious themes, devotional matters, man and the universe, the hereafter, and even the history of . . . bygone events and parables."⁴⁸ About five percent of the verses in the Qur'an, however, are concerned with legal matters. Some even contain specific legal commands. For example, the Qur'an states that "divorced women must wait for three monthly periods before remarrying."⁴⁹ This

⁴⁶ Abdal-Haqq, *supra* note 45, at 4.

⁴⁷ Kamali, *supra* note 25, at 19.

⁴⁸ *Id.*

⁴⁹ Qur'an 2:228, trans. M. A. S. Abdel Haleem (New York : Oxford University Press, 2004).

Qur'anic command is reflected in the Civil Code of Afghanistan, which requires a divorced woman to wait for three menstrual cycles before getting remarried.⁵⁰

Other legal verses in the Qur'an are less specific. When the Qur'an provides only a general principle, the Sunna may provide clarification. Much of the Sunna is known through **ḥadīth**, which are accounts of Prophetic sayings that have been transmitted from generation to generation. The Sunna is also known through descriptions of things Muḥammad (PBUH) did, things he saw and tacitly approved, and his physical attributes and personality.

As an example, consider Qur'an 2:276, which states, "God has allowed trade but forbidden usury (riba)."⁵¹ This verse generally prohibits an unjust moneylending practice called usury, but does not provide a detailed explanation of exactly what kinds of transactions this includes. In such a case, scholars of Islamic law look to the Sunna for further guidance. There are many ḥadīth that provide more detail about what sorts of transactions constitute usury.⁵² For example, one ḥadīth reports that Muḥammad (PBUH) said, "Gold is to be paid for by gold, silver by silver, wheat by wheat, barley by barley, dates by dates, salt by salt, like by like, payment being made hand to hand. He who made an addition to it, or asked for an addition, in fact dealt in usury. The receiver and the giver are equally guilty."⁵³

The Sunna not only provides additional detail about general legal principles found in the Qur'an, but also contains legal rules on issues that are not directly addressed in the Qur'an. Nevertheless, many legal questions arise that neither the Qur'an nor the Sunna explicitly resolve. In such cases, Muslim legal scholars engage in **ijtihād**, a process of striving to derive specific legal rules from the Qur'an and Sunna. Over time, Muslim scholars engaged in this interpretive project have developed a massive body of Islamic jurisprudence known as **fiqh**. "Fiqh" can be translated "true understanding."⁵⁴ Fiqh represents human attempts to understand sharī'a and apply it to situations that are not explicitly addressed by the Qur'an and Sunna. Thus, unlike divinely revealed sharī'a, which Muslims believe to be perfect and unchanging, fiqh is developed by human beings, which means it is imperfect and can vary across time and place.

All five major schools of Islamic jurisprudence agree that the Qur'an and Sunna are the most authoritative sources of Islamic law. When the Qur'an and Sunna do not unambiguously resolve a legal question, however, scholars from the various schools employ various other forms of legal reasoning.

All four of the Sunnī schools recognize the consensus (ijmā') of the Muslim community as a third source of Islamic law. The origin of this principle is a ḥadīth in which the Prophet said, "My community will never agree upon an error."⁵⁵ Consider the doctrine of abrogation (naskh), which holds that certain Qur'anic verses are superseded and replaced by other Qur'anic verses that were revealed later on. According to Afghan scholar Mohammad Hashim Kamali, this doctrine has been conclusively established by a consensus of the Islamic community.⁵⁶ Once established, such a consensus cannot be invalidated by a later scholar who attempts to disagree with it.

All four of the Sunnī schools also recognize reasoning by analogy (qiyās) as an additional means of deriving Islamic legal principles from the Qur'an and Sunna. For example, the Qur'an explicitly forbids Muslims from drinking wine made from grapes.⁵⁷ Confronted with the question of whether it is

⁵⁰ Civil Code, Articles 198-211.

⁵¹ Qur'an 2:276, trans. M. A. S. Abdel Haleem (New York : Oxford University Press, 2004).

⁵² Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge, UK: Islamic Texts Society, 2003), 129.

⁵³ *Sahih Muslim*, trans. by Abdul Hamid Siddiqui, Book 010, Number 3854.

⁵⁴ Abdal-Haqq, *supra* note 46, at 6.

⁵⁵ Marie Bernand, "Ijmā'," in *Encyclopaedia of Islam, Second Edition*, ed. P. Bearman et al. (Leiden: Brill, 2012).

⁵⁶ Mohammad Hashim Kamali, *supra* note 52, at 129.

⁵⁷ This example is borrowed from Hallaq, *supra* note 44, at 21.

permissible for a Muslim to drink wine made from dates, an Islamic legal scholar might consider the rationale for the prohibition on grape-wine—the potential for intoxication. Since this rationale equally applies to date-wine, the scholar would conclude by analogical reasoning that Islamic law also prohibits date-wine. While all four schools recognize this type of reasoning, the Shāfi‘ī and Ḥanbali schools consider it a last resort, and many scholars view it as unreliable because it relies on a human reason rather than divine revelation alone.

Beyond these four sources of Islamic law, the different schools of thought diverge. The Ḥanafī school also recognizes a method of reasoning called *istiḥsān*, which allows the legal scholar to use his own judgment to choose what he views as the most suitable rule. The Mālīki school has a somewhat similar method called *istiṣlāḥ*, which involves considering what rule would best promote human welfare. The Shāfi‘ī and Ḥanbali schools reject these methods, however, believing that they give fallible human judges too much discretion.

The Ḥanafī and Mālīki schools also recognize local customary law (*‘urf*). After the Islamic conquest, a wide variety of people groups across North Africa, the Middle East, and Central Asia gradually became Muslim. Naturally, these groups had their own longstanding social and cultural practices, many of which were not easily discarded. Some Islamic legal scholars rejected all such practices as un-Islamic, but other scholars accommodated local customs on two conditions. First, the local custom could not violate any definitive provision of Islam. Polytheism, for example, is strictly forbidden by the Qur’an, so local practices of idol-worship could not be tolerated. Second, the local custom had to represent a longstanding, widespread tradition in order to be recognized by Islamic law.

Finally, you should be aware that Islamic law categorizes all human behavior into five classes:⁵⁸

- (1) Prohibited—acts that are punished if committed. Example: stealing.
- (2) Disapproved—acts that are not punished, but are seen as undesirable and may decrease one’s reward in the afterlife. Example: a husband unilaterally divorcing his wife.
- (3) Neutral—acts that merit neither punishment nor reward. Example: eating an apple.
- (4) Recommended—acts that are seen as praiseworthy and may be rewarded in the afterlife. Example: giving money to the poor.
- (5) Mandatory—acts that are punished if *not* performed. Example: paying monetary debts.

Discussion Question

Think back to the distinction between law and morality that we explored in Section 1.1.1. Which of the five classes of action correspond to our definition of law? Which of the given classes correspond to morality, as we defined it? Where might social norms fit in?

3.2. Romano-Germanic Law

Today, most European countries—with the notable exception of England, which is discussed below in Part 2.3—fall into the Romano-Germanic legal tradition, also known as the civil law tradition. This legal tradition began to influence Afghan law during the early 20th century. Amir Amanullah, who ruled Afghanistan from 1919-1929, embarked on an ambitious program of social, political, and legal modernization, and enacted Afghanistan’s first constitution in 1923.⁵⁹ This constitution was influenced by the constitutions of France and Turkey, two countries from the Romano-Germanic tradition.

⁵⁸ Hallaq, *supra* note 44, at 20.

⁵⁹ Thomas Barfield, *Afghanistan: A Cultural and Political History* (Princeton, NJ: Princeton Univ. Press, 2010) 182-83.

The influence of the Romano-Germanic tradition continued in the decades that followed, as the Afghan government adopted a series of legal **codes**—compilations of individual laws intended to comprehensively cover a particular topic. The major legal codes of Afghanistan, including the Commercial Code (1955), Penal Code (1976), Civil Code (1977), and Civil Procedure Code (1990), are rooted in the Romano-Germanic tradition.

This subsection contains a brief introduction to the history and key concepts of the Romano-Germanic tradition. Chapter Three will explain in more detail how the Romano-Germanic tradition has influenced the modern Afghan legal system.

3.2.1. Origins and History of Romano-Germanic Law

The Romano-Germanic tradition has its origins in ancient Rome.⁶⁰ Around 450 B.C.E., the common people of Rome demanded that their leaders prepare an authoritative written version of their customary law. A commission of ten men prepared this codification of the law, which was then engraved on twelve stone tablets (called the “Twelve Tables”) and displayed in a public place. Writing down the law informed the people of their rights and duties and gave them something to refer to when disputes arose.

Almost one thousand years later, in 530 C.E., the emperor Justinian created a commission of legal scholars to again codify the rules and reasoning of Roman law. This codification was known as the *Corpus Juris Civiles* (Body of Civil Law). Like the Twelve Tables, it was another attempt to clarify the law and present it in an orderly manner. Soon after this code was published, however, the Roman Empire fell apart, and European society returned to a more primitive state in which many people lived in rural communities where disputes were resolved by physical force, rather than law.

In approximately 1070 C.E., Italian scholars rediscovered the *Corpus Juris Civiles*. In 1140 C.E., an Italian monk named Gratian published a major codification of the law of the Catholic Church. The *Corpus Juris Civiles* and Gratian’s code were shared among universities in major European cities. Scholars studied them, commented on them, and adapted them to serve the needs of their communities. European merchants also created commercial codes to govern the buying and selling of goods during this period. Thus, cities across Europe developed and applied local versions of Roman law, mixed with Catholic law and commercial law, from about 1200 to 1700 C.E.

During the 1700s, modern nation-states began to emerge in Northern and Western Europe. The governments of these states began compiling and enacting codes of national law. After the French Revolution of 1789, for example, the French government worked to develop a single, comprehensive set of laws known as the French Civil Code. In March 1804, the Civil Code went into effect, bringing an unprecedented degree of uniformity to French law. The government decreed that it was to completely replace the various local interpretations of Roman law that had previously governed the French people.

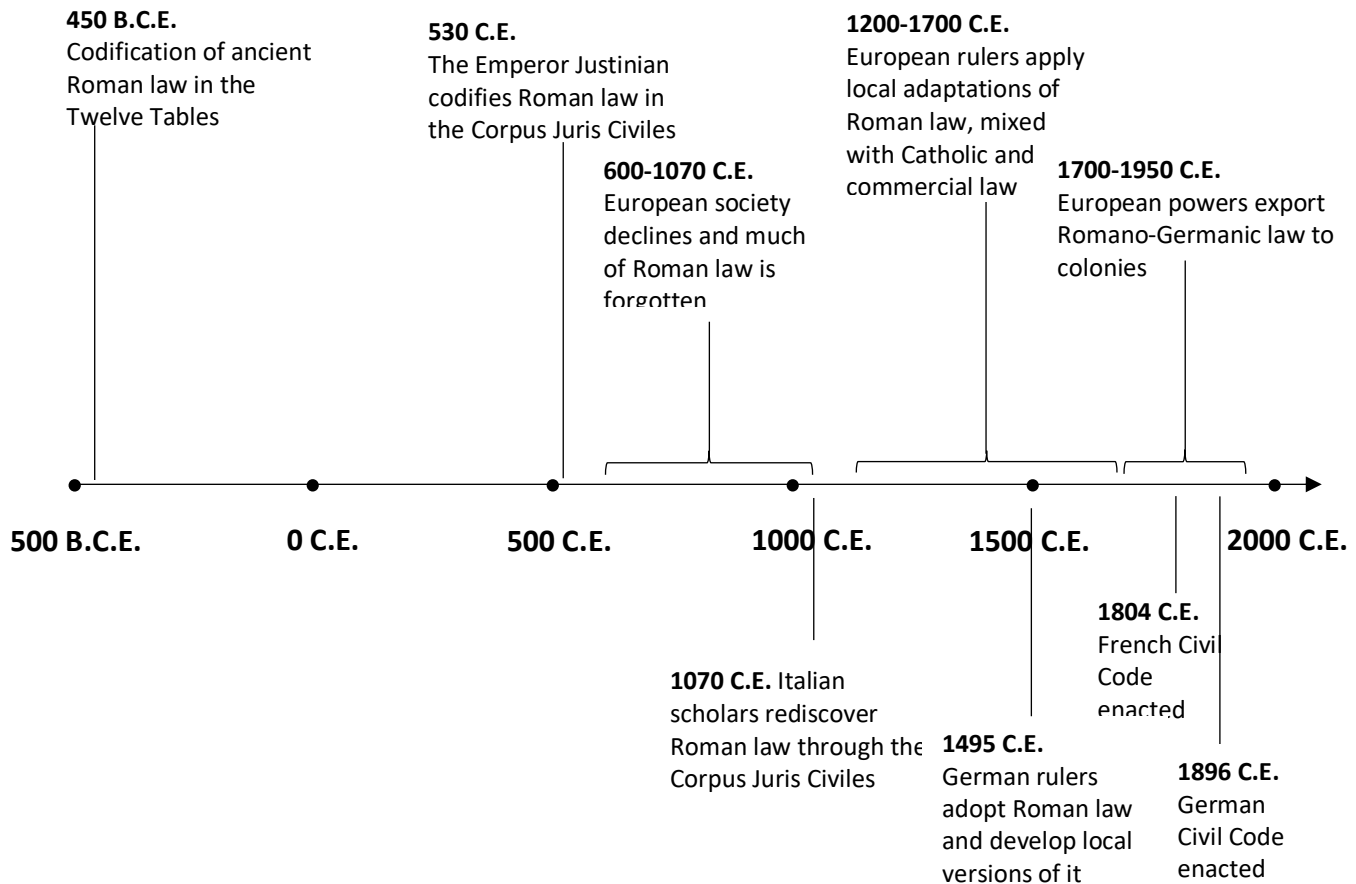
A similar process of codification took place in Germany in the late 1800s. Around 1500 C.E., the various lords who ruled different parts of modern-day Germany adopted Roman law and developed local versions of it. In 1871, these independent states were united into a single German nation by the ruler Otto von Bismarck. In 1896, the unified country enacted the German Civil Code, which codified German law as it had evolved from Roman law over the previous five hundred years.

Between 1500 and 1900, European powers such as France, Germany, the Netherlands, Portugal, and Spain conquered and colonized large portions of Africa, Asia, and South America. The colonial powers

⁶⁰ Sections 3.2.1 and 3.2.2 are based on John W. Head, *Great Legal Traditions: Civil law, common law, and Chinese law in historical and operational perspective* (Durham, NC: Carolina Academic Press, 2011), 41-109.

brought with them the Romano-Germanic legal tradition. The era of colonialism ended in the mid-1900s, by which point most former colonies had become independent states. However, as shown on the map at the beginning of this section, the Romano-Germanic legal tradition continues to influence many states that were once European colonies. And because of globalization, even non-European states that were never European colonies have adopted elements of the Romano-Germanic tradition.

Timeline: History of the Romano-Germanic Legal Tradition



3.2.2. Sources of Romano-Germanic Law

In the Romano-Germanic tradition, there are four primary sources of law: (1) a constitution; (2) statutes; (3) regulations; and (4) custom.⁶¹

A **constitution** is a set of fundamental rules that govern all other rules within a legal system and cannot be changed by regular legislative action. In general, a constitution lays out the structure of the government and describes the elements and roles of the legislature, executive leadership, government ministries, and court system. Most constitutions also express the fundamental values of the country and guarantee citizens certain rights. The 2004 Constitution of Afghanistan, for example, expresses the country's Islamic identity, prohibits persecution and torture, and guarantees freedom of expression.⁶²

A **statute** is a particular law (*qanūn*, not *huqūq*) that has been enacted by the government. In modern democracies, an elected legislature such as the Afghan National Assembly has the power to write,

⁶¹ See Merryman and Pérez-Perdomo, *supra* note 40, at 24-25.

⁶² Constitution of Afghanistan, Articles 1-3, 29, 34.

consider and enact—or reject—statutes. Statutory law is often considered the defining feature of the Romano-Germanic tradition because many legal systems within this tradition did not have constitutions until the nineteenth century.

A **regulation** is similar to a statute insofar as it is a legally binding rule, but it is enacted by some branch of government other than the legislature. In many countries, executive or administrative institutions can only act if the legislature authorizes them to do so. That is, the legislature would have to pass a law directing a government agency to pass some kind of regulation. For example, the legislature might instruct the Ministry of Health to reduce air pollution by enacting restrictions on the amount of smoke that power plants can emit. In Afghanistan, however, the executive branch has significant authority to issue decrees without prior approval from the National Assembly, provided that its decrees do not conflict with any other law.⁶³

Customary law, which we defined and introduced at the beginning of Section 2, above, makes up the final source of law in the Romano-Germanic tradition. The tradition only accepts customary law when (1) it does not contradict any constitutional provision, statute, or regulation; and (2) a person has relied on it, believing that it carries the force of law. Therefore, with a few exceptions, it is “routinely dismissed as of slight practical importance.”⁶⁴

Discussion Question

As we saw in Section 3.1.2, customary law is similarly disfavored in the Islamic legal tradition. Two of the Sunnī maddhabs consider it a source that may be resorted to only if the Qur’an and Sunna are silent on an issue and there is no consensus within the Muslim community, and the other two maddhabs reject it outright. Why do you think both the Islamic tradition and the Romano-Germanic tradition disfavor customary law?

3.2.3. Key Features of Romano-Germanic Law

Let’s briefly explore a few of the most distinctive features of Romano-Germanic law. As suggested above, the defining feature of the Romano-Germanic tradition is a statutory code. Examining three aspects of the ideal statutory code help can help us better understand the Romano-Germanic approach to law.

First, the code is meant to be comprehensive. This means that the code contains general principles meant to govern any situation that might arise. Because the code is comprehensive, judges play only a limited role in the Romano-Germanic tradition. Judges do not make the law; they merely implement the intent of the legislature by following the detailed instructions set forth in the code.

Second, the code is meant to be coherent. There should not be internal contradictions within the code, and it should be presented in a clear, logical, and systematic manner. This reflects the rationalism of the Enlightenment period (the seventeenth and eighteenth centuries), during which European scholars rediscovered and reinvented the ancient Roman tradition.⁶⁵

Third, the code is meant to be clear. The common person should be able to access the code and understand what the law requires and what it forbids. This can be understood as a reaction to the patchwork of local interpretations of Roman law that governed much of the European continent before the

⁶³ Constitution of Afghanistan, Article 76.

⁶⁴ Mary Ann Glendon et al., *Comparative Legal Traditions in a Nutshell* (St. Paul, MN : Thomson/West, 2008), 131.

⁶⁵ Martin Vranken, *Fundamentals of European Civil Law* (Sydney: Federation Press, 2010) 41.

codification projects of the late eighteenth and nineteenth century. The project of codification sought to correct the prior laws' lack of uniformity and clarity.

Another key feature of the Romano-Germanic tradition is legal positivism, an approach that we briefly defined Section 2.2.3 of this chapter. The democratic modern nation-state claims to derive its authority from its people: by electing representatives who make the state's law, the people consent to be governed by that law. Such positivism represents a radical break with the ancient idea that the law is divinely revealed or inspired.

Finally, the Romano-Germanic codes tend to represent a radical break with the law that went before them. When the Roman Emperor Justinian created the *Corpus Juris Civiles*, he attempted to abolish all prior law. Similarly, the French Civil Code stated that it superseded the various local laws that predated it. This self-conscious break with the past sharply contrasts with the Islamic legal tradition, which highly values continuity with past scholars because they stand in closer proximity to the Prophet and his companions. Indeed, the Islamic tradition views any innovation (*bid'a*) that is contrary to the Qur'an and Sunna as practically heretical. The common law tradition, too, values continuity with the past, as we will see in the following section.

3.3. Common Law

Historically, the common law tradition has had much less influence on the law of Afghanistan than the Islamic and Romano-Germanic traditions have had. The Afghan legal system is best understood as a mix of customary law, Islamic law, and Romano-Germanic law—*not* common law. Nevertheless, there are three reasons for including a subsection on the common law tradition in this book.

First, as we will discuss further below, the past two centuries have seen an increasing convergence between the common law and Romano-Germanic traditions. Thus, the main source of law in the common law tradition—*caselaw*—is now considered a type of secondary authority in some Romano-Germanic legal systems. Second, particularly since the U.S.-led invasion of Afghanistan in 2001, lawyers from common law countries such as the United Kingdom and the United States often help to draft Afghan laws and offer trainings and workshops for Afghan lawyers. And third, Afghan lawyers who spend time studying abroad in common law jurisdictions learn common law forms of reasoning, writing, and argumentation and bring them back to Afghanistan.

3.3.1. Origins and History of the Common Law

The common law tradition has its origins in medieval England.⁶⁶ England is an island, separated from the European continent by the English Channel. Although the Romans conquered England and occupied it from the middle of the first century C.E. until the beginning of the fifth century, Roman law never took hold in England the way it did in mainland Europe. Roman rule of England ended in approximately 410 C.E. and was followed by the Anglo-Saxon period, which lasted until the eleventh century. During the Anglo-Saxon period, England was divided among various Germanic tribes. England had no central government during this time, and various local and county courts administered their own forms of customary law.

The Norman conquest of England in C.E. 1066 dramatically altered the political and legal situation in England. Duke William of Normandy took control of England and declared that all land in England

⁶⁶ Section 3.3.1 is based on René David and John E.C. Brierly, *Major Legal Systems in the World Today* (London: Stevens & Sons, 1985), 310-379.

belonged to the king, and that all law emanated from the king.⁶⁷ The second of these declarations is the origin of the “common law”: William and his successors claimed that the entire kingdom—that is, all of England—was governed by a shared (common) law.

Immediately following the Norman conquest, local courts throughout England continued to resolve nearly all disputes by applying local customary law. But the English kings, or their representatives, sometimes traveled throughout the country resolving disputes in the name of the king’s justice. Before long, royal courts that applied the “common law” were established at Westminster. Between the twelfth and fourteenth centuries, these royal courts gradually expanded their power.⁶⁸ This led to eventual disappearance of the various types of local courts in which lords and barons had applied local customary law.

However, there were two major problems with these royal common law courts. First, they accepted only certain types of disputes and used extremely complex procedures. This meant that some individuals who wanted to bring a lawsuit were not able to access the courts. Second, the common law courts could only grant monetary compensation. They lacked the power to issue an **injunction**—a decree requiring or forbidding a party to perform a particular action. But monetary relief is not the desired remedy in some cases. For example, if you brought a lawsuit against a person who was spreading lies about you, you probably wouldn’t ask just for money. Your main request would be for the court to forbid that person from continuing to spread those lies.

By the fourteenth century, disappointed litigants had found a solution to these problems: they could apply directly to the king, who had independent power to grant their requests. The king was able to hear any type of dispute and grant any type of relief, including an injunction. Appeals to the king normally passed through a member of the royal household called a chancellor. During the fifteenth century, the practice of appealing to the king developed into a separate court system in which the chancellor functioned as a mostly autonomous judge who acted in the name of the king.

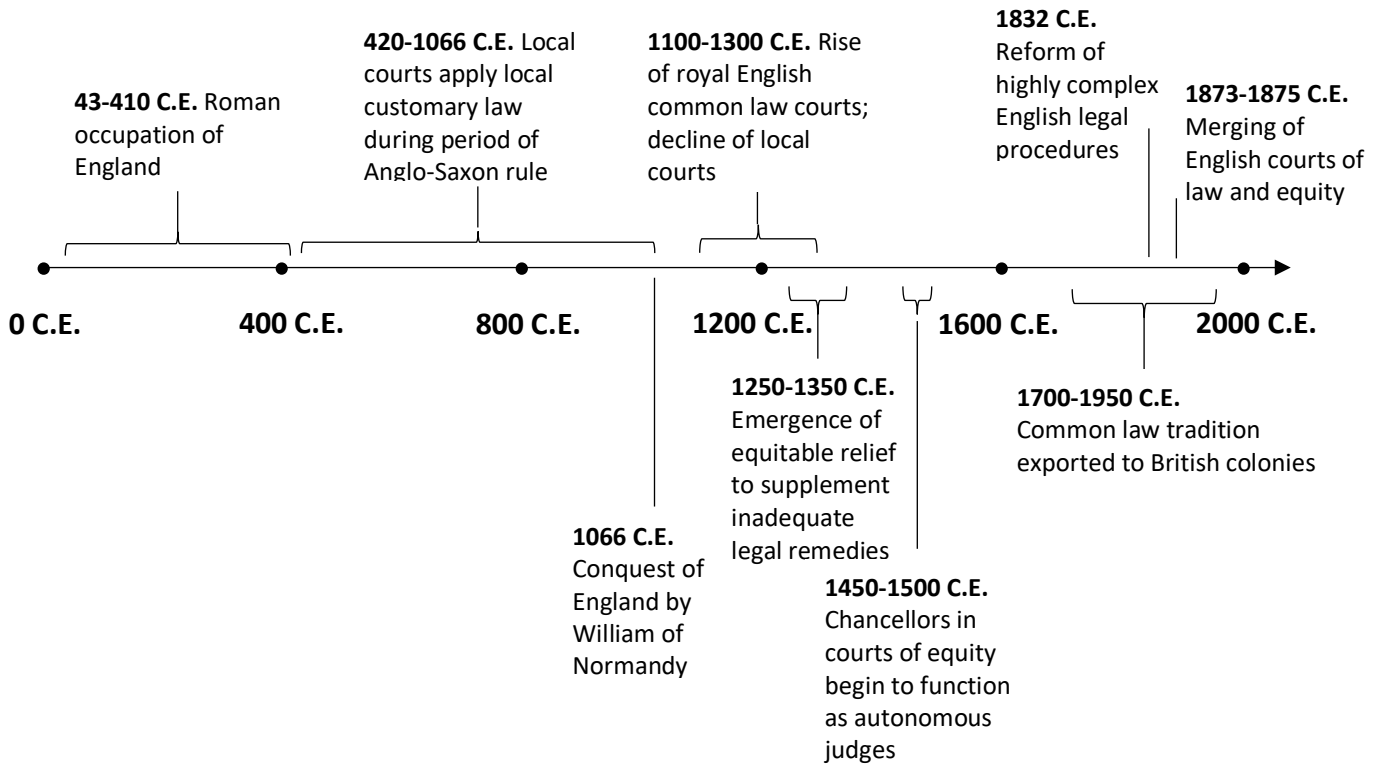
To summarize, the English common law system developed two types of courts by the fifteenth century. In **courts of law**, judges used rigid procedures, applied legal rules that developed over time, and could grant only monetary remedies. If a person was unable to access a common law court or unsatisfied with the remedy that the law provided, he could turn to a **court of equity** (or chancery). In a court of equity, a chancellor acting in the name of the king was given discretion to grant whatever type of relief he thought was fair. These two types of courts coexisted in England until the nineteenth century, at which point reforms in the English legal system allowed all courts to administer both legal (i.e., common law) and equitable remedies.

Between the eighteenth and twentieth centuries, the British Empire gained many colonial territories in North America, East Africa, Asia, and Australia. The British rulers brought their common law tradition to these territories. As a result, the common law is still followed in most former British colonies today, including the Australia, India, and the United States. Like the courts of England, the courts in these other common law jurisdictions have the power to grant both legal and equitable remedies.

⁶⁷ Francis H. Heller, *The Growth of the Law in England* (unpublished), excerpted in Head, *supra* note 41, at 338-339.

⁶⁸ Head, *supra* note 41, at 360-361.

Timeline: History of the Common Law Tradition



3.3.2. Sources of the Common Law

The common law is often called “judge-made” law. When deciding a case, a common law judge does not just apply the law; he also creates new law by defining new legal rules. Instead of simply stating a decision, the common law judge “explains the rules and principles of [common] law involved in the judgment he has just rendered Often the judge’s statements and comments are substantially broader than is strictly necessary” to decide the case before him.⁶⁹ Historically, the purpose of this process was to allow law students to learn the legal profession by attending court and helping with administrative duties. Today, common law judges still explain their reasoning in detail in order to clarify the law and explain how the court is likely to decide future cases.

The primary source of the common law tradition is **caselaw**—judicial decisions in prior cases.⁷⁰ When a common law judge encounters a legal question, she first consults similar cases that have already been decided. If the question has previously been resolved by the same court or a higher ranking court, the **rule of precedent** requires her to follow that earlier ruling. If the question has not yet been resolved, the judge uses reason—perhaps drawing an analogy to a similar case or invoking a general principle of justice—to resolve the question. Once the judge issues her ruling, future judges in that court and any lower ranking courts will be bound to follow it as precedent whenever the same question is presented.

Consider the following example: The United States Constitution, adopted in 1787 C.E., guarantees the freedom of expression. Over the last two hundred and thirty years, American common law judges have developed a large body of law explaining what sorts of expression receive constitutional protection.

⁶⁹ René David and John E.C. Brierly, *supra* note 66, at 379.

⁷⁰ Head, *supra* note 41, at 436.

Judges have reasoned that libel—publishing false statements about another person in a way that harms her reputation—is not a form of expression that the Constitution protects. Today, when a judge is confronted with a case in which a person published false statements about someone else in a way that harmed her reputation, he does not reconsider the issue. He simply follows the precedent that has already been determined and rules that the person who committed libel can be forced to pay money to the person he harmed because the Constitution does not protect libel.

Sometimes, however, a common law judge finds a reason to **distinguish** a new case from a line of precedents. This means that some aspect of the case is different enough to justify a different ruling. To return to our example about libel, consider a new case in which a newspaper published a story about policemen mistreating African Americans. Some minor details in the story were false, and the story harmed the policemen’s reputation. (A case like this actually came before the U.S. Supreme Court in 1964.)⁷¹ You might expect that the rule of precedent would require the judges considering this case to find that the newspaper could be punished for libel. The judges on the U.S. Supreme Court, however, found two facts that distinguished the new case from prior cases about libel. First, the newspaper was reporting about misconduct by a public official—something that was important for the general public to know about. Second, the newspaper did not realize that those details were false.

The judges reasoned that these two facts were important. The court was concerned that if a newspaper could be punished for libel whenever it made a small factual mistake, the fear of lawsuits would prevent the press from quickly and efficiently reporting about important matters. The court explained its reasoning in detail and announced a new standard: a newspaper cannot be punished for making a mistake when reporting about a newsworthy topic unless it *knows* or recklessly disregards the possibility that it is printing false information. This standard of “recklessness” means extreme disregard for the risk of error and harm; it is a more demanding standard than “negligence,” which refers to mere carelessness. Because the newspaper in this case was not reckless, but merely careless about a few details, its expression was protected by the Constitution.

Discussion Questions

First, recall the distinction between “rules” and “standards” that we encountered in Section 2.1.3. Next, consider the two elements of libel: (1) publishing false statements about another person (2) in a way that harms his or her reputation. Is each element more of a “rule” or a “standard”?

Now consider the U.S. Supreme Court’s decision that where newsworthy subjects are concerned, libel requires publishing false statements about another person with (1) knowledge or (2) reckless disregard for the possibility that the statements are false. Is the first option (knowledge that the statements are false) a rule or a standard? What about the second option (recklessness)? Do you think the court made sensible choices about when to use rules and standards? If not, can you propose a better alternative?

Since at least the nineteenth century, the common law tradition and the Romano-Germanic tradition have been converging. Caselaw remains important in the common law tradition today, but common law countries also use constitutions, statutes, and regulations (which we already discussed in Section 3.2.2 as the three most important sources of law in the Romano-Germanic tradition). And, as already mentioned, caselaw has become a secondary source of authority in some Romano-Germanic countries.

⁷¹ See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Therefore, the major differences between the Romano-Germanic tradition and the common law tradition are no longer found in their sources of law, but in their procedures, institutions, and assumptions about the role of the law in society.

3.3.3. Key Features of the Common Law

Because caselaw is such an important part of the common law tradition, judges have significant power to define legal rules. This makes the common law judge an important, perhaps even heroic figure. In the common law tradition, the judge occupies arguably the most important position in the legal profession. Young law school graduates cannot immediately enter the judiciary. Only after many years of experience—perhaps as a successful litigator or top legal scholar—can a lawyer develop the expertise necessary to become a judge. In the Romano-Germanic tradition, by contrast, the role of the judge is usually more limited. Romano-Germanic judges are generally seen as a low-level bureaucrats rather than legal experts.

Of the three legal theories that we encountered in Section 2.2, the common law tradition most readily fits with natural law theory. One way of thinking about the common law judge is that he does not simply create law in the way that a legislature would, but instead uses reason to discover the law that already exists in nature. This sharply contrasts with the Islamic legal tradition, which relies on divine revelation as much as possible and is deeply skeptical of human reason. It also contrasts to some extent with the Romano-German approach, in which the state creates the law as it sees fit.

Another contrast between the common law tradition and the Romano-Germanic tradition can be seen in the ways that each tradition promotes order and justice. The common law tradition has been criticized for failing to give people adequate notice about what actions are permitted and what actions are forbidden. The rule of precedent provides a degree of uniformity, but it is sometimes difficult to predict when a judge will distinguish a case from existing precedent and craft a new legal rule. The Romano-Germanic tradition seeks to remedy this uncertainty by providing clear, written, publicly accessible statutes. In doing so, it places a greater emphasis on order. However, the rules of the Romano-Germanic tradition are open to criticism for being too inflexible. When an unforeseen circumstance arises, rigid application of a statute may produce an unjust result. Because common law judges are given the discretion to craft equitable remedies, they may be better positioned to achieve justice in each specific case.

Application Exercise

Consider the following scenario:

Fateh is a sixteen-year-old boy who wants to buy a new cricket bat but can't afford to pay full price. He knows that the store that sells cricket gear offers a 30% discount on slightly damaged merchandise, which gives him an idea. He convinces his friend, Janan, to go into the store and make a long scratch on the handle of one of the bats when no one is looking. Twenty minutes later, Fateh goes into the store, asks a salesperson to show him the cricket bats, finds the one with the scratch, and says he will buy it for a 30% discount. The storekeeper, however, had seen Janan holding the bat earlier and realized that he intentionally damaged it so that Fateh could buy it for a lower price.

Have Janan and Fateh broken the law? Discuss how an Islamic law judge, a Romano-Germanic law judge, and a common law judge might approach the case. What sources would each judge consult? What kinds of reasoning would each judge use? Do you think the three judges would reach the same conclusions about whether Janan and Fateh broke the law and what punishment they should receive if they did?

4. RULE OF LAW

In the final portion of this chapter, we will briefly examine an important concept called the rule of law.

4.1. What is the rule of law?

Political leaders from across the world praise the rule of law and claim to be working to promote it, but there is significant disagreement about what the rule of law actually is.⁷² Some influential organizations such as the United Nations define the rule of law very broadly so that it includes guarantees of human rights and good governance.⁷³ In this book, however, we will adopt a more narrow definition: a society is governed by the **rule of law** when (1) the laws are clear, publicly accessible, and prospective; (2) all people and institutions, including ruling officials, are accountable to the law; and (3) the laws are applied by impartial, independent judges. Let's examine each part of this definition in turn.

First, the rule of law does not exist in a society unless its laws are clear, publicly accessible, and prospective. "Prospective" means that laws only apply *after* they are enacted. For example, if on Tuesday the government enacts a law banning cigarette smoking in a public park, it cannot punish me because I smoked a cigarette in that park on Monday (the day before the law was passed). If laws are vague, unpublicized, or apply retroactively, people do not have adequate notice of what is prohibited and what is forbidden. Another problem with such laws is that it is easy for the government to enforce them inconsistently. For example, a criminal law prohibiting "harmful speech" is vague. A corrupt government could take advantage of the vagueness of such a law by enforcing the law against only its political opponents while letting its supporters say whatever they pleased. A clearer law, such as a ban on printing false claims that harm a person's reputation, will tend to be enforced more consistently.

Second, the rule of law requires that all the people and institutions in a society be accountable to the law. If someone breaks the law, he must be punished accordingly. It does not matter whether he is poor or rich, unknown or famous, a simple farmer or the president of the country. In constitutional democracies such as Afghanistan, this element of the rule of law also places substantive limits on statutes that the legislature and President may enact.⁷⁴ For example, the Constitution provides that "[n]o one, including the state, shall have the right to enter a personal residence or search it without the owner's permission or by order of an authoritative court."⁷⁵ Because even the government is bound by this constitutional guarantee, the legislature and President lack the power to pass a law authorizing random searches of private homes.

Third, the rule of law requires independent judges who apply the law impartially. **Judicial independence** means that judges are free to decide cases according to the law without being pressured by political leaders. For example, if a country's president issues a decree banning the publication of a newspaper that has criticized him, and a judge invalidates that decree because it violates the country's constitution, the president should not be able to punish or fire the judge for ruling against him. Judicial independence is necessary to ensure that even powerful individuals such as government officials are ruled by the law.⁷⁶ **Judicial impartiality** means that judges decide cases based on the law, not based on their personal interests or preferences. For example, a judge who accepts bribes, decides cases in favor of his friends and relatives, or rules against certain parties because of their race or social class is not impartial. Judicial impartiality promotes justice by ensuring that the law—rather than the preferences of individual judges—determines the outcome of legal cases.

⁷² Brian Z. Tamahana, *On the Rule of Law: History, Politics, Theory* (Cambridge, UK: Cambridge University Press, 2004), 2-3.

⁷³ See Lelia Mooney, "A Practitioner's Guide to Rule of Law Promotion: An Introduction," in *Promoting the Rule of Law*, ed. by Lelia Mooney (American Bar Association, 2013), 5-6.

⁷⁴ See Tamahana, *supra* note 72, at 118.

⁷⁵ Constitution of Afghanistan, Article 38.

⁷⁶ Tamahana, *supra* note 72, at 123.

4.2. Purposes of the rule of law

The rule of law, as we have defined it, serves at least three purposes. First, it protects fundamental ideas about justice. Most people would agree that it is unjust to punish someone for an act if she could not have known that it was illegal when she did it. For example, this could occur if the law was not accessible to her or the act was not made illegal until *after* she did it. Most would also agree that it is unjust to punish one person for a certain act, but not to punish a second person for doing that exact same act. Similarly, it seems unjust for the government to impose rules on citizens but fail to abide by its own rules. And finally, it cannot be said that judges who decide cases based on their personal preferences instead of the law—or, worse, who accept bribes—are doing justice.

Second, the rule of law promotes order and stability. Clear, publicly accessible, prospective laws allow people to anticipate the consequences of their actions; vague or inaccessible laws do not. Rulers who are accountable to the law are more constrained than rulers who have unlimited power. Judges who impartially apply the law reach more predictable results than judges who accept bribes or decide cases based on their personal preferences. Therefore, societies that are governed by the rule of law tend to be more stable than societies that are governed by the arbitrary whims of rulers or corrupt judges.

Third, and relatedly, recent research suggests that the rule of law promotes economic development.⁷⁷ There are several reasons for this. Investors and businesses prefer to operate in environments that are stable and predictable. Without the rule of law, they face risks from sudden, arbitrary government action. Without impartial judicial enforcement of contracts, commercial transactions may be risky or difficult.⁷⁸ Public officials who are legally (and democratically) accountable are more likely to effectively deliver public services, which is another driver of economic growth.

Discussion Questions

To what extent do you think the rule of law exists in Afghanistan? For example, are the laws publicly accessible? Is everyone—including wealthy and politically powerful individuals—equally accountable to the law? Do police officers and other government officials tend to treat members of their own ethnic or social group better than members of other groups? Do judges decide cases based on the law alone, or do they allow their personal preferences and interests to influence their decisions?

Compare the purposes of the rule of law, discussed above, with the general purposes of law that we discussed back in Section 1.2. Can law accomplish its purposes if the rule of law does not exist? Which of the three purposes of the rule of law do you see as most important? Can you think of a way in which increased adherence to the rule of law would improve the current situation in Afghanistan?

CONCLUSION

Law—a body of rules that regulate human behavior and are enforced by the government—serves a crucial function in human society by creating order and protecting basic principles of justice. These goals cannot fully be realized without adherence to the rule of law—a state of governance in which the laws are clear, publicly accessible, and prospective; where all people and institutions, including ruling officials, are accountable to the law; and where the laws are applied by impartial, independent judges. Certainly, no system of law is perfect. Indeed, the law is often criticized as overly complex and restrictive, and it

⁷⁷ *Id.* at 119; see also Hassane Cissé, “Creating a Global Community of Rule of Law Practitioners in the Service of Development,” in *Promoting the Rule of Law*, ed. by Lelia Mooney (American Bar Association, 2013), 70-71.

⁷⁸ Cissé, *supra* note 77, at 71.

sometimes achieves results that are far from ideal. Nevertheless, law is undeniably necessary and important. None of us would want to live in a society that had no law.

As discussed above, the present-day law of Afghanistan has been shaped by three of the world's major legal traditions: Islamic law, Romano-Germanic law, and the English common law. In the next chapter, you will learn more about the sources and content of Afghan law, as well as efforts to promote the rule of law in Afghanistan. As you read on, you should continue to practice using the concepts and terms that you learned in this chapter, referring back to our definitions and examples as necessary.

CHAPTER 3: INTRODUCTION TO AFGHAN LAW AND LEGAL SOURCES

INTRODUCTION

Imagine the following situation. Farah is fourteen years old and lives with her uncle, aunt, and cousins in Herat. She is the best student in her science and mathematics classes, and Farah’s teachers believe she has the potential to become a doctor. One day, Farah’s uncle tells Farah that she is too old to continue going to school and insists that she quit school to stay home and take care of her younger cousins. Farah pleads with her uncle to change his mind, but he exclaims, “You can’t argue with me! Girls don’t have a right to an education. Taking care of your cousins will provide any education that you need.” He tells her that he will only allow her to attend school for the rest of that week.

Later that evening, Farah reflects on her uncle’s statement that girls don’t have a right to an education. His statement suggested that some people *do* have a right to an education. If a person has a right to an education, who has the obligation to provide that education? And how could such an obligation be enforced?

On her final day of school, Farah approaches her favorite teacher and finds the courage to ask, “Who has the right to an education in Afghanistan?” Farah’s teacher explains that all Afghan citizens, regardless of whether they are male or female, have a right to an education up to the BA level. This right is guaranteed by Afghanistan’s laws, which say that Afghanistan’s government has an obligation to ensure that the education is provided. Laws also ensure that Afghanistan’s government has the tax revenue to fund the school system and to enforce the government’s overall responsibility.

Farah’s teacher has a brother named Ghous, who recently became a lawyer. Ghous offers to do research for Farah about her legal right to an education. To help Farah, Ghous must understand which legal sources to consult.

As you read the following chapter, keep Farah’s quest for an education in mind. First, you will learn about efforts to promote justice and the rule of law in Afghanistan. Next, you will be introduced to the many sources of Afghan law, and will learn about their level of detail and authority. Finally, you will learn about public law, private law, domestic law, and international law, including how these categories of law interact.

After reading this chapter, you should be able to:

- Describe why the rule of law is important to Afghanistan
- Understand Afghanistan’s hierarchy of legal sources
- Explain the role of Afghanistan’s current constitution
- Understand the difference between public and private law
- Know when domestic law or international law is relevant to a legal question
- Discuss the intersection of public, private, domestic and international law

1. RULE OF LAW IN AFGHANISTAN

In Chapter 2, you learned what the term “rule of law” means and why it is important to promoting justice, order, stability, and economic development. This section discusses the rule of law in Afghanistan. It begins by exploring Afghan beliefs about justice and why the rule of law is important to Afghanistan. Next, it explores challenges to implementing the rule of law in Afghanistan, including resource constraints, a shortage of qualified lawyers, limited access to justice, and corruption. The section concludes with a discussion of efforts to promote rule of law in Afghanistan, including efforts by the

Ministry of Justice, Afghan Supreme Court, Attorney General's Office and Afghan Independent Bar Association (AIBA).

1.1. Justice in Afghanistan

Ideas about justice are at the heart of any legal system. Citizens of a state sometimes follow the law out of fear, but in a constitutional system with different branches of government, the law is supposed to represent the people's vision of justice.

Definitions of justice often depend on culture, religion, and governmental structures. What is justice for one nation, province, or even town may be considered very different from justice in another community. Therefore, when you are thinking about justice, it is important to consider the cultural context of the relevant community.

Afghanistan's definition of justice is shaped by Islam. Since the beginning of the state of Afghanistan and especially since the consolidation of the state under Amir Abd al-Rahman Khan in the 1880's, Afghan governments have frequently defined justice in Islamic terms. Abd al-Rahman created a legal system with regularized courts and procedures with the underlying understanding that the function of government is to implement God's law on earth. In other words, Islamic Shari'a was the law of the nation. Although Afghan governments throughout history have also looked to other sources of law, Shari'a has always played an important role. As you will learn about in detail later in this chapter, Article 3 of Afghanistan's Constitution of 2004 requires that no law may contravene the principles of the Shari'a, demonstrating that the idea of religious principles as justice is still of foremost importance in Afghanistan today.

Culturally, justice in Afghanistan often has a communal component. This means that justice may be defined in terms of what benefits a group of people in a community, instead of something to which individuals are entitled. For example, crimes tend to be considered crimes against the community, and punishments reflect the needs and safety of the community.

There is also a broader sense of justice in Afghanistan as part of the democratic system. Justice in a democracy is supposed to represent the will of the people—who, as voters, are charged with selecting their government. Therefore, in a democracy, if the citizens of a state do not believe the law is just, then it cannot be legitimate. By exercising their right to free speech, advocating for causes, and voting in elections, citizens in a democratic society can express their beliefs about justice.

1.2. The Rule of Law in Afghanistan

As we learned in Chapter 2, the "rule of law" refers to a state of governance in which (1) the laws are clear, publicly accessible, and prospective; (2) all people and institutions, including ruling officials, are accountable to the law; and (3) the laws are applied by impartial, independent judges. How are Afghans working to promote the rule of law in their country, and why is the rule of law important for Afghanistan?

Establishing the rule of law requires legislative, judicial and law enforcement institutions. In Afghanistan, these institutions include the National Assembly, courts, Attorney General's Office, Ministry of Justice (MoJ), and the national and local police forces. You will learn more about Afghanistan's legislative, judicial and law enforcement institutions in Chapter 5 of this textbook.

Afghanistan also has informal and non-state institutions of dispute resolution—such as local councils—that help promote the rule of law. Education and watchdog organizations, such as the Afghanistan Independent Human Rights Commission and those within the media and civil society, participate as well.

Promoting the rule of law and increasing access to justice is essential to Afghanistan's security and stability, economic development,¹ and the protection of citizens' rights. Afghanistan's security and stability depend on Afghanistan having clear, publicly accessible laws because this enables the Afghan people to hold state institutions accountable for their obligations. Clear, impartially applied laws promote economic development because Afghans are more likely to engage in business with each other if there are clear, predictable laws guiding their transactions. Foreign businesses and countries are also more likely to transact with and invest in Afghanistan if they can count on enforcement of Afghanistan's laws. Finally, enforcement of the law against those with power, including government officials, helps protect citizens' rights, such as every Afghan's right to a defense attorney if he is accused of a crime.

Discussion Questions

1. How does the rule of law help citizens hold the government accountable for delivering on governmental obligations? For example, how does the rule of law empower citizens to require the government to provide citizens with an education?
2. How is the right to an education impacted by security, stability, and economic development?

1.3. Challenges to Implementing Rule of Law in Afghanistan

As you may imagine, establishing and sustaining the rule of law in Afghanistan is an expensive, time consuming, and complex process. Important and interrelated challenges include resource constraints, a shortage of qualified lawyers, limited access to justice, and corruption.

1.3.1. Resource Constraints

It is difficult for Afghan institutions to define and commit to long-term justice sector reforms without certainty about the amount of funding that will be available from international donors. As Afghanistan succeeds in building its rule of law, public awareness of the rule of law increases, which makes the demand for legislation and access to justice increase. This increasing demand creates a need for funding. Despite generous donor commitments, Afghanistan's justice system requires additional funding to build its infrastructure and sustain its progress in implementing the rule of law.² Clear communication between donor organizations, Afghan justice institutions and the Afghan government may help resolve this problem.³

1.3.2. Shortage of Qualified Lawyers

The decades-long conflict in Afghanistan has devastated its infrastructure and severely stunted the institutions that are central to educating and cultivating Afghan leaders. Consequently, the country faces a dire shortage of qualified lawyers. This shortage is felt keenly during this time of transition, as the participation of skilled legal practitioners is crucial to rebuilding the Afghan republic. For example, the lack of skilled legal practitioners leads to challenges with drafting and reforming laws, since there is limited capacity to draft legislative documents.⁴

¹ Islamic Republic of Afghanistan Ministry of Justice, *Five Year Strategy: Law and Justice 1393-1397*, (January 1392), 7.

² *Id.* at 13-17.

³ See Istituto Superiore Internazionale di Scienze Criminali (ISISC), *An Assessment of Justice Sector and Rule of Law Reform in Afghanistan and the Need for a Comprehensive Plan*, 4 <http://www.rolafghanistan.esteri.it/NR/rdonlyres/F16F08B8-5C24-48C6-B0F0-8D65B4003521/0/Assessmentjusticesectorandruleoflawreform.pdf>

⁴ Islamic Republic of Afghanistan Ministry of Justice, *Five Year Strategy: Law and Justice 1393-1397*, (January 1392), 13.

1.3.3. Access to Justice

Many Afghans do not have access to the current justice system. Afghans' legal needs and definition of justice differ by region of the country, and it is difficult to provide relevant nationwide coverage.⁵ Additionally, Afghanistan does not have enough free or affordable legal aid services, and the public is often unaware of the legal aid services that exist.⁶ Finally, Afghanistan's legal institutions are often slow to provide legal resolution,⁷ which makes it more difficult for citizens to rely on them.

1.3.4. Corruption

Afghan citizens are often skeptical of the Afghan justice system because they perceive it as susceptible to **corruption**, or abuse of a public position for private gain.⁸ Corruption is one of citizens' primary complaints about the government, and the justice sector is widely viewed as one of the most corrupt government areas.⁹ Afghanistan's struggles with corruption originate from Afghanistan's conflicts in the past several decades, Afghanistan's role in opium and heroin production, and diverse and uncoordinated sources of security, humanitarian, and development assistance.¹⁰ Justice sector employees may also be susceptible to corruption because many of them earn a low salary that fails to meet their basic needs.¹¹

1.4. Efforts to Promote Rule of Law

Despite these challenges, there are many efforts underway to promote rule of law in Afghanistan. Important efforts are being led by the Ministry of Justice ("the MoJ"), Afghanistan's Supreme Court, the Attorney General's Office, and the Afghan Independent Bar Association (AIBA).

Many donors support Afghanistan's rule of law efforts. Some of the notable donors include the World Bank, United Nations Development Programme (UNDP), the Justice Sector Support Program (JSSP), the Correction Sector Support Program (CSSP), Gesellschaft für Internationale Zusammenarbeit (GIZ), the United States Agency for International Development (USAID), the International Development Law Organization (IDLO)¹² and The Bureau of International Narcotics and Law Enforcement Affairs (INL)¹³, and Swedish Foreign Ministry¹⁴.

1.4.1. The Ministry of Justice's Efforts

From 2008-2013, the MoJ made significant progress on its rule of law efforts. For example, it drafted, reviewed, and processed 259 legislative documents that are aligned with the Constitution.¹⁵ The MoJ also reprinted and distributed the penal, civil and commercial laws to all Afghan judicial entities, the parliament, and provincial and district councils.¹⁶ In addition, it established legal libraries in 12

⁵ *Id.* at 7.

⁶ *Id.* at 14.

⁷ See Istituto Superiore Internazionale di Scienze Criminali (ISISC), *An Assessment of Justice Sector and Rule of Law Reform in Afghanistan and the Need for a Comprehensive Plan*, 10 <http://www.rolafghanistan.esteri.it/NR/rdonlyres/F16F08B8-5C24-48C6-B0F0-8D65B4003521/0/Assessmentjusticesectorandruleoflawreform.pdf>

⁸ Tarek Azizy, *Max Planck Manual on Administrative Law in Afghanistan* (February 2011), 139.

⁹ See Istituto Superiore Internazionale di Scienze Criminali (ISISC), *An Assessment of Justice Sector and Rule of Law Reform in Afghanistan and the Need for a Comprehensive Plan*, 17 <http://www.rolafghanistan.esteri.it/NR/rdonlyres/F16F08B8-5C24-48C6-B0F0-8D65B4003521/0/Assessmentjusticesectorandruleoflawreform.pdf>

¹⁰ Tarek Azizy, *Max Planck Manual on Administrative Law in Afghanistan* (February 2011), 139.

¹¹ See Istituto Superiore Internazionale di Scienze Criminali (ISISC), *An Assessment of Justice Sector and Rule of Law Reform in Afghanistan and the Need for a Comprehensive Plan*, 17 <http://www.rolafghanistan.esteri.it/NR/rdonlyres/F16F08B8-5C24-48C6-B0F0-8D65B4003521/0/Assessmentjusticesectorandruleoflawreform.pdf>

¹² Islamic Republic of Afghanistan Ministry of Justice, *Five Year Strategy: Law and Justice 1393-1397*, (January 1392), 12.

¹³ See U.S. Department of State, *Afghanistan Program Overview*, <https://www.state.gov/j/inl/narc/c27187.htm>

¹⁴ See International Bar Association, *The establishment of the Afghan Independent Bar Association (AIBA)*, http://www.ibanet.org/Human_Rights_Institute/Work_by_regions/Asia_Pacific/Afghanistan.aspx

¹⁵ Islamic Republic of Afghanistan Ministry of Justice, *Five Year Strategy: Law and Justice 1393-1397*, (January 1392), 10.

¹⁶ *See id.*

provinces¹⁷ and created legal aid offices in all provinces to provide access to justice for people who are accused of committing crimes.¹⁸

As of 2013, the MoJ began implementing its five-year “Law and Justice Strategy,” which aims to strengthen the justice system and improve access to legal services in Afghanistan.¹⁹ Core elements of the MoJ’s strategy include reforming laws and improving legislative effectiveness, providing free legal aid to impoverished people who are accused of crimes and ensuring that state administrations fulfill their human rights obligations.²⁰

The MoJ also frequently holds workshops and trainings about access to justice and law in Afghanistan, and often does so in collaboration with donor organizations. The MoJ uses these workshops and trainings to advance awareness of human rights issues²¹ and promote high quality legal services.²² In the interest of expanding access to justice, the MoJ created a program that allows citizens to call a telephone line and receive free and confidential legal services, as of December 2016.²³

Discussion Questions

1. What are the benefits and challenges of using a telephone line to provide access to free and confidential legal services?
2. What other ideas do you have for expanding access to justice?

1.4.2. The Supreme Court’s Efforts

Afghanistan’s Supreme Court also promotes the rule of law by interpreting and applying Afghanistan’s laws to protect citizens’ rights and enforce their obligations. As of 2017, priorities for the Supreme Court include improving judges’ judicial skills across Afghanistan, access to justice, and judges’ commitment to fair and efficient resolution of legal cases.²⁴ The Supreme Court supports judges’ efforts to participate in domestic judicial training programs and to travel outside the country to study other legislative and judicial systems.²⁵ Some of the Supreme Court’s other priorities include investing in infrastructure, creating a translation and publication unit, and investing in a code of conduct and judicial services commission.²⁶ You will learn more about the Supreme Court’s history and functions in chapters 4 and 5 of this textbook.

¹⁷ See *id.*

¹⁸ See *id.* at 11.

¹⁹ See *id.* at 7.

²⁰ See *id.* at 8.

²¹ Ministry of Justice: Islamic Republic of Afghanistan, *A meeting for introduction of Public Awareness National Campaign Action Plan on Inevitable Consequences of Human Trafficking and Prevention of Illegal Emigrations was Held at the Ministry of Justice*, (January 2017), <http://moj.gov.af/en/news/300268>

²² Ministry of Justice: Islamic Republic of Afghanistan, *Ministry of Justice Conducts National Conference on High Quality Justice and Legal Services*, (January 2017), <http://moj.gov.af/en/news/300366>

²³ Ministry of Justice: Islamic Republic of Afghanistan, *Notice*, (December 2016), <http://moj.gov.af/en/news/269853>

²⁴ See The Supreme Court: Islamic Republic of Afghanistan, *The Supreme Court Chief Justice Message*, <http://supremecourt.gov.af/en/page/9018>

²⁵ See *id.*

²⁶ See Istituto Superiore Internazionale di Scienze Criminali (ISISC), *An Assessment of Justice Sector and Rule of Law Reform in Afghanistan and the Need for a Comprehensive Plan*, 3, <http://www.rolafghanistan.esteri.it/NR/rdonlyres/F16F08B8-5C24-48C6-B0F0-8D65B4003521/0/Assessmentjusticesectorandruleoflawreform.pdf>

1.4.3. The Attorney General's Efforts

The Attorney General's Office (AGO) promotes rule of law by acting on the Afghan government's behalf to bring justice to the Afghan people. Specifically, the AGO investigates and **prosecutes** crimes that are discovered by the police, which means that prosecutors present the case against the accused. The AGO pays particular attention to enforcing laws against embezzlement, tax evasion, drug trafficking, and corruption, among other crimes.²⁷ Additionally, the AGO is committed to expanding access to justice for women and increasing the role of women in Afghanistan's legal system. As of December 2016, the AGO started a program in collaboration with USAID that will offer six-month internships to 240 female Afghan law school or Shari'a school graduates.²⁸ The internship program aims to increase the number of Afghan female prosecutors.²⁹

1.4.4. The Afghan Independent Bar Association's Efforts (AIBA)

The Afghan Independent Bar Association (AIBA) was established in 2008 and helps implement rule of law in Afghanistan.³⁰ Specifically, the AIBA is an organization of lawyers that promotes lawyer competence and continuing education, enforces ethical standards for lawyers, and increases access to justice. In short, the AIBA governs the distribution of legal services in Afghanistan and the regulation of who may practice law under what conditions. In the spirit of increasing access to justice, the AIBA requires all AIBA members to conduct three legal cases **pro bono**, or for free, each year.³¹

1.4.5. For Further Consideration

Afghanistan Recent Effort to Combat Corruption

Afghanistan's Anti-Corruption Criminal Justice Centre was created in June 2016. It aims to bring corrupt ministers, judges and governors to justice. Historically, corrupt ministers, judges and governors have rarely been prosecuted.³²

The court's first cases were heard in November 2016. These cases charged a Supreme Court prosecutor and a private bank official with corruption.³³

Although Afghans commend the government's effort to punish corruption, some worry that this court will fail to prosecute top government officials. One lawyer remarked, "I wish the start of this court was by a million dollar corruption case, not by a 50,000 afghani corruption case."³⁴

Discuss:

1. If you oversaw the Anti-Corruption Criminal Justice Centre, would you begin by prosecuting top government officials or less senior government officials? Why? What are the benefits and risks of each approach?

²⁷ See Performance and Achievement of Attorney General's Office during the Last Five Years (1390-1394 i.e. 2011-2015), <http://ago.gov.af/Content/Media/Documents/Review-AGOFiveYearActivityReportfor1390-1394-English692016152816339553325325.pdf>

²⁸ See Wadsam: Afghan Business News Portal, Afghan Attorney General Office offers internship to women, (December 2016), <http://wadsam.com/afghan-business-news/afghan-attorney-general-office-offers-internship-women-344/>

²⁹ See *id.*

³⁰ Islamic Republic of Afghanistan Ministry of Justice, *Five Year Strategy: Law and Justice 1393-1397*, (January 1392), 11.

³¹ See International Bar Association, *The establishment of the Afghan Independent Bar Association (AIBA)*, http://www.ibanet.org/Human_Rights_Institute/Work_by_regions/Asia_Pacific/Afghanistan.aspx

³² See Reuters, Afghan's new anti-graft court hears first cases in Kabul, (November 2016), <http://www.reuters.com/article/us-afghanistan-corruption-idUSKBN13709F>

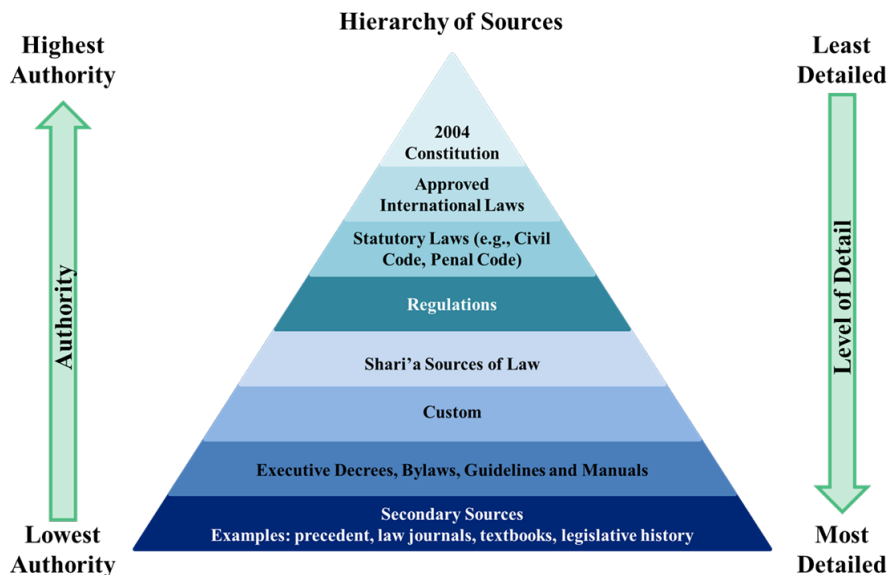
³³ See *id.*

³⁴ See *id.*

2. SOURCES OF AFGHAN LAW AND THEIR HIERARCHY

2.1. Foundational Concepts

When you encounter a legal question, you should begin by thinking about which sources of law apply. Afghanistan has a **pluralistic legal system**, meaning that it has many sources of law. Sources vary in their authority and level of detail. **Primary legal sources** are **binding**, which means that judges must apply them when deciding legal questions. **Secondary legal sources** are not binding, but they help explain primary sources and persuade judges. Afghan sources of law typically follows the hierarchy³⁵ shown in the graphic below. This section of this chapter will review this hierarchy, starting from the top of the triangle and moving to the bottom. Also, read the “key notes” below the triangle to understand the hierarchy’s limitations.



- Islamic principles are reflected throughout Afghanistan’s Constitution, Statutory Laws, Regulations, and Customs.
 - The Constitution generally uses Hanafi Fiqh (Art. 130) and uses Shia Fiqh in specific situations (Art. 131).
- The triangle presents the general layout of the hierarchy of sources, but the hierarchy may change in certain circumstances.
 - For example, a specific law might say that if a specific domestic and international law conflict, the domestic law prevails. Another example is that a law might say that custom should prevail in certain circumstances.
- Sometimes, a source of law in the triangle does not apply to a specific situation.
 - For example, there is almost no role for customary legal sources in criminal disputes.

2.2. The Constitution

2.2.1. Defining the Term “Constitution”

As described in Chapter 2, a constitution is a set of fundamental rules that governs all other rules within a legal system and cannot be changed by regular legislative action. It determines the procedures for governing and the powers of the different branches of government. Overall, the constitution is the foundation of the political and legal system on which all governing actions of a country rely.

³⁵ The hierarchy of sources for answering an individual legal question may vary, depending on the area of law.

2.2.2. Afghanistan’s Current Constitution: The Constitution of 2004

In November 2003, a constitutional Loya Jirga³⁶ was convened. In its own words, the Loya Jirga was convened “as the supreme manifestation of the will of the Afghan people . . . to adopt a constitution that fosters the establishment of lasting peace in Afghanistan.” 502 delegates from all areas of Afghanistan came to a consensus on January 4, 2004, creating the Constitution that is currently in effect. In Chapters 4 and 5, you will more about the constitutional drafting process and timeline for ratifying the 2004 Constitution.

2.2.3. The Constitution’s Core Functions

Some of the Constitution’s main functions include creating a structure for the government, protecting citizens’ rights, and explaining citizens’ duties.

2.2.3.1. The Constitution Provides Structure for the Government

The Constitution is meant to be a permanent guiding structure for the government of Afghanistan. It created three equal branches of Afghanistan’s government—executive, legislative, and judicial. You will learn about these branches of government in detail in Chapter 5 of this textbook.

2.2.3.2. The Constitution Codifies Citizens’ Rights and Duties

The Constitution mentions the importance of individual rights on its very first page, in its preamble. The preamble affirms Afghanistan’s respect for the Universal Declaration of Human Rights and stresses the importance of “protecting . . . human rights, and attaining peoples’ freedoms and fundamental rights.” It clarifies that rights are critical to Afghanistan’s goal of forging a civil society “void of oppression, atrocity, discrimination, as well as violence” and based on the “rule of law, [and] social justice.”

Although the focus of Chapter 1 of the Constitution is the State, Chapter 1 contains a handful of key articles relating to individual rights. Chapter 2 of the Constitution is appropriately titled, “Fundamental Rights and Duties of Citizens.” It consists of thirty-eight articles that list many individual rights, including the right of equality of all citizens.

Chapter 1 of the Constitution also explains citizens’ constitutional duties. Examples of citizens’ constitutional duties include citizens’ obligation to pay taxes,³⁷ participate during times of war, calamity and other situations threatening lives and public welfare,³⁸ and observe Afghan laws in accordance with international law.³⁹

While respect for individual rights in Afghanistan has increased significantly since the fall of the Taliban, much work remains to be done. Many fundamental rights are guaranteed under the Constitution, but are not enforced in most provinces. It is important to consider the influence of religion and culture on the protection of individual rights. Both tribal customs and Islam affect public perception of rights and their enforcement. This is most evident from the many informal institutions that commonly resolve disputes (including those involving individual rights) throughout Afghanistan. Acknowledging these realities, however, only highlights the importance of increased enforcement of rights for Afghanistan’s future development.

³⁶ The Loya Jirga is composed of all members of the National Assembly and the chairpersons of the provincial and district councils, and will be discussed in greater depth in Chapter 5.

³⁷ Islamic Republic of Afghanistan Constitution, Chapter 2, Article 42 (2004), <http://moj.gov.af/en/page/legal-frameworks/168329941684>

³⁸ *See id.* at Article 49.

³⁹ *See id.* at Article 57.

Discussion Questions

Understanding the Purpose of Chapter 2 of the Constitution

The full 2004 Constitution of Afghanistan can be found on the MoJ's website⁴⁰. Skim Chapter 2 of the Constitution, which is called the “Fundamental Rights and Duties of Citizens”, and then discuss the questions below.

1. What is one aspect of this Chapter of the Constitution that surprises you?
2. Are the Articles broad or specific?
3. What are the benefits and challenges of having a Constitution with broad provisions?

2.2.4. Key Principles About the Constitution

When you are beginning to learn about the Constitution, it is important to remember three guiding principles. This section introduces you to the guiding principles, namely that the Constitution reflects Islamic values, the Constitution explains the hierarchy of the laws, and the Supreme Court plays a major role in interpreting the Constitution and guiding how it is enforced.

2.2.4.1. The Constitution Reflects Islam

The Constitution reflects Islam's foremost importance to Afghanistan. Consider the following constitutional articles:

- Article 1 of the Constitution establishes that Afghanistan is an Islamic Republic.⁴¹ This gives Islam a dominant role in other laws (including the codes, which will be discussed next) and the structure of the government.⁴²
- Article 2 declares Islam to be the nation's official religion, but also protects the individual freedom to practice other faiths within the limits of the law.⁴³
- Article 3 states, “No law shall *contravene* [emphasis added] the tenets and provisions of the holy religion of Islam in Afghanistan,”⁴⁴ demonstrating that the idea of religious principles as justice remains important to Afghanistan today

The lack of specificity of Article 3 has caused concern in some circles over its potential reach. Could Article 3 be used to limit the numerous individual rights enumerated elsewhere in the Constitution? It is important to recognize the potential tension between certain individual rights enshrined in Chapter 2 of the Constitution, such as the freedom of expression, and certain Islamic doctrines. Yet Islam has a long tradition of protecting individual rights.

Moreover, a law that contradicts fiqh does not necessarily contravene the “tenets and provisions of the holy religion of Islam.” You learned in Chapter 2 that fiqh represents the human understanding of the

⁴⁰ As of January 2017, the Constitution can be found at <http://moj.gov.af/en/page/legal-frameworks/168329941684>

⁴¹ Islamic Republic of Afghanistan Constitution, Chapter 1, Article 1 (2004), <http://moj.gov.af/en/page/legal-frameworks/168329941684>

⁴² See Nadjma Yassari, *The Shari'a in the Constitutions of Afghanistan, Iran and Egypt—Implications for Private Law* (Mohr Siebeck 2005), 19.

⁴³ Islamic Republic of Afghanistan Constitution, Chapter 1, Article 2 (2004), <http://moj.gov.af/en/page/legal-frameworks/168329941684>

⁴⁴ See *id.* at Article 3.

Islamic rules. This means that fiqh is subject to interpretation, growth, and change. In fact, scholars often disagree with each other about how to interpret the Quran and Sunna. It can be argued that a law does not contravene Islam if it can be reconciled with one possible interpretation of the Quran and Sunna.⁴⁵

Additionally, Islam is generally permissive, where prohibitions are exceptions to its permissive rules. This means that situations rarely arise in practice that contravene Islam. For example, Afghanistan's Commercial Code is modeled heavily after western commercial law, including the Uniform Commercial Code developed by American scholars. Provisions of the Uniform Commercial Code are not contrary to Islam unless they conflict with a practice that is explicitly forbidden by Islam, such as usury. The absolute and universal nature of Islam's protections of the right to life and right to equality before the law, among others, suggests that Article 3 of the Constitution is compatible with protections for these rights found elsewhere in the Constitution.⁴⁶

2.2.4.2. The Constitution Explains the Hierarchy of Laws

The Constitution also contains information about the hierarchy of Afghanistan's laws. Article 130 states, "In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner."⁴⁷ This means that when the Constitution and other statutory laws do not address an issue, Hanafi jurisprudence may be applied so long as it is in the bounds of the Constitution.

Discussion Question

Using the Constitution to Make a Legal Argument For Education

1. If you were Farah's lawyer, where would you begin your search for constitutional articles that are relevant to helping her demonstrate that she has a right to education? Consider beginning in Chapter 2 of the Constitution, which contains Fundamental Rights and Duties of Citizens. What are three articles that could help Farah's case?

2.2.4.3. The Supreme Court Strongly Influences How the Constitution is Interpreted and Enforced

As you might have noticed when you reviewed Chapter 2 of the Constitution, most constitutional articles are broad. The Supreme Court influences how the Constitution is interpreted by creating binding regulations and rules for lower courts that reflect Constitutional principles. In addition, the Supreme Court regularly distributes guides and circulations to lower courts. These guides and circulations are binding and explain how lower courts should interpret specific provisions of law, including the Constitution, and answer other legal questions.

At times, the Supreme Court also influences how the Constitution is interpreted and enforced through its case law—that is, its decisions about how to resolve individual cases. In Chapter 2, you learned that in common law jurisdictions such as the U.K. and U.S., case law is considered binding precedent, meaning that lower courts are required to follow the decisions of higher courts. Since the Afghan legal system does not follow this common law approach, the case law of the Afghan Supreme Court is not binding.

⁴⁵ Nadjma Yassari, *The Shari'a in the Constitutions of Afghanistan, Iran and Egypt—Implications for Private Law* (Mohr Siebeck 2005), 3.

⁴⁶ See Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oneworld Publications 2008), 222.

⁴⁷ Islamic Republic of Afghanistan Constitution, Chapter 7, Article 130 (2004), <http://moj.gov.af/en/page/legal-frameworks/168329941684>

Nevertheless, the Supreme Court's past decisions may have persuasive force and can thus be considered a part of Afghan constitutional law. As Afghanistan's system matures and Supreme Court decisions accumulate, lawyers and judges will be able to look at constitutional provisions through layers of interpretations from previous cases. However, many lower courts do not currently have access to Supreme Court opinions, unless the Supreme Court explicitly shares its opinions with a court.

Article 129 of the Constitution requires judges to state the legal reasons for their decisions.⁴⁸ Although the Constitution does not officially tell lower courts that they are bound by Supreme Court decisions, the Supreme Court can **overturn**, or invalidate the decision of a lower court in certain circumstances. Specifically, the Supreme Court can overturn a lower court's decision if it determines that a lower court decision was made contrary to law, the court committed an error in applying the law, or the court's decision was based on an error in interpretation of law. Thus, when the Supreme Court interprets the Constitution in a certain way, the Supreme Court's interpretation will likely impact future cases. Lower court judges may realize that their decisions are likely to be overturned if they rule in a way that goes against earlier Supreme Court decisions.

Interpretation of constitutional articles may also change over time. Although courts may interpret the Constitution in a certain way today, it may be appropriate to reconsider that interpretation at some point in the future.

2.3. International Law

Afghanistan must comply with international laws to which it has agreed by treaty or custom.⁴⁹ International law will be discussed at length in section 3 of this chapter.

2.4. Statutory Laws and Regulations

2.4.1. Statutory Laws

In Chapter 2, you learned that Afghanistan follows the Romano-Germanic legal tradition, instead of the English common law tradition. As in other countries with Romano-Germanic legal systems, statutes and regulations are especially important sources of law in Afghanistan.

In Afghanistan, statutes must be approved by both houses of the National Assembly⁵⁰ and endorsed by the President. Important statutory laws are the contained within the Afghan Civil Code (1977), the Afghan Commercial Code (1955), and the Penal Code of Afghanistan (1976). Afghanistan's Civil Procedure Code and Criminal Procedure Codes also contain important statutory laws.

The Civil Code (CCA)⁵¹ was written in 1977 during the republic of Daoud Khan, between the monarchy of King Zahir Shah and the period of communist control. It is still in effect today. The CCA is the most comprehensive source of civil law and regulates situations that arise from legal relationships between individuals, covering areas such as family law, contracts, civil responsibility, rules of private international law, property, and inheritance law.

⁴⁸ Art. 129 of the Islamic Republic of Afghanistan Constitution (2004) states: "In issuing decision, the court is obligated to state the reason for its verdict."

⁴⁹ See Afghanistan Parliamentary Assistance Project/ United States Agency for International Development (USAID), *Legislative Drafting Training Materials First Series—Sessions 1-9* (March 2007).

⁵⁰ The structure of the National Assembly will be discussed in Chapter 5.

⁵¹ Civil Law of the Republic of Afghanistan (1977), <http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/737834/doc/slspublic/Afghan%20Civil%20Code%20%20English%20translation%20ALEP%20Sept%202014.pdf>

The CCA serves as the default law, which is the law that people apply when no other law applies directly, though legislation may be passed that provides more specific regulations. The CCA codifies elements of other countries' civil codes, recommendations of legal scholars, Hanafi fiqh, and customary Afghan law. In particular, the CCA's provisions on obligations and property demonstrate the influence of the French Civil Code, while provisions about personal status reflect Islamic law and Hanafi jurisprudence.⁵²

Afghanistan's Commercial Code was written in 1955 and is still in effect today. It applies exclusively to commercial transactions, such as agreements to transport goods and people, bank transactions, and the distribution of water, gas, electricity, and telephone communications.⁵³ The primary sources of law for governing commercial contracts are the Commercial Code and the 2014 Law on Commercial Contracts and Sale of Goods. Commercial contract law is primarily defined by the Law on Commercial Contracts and Sale of Goods, because the Commercial Code only describes commercial contract law briefly.

The Civil Code only applies to commercial contracts where the described sources of law do not provide an answer. Before the Civil Code should be consulted, lawyers must first look for a provision in the Law on Commercial Contracts and Sale of Goods and the Commercial Code. However, when the transaction is a civil transaction, the primary source of law is the Civil Code, followed by the commercial sources if the Civil Code does not have a provision. Still, many commercial contract concepts are derived from the Civil Code, such as principles guiding contract formation and termination.

Since the Taliban fell in 2001, there has been spectacular growth in laws and regulations. For example, new statutory laws have been created to govern commercial transactions, such as the 2014 Law on Commercial Contracts described above, and the 2016 Law on Trade of Foreign Merchandise. These specific laws have diminished the influence of the Commercial Code in certain circumstances.

The Penal Code of 1976 is Afghanistan's primary source of criminal law. It regulates criminal conduct and specifies punishment for the conduct. The current Penal Code was a product of President Daoud's codification campaign during the 1970s. And though the Penal Code was not considered the law of the state during the Soviet era, the civil war, and the Taliban rule, the Bonn Agreement⁵⁴ restored it as the governing law of Afghanistan in 2002 due largely to its completeness and to its thorough description of criminal activity. As of 2017, the process for rewriting the Penal Code is underway in the National Assembly, but the 1976 Penal Code remains in force.

Islamic Law guides all aspects of Afghan criminal law, particularly the Criminal Penal Code and its individual statutes. When the Quran or a reliable hadith prescribes a specific punishment for a crime, Afghan law adopts the Islamic punishment in accordance with Hanafi fiqh. Crimes for which Islamic law provides no fixed punishment are dealt with under the Penal Code. All criminal charges—whether based in Islamic law or in the Penal Code—are prosecuted in the Primary Courts. Therefore, it is extremely important that prosecutors, defense attorneys, and judges know both the law of the Penal Code and the provisions of the Hanafi school of Islamic jurisprudence. The substance of these sources of criminal law is discussed in detail in Chapter 6.

⁵² See Nadjma Yassari, *The Shari'a in the Constitutions of Afghanistan, Iran and Egypt—Implications for Private Law* (Mohr Siebeck 2005), 4.

⁵³ Commercial Code of the Republic of Afghanistan (1955), <https://www-cdn.law.stanford.edu/wp-content/uploads/2015/10/Commercial-Code-of-Afghanistan-ALEP-Translation.pdf>

⁵⁴ The Bonn Agreement was the first in a series of agreements designed to rebuild Afghanistan, in the aftermath of the September 11th, 2001 terrorist attacks in America. It stated that all statutes remain valid unless otherwise barred by a separate international legal obligation. You will learn more about the Bonn Agreement in Chapter 4. Embassy of the Islamic Republic of Afghanistan, Oslo, *Bonn Agreement*, <http://www.afghanistanembassy.no/afghanistan/government/core-state-documents/bonn-agreement>

Other important statutes are contained within Afghanistan’s Civil Procedure Code and Criminal Procedure Code, which govern process for resolving lawsuits. You will learn about procedural law in detail when you read Chapter 7.

As a general practice, you should consider whether a given law has been shaped by another source of law and refer to that source for help with interpretation. Since statutory law is shaped by Islamic law, for example, you might need to refer to Islamic sources of law for guidance on interpreting a statute. In addition, many domestic laws are shaped by international treaties, such as those related to trade and finance. You can therefore refer to treaties when determining how to interpret domestic laws. Professional practices, such as commercial practices, may also shape how the law was developed and interpreted. Consider looking to practice when interpreting laws that relate to the practice.

2.4.2. Regulations

Regulations are legally binding sets of rules that the government adopts to implement government policies, enforce the law, and regulate government administration. In contrast to statutes, which must be enacted or approved by a legislative body,⁵⁵ regulations can be enacted by one of the branches of the state (such as the Supreme Court), or by the Cabinet, which is also known as the Council of Ministers. For example, the Central Bank of Afghanistan adopted regulations to govern money service providers and banks, in addition to governing the Central Bank itself. There are also regulations on many other topics, including mining regulations, civil aviation regulations and more. One example of regulation is the Regulation on the Procedure for Preparing and Processing Legislative Documents, which was approved by Ministerial Council and subsequently published in Official Gazette no. 1081, on July 10, 2012.

Exercise

Research whether the Ministry of Education enacted an education regulation that will protect Farah’s right to an education. Summarize the regulation. Are the regulation’s provisions more detailed than constitutional provisions about education?

Hint: There was an Education Law enacted in 2009.

2.4.3. Key Principles

When you are considering whether a specific statute or regulation applies to a legal case, keep two questions in mind: 1) Is this statute or regulation specific enough? 2) Is this statute or regulation current?

When you are thinking about specificity, keep in mind that a statute or regulation may refer to other, more specific sources of law, such as contract or custom, giving further guidance on the hierarchy of sources in particular areas of law.

Additionally, you should make sure that the statute or regulation you are considering is current. It isn’t current if it has been **amended**, which means changed, **repealed**, which means canceled, or **superseded**, which means replaced. Statutes must be passed by both houses of the National Assembly and signed by the President, after which they become controlling law.⁵⁶ Statutory law, however, is subordinate to the

⁵⁵ See Afghanistan Parliamentary Assistance Project/ United States Agency for International Development (USAID), *Legislative Drafting Training Materials First Series—Sessions 1-9* (March 2007).

⁵⁶ See Islamic Republic of Afghanistan Constitution, Chapter 5, Article 94 (2004), <http://moj.gov.af/en/page/legal-frameworks/168329941684>

Constitution and can be changed by a subsequent National Assembly and President. You will learn more about the process of changing laws in Chapter 5.

The Bonn Agreement states that all codes remain valid unless otherwise barred by a separate international legal obligation. The 2004 Constitution reflects the Bonn Agreement by providing that laws enacted before 2004 continue to be in force unless repealed or superseded by other laws.

2.5. Shari'a Law

Islam is the official religion of the Islamic Republic of Afghanistan.⁵⁷ While other divine religions are respected in Afghanistan, and their followers are permitted to practice their religions⁵⁸, no law shall be passed that is not in accordance with Islam.⁵⁹

It is also important to consider the role of al-Majallah al-Ahkam al-Adaliyyah (the Ottoman Courts Manual), which is also called the Mejlle or Hanafi Islamic Code. The Mejlle is the first codified collection of Hanafi views on civil law related matters, such as transactions and contracts, property and obligations.⁶⁰ It does not include Hanafi rules on all legal areas, including family law.⁶¹ The Mejlle was in effect in Afghanistan until the Civil Code was drafted in 1977, and the Civil Code continues to mimic the Mejlle in many ways.

According to Article 130 of the Constitution, Afghan courts must refer to Islamic sources of law when there are no relevant provisions in the Constitution to address a legal issue and there are no other relevant laws (such as international laws, statutes, or regulations). In these situations, courts will generally refer to Hanafi jurisprudence. However, if the legal issue involves personal status matters and the parties are followers of the Shia sect, the courts refer to Shia fiqh,⁶² which generally means the Jafari school of jurisprudence.

2004 Constitution of Afghanistan (Chapter 7, Article 130)

In cases under consideration, the courts shall apply provisions of this Constitution as well as other laws.

If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner.

Afghanistan Constitution 2004 (Chapter 7, Article 131)

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

The Quran and Sunna are the primary sources of Islamic law in Afghanistan. Not all sources of Islamic law are binding. For example, Sahih al-Bukhari is a primary, binding source of Islamic law, because it is

⁵⁷ See *id.* at Chapter 1, Article 2.

⁵⁸ See *id.*

⁵⁹ See *id.* at Chapter 1, Article 3.

⁶⁰ The Mejlle, An English Translation of Majallahel-Ahkam-I-Adliya And a Complete Code on Islamic Civil Law, (Punjab Educational Press 1967)

⁶¹ See *id.*

⁶² See Islamic Republic of Afghanistan Constitution Chapter 7, Article 131 (2004), <http://moj.gov.af/en/page/legal-frameworks/168329941684>

recognized as an authentic collecting of hadith. However, a scholar's book about Islamic law would be a persuasive secondary source.

Lawyers may refer to Islamic law to support their arguments, even in situations when Islamic law is not binding authority. For example, a lawyer may use statutory sources and also quote the Hadith or Quran to support her argument.

2.6. Customary Law

2.6.1. Defining Customary Law

Afghanistan's formal justice system historically played a limited role in governing Afghan society, and this is especially true in rural areas.⁶³ The other major sources of law discussed in this section, such as the Constitution, Codes, and Regulations, are part of the formal justice system.

Historically, many disputes in Afghanistan were resolved outside of the formal justice system, and this informal legal practice continues for many Afghans today. Local councils and groups of elders called **shuras** and **jirgas** have resolved legal disputes outside of the formal court system for centuries.

Shuras are local councils, either religious or secular, that are typically convened on an as-needed basis to resolve disputes or decide issues of community governance or resource management. The two principal types are shuras of the Ulema (Islamic scholars) or shuras of elders. Jirgas are similar to shuras and more prevalent among Pashtun tribes. A Jirga refers to a gathering of elders or leaders who sit in a large circle to resolve a dispute or make collective decisions about an issue of community-wide importance. These informal institutions enforce Shari'a law, customary tribal law, and the collective wisdom of elders, instead of Afghanistan's Constitution and statutes.

Too often, "informal" is interpreted as "unsophisticated." While it may be true that local adjudicatory systems rely on oral tradition rather than written rules, the local processes are, in fact, highly sophisticated. This sophistication is visible in both the decision-making processes of local systems, as well as the structures of those systems. In a typical jirga, for example, decisions are made in accordance with well-developed understandings of morality and justice (such as Pashtunwali). In some cases, there is even an established system for appealing jirga decisions to a higher group of elders. Thus, Afghanistan's local adjudicatory systems share many of the "formalities" of codified legal systems, and can rightly be viewed as institutions applying customary law.

The process of resolving disputes outside of the formal court system is called **alternative dispute resolution**, and you will learn more about it in Chapter 5.

2.6.2. Benefits and Drawbacks of Customary Law

Many citizens of Afghanistan prefer the local systems that apply customary law to the formal legal systems for a variety of reasons. Some consider the formal justice system slow, bureaucratic, and corrupt, and some see it as an intrusion by a faraway government on their culture and way of life. Others note the local systems' focus on social harmony and reparation, and argue that these systems promote greater societal good than the "prison-focused" state system. In the eyes of many, the local systems work well when compared to the formal system.

However, customary law can be problematic for several reasons. Decisions tend to be unpredictable: they vary from place to place and from group to group, making it difficult for people to do business in different

⁶³ Nadjma Yassari, *The Shari'a in the Constitutions of Afghanistan, Iran and Egypt—Implications for Private Law* (Mohr Siebeck 2005), 68-69.

areas of the country or with different groups. Local customs are rarely recorded, and the specific interpretation or implementation of many customs can vary widely in different parts of the country. It is also difficult to evaluate and amend customary laws because they aren't included in formal codes. Additionally, local leaders or members of shuras are frequently parties to the agreements that are in dispute, or they have individual interests in certain cases that could bias their decisions. Consensus may be prioritized over neutrality, favoring parties that have more authority.⁶⁴

Women may also be disproportionately marginalized by customary law. Compared with Islamic law, Pashtunwali grants women with fewer rights regarding family, inheritance and marriage.⁶⁵ For example, only males may own property under Pashtunwali, but females may inherit property from male relatives under Islamic law.⁶⁶ This means that a female might be deprived of her inheritance if the dispute is resolved under customary law, but would be entitled to it in the formal justice system.

Discussion Questions
Customary Law in Afghanistan

1. What are other benefits and drawbacks of customary law?
2. Is it feasible for Afghanistan's government to acknowledge, govern and promote customary law? Why or why not?
3. Is it desirable for Afghanistan's government to acknowledge, govern and promote customary law?

2.6.3. Customary Law in Afghanistan Today

Custom is treated as a secondary, persuasive source, unless a statute indicates that it is binding in a certain situation. In cases where there are no laws and where Shari'a law is silent, the Afghan Civil Code permits courts to issue rulings based on public customs, or Urf-i Umoomi, as long as these customs are not in violation of the law or against the principles of justice.

Discussion Questions
Comparing Hanafi Jurisprudence to Custom

Afghanistan's Civil Code tells readers to consult Hanafi jurisprudence before custom. In contrast, the Egyptian Civil Code places custom above Islamic law on the legal hierarchy.

What are the benefits and drawbacks to Egypt's approach? Is it much different from Afghanistan's, given that Islamic tradition is reflected in Afghan culture?

2.7. Other Sources of Law

In addition to the Constitution, international law, statutes, regulations, Shari'a law and customary law, lawyers draw on some other more detailed sources of law. These include executive decrees, bylaws, guidelines and manuals and secondary sources.

2.7.1. Executive Decrees

Executive decrees come in two forms: legislative decrees and presidential decrees.

⁶⁴ See Hamid M. Khan, *Islamic Law, Customary Law and Afghan Informal Justice* (United States Institute of Peace, Special Report 363, 2015), 1 <https://www.usip.org/sites/default/files/SR363-Islamic-Law-CustomaryLaw-and-Afghan-Informal-Justice.pdf>

⁶⁵ See *id.*

⁶⁶ See *id.* at 10.

Legislative decrees are laws that the government proposes during a National Assembly recess. The legislative decrees become binding if they are endorsed by the President, unless they are later rejected by the National Assembly.⁶⁷

Presidential decrees are laws that the President can issue, based on authority from the Constitution or statutory laws.

Discussion Questions

1. Article 79 of Afghanistan’s Constitution discusses legislative decrees⁶⁸. One part of Article 79 states: “During the recess of the House of Representatives, the Government shall, in case of an immediate need, issue legislative decrees, except in matters related to budget and financial affairs.” Why do you think the Constitution limits the government’s ability to issue legislative decrees in matters related to budget and financial affairs? What are the benefits of this limitation? The risks?

2.7.2. Bylaws

Bylaws help implement relevant regulations and are less authoritative than regulations. The government usually empowers an administrative body to enact a bylaw. Unlike regulations, bylaws can be made by a single administrative body and do not require approval from the Council of Ministers.

2.7.3. Guidelines and Manuals

Guidelines and manuals are binding, detailed documents that are narrow in scope and implement regulations. For example, Article 9 of the Constitution suggests that Afghanistan’s mines be regulated by law. This led Afghanistan to develop mining regulations. More details on these mining regulations can be found in relevant guidelines and manuals.

2.7.4. Secondary Sources

Secondary sources are persuasive (that is, non-binding) authority. They include, but are not limited to previous legal decisions, law journals, law dictionaries, encyclopedias, textbooks, scholarly publications, legal publications by various government bodies, policies & strategic plans,⁶⁹ commentaries on statutory laws, and legislative history.

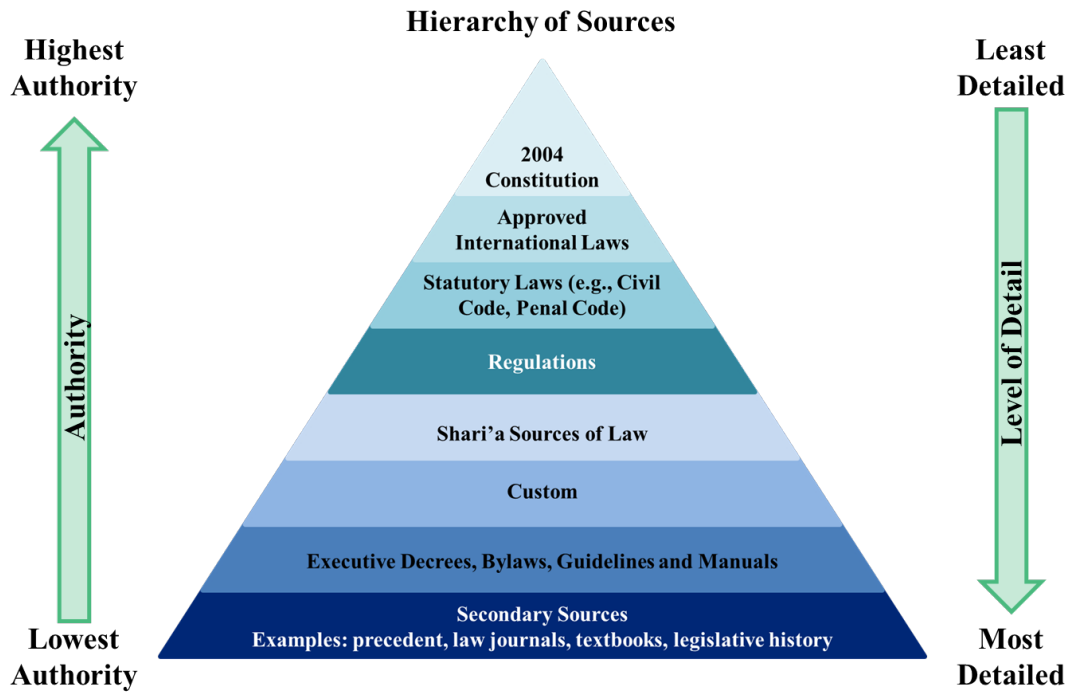
2.8. Review

As you can see, there are many sources of Afghan law, and the sources differ in their authority and level of detail. Review the graphic about the hierarchy of laws again. Notice that the sources of authority on the top of the hierarchy offer the least amount of detail, while sources with less authority offer greater levels of detail.

⁶⁷ Article 79 of Afghanistan’s Constitution (2004) also describes legislative decrees.

⁶⁸ Islamic Republic of Afghanistan Constitution Chapter 4, Article 79 (2004), <http://moj.gov.af/en/page/legal-frameworks/168329941684>

⁶⁹ One example of a strategic plan is the *Education Sector Strategy For the Afghanistan National Development Strategy*, http://planipolis.iiep.unesco.org/upload/Afghanistan/Afghanistan_MoE_strategy_English.pdf. This strategy specifies the Ministry of Education’s goals before they are formally incorporated into law.



Islamic principles are reflected throughout Afghanistan's Constitution, Statutory Laws, Regulations, and Customs.

Discussion Question

1. Why would higher sources of legal authority have less detail, but lower sources of legal authority have more detail? Consider the difficulty of approving and changing the higher sources of legal authority when you answer this question.

2.9. For Further Consideration

The Intersection of Afghanistan's Constitution and the Mejjelle

Consider five leading maxims from the Mejjelle, listed below.⁷⁰ Which articles in Afghanistan's constitution reflect them? Find an article in Afghanistan's constitution that reflects a maxim and explain why it reflects the maxim.

- i. Harm must be eliminated (Mejjelle, Art. 20)
- ii. Acts are judged by their goals and purposes (Mejjelle, Art. 2)
- iii. Certainty is not overruled by doubt (Mejjelle, Art. 4)
- iv. Hardship begets facility (Mejjelle, Art. 17)
- v. Custom is the basis of judgment (Mejjelle, Art. 36)

Hint: Here are some example answers of Constitutional provisions that embody the Mejjelle's principles. Do not consult them before attempting to find the provisions yourself! There are many possible correct answers, and the following are just examples. i. Article 51; ii. Article 27; iii. Article 25; iv. Article 31; v. Preamble.

3. KEY DISTINCTIONS: PRIVATE LAW COMPARED TO PUBLIC LAW AND DOMESTIC LAW COMPARED TO INTERNATIONAL LAW

As you learned in the previous section, there are many sources of law for lawyers to consult. You may wonder how lawyers select relevant sources of law when they are presented with a legal dispute. To find relevant sources of law, lawyers must ask themselves: who are the parties to the dispute? This section will briefly introduce two important distinctions that rest on parties belonging to certain groups: 1) the difference between private and public law and 2) the difference between domestic and international law. (You will learn more about domestic and international law in sections 4 and 5 of this chapter.)

3.1. Introduction to Private and Public Law

To understand the difference between private and public law, the first step is to consider whether a government entity is a party to the legal dispute. Private law applies to legal disputes between private persons, while public law applies when a government entity is a party to a dispute and is performing one of its governmental functions.

Key governmental functions include maintaining order and security, safeguarding individual rights, enacting and enforcing administrative regulations, collecting taxes, and engaging in relations with foreign states. Sometimes, however, a government office is not performing one of these functions, but is instead acting in the same way that a non-government party would. For example, if the Ministry of Justice enters

⁷⁰ Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oneworld Publications 2008), 144.

into a contract with a restaurant to provide food for an event that it is holding, that contract is just like a contract between a private citizen and the restaurant. The contract would be governed by private law.⁷¹

Private law aims to recognize and enforce private parties' rights.⁷² A party is "private" if he is an individual acting in his own personal interest, rather than as an agent or a representative of a government.⁷³ Private law determines outcomes of legal disputes between individuals and therefore tends to be more specific to particular facts.⁷⁴ The government plays the role of a "referee" in private disputes, deciding how to recognize and enforce private rights.⁷⁵

On the other hand, **public law** applies when the government is a party to a legal dispute.⁷⁶ Public law governs the relations between a state and its citizens.⁷⁷ Public law protects **civil rights**, which are legal rights that restrict government action that may affect a protected interest, such as an individual's freedom. Civil rights are often **negative rights**, which are rights that create a duty for another party, such as the Afghan government, not to act a certain way. For example, citizens' rights to peaceful un-armed demonstrations means that the government has a duty to abstain from putting restrictions on peaceful un-armed demonstrations.

Substantive laws, or bodies of law about a specific topic, such as commercial transactions or crimes, tend to fall within the category of public or private law. You will learn about which areas of substantive law belong to public or private law later in this chapter, and which areas do not fit neatly into one category or the other. For now, it's simply important to note that a single dispute may involve questions of both public and private law.

3.2. Introduction to Domestic and International Law

It's also important to understand the difference between domestic and international law, and how these two sources of law interact with and compete.

Domestic law, which is also called municipal law, governs individual citizens and corporations within a country. Domestic laws are created by Afghanistan's legislature (the Wolesi Jirga and the Meshrano Jirga⁷⁸), enforced by a single executive (the President), and interpreted by a unified judiciary (the Supreme Court). Domestic law includes the Constitution of Afghanistan, Shari'a sources of law, custom, state codes and statutory law, and other formal decrees or regulations.

International law governs legal disputes and transactions between citizens or governments of different **states**. A state is a nation or territory that is considered an organized political community under one government.

The distinction between public and private law that we discussed in section 3.1 is especially important to international law. As you may guess, there are two kinds of international law: 1) public international law

⁷¹ See Jaap Hage, *Basic Concepts of Law*, in *Introduction to Law*, ed. Jaap Hage and Bram Akkermans (Switzerland: Springer International Publishing, 2014), 38-39.

⁷² See J.H. Merryman, *The Public Law—Private Law Distinction in European and United States Law* (1966), 40.

⁷³ Howard Schweber, "Private Law," in *Legal Systems of the World*, ed. Herbert Kritzer (ABC-CLIO, 2002), 1321.

⁷⁴ See *id.*

⁷⁵ J.H. Merryman, *The Public Law—Private Law Distinction in European and United States Law* (1966), 40.

⁷⁶ J.B. Grossman & Erin Ackerman, "Public Law," in *Legal Systems of the World*, ed. Herbert Kritzer (ABC-CLIO, 2002), 1339.

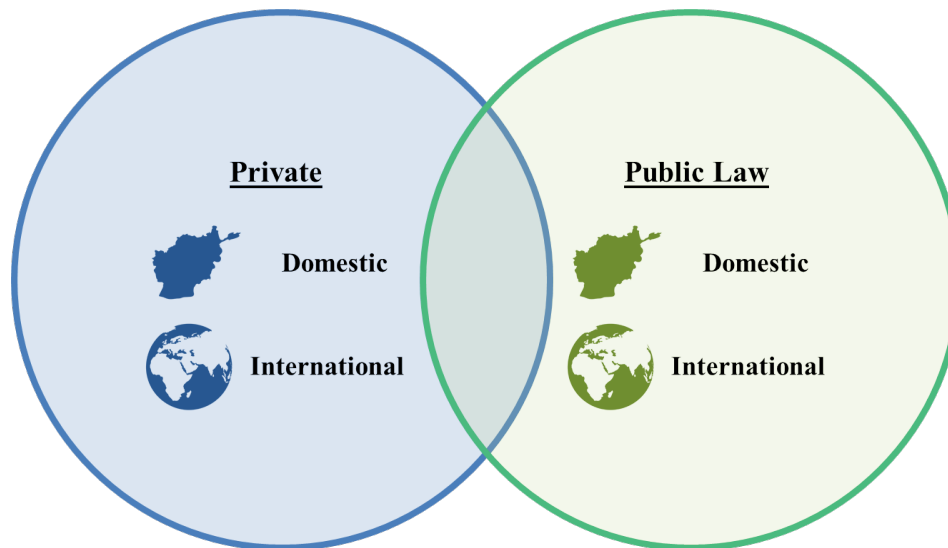
⁷⁷ See *id.* at 1340.

⁷⁸ The Wolesi Jirga has popularly elected representatives from each of the 34 provinces, proportional to their population. The Meshrano Jirga has two representatives from each province, elected respectively by a provincial council and a district council. Chapters 4 and 5 of this textbook will discuss them more in detail.

and 2) private international law. **Public international law** is the collection of rules and customs that govern the interactions between states. If, for example, Afghanistan's government signed an agreement with Germany's government to limit export tariffs, public international law would apply.

Private international law addresses interactions of individuals and corporations from different states. It focuses on individual interactions across borders where state governments do not play a direct role. Imagine that a textile manufacturer from Afghanistan is seeking to sell its goods through retail stores in Russia. These parties consider important questions about their business relationship while they negotiate a contract. For example, they decide how to deal with differences in currency, differences in Russian and Afghan laws, and where to seek resolution in the case of a dispute. These are the types of legal issues that concern private international transactions, although some aspects of public international law, such as international tariffs and international labor laws still affect these transactions.

The graphic below⁷⁹ illustrates how the distinction between private and public law and domestic and international law intersect. Review it, and then consider the exercise that follows.



⁷⁹ Icons featured in the graphic are from the Noun Project. Specifically, the Afghanistan icon is created by the Linseed Studio from the Noun Project, and the Globe Icon is created by Ted Grajeda from the Noun Project.

Exercise

Which type of legal categorizations is relevant to the following scenarios? Each scenario corresponds with one categorization.

<u>Scenario</u>	<u>Categorization</u>
A. Tahir is an apricot farmer in Kandahar. He makes a contract with Waheed, who is a grocery store owner in Kabul, agreeing to sell him 10 crates of apricots.	1. Public International Law
B. Tahir works for the Ministry of Agriculture, Irrigation and Livestock. He, along with other branches of the Afghan government, is deciding whether to enter an agreement with France which would limit the tariff on apricots.	2. Private International Law
C. Tahir is an apricot farmer. He must comply with certain regulations from the Ministry of Agriculture, Irrigation and Livestock, which prevents him from using certain chemicals to grow his apricots.	3. Public Domestic Law
D. Tahir is an apricot farmer in Kandahar. He makes a contract with Irena, who is a grocery store owner in Moscow, Russia, agreeing to sell her 10 crates of apricots.	4. Private Domestic Law

3.3. Differences Between Domestic and International Law

Unlike domestic laws, international laws are not created by a single legislature, enforced by a single executive, and interpreted by a unified judiciary. Although there are no single international bodies that perform the legislative, executive and judicial functions entirely, several international organizations act in some capacity as legislatures, executives, or judiciaries. For example, the United Nations⁸⁰ performs as a legislative body for 193 member states, including Afghanistan, and several regional international organizations such as the European Union and the South Asian Association for Regional Cooperation perform as legislative bodies for their respective regions.

In addition, international laws are **consent-based**, meaning that states are typically only bound by rules that they accept (with exceptions, such as customary international law). States accept laws by opting into international organizations and agreements. This is different from a domestic legal system, in which a citizen cannot choose to drive on the left side of the road if the domestic law dictates that everyone must drive on the right.

3.4. An Important Criticism of the International Legal Regime

International law remains **Eurocentric**, meaning that it operates from a perspective of Western bias. The modern international legal regime has developed significantly over the past 400 years but originated in the interactions between European states. Treaties, ambassadors, and even international organizations

⁸⁰ The United Nations was formed in 1945 when 51 countries (the victorious states that had declared war on Germany and Japan in World War Two) convened in San Francisco to design a Charter that would provide the organizational framework for treaty formation and the promotion of peace and human rights. "History of the United Nations," United Nations, last updated 2015, http://www.un.org/en/aboutun/history/sanfrancisco_conference.shtml. The UN operates to maintain international peace and security, to develop friendly relations among nations, to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and to be a center for harmonizing the action of nations.

arose from the needs of those states. The United Nations itself derives from an effort to prevent another Europe-born war after World War II ended. Today, the major international bodies reside in Europe and the United States.

Over the past several decades, the world has seen new powers from other continents emerge as political and economic forces. Many have very different values from Western values. Many have engaged in conflict with Western nations in the past and/or are former colonies of Western nations who are skeptical of Western institutions. These developments make it even more important now to include diverse points of view in the making of international law.

We encourage you to question the point of view of this book as well—it is written by a collection of Western-educated authors, each defined to some degree by his or her own experience and worldview. To develop your own perspective, we encourage you to seek out and think critically about the sources presented in this book and assumptions behind them. Chapter 8 of this textbook will also provide suggestions for improving your critical thinking skills.

3.5. Review

Now that that you have a basic understanding of the differences between private and public law and domestic and international law, we will cover these topics in more depth. You will learn more about private and public domestic law in section 4, and you will learn more about private and public international law in section 5.

4. DOMESTIC LAW

In this section, you will be briefly introduced to some of the key areas of domestic law and how they interact with the distinction between private and public law. As you read the following sections, keep the following question in your mind: what is the government’s role with respect to these substantive areas of law? You will learn about the substantive areas of law in detail in Chapter 6 of this textbook.

4.1. Private Domestic Law

As mentioned above, private law governs relations between persons. Recall from Chapter 2 that the legal definition of personhood includes not only human beings (“natural persons”) but also corporations (“legal persons”). Substantive areas of law that govern relations between persons—whether two individuals, an individual and a corporation, or two corporations—tend to be areas of private law. Afghan family law, property law, law of obligations, and commercial law are core substantive areas of private domestic law and will be introduced briefly below.

Family law typically covers marriage, filiation, and family support obligations.⁸¹ For citizens to be recognized as “family” under the law, they must have a legally recognized relationship. Citizens can establish a legally recognized relationship through a legally acknowledged blood relationship, a legal act like adoption or marriage, or through a legally relevant factual act, such as accepting a person into their household.⁸² Family law falls into the private law category because the government is not a party to family law disputes. Instead, family law disputes focus on whether family members are upholding their obligations.

Property law governs private ownership of land and other possessions, including the right to possess, use, lease, and sell possessions. Like the governments of most countries in the Romano-Germanic

⁸¹ See M.A. Glendon & P. Carozza., *Comparative Legal Traditions and Cases on Western Law* (4th edition 2014), 375.

⁸² See Basedown et al., *The Marx Plank Encyclopedia of European Private Law* (Oxford 2012), 676.

tradition, Afghanistan's government serves the important function of protecting private property.⁸³ Thus, the government typically acts as the referee, rather than as a party, to property law disputes.

The **law of obligations** governs two types of obligations: 1) obligations that persons owe each other by contract or other agreement and 2) obligations created by civil wrongs committed by one person that harmed another. Disputes under the law of obligations are **civil actions** between private parties, meaning that the government is not a party to the dispute.

Finally, **commercial law** governs commercial transactions between corporations or other business associations. It governs topics such as securities, banking, formation of corporations, and negotiable financial instruments.⁸⁴ Since corporations and other business associations count as private parties and the government is not normally a party to commercial disputes, commercial law is typically considered to be a kind of private law.

4.2. Public Domestic Law

In contrast to private domestic law, public domestic law governs relationships with private citizens and the state. Core substantive areas of public domestic law include constitutional law, administrative law, criminal law and tax law.

4.2.1. Constitutional Law

Under constitutional law, the State has a legal obligation, or duty, to guarantee the rights of citizens granted in its constitution. For example, pursuant to Article 36 of the Constitution of Afghanistan, Afghan citizens have the right to "unarmed demonstrations." This means that they may hold demonstrations or gatherings. The Constitution further notes, however, that only demonstrations with peaceful and legitimate goals are constitutionally protected. In other words, according to the Constitution, the State of Afghanistan may not prevent Afghan citizens from holding such unarmed demonstrations, as long as the demonstrations have peaceful and legitimate goals.

Constitutional rights only regulate the relationship between the State and its citizens. To understand this point, imagine that Farah and her friends are trying to hold an unarmed demonstration to advocate for their right to an education. Farah's brother, Arash, would not be committing a constitutional violation if he and his friends tried to hold a separate demonstration opposing female education, as long as he and his friends aren't agents of the states. If, however, Arash was representing the Afghan State, he would be committing a constitutional violation.

Another way to think about the State's obligation to uphold rights is to keep in mind that there must be state action for a constitutional violation to occur. Because only the State is obligated to uphold constitutional rights, a constitutional violation requires state involvement. This is why Arash would not commit a constitutional violation by disrupting Farah's unarmed demonstration, but the State would commit a violation by disrupting the same demonstration. State action can also occur when a State fails to prevent something that it should. For example, there could be state action if the State allowed Arash and his friends to prevent Farah's demonstration.

Although Arash is a private actor with no duty to uphold Farah's constitutional rights, he may still have done something illegal. Imagine, for example, that Arash prevented Farah's protest by stealing Farah's friends' automobiles. Article 40 of the Constitution states, "Property shall be safe from violation." Since Arash is a private actor, he did not commit a constitutional violation by stealing the automobiles.

⁸³ See M.A. Glendon & P. Carozza., *Comparative Legal Traditions and Cases on Western Law* (4th edition 2014), 375-76.

⁸⁴ See *id.* at 377.

However, he likely violated the Penal Code—which reflects the Constitution’s principles—and would therefore face criminal liability.

Discussion Questions

In 2009, the Taliban and other insurgent groups attacked schools, with focus on girl’s schools and an intent to discourage female education.⁸⁵ Recall that Afghanistan’s Constitution gives men and women right to education.⁸⁶

1. Did the Taliban commit a Constitutional violation?
2. How would the answer to this question change depending on whether the Taliban held government power when it attacked the schools?

4.2.2. Administrative Law

Administrative law governs administrative authorities of the Executive branch, such as the Ministries, Commissions and municipalities.⁸⁷ It generally regulates the organization, function, and relations between administrative authorities and governs the relationship between administrative authorities and citizens,⁸⁸ making it a source of domestic public law. Compared with private law, administrative law tends to leave more room for judicial discretion and to change more frequently.⁸⁹ Administrative law is very broad and complex, which is why it is mentioned only briefly in this textbook.

4.2.3. Criminal Law

Criminal law, sometimes called penal law, concerns a body of regulations that define criminal actions. Police and prosecutors refer to criminal law when charging and trying a person for criminal conduct.

Criminal law is public law because the state acts as a party in criminal trials, justifying its interest in “proscribing and punishing behavior that violates community order.”⁹⁰ Unlike civil cases, which usually involve a dispute over money between private parties, criminal cases are brought by the government on behalf of Afghan citizens to punish someone for a criminal transgression against society.

There may be acts that create both criminal liability and liability under the law of obligations. In a theft, for example, the thief has harmed society by undermining general property rights—others will feel that their person or possessions are at risk. Simultaneously, the thief has directly harmed the individual from whom he stole, and therefore has an obligation to replace the value of the object. Both wrongs must be addressed.

The government may punish criminal behavior in several ways. Criminal law reflects society’s judgment that a certain act is so bad that a person who commits it should be deprived of his or her liberty, wealth,

⁸⁵ Human Rights Watch, *Afghanistan Events of 2009*, <https://www.hrw.org/world-report/2010/country-chapters/afghanistan>

⁸⁶ Relevant parts of Afghanistan’s 2004 Constitution include: Chapter 2, Article 22 (“The citizens of Afghanistan – whether man or woman – have equal rights and duties before the law”), Chapter 2, Article 43 (“Education is the right of all citizens of Afghanistan which shall be offered up to the B.A level in the state educational institutes free of charge by the state”) and Chapter 2, Article 44 (“The state shall devise and implement effective programs to create and foster balanced education for women, improve education of nomads as well as eliminate illiteracy in the country”).

⁸⁷ See Tarek Azizy, *Max Planck Manual on Administrative Law in Afghanistan* (February 2011), 3-5.

⁸⁸ See M.A. Glendon & P. Carozza., *Comparative Legal Traditions and Cases on Western Law* (4th edition 2014), 373.

⁸⁹ See *id.* at 374.

⁹⁰ See J.B. Grossman & Erin Ackerman, “Public Law,” in *Legal Systems of the World*, ed. Herbert Kritzer (ABC-CLIO, 2002), 1341.

freedom, or even life. Article 97 of the Penal Code describes six main types of punishment: execution, continued imprisonment (16-20 years), long imprisonment (5-15 years), medium imprisonment (1-5 years), short imprisonment (24 hours to 1 year), and cash payment. The Penal Code generally prescribes the punishment's range (e.g., medium punishment), leaving the exact punishment up to the judge's discretion. This means that the judge may adjust the punishment within the range so it fits the crime. The judge may, for example, order a punishment on the lower end of the range if there are mitigating circumstances, such as a person who committed a crime but had honorable intentions. A judge might also order a punishment on the upper end of the range if the crime involved aggravating circumstances, such as if the person had committed the same crime before.

4.2.4. Tax Law

Tax law is another area of public law because general welfare is harmed when people don't pay their taxes and the government exercises its governmental function when it collects taxes. Article 42 of Afghanistan's Constitution mandates that Afghan citizens have a duty to pay taxes.⁹¹ This is a basic but important duty because the government cannot function without tax revenue. Without taxes, the government would lack the necessary funds to ensure the right of all citizens to an education, the right of the indigent defendant to a defense attorney, the right to just compensation for any property seized by the government, and other constitutionally-guaranteed rights.

5. INTERNATIONAL LAW

Afghanistan's role on the global stage is increasing. As Afghanistan's government enters agreements with other countries and individual Afghans transact business with citizens around the globe, international law becomes increasingly important. This section will introduce you to basic international law concepts, beginning with public international law and concluding with private international law. Keep in mind that international law is a complex topic and this section serves as a very brief overview. Consider taking a class dedicated to international law if it is an area that interests you.

5.1. Public International Law

5.1.1. Importance of Public International Law

Countries around the world, like Afghanistan, India, China, and the United States, interact each day in many ways. They share borders and keep track of movements across those borders. They trade and may impose **tariffs**, or charges on goods that enter their territory from the outside. Sometimes countries collaborate with others to prevent the spread of weapons, narcotics, and other dangerous goods. Other times they seek **alliances**, or agreements across multiple countries to promote peace and stability. Countries also work together to build large international organizations like the United Nations, World Bank, International Atomic Energy Agency, and International Court of Justice, which have tremendous responsibility for supervising, regulating, and enforcing international activity.

Public international law is an especially important topic for students in Afghanistan. Consider Afghanistan's recent history: the occupation by the Soviet Union, the rise of the Taliban government backed by foreign powers, the presence of forces from North Atlantic Treaty Organization (NATO) and the United States after 2001, aid agreements sponsored by international organizations, and continual conflicts at the porous Durand Line border with Pakistan. International law has a strong influence on domestic law, especially as it relates to trade and finance.

⁹¹ Islamic Republic of Afghanistan Constitution, Chapter 2, Article 42 (2004), <http://moj.gov.af/en/page/legal-frameworks/168329941684>

Each of these moments has shaped people’s experience with international law and the direction of Afghanistan’s future. Each of these also involves complex and important questions about the criteria for recognizing statehood, how international agreements are formed and the obligations they compel, and how war and conflict are addressed in international law. Finally, they also test our assumptions about the legitimacy of international law—whether it can and should be enforced, and who should enforce it.

5.1.2. Review of Public International Law Definition

As you learned earlier in this chapter, public international law is the collection of rules and customs that govern the interactions between states. A state is a nation or territory that is considered an organized political community under one government.

In some ways, public international law governs states similar to the way in which domestic law governs individuals and corporations within a country. Just as individuals and corporations must obey domestic rules and regulations, states must obey international rules and regulations that they agree to. States perform certain responsibilities, submit to regulations from a variety of international organizations such as the United Nations, and expect consequences for breaking the rules.

Under international law, states control what happens within their own borders. An international law cannot dictate one state’s internal traffic laws, if that state does not agree to the international law. In theory, states are also free from compulsion by other states. All states theoretically reside on an equal plane, although in practice some have vastly greater legal influence in the international system.

5.1.3. Role of the International Court of Justice

The International Court of Justice plays a significant role in enforcing international law. It was established in 1945 through the United Nations Charter, and came into effect in 1946. The International Court of Justice is composed of 15 elected judges and is the principal judicial body on the United Nations, which means that it interprets international law and administers justice when disputes arise between states. For example, the court has resolved cases about boundaries in ocean water and diplomatic disputes arising from international hostage crises. It is often the final decision maker between conflicting claims of different states.

5.1.4. Sources of International Law

The Charter of the United Nations contains the Statute of the International Court of Justice,⁹² which organizes the International Court’s composition and functioning. Article 38(1) lists the four main sources of international law: international conventions (also called treaties), customary international law, general principles of law, and international legal discourse. The International Court of Justice allocates importance of these sources of law in order from highest to lowest on the list, even though Article 38(1) does not specify a hierarchy explicitly.

Statute of the International Court of Justice
Chapter II: The Competence of the Court
Article 38(1)

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or establishing rules expressly recognized by the contesting states.
- b. international custom, as evidence of a general practice accepted as law.

⁹² International Court of Justice, *Statute of the Court*, <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

- c. the general principles of law recognized by civilized nations.
- d. subject to the principles of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Now we will discuss each of the four sources of international law in greater depth.

5.1.4.1. Treaties (International Conventions)

Treaties, which are also called international conventions, are formal agreements between states that impose special legal obligations upon them. Treaties provide an instrument for states to cooperate and express their positions on important issues ranging from commerce and security, to public health and human rights.

Treaties are binding obligations that states expressly and voluntarily accept between themselves, usually in writing. Treaties are usually signed and then ratified through a domestic legislative process. If a state consents to an agreement, then it is committing itself to certain obligations and allowing others to intervene if it fails to meet those obligations.

You may be wondering about the difference between signature and ratification. States that **ratify** a treaty indicate their consent to be bound to the terms of the treaty.⁹³ States that **sign without ratifying** are not yet officially bound to the terms of the treaty.⁹⁴ By signing, but not ratifying the treaty, these states are showing a desire to continue participating in the treaty-making process, and are expected to refrain from acts that would defeat the purpose of the treaty.⁹⁵

You will hear many different words used to name treaties, including: conventions, covenants, agreements, pacts, understandings, protocols, charters, statutes, acts, declarations, engagements, arrangements, accords, regulations, and provisions.⁹⁶ But do not be confused. No matter the name, all treaties have a common legal effect—they set out rules that bind the parties to them in their relations with one another as a matter of international law.⁹⁷

Treaties basically take one of two forms: **bi-lateral**, which is a treaty between two state parties, and **multi-lateral**, which is a treaty amongst more than two states and/or international organizations. Some treaties are formed to address only a single issue, such as the Mine Ban Treaty of 1997, which is also known as the Ottawa treaty, and bans all mines that are designed for use against humans.⁹⁸ Afghanistan is an important party to the Mine Ban Treaty of 1997 because of its historic experience with land mine eradication in the decades after the Soviet invasion.

Article 7 of Afghanistan's Constitution mandates that it honor its international agreements. In addition, Afghanistan's Supreme Court has the authority to review the international treaties for compliance with the constitution and interpretation in accordance with the law, under Article 121.

⁹³ See United Nations, *What is the difference between signing, ratification and accession of UN treaties?*, <http://ask.un.org/faq/14594>

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ Jenny Martinez, "Sources of International Law" (International Law lecture, Stanford Law School, Stanford, California April 1, 2014).

⁹⁷ John H. Currie et al., *International Law: Doctrine, Practice, and Theory* (Toronto: Irwin Law, 2007), 40.

⁹⁸ See Canadian Landmine Foundation, *Ottawa Treaty*, <http://canadianlandmine.org/ottawa-treaty>

2004 Constitution of Afghanistan (Chapter 1, Article 7)⁹⁹

The state shall observe the United Nations Charter, inter-state agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights.

2004 Constitution of Afghanistan (Chapter 7, Article 121)¹⁰⁰

At the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law.

5.1.4.2. Customary International Law, General Principles of Law and International Legal Discourse

The three other sources of public international law are customary international law, general principles of law, and international legal discourse.

Customary international law refers to legal obligations that arise from consistent state practices instead of formal agreement. It relies on common behavior among states from a sense of legal obligation that implies that there is a widely understood global rule. The behavior does not need to be universal to count as customary, but it does have to be widespread. For example, the prohibition on slavery has become widespread enough to be customary.

General principles of law are laws that major legal systems have already adopted. One example is **res judicata**, which is the principle that when a specific issue has been decided in court once, that same issue cannot be argued again. Another example is **laches**, which is the idea that if a party waits too long after a dispute to make a claim, then that party loses its right to sue.

The final core source of public international law is international legal discourse. This includes wide discussion about international legal norms, especially among legal scholars and other international courts. For example, scholars wrote an article called *Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions*, which informs the legal community's understanding of how Islamic Supremacy Clauses, like Article 3 in Afghanistan's Constitution, are developed and interpreted internationally.¹⁰¹

5.1.4.3. Other Public International Law Source Implications and Summary Table

There are two other principles to keep in mind when considering the four sources of public international law. First, the sources of public international law can interact. For example, treaties can turn existing customary international law into formal agreements or create new customs. Second, the sources of public international law differ in their level of authority. Treaties and customary international law are **binding**, which means that the Court *must* use them in applying the law. In contrast, general principles of law and

⁹⁹ See Islamic Republic of Afghanistan Constitution, Chapter 1, Article 7 (2004), <http://moj.gov.af/en/page/legal-frameworks/168329941684>

¹⁰⁰ See *id.* at Chapter 7, Article 121.

¹⁰¹ See Dawood I. Ahmed & Tom Ginsburg, *Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions* (54 Virginia Journal of International Law, 2014), https://www.academia.edu/11832155/Constitutional_Islamization_and_Human_Rights_The_Surprising_Origin_and_Spread_of_Islamic_Supremacy_in_Constitutions

international legal discourse are only **persuasive**, which means that the Court *can* use these sources if it chooses to.

You may find it helpful to review the table below, which summarizes the four sources of public international law and key concepts from this section.

Summary: Sources of International Law			
Source	Example	Binding or Persuasive?	Key Points
International Conventions	Afghanistan is a member of the Mine Ban Treaty of 1997. States that join this treaty agree not to use explosive mines designed to injure or kill humans.	Binding	<ul style="list-style-type: none"> States expressly and voluntarily can choose whether to join (that is, ratify) conventions and typically do so in writing. They are bound once they ratify. International conventions may be called treaties, conventions, covenants, agreements, pacts, understandings, protocols, charters, statutes, acts, declarations, engagements, arrangements, accords, regulations, and provisions They may be <u>bilateral</u> (between two states) or <u>multilateral</u> (amongst more than two states and/or international organization(s))
Customary International Law	The widespread prohibition of slavery	Binding	<ul style="list-style-type: none"> Customary international law obligations come from general and consistent state practices instead of formal agreements. To be considered customary law, the practice does not need to be universal; it just needs to be widespread. International conventions may codify customary international law.
General Principles of Law	Res judicata (when a specific issue has been decided in court once, that same issue cannot be argued again)	Persuasive	<ul style="list-style-type: none"> General principles of law are laws that major legal systems have already adopted.
International Legal Discourse	A scholarly article published in the Virginia Journal of International Law argues that adding an Islamic Supremacy Clause tends to lead to expanded grounds	Persuasive	<ul style="list-style-type: none"> Includes both discussion among scholars and international courts.

	for Constitutional rights. ¹⁰²		
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5.1.5. Afghanistan’s Participation in International Conventions

Afghanistan takes part in many international conventions, many of which focus on human rights, the environment and economic policies.

5.1.5.1. Afghanistan’s Participation in Human Rights International Conventions

Afghanistan promotes human rights across the globe by ratifying human rights conventions. For example, Afghanistan is a member of the International Covenant on Civil and Political Rights of 1976, which protects human rights to life and liberty by forbidding slavery and arbitrary imprisonment, among other practices.¹⁰³ Afghanistan is also a member of the following conventions: the International Convention on the Elimination of All Forms of Racial Discrimination of 1969, International Covenant on Economic, Social and Cultural Rights of 1976, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1987, Convention on the Rights of the Child of 1990 and optional protocols from 2002 protecting children from armed conflict, sale, prostitution and pornography, Convention on the Rights of Persons with Disabilities of 2008, and the Convention on the Elimination of All Forms of Discrimination against Women of 1981.¹⁰⁴

Afghanistan pledged to incorporate the principle of equality of men and women into its legal system when it became a member of the Convention on the Elimination of All Forms of Discrimination against Women of 1981.¹⁰⁵ The green box below contains some of this treaty’s provisions that require member states to promote equality of men and women in education:

Convention on the Elimination of All Forms of Discrimination Against Women

Part III: Education

Article 10 (a-d)

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

- a. The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;
- b. Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;

¹⁰² See Dawood I. Ahmed & Tom Ginsburg, *Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions* (54 Virginia Journal of International Law at 616, 2014)

https://www.academia.edu/11832155/Constitutional_Islamization_and_Human_Rights_The_Surprising_Origin_and_Spread_of_Islamic_Supremacy_in_Constitutions

¹⁰³ See United Nations Human Rights Office of the High Commissioner, *International Covenant on Civil and Political Rights*, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

¹⁰⁴ See United Nations Human Rights Office of the High Commissioner, *Status of Ratification Interactive Dashboard-Afghanistan*, <http://indicators.ohchr.org/>

¹⁰⁵ See UN Women, *Convention on the Elimination of All Forms of Discrimination Against Women*, <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>

- c. The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;
- d. The same opportunities to benefit from scholarships and other study grants

Discussion Questions

1. Which sources of Afghan law (e.g., the constitution, statutory law, customary law) do you think were impacted by Afghanistan's membership in the Convention on the Elimination of All Forms of Discrimination Against Women? Do you think it would help Farah's case? Why?
2. Under what circumstances does it make sense for Afghanistan to wait until its domestic sources of law reflect content in international treaties, before signing the treaties?
3. Under what circumstances does it make sense for Afghanistan to change its domestic laws in response to international treaties?

5.1.5.2. Afghanistan's Participation in Environmental International Conventions

Afghanistan also participates in international conventions that aim to preserve the environment. For example, Afghanistan ratified the Paris Agreement in 2017, a global environmental initiative to slow climate change.¹⁰⁶ The Paris Agreement aims to reduce greenhouse gas emissions, preventing dangerous human interference with the climate system. States that ratify the Paris Agreement commit to comply with gas emissions targets.¹⁰⁷

5.1.5.3. Afghanistan's Participation in Economic International Conventions

Finally, Afghanistan participates in many economic-focused international conventions. For example, Afghanistan ratified the International Labour Organization's Minimum Age Convention of 1973, indicating that the minimum age for employment in Afghanistan is 14 years old.¹⁰⁸ Afghanistan is also a member of a large Asian regional organization, the South Asian Association for Regional Cooperation (SAARC).¹⁰⁹ SAARC members are parties to the South Asian Free Trade Area Agreement, which establishes a free trade area that will eliminate customs duties among signatory nations.

Another prominent international organization focused on trade is the World Trade Organization (WTO). The WTO was established in 1994 as the culmination of nearly 50 years of negotiations under the General Agreement on Tariffs and Trade (GATT). The General Agreement on Tariffs and Trade was formed shortly after World War II to provide a structure for international trade matters, specifically the reduction

¹⁰⁶ See United Nations Framework Convention on Climate Change, *Paris Agreement-Status of Ratification*, http://unfccc.int/paris_agreement/items/9444.php

¹⁰⁷ See United Nations, *Paris Agreement*, http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf

¹⁰⁸ See International Labour Organization, *Ratifications for Afghanistan*, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102945

¹⁰⁹ SAARC consists of eight bordering countries: Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka. It derives much influence from the size of its enormous market; India alone is the fourth-largest economy in the world, and the world's largest democracy by population. Economic cooperation within SAARC focuses on such sectors as energy, tourism, and telecommunications.

of taxes on imports called **tariffs**. Today, the WTO administers trade agreements, acts as a forum for trade negotiations, settles trade disputes, and assists developing countries with trade policy issues.¹¹⁰ Although originally designed to focus on tariff reduction and trade policy generally, recent WTO negotiations have involved everything from telecommunications to agricultural policy and intellectual property. There are about 164 countries in the WTO accounting for over 95% of global trade.

5.1.5.4. For Further Consideration

Afghanistan's WTO Membership

On July 29th, 2016, Afghanistan became a WTO member.¹¹¹ As part of its process for becoming a WTO member, Afghanistan signed several international conventions that make it less costly to trade goods and services with other countries.¹¹² For example, Afghanistan agreed to keep its import and export tariffs below specified amounts. Afghanistan also signed an international convention called the Information Technology Agreement (ITA)¹¹³, which eliminates tariffs on certain IT products, including computers, telecommunication equipment, software, scientific instruments, and more.¹¹⁴ In its convention with the WTO, Afghanistan states its goals of reforming Afghanistan's domestic economy, attracting investments, creating jobs, and improving the welfare of Afghans.¹¹⁵

For Discussion

1. How can WTO membership help Afghanistan achieve these goals?
2. What role will the ITA play in achieving Afghanistan's goals?
3. How does reciprocity from other countries help Afghanistan achieve its goals? Keep in mind that other countries signed the ITA.

5.1.6. Enforcing International Conventions

There is no unified global legislature solely responsible for enacting international laws, no official global police to enforce international rules, and no world leader who acts as an executive. However, the United National General Assembly, the United Nations Security Council, and the International Court of Justice are somewhat similar to a legislature, executive and judiciary respectively.

There are many international courts and tribunals, with some directly related to the United Nations (UN) and others strictly independent from the UN. Recall section 5.1.3 of this chapter. There, you learned that the International Court of Justice is a principle organ of the UN, and that it adjudicates legal disputes between states in accordance with international law. The International Court of Justice also provides advisory opinions when certain UN organs or Specialized Agencies submit legal questions to the court.¹¹⁶

¹¹⁰ See World Trade Organization, *The Organization*, http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr02_e.htm

¹¹¹ See WTO, *Overview of Afghanistan's Commitments*, https://www.wto.org/english/news_e/news15_e/afgancommitmentsmc10_e.pdf

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See World Trade Agreement, *Information Technology: Introduction*, https://www.wto.org/english/tratop_e/inftec_e/itaintro_e.htm

¹¹⁵ See WTO, *Overview of Afghanistan's Commitments*, https://www.wto.org/english/news_e/news15_e/afgancommitmentsmc10_e.pdf

¹¹⁶ See United Nations, *UN Documentation: International Law*, <http://research.un.org/en/docs/law/courts>

The International Criminal Court (ICC), conversely, is an independent judicial body and not part of the UN. Established by a treaty called the Rome Statute, the ICC has jurisdiction over persons charged with genocide, crimes against humanity, and war crimes. As of 2017, Afghanistan is one of 124 states parties to the Rome Statute.¹¹⁷ A State not party to the Rome Statute can accept the jurisdiction of the ICC with respect to crimes committed in its territory or by one of its nationals.

There are three major challenges with enacting, enforcing, and adjudicating public international laws. First, the lack of unified legislative, executive, and judiciary bodies creates difficulties. Second, the public international law institutions that are in place are immature and do not always represent all nations equally. Finally, it is difficult for the public international law regime to hold states to their commitments because the international legal regime is consent-based. This means that states can weigh the benefits and burdens of a law and choose whether to comply. For example, in 2011, Canada, Japan, and Russia withdrew from the Kyoto Protocol, an international treaty to reduce greenhouse gas emissions. They did so because they were unable to meet their emission targets and would experience severe financial penalties if they remained signatories to the treaty.

5.1.6. For Further Consideration

Signing Conventions is Easier Than Enforcing Them

Recall that Afghanistan ratified the International Labour Organization's Minimum Age Convention of 1973, indicating that the minimum age for Afghan employment is 14 years old.¹¹⁸ Although the Afghanistan Labor Code includes certain provisions recommended by the International Labor Organization (ILO), such as banning forced labor and child labor, it may not meet the ILO's standards because it does not contain adequate enforcement mechanisms. For example, Afghanistan's Penal Code does not criminalize forced labor and child labor, so the public may choose to ignore the Labor Code's provisions regarding these forms of labor because there is no punishment involved. Another critique is that there is a lack of awareness of the Labor Code's provisions in both the government and the private sector. In response to such critiques, the Ministry of Labor is working to develop regulations that would strengthen its capacity to enforce the labor laws and bring Afghanistan into compliance with ILO standards.¹¹⁹

5.2. Private International Law

5.2.1. Importance of Private International Law

A series of global interactions in the past century—such as World War II, decolonization of European colonies in Asia, Africa, and the Americas, and the collapse of the Soviet Union—have shaped current international relations. Important advances in technology—including airplanes and the Internet—allow people, goods, and information to travel large distances in relatively little time. Nations that are separated by large distances now interact more than ever before. This phenomenon of increasing integration among people, companies, and governments around the world through increasing international trade and the rise of information technology is known as globalization. As the world becomes more globalized, the role of private international law in governing global interactions becomes increasingly important.

¹¹⁷ See International Criminal Court, *The States Parties to the Rome Statute*, https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx

¹¹⁸ See International Labour Organization, *Ratifications for Afghanistan*, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102945

¹¹⁹ See International Labour Organization, *The ILO in Afghanistan*, http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-kabul/documents/publication/wcms_241087.pdf

International lawyers do a significant amount of work on behalf of private clients whose needs have international implications. Recall the exercise from section 3.2 about Tahir, the farmer who sells apricots to Russia. If Tahir had a large business that involved growing, selling, and distributing his fruit to clients in Russia, he would probably have a lawyer help him create contracts to govern his relationships with his buyers. The lawyer would negotiate with the buyers themselves, which would likely be corporations, manufacturers, shops or resellers, rather than the Russian government. Tahir's lawyer would be using private international law to enable and protect Tahir's global business.

5.2.2. Review of Private International Law Definition

Private international law is the body of conventions, model laws, national laws, legal guides, and other documents and instruments that regulate private relationships across national borders. As you learned earlier in this chapter, private international law addresses private interactions between individuals of different states. Governments do not play a direct role in transactions that are governed by private international law.

In a civil law context, private international law is also known as **conflict of laws**. The name “conflict of laws” is fitting for private international law, because private international law helps determine which law to apply when parties to a transaction come from different nations, and the nations have conflicting laws.

In the example about Tahir and his apricot business, Tahir would consider the differences between Afghan and Russian law when deciding whether and how to sell apricots to a buyer in Russia. Specifically, Tahir and his lawyer could use private international law to craft a contract that addresses differences in Afghan and Russian currency, where disputes should be resolved, and other contractual terms. Note that public international law may play a role in these types of transactions too, if, for example, there are taxes on imports or exports, or differences in international labor laws.

5.2.3. Sources of Private International Law and Mechanisms for Enforcement

Domestic laws are the primary sources of private international law. However, private international law is also embodied in treaties and conventions, model laws, legal guides, and other instruments that regulate transactions.

Note that there is no single, well-defined body of private international law. The transactions and disputes covered by private international law are so diverse that it would be difficult to address all scenarios with a single body of law. Private international law governs a variety of topics, including but not limited to contracts, marriage, divorce, child adoption and abduction, enforcement of remedies, and deciding where disputes should be resolved. If contracts are used, private international law considers each specific contract and the corresponding choice of law provisions. Each case will vary according to the relevant domestic law, with the potential for some application of international legal principles.

5.2.3.1. For Further Consideration

A Growing Trend: Private International Law Conventions

International organizations are developing and promoting international conventions to make international private law more uniform across countries. For example, The Hague Conference on Private International Law developed conventions, including a convention about evidence for international private law suits. The United Nations Commission for International Trade Law (UNCITRAL) is another important international organization that developed conventions to govern the sale of international goods, such as the United Nations Conventions on Contracts for International Sale of Goods (CISG). UNIDROIT is

another organization that aims to modernize, harmonize, and coordinate private international law. It is most famous for developing the UNIDROIT Principles of International Commercial Contracts, which reflect contract law from many legal systems and may be used to help private parties draft and enforce contracts across international borders.¹²⁰

Discuss

1. Afghanistan has not yet ratified the conventions described above. What would be the benefits of Afghanistan's ratification? The challenges?

Discussion Questions

“Interest”ing Questions: Navigating Different Interest Practices on Loans

Afghanistan follows Islamic law, and Islamic law forbids charging interest on loans. However, charging interest is a frequent practice in countries that do not follow Islamic law, and it is reflected in some international conventions. For example, Section III, Article 78 of the CISG states “If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.”¹²¹

Discuss:

1. How can Afghanistan benefit from conventions that make it easier to resolve private international law disputes, without compromising its commitment to Islamic law?

2. Can Afghanistan collaborate with other countries that follow Islamic law to create its own convention?

CONCLUSION

As you can see, sources of law play an important role in Afghanistan's present and future. The rule of law enables Afghanistan's security and stability, economic development, and the preservation of rights, such as the right to education. Lawyers in Afghanistan implement the rule of law by drawing upon many Afghan sources of law to address their clients' domestic legal questions. The sources of law that lawyers use vary in their persuasiveness and level of detail, but all sources of Afghan law embody Islamic values. Additionally, in a world where global transactions are increasing, Afghan lawyers must be able to use private and public international law to serve their clients' needs.

In the next chapter, you will learn about Afghanistan's legal history. As you read it, consider how the history has shaped Afghanistan's current approach to the rule of law, which you learned about in this chapter.

¹²⁰ See American Society of International Law, *Private International Law* (August 2013) https://www.asil.org/sites/default/files/ERG_PRIVATE_INT.pdf

¹²¹ Pace Law School Institute of International Commercial Law, *United Nations Convention on Contracts for the International Sale of Goods (1980)*, (last updated 2007), <http://www.cisg.law.pace.edu/cisg/text/treaty.html>

CHAPTER 4: AFGHANISTAN'S LEGAL HISTORY

INTRODUCTION

Afghan sources of law that you learned about in Chapter 3 have been shaped by Afghanistan's rich and varied legal history. Learning legal history is important because today's laws are influenced by governmental systems and constitutions from the past.

In this chapter, we will explore Afghanistan's legal history, starting in 1880 and working our way to the present day. The goal is to identify major articles in each constitution that are still used today and discuss how different constitutions and movements have led to Afghanistan's present legal system. Several timelines displaying an overview of the key developments are provided at the end of the chapter. Please refer to them as you progress through the chapter to help understand the important developments in Afghanistan's legal history.

READING FOCUS

As you read Afghanistan's legal history, think about the effect this history may have on Afghanistan's government today. Do you think one of the periods or events covered below have been particularly influential in present-day Afghanistan?

1. SECTION I: 1880-1919

1.1 The Joining of the State Under Abdul Rahman Khan

In this section, you will identify three major contributions Amir Abdul Rahman Khan made to the court system and analyze how his contributions may have impacted the court system in Afghanistan today. You will also create your own court system and see how it compares Abdul Rahman's court system.

We begin our study in the 1880s because it is when Amir Abdul Rahman became Afghanistan's king. Many of the elements of the current judicial system began under his reign. Prior to Amir Abdul Rahman's reign, the Afghan judiciary was entirely independent from the government. Afghan judges were trained in religious madrasas and practiced exclusively Islamic law. As part of his effort to seize political power from the provinces and strengthen the central Afghan state, Amir Abdul Rahman established a formal legal system that enforced a new, **secular law**, which is law not based on religious beliefs. The secular law was called the law of **royal edicts**, which is an official order by a king or ruler, and is sometimes known as civil codes.

Many reforms undertaken in the 1880s continue to shape the judiciary today. During the 1880s, Amir Abdul Rahman began a program to consolidate his control over the state, establishing new laws and systems of governing. Throughout his reign, he believed he laid "the foundation stone of a constitutional government . . . [even] though the machinery of a representative government had not taken any practical shape yet."

TIME FOR YOU TO MAKE THE RULES

You and your best friend are flying to meet with Stanford Law Professor Erik Jensen. On the way, your airplane is hit by a strong storm and crashes into the Pacific Ocean. Thankfully, none of the 115 people on board the airplane is hurt. As everyone makes their way to the beautiful tropical island near the crash, you realize that the island is uninhabited by people, despite its abundance of fresh fruit, wild fish, and small animals.

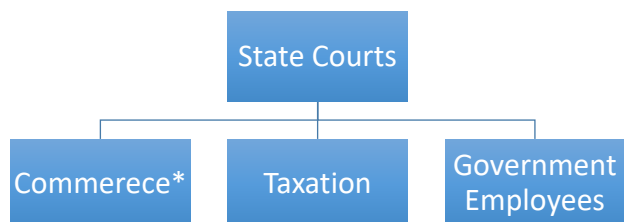
After several attempts to communicate with the outside world, it becomes clear that communication is impossible; you are all cut off from the outside world for the foreseeable future. After several days, groups of people start to argue over different things. One man is complaining that he set up a nice place to sleep under a palm tree and while he was out fishing the next day, someone else took his bed. A woman is claiming that she had gathered close to 10 coconuts for her children and her 9-year-old child is claiming another woman stole 6 of the coconuts. People are claiming they agreed to split the food they found with others and now the people with more food are saying there was never an agreement.

Everyone is looking to the airplane captain for answers and she decides that anyone who has taken an Introduction to Law class or who is majoring in Law should figure out how to resolve these disputes. As everyone looks around, there are only two people who have studied law at all: you and your friend. Now the entire group of people are counting on you to create a system to determine who is telling the truth and how punishments or decisions should be determined. What type of courts would you create and how would you decide to settle these arguments?

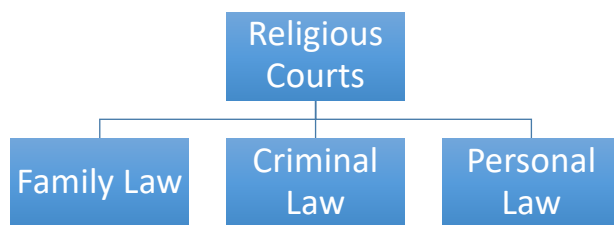
See below for what Amir Abdul Rahman Khan decided to do.

Amir Abdul Rahman Khan was the first Afghan leader to centralize and systematize the court and legal system. Three of his innovations are fundamentally important to Afghanistan's legal history and continue to influence the legal system today. We will discuss each of these three innovations in detail, including:

- 1) The creation of a court system
 - 2) The Fundamentals for Judges (*Asasul Quzat*), also known as a judge's manual
 - 3) The installation of the boxes of justice.
- 1) A court system was set up in each district to enforce two types of law: *Shari'a* law and royal edict. The court system was divided into two branches: state courts and religious courts. Each branch included divisions to address specific issues. See below for a graphic illustrating



*The commerce court was composed of Muslim and Hindu judges, a feature that was unique to that court. Extensive trade between India and Afghanistan during that time meant that merchants of both creeds appeared before the commerce court.



The district courts adjudicated disputes at their inception. Their decisions were made in accordance with the *Shari'a* on criminal cases. The judges of these courts were advised and assisted by a mufti who acted as legal and religious advisor. The mufti were assisted by a large number of government officials who managed the cases and made sure that all was recorded correctly.

The highest court in Afghanistan, now known as the Supreme Court, was first established under Amir Abdul Rahman Khan and was known as the *khan-i 'ulum*. In fact, the entire structure of the courts during this time mirrors the structure of specialized district court, appellate court, and Supreme Court that exists today.

TIME FOR YOU TO MAKE THE RULES

Let's go back to the problem above with your island country. If you had created a court system similar to Abdul Rahman Khan's, what role would you give yourself in this system of courts? Would you be the ultimate decision maker or would you try and create a system of separation of powers? See below for what the king actually did.

Abdul Rahman Khan was the final authority over any case brought before any court. Individuals could personally appeal to him after the conclusion of their case if they disagreed with the result. Abdul Rahman Khan held a weekly meeting during which petitioners could inform him of their case and argue for his resolution of it. The king even set up special days for female petitioners, which seem to have been very popular. As part of his codification and regularization of the courts, Abdul Rahman Khan institutionalized *Hanafi*, as the law of Afghanistan. The inclusion of religion in the court system was fundamentally important to Abdul Rahman Khan's government because, as he wrote, the state "exists to bear witness to God amid the darkness of this world, and the function of the government is to act as the executive of the law."

Was religion a consideration in your court system? Do you think it should or should not be, and why?

TIME FOR YOU TO MAKE THE RULES

Now let's say that your court system is very successful, but you are running out of judges who know what they are doing. How would you solve this problem? See below for what Abdul Rahman Khan did.

- 2) Abdul Rahman Khan also created the **Fundamentals for Judges**, or judge's manual, which is described below.

The judge's manual (*Asasul Quzat*) was written by Ahmad Jan Khan Alokozai and published in royal publication in Kabul in November 19, 1885.¹ It was the first manual of its kind in Afghanistan, and

¹ See the following link for more information about the manual: <http://www.afghanpedia.com/projects/libraries/pdfs/95vixchf.pdf>

contained 136 rules for court procedure and deciding cases. The manual was 140 pages long and divided into the following three parts. The first part instructed judges on ethics and rules of conduct. In other words, this section explained judicial conduct and procedures that judges should consider when dealing with disputing parties, witnesses, and others in court. For example, the manual prohibited judges from taking bribes. The second part gave judges direction on preparing legal documents. The third part created and regulated the office of the judicial inspector (*muhtasib*). This inspector was the official entrusted with the supervision of moral behavior.

TIME FOR YOU TO MAKE THE RULES

After a few years of your court system, people are generally happy but you start to hear complaints that people want to talk to the legal expert that came up with the system. They feel like you are the most knowledgeable and wanted to send you their complaints and petitions directly. You fear that without direct contact with the people, you might lose your status as the legal expert. How could you keep your status as the legal expert considering such complaints?

See below for Abdul Rahman Khan's solution.

- 3) Amir Abdul Rahman Khan's final contribution that we will study was the use of the **boxes of justice** (*sandug-i 'adalat*). One Box of Justice was placed in each district. A Box of Justice was literally a large, locked mailbox in which individuals could place sealed letters. It allowed individuals to directly petition the king for aid in resolving disputes by writing him a letter. The boxes were taken to Kabul twice a year and opened for the king to read the petitions. He would then send a reply to the petitioner through the mail. This practice reinforced the king's role as the ultimate decision maker in the judicial system.

In addition to involving the king in legal disputes, this practice was important for two other reasons.

- a) The boxes of justice brought the formal legal system into the life of each citizen of Afghanistan. This allowed individuals, often for the first time, to settle a dispute through the state-based system. It also allowed those who could not reach a district court or Kabul to petition the king directly and have access to the formal legal system.
- b) Second, these boxes allowed individuals who would not usually initiate legal disputes, such as women or the elderly, to use the boxes and defend their legal rights.

WHAT WOULD THIS LOOK LIKE TODAY?

Now imagine that after years of no communication from the outside world, a rescue airplane has finally found your island. They are happy to report that they will be taking back to your home in Afghanistan where you can continue your studies. However, once you arrive, you realize that the system you created on your island is better than what the current government in Afghanistan has implemented. Assuming that there are boxes of justice today, what are some legal issues or questions you might write to the current president about to help you resolve a dispute, if you knew he would read it and respond to you?

In this section, we learned that Abdul Rahman Khan was the first Afghan ruler to centralize power in Kabul and create a formal, binding court system based on the *Hanafi* school of jurisprudence. We also learned that the three major contributions by Abdul Rahman Khan were:

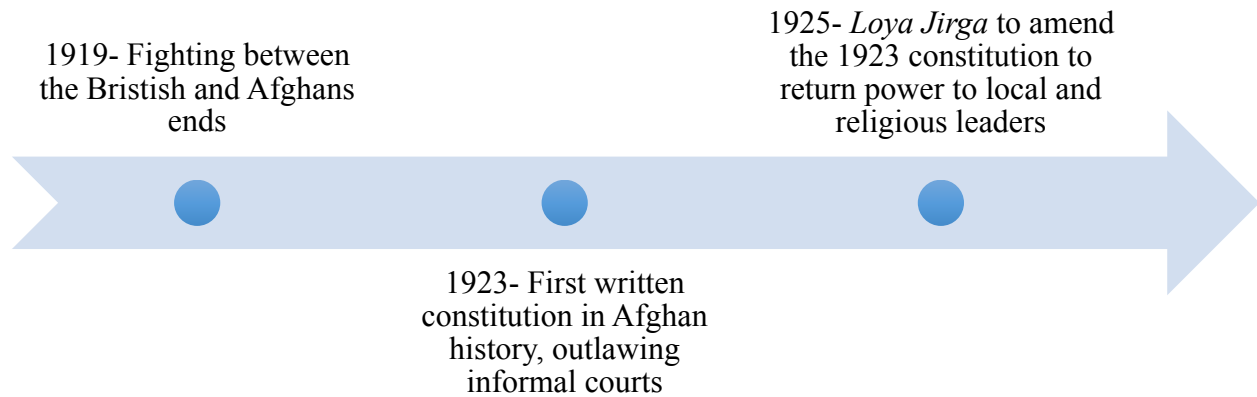
- A. The creation of a court system
- B. The Fundamentals for Judges (*Asasul Quzat*), also known as a judge's manual

C. The installation of the boxes of justice.

2. SECTION II: 1919-1929

2.1 Afghanistan's First Constitution, Approved in 1923 by Amanullah Khan

This section explores three major changes found in the 1923 constitution, compares the formal court system with the informal court system, and explains why Amanullah Khan outlawed the informal system.



Under the reign of Amanullah Khan, Afghanistan embarked on an ambitious process of centralization and legalization that included writing Afghanistan's first constitution, which was approved by the *Loya Jirga* in Jalalabad in 1923. This practice has continued with each subsequent constitution, although most *Loya Jirgas* since 1923 have been in Kabul. The 1923 constitution was influenced mainly by the Turkish and French Constitutions.

2.1.1 Independence First

However, before Amanullah Khan felt ready to establish a written constitution, he felt Afghanistan could not be controlled by any external forces, namely the British. Therefore, it was important to him that the Afghans won the War for Independence in 1919 and the British were expelled from Afghanistan. The first article in the first constitution written in Afghanistan, Article 1, strongly affirmed Afghanistan's independence. See below for the article's text:

1923 Constitution, Article 1

Afghanistan is completely free and independent in the administration of its domestic and foreign affairs. All parts and areas of the country are under the authority of His Majesty the King and are to be treated as a single unit without discrimination between different parts of the country.

2.1.2 What Changes Arose from the 1923 Constitution?

The 1923 constitution did not provide for a legislative body and instead vested all the lawmaking power in the hands of the king. This meant that the king could pass any law that he wanted to without approval from anyone else. It prohibited all courts outside of the formal state courts, greatly reducing the power of the religious courts. See below for the newly created structure for these courts. For example, Article 55 stated that no court other than the regularly constituted tribunals sponsored by the state could hear a case. This constitution significantly limited the power traditionally held by religious and tribal elders by concentrating

authority in the king. The king therefore did not need to share power with a legislative body or religious and tribal elders.

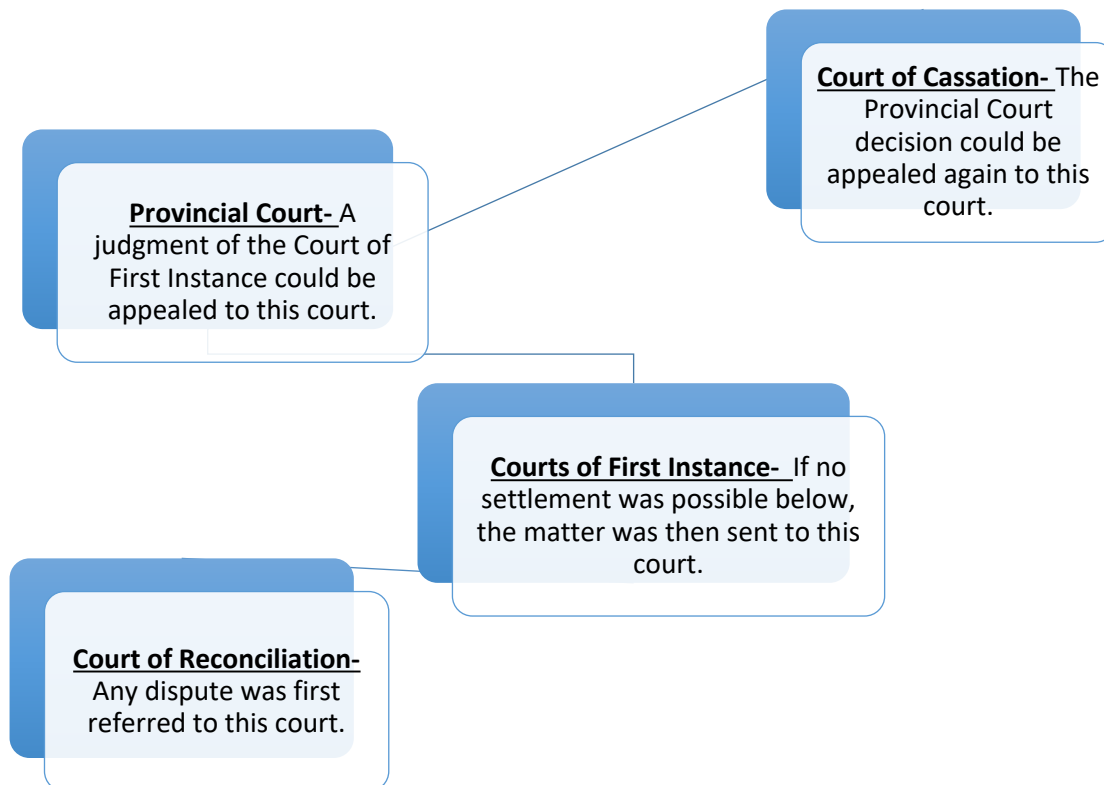
TIME FOR YOU TO MAKE THE RULES

Currently, there is no constitutional provision or law prohibiting the use of the informal justice system. Do you have friends or family who would rather use informal justice systems than the official laws of Afghanistan? What do you think are the pros and cons of the different types of systems?

2.1.2.1 The Four Levels of Courts in the 1923 Constitution

The 1923 constitution established the following four levels of courts:

- 1) The Court of Reconciliation (*mahkama-e-islahaeya*)- This was the first court to hear a dispute. If the case could not be settled or decided here, it was sent to the Court of First Instance.
- 2) The Court of First Instance (*mahkama-e-ibtedaya*)- Received disputes from the Court of Reconciliation. If either party did not agree with the decision, it could be appealed to the Provincial Court. An appeal is asking a superior court to review the decision made, normally by the party that lost in the lower court.
- 3) The Provincial Court (*mahkama-e-murefia*)- Received appealed cases from the Court of First Instance. If either party was not happy with the result, they could appeal to the Court of Cassation.
- 4) The Court of Cassation (*mahkama-e-tamiz*). Received appealed cases from the Provincial Court. This was the final court and the decision could not be appealed after the Court of Cassation ruled on the dispute.



PUT YOURSELF BACK IN TIME

Imagine you are a well-respected local religious leader in 1924 in Jalalabad. You consider yourself just, fair, and honest. In addition, you have done some reading on legal traditions and so you are considered a type of judge. However, there are no formal systems that you follow. Instead, whenever there is a complaint or dispute, both parties go to your house and discuss what they consider the problem to be. You listen and give each side what you consider a fair chance to argue their point. After you hear all the issues, you decide who is right and what should be done to make the situation better. There is no appeal process and no one else the losing party can turn to but you consider this to be okay because you consider yourself fair and honest. All of a sudden, you hear from a relative in Kabul that you can no longer act to settle disputes in Jalalabad because this “constitution” prohibits that. You are outraged that the king thinks he can stop you from helping keep peace in your community. Shortly thereafter, a representative of the king shows up to your house and explains that if you try and solve any problem other than those in your own home, you will be arrested. What would you do if you felt your system of life was under attack? See below for what happened in Afghanistan.

2.2 Rebellion

The concentration of power in the central government proved too much for local and religious leadership at the time. It limited their power to govern and resolve disputes, leading local leaders to rebel against the king. In 1925, the constitution was amended during the *Loya Jirga* to compromise with these leaders. Subsequent governments have been more careful to be in touch with local sentiments before proposing major legal reforms. Specifically, the 1925 amendments to the 1923 constitution focused on reintegrating religion officially into the constitution. The greatest change was to Article 2, which, after the 1925 amendments read:

The religion of Afghanistan is the sacred religion of Islam and its official religious rite is the sublime *Hanafi* rite. Followers of other religions such as Jews and Hindus residing in Afghanistan are entitled to the full protection of the state provided they do not disturb the public peace. Hindus and Jews must pay the special tax and wear distinctive clothing.

The Constitution of 1923 would not last long and had many issues, but it played a tremendously important role in informally binding future regimes to legitimize their power with a written constitution, something prior rulers of Afghanistan never did.

LOOKING BACK

Do you think taking power away from local religious leaders and establishing a formal court system made sense? Think about the benefits and drawbacks of the informal system if you are:

- 1) The informal judge whose life is described above
- 2) A poor woman who, because she is a woman, cannot represent herself at the informal religious court
- 3) A young girl is forced to marry someone she doesn't want to, so she runs away
- 4) A wealthy business owner who knows and is friends with most of the judges of the court

Discussion Questions

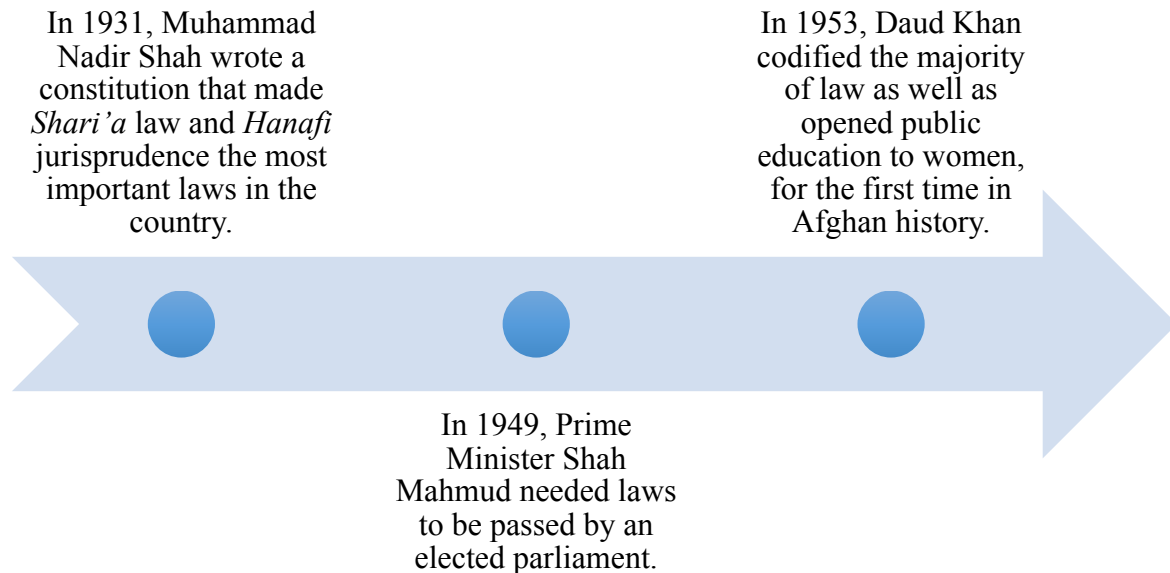
What was the major mistake that Amanullah Khan made that caused his people to rebel? How do you think future leaders might address this concern so that they are not removed from power? Read the next section for answers.

In Section II, we learned that there are benefits to the formal court system, such as the opportunity to appeal, but that religious and local leaders were too powerful to be outlawed by a written constitution. We also learned that even a king cannot take too much power for himself without consequences.

3. SECTION III: 1929-1964

3.1 Modification of State Institutions and Codification of Laws Under King Zahir Shah and Prime Minister Daud Khan

In Section III, you will learn what a legislative body with two houses means, analyze why the 1931 Constitution prioritized *Shari'a* and *Hanafi* principles when the 1923 Constitution ignored them and evaluate whether freedom of the press still exists today. You will learn about the legislative system in more detail in Chapter 5.



In 1929, Habibullah Kalakani instigated a coup against Amanullah Khan and ruled briefly until he was killed by Muhammad Nadir Shah, who was proclaimed king by a Loya Jirga in September 1930. One of the new government's first orders of business was to create a new constitution in 1931. Despite its limitations, the constitution of 1923 constrained later regimes because it established the tradition of constitutional rule. No monarchy after Amanullah Khan dared rule without a constitution legitimizing its government.

In addition, Muhammad Nadir Shah was determined to avoid the fate of Amanullah Khan and returned power to the hands of the local leaders. Notably, Nadir Shah still felt constrained to create a constitution

because of the precedent set of having a government with limited powers. Therefore, Nadir Shah enacted the Fundamental Laws of the Exalted Government of Afghanistan in 1931.

The 1931 constitution was based on the French, Iranian, and Turkish constitutions of the period. This new version created Afghanistan's first legislative body with two houses: the Upper House (majlis-e-ai'yan) and the National Assembly (majlis-e-shura-e-milli).

Upper House	National Assembly
<input type="checkbox"/> Elected for three years	<input type="checkbox"/> Appointed for X years
<input type="checkbox"/> Elected by voters in their district	<input type="checkbox"/> Appointed by the King
<input type="checkbox"/> Both Houses can recommend laws to the king, but have no formal lawmaking powers.	

YOU DECIDE

Why do you think Nadir Shah wrote a constitution that included two houses? Why not just one house? Also, why do you think the "Upper House" is elected by voters and the "National Assembly" is appointed by the king? Do you think this is a good system or not?

The constitution was also influenced by the *Hanafi* religious leaders who were consulted during its drafting. Nadir Shah's decision to consult the *Hanafi* religious leaders illustrated his determination that his constitution be in touch with the sentiment of the people. This constitution declared the religious law of the *Hanafi* school of Sunni Islam as the official law of Afghanistan and required adherence to Islam and *Shari'a* in legislative action. As the articles discussed below demonstrate, *Shari'a* law was a major factor in the constitution of 1931.

In fact, the legislation (laws) passed by the parliament as part of the constitutional system was, by law, inferior to unwritten *Shari'a* law. Further, in Article 5, the king was required to carry out his duties in accordance with the law of the *Shari'a* and the dictates of the *Hanafi* jurisprudence. The courts were also required by Article 88 to decide cases in accordance with the holy *Hanafi* creed. See below for the exact text of Article 1, 5, 88.

THEN VS. NOW

Do you think Muhammad Nadir Shah was responding to the will of the people by making *Shari'a* Law superior to laws passed by the legislature and requiring himself to follow *Hanafi* jurisprudence? Do you think the influence Islam and *Shari'a* law has increased or decreased since 1931?

Always pay attention to how much religion is included in the different Constitutions and consider what that says about the group in power at the time the constitution was written.

Soon after the constitution was enacted, Nadir was assassinated in 1933 and the Loya Jirga anointed Zahir Shah king. Although he was technically only a figurehead from 1933 to 1973, Zahir Shah still exercised considerable power and was assisted by a succession of prime ministers during this time. From 1933 to

1946, the King's uncle, Hashim Khan, acted as prime minister. From 1946 to 1953, another uncle, Shah Mahmud, held the position.

With Shah Mahmud as prime minister, the 1949 election of the parliament saw many delegates who seemed interested in reforming Afghanistan's government. This was the first period of true representative governance in Afghanistan. Laws had to be passed by an elected parliament instead of being put into effect directly by the king. One of the most important reforms passed by the National Assembly during the period was a law permitting **freedom of the press**, which is the freedom of communication and expression through published sources including the internet and newspapers.

THEN VS. NOW

What does the phrase freedom of the press really mean? Do you think Afghans enjoy freedom of the press today? Do you think freedom of the press is essential to a democracy?

In 1953, Daud Khan ousted Shah Mahmud and became prime minister. Daud Khan focused on changes in domestic law through the existing constitutional structure. Perhaps the most significant domestic reform during this period was the opening of public education to women. Daud Khan also embarked on a major project of **codification of the law**. The phrase "codification of laws" means writing down the laws with clear directions on how and when they apply so that the government and citizens will always know what the laws are. Daud Khan began the process of developing Afghanistan's civil law system that has continued to the present.

In section III, we learned that in 1931, Muhammad Nadir Shah wrote a constitution that made *Shari'a* law and *Hanafi* jurisprudence the most important laws in the country. We also learned that in 1949, under Prime Minister Shah Mahmud, laws had to be passed by an elected parliament rather than being enacted directly by the king. One of the most important reforms passed during this time was a law allowing for freedom of the press. Finally, we learned that in 1953, Daud Khan enacted a codification of the law and opened public education to women, for the first time in Afghan history.

4. SECTION IV: 1964-1977

4.1 The Evolution of a Modern Constitutional State

In Section IV, you will learn to define individual rights, statutory law, and judicial review. You will also learn why certain rights were protected in the constitution and why statutory laws were prioritized above religious laws in the 1964 constitution. You can then judge whether such drastic changes in the constitution would last and what type of long-term impact they would have on Afghanistan's legal history.

Daud Khan resigned in 1963 and was replaced by Dr. Muhammad Yousuf. He, along with the king, immediately announced the formation of a seven-member constitutional advisory commission to write a new constitution. Dr. Louis Fauger, a French constitutional expert who wrote the Moroccan constitution, assisted the commission.

In May 1964, the constitutional review committee presented the constitution to the 455-member Loya Jirga for its approval. This was not the first time the Loya Jirga had been called upon to approve a constitution, but it was the first time that it was "**constitutionalized**". The term constitutionalized means being explicitly written into a constitution. The 1964 constitution gave the Loya Jirga the right to approve both the constitution and to approve the monarch, both of which had never been required by a constitution.

The Loya Jirga passed most of the articles of the draft constitution without significant debate. However, the role of the judiciary attracted significant attention. Three points of view emerged, and they are summarized by the graphic below.



At the end of the discussion, the “moderate group” won and an independent judiciary was formed. When the constitution was passed in 1964, Afghanistan’s constitution was unique in the Islamic world because it accepted a separation between religion and the state’s governing institutions. Article 1 of the constitution was new to the region because it established a government based on the sovereignty of the people, rather than religion. Islam remained the official religion of the country per Article 2, yet the different role played by religion in the constitution was striking.

The 1964 constitution also significantly expanded individual rights. As discussed in Chapter 3, individual rights are rights that citizens of a country are guaranteed to prevent the government or monarch from abusing its power. Some examples of the newly approved individual rights in the 1964 constitution included:

- a) Formal equality of men and women and all tribes before the law
- b) Freedom of thought and expression
- c) Protection of private property
- d) A right to form political parties

Discussion Questions

In the United States, some of these individual rights are considered “inalienable rights” which are defined as rights that are natural and cannot be taken away by any government or ruler. However, history has shown that even these “inalienable rights” are in fact taken away by different governments and rulers. Do you think any rights can be “inalienable” or are all rights a function of government rule? In other words, did the Afghan people in 1965 enjoy the rights listed above only because the government protected them or are those rights so natural that no government can take them away?

Probably the most important provision of the constitution, in terms of its difference from the 1931 constitution, was the mandated supremacy of the statutory law over *Shari'a* law. Recall from Chapter 3 that statutory law is law that has been passed by the government. In contrast to the 1931 constitution, the 1964

constitution made statutory law legally more binding than *Shari'a* law once it was passed by the parliament and accepted by the king. Further, courts were required by Article 102 to apply first the provisions of the constitution and the laws of Afghanistan when deciding a case. See below for a direct comparison of the changes in Afghanistan according to the two constitutions.

COMPARE THE FOLLOWING TWO ARTICLES:

1931 constitution: Article 88

The court of *Shari'a* decides cases according to the Holy *Hanafi* creed.

1964 constitution: Article 102

The courts in the cases under their consideration shall apply the provisions of this constitution and the laws of the state. Whenever no provision exists in the constitution or the laws for a case under consideration, the court shall, by following the basic principles of the *Hanafi* jurisprudence of the *Shari'a* of Islam and within the provisions set forth in this constitution, render a decision that in their opinion secures justice in the best possible way.

After the 1964 constitution was passed, *Shari'a* law was only used to decide a case in the absence of statutory law on the subject. This structure is mirrored in the way courts decide cases in Afghanistan today, as you saw in the hierarchy of laws in Chapter 3.

FOR FURTHER CONSIDERATION

Remember that not too long ago, in 1923, there was a rebellion and assassination because the ruler passed a constitution that did not protect religious and local leaders. Consider how shocking it must have been to the people of Afghanistan to have all these changes occur at the same time. Do you think this constitution will last?

See below for what happens.

4.1.1 Judicial Review

Further, the Supreme Court was empowered to perform judicial review for the first time. Judicial review is the power to decide whether the laws passed by the parliament violate any provision of the constitution and if they do, then the law is invalid. Remember, as we learned in Section II, the 1931 constitution required courts to rule using the *Hanafi* school of jurisprudence. Under the constitution of 1964, courts were required to rule based on statutory law and reject any law that the court did not consider valid under the constitution. The constitution also created a unified and regularized judiciary under the control of the **state**, where the state appointed the judges who would fill the positions and decide cases for the state. In this context, the “state” means the federal government of Afghanistan.

As you might remember from Section I, since 1880, there had existed two parallel functioning judiciaries with religious and state courts exercising different roles. The 1964 constitution united these two parts of the judiciary and placed them under state control. Furthermore, the judiciary was officially named as a separate co-equal branch with the executive and the legislature in Article 97. This change laid the foundation for the current separation of powers under the 2004 constitution.

4.1.2 Changes to the Structure of Houses

The 1964 constitution also changed the composition of the legislature to include the Wolesi Jirga (Lower House) and the Meshrano Jirga (Upper House). These structures are discussed in more detail in Chapter 5, but their differences can be seen in the table below.

Upper House Meshrano Jirga composition:	Lower House Wolesi Jirga composition:
1/3 rd are appointed by the king	Elected by the voting public for four year terms
1/3 rd are appointed by the Provincial Council	
1/3 rd are appointed by the Chairman of the Provincial Jirga	

PUT YOURSELF IN THAT TIME

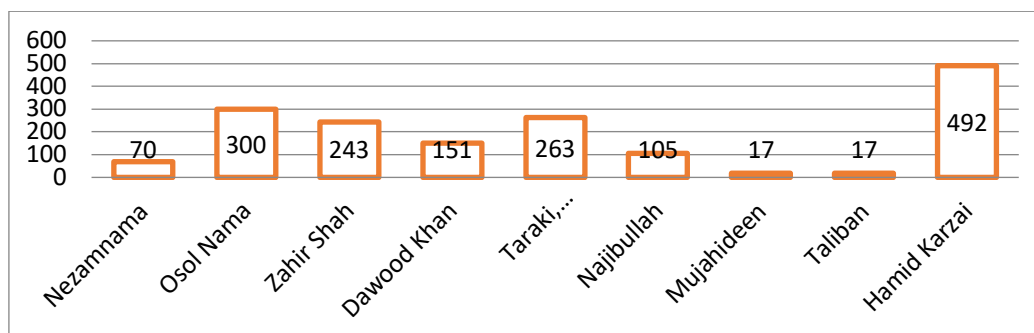
Consider this from the perspective of the average Afghan in 1964. Few Afghans knew how to read, and even fewer attended university-level classes. If you lived with your family during that time period and were not at a university, how might you respond to these changes? Do you think the average Afghan liked these changes, or even knew enough to have a well-formed opinion about the new laws?

The new constitution and the parliamentary elections that followed were criticized as not really affecting the lives of many citizens of Afghanistan, who were uneducated about the new concepts in the constitution. The parliament was given the ability to pass laws that enforced the new principles in the constitution, but they lacked support from the people. As a result, Dr. Yousuf was driven from office by protests that culminated in the shooting of three protesting students outside his home. Subsequently, Dr. Mohammad Hashim Maiwandwal was appointed prime minister, a position he occupied until the overthrow of the monarchy.

PUT YOURSELF IN THAT TIME

Why do you think students were protesting these changes? Do you think you might protest similar changes now?

The period of 1965 to 1973 was the most productive in the legal history of Afghanistan in terms of codification and centralization. See below for a chart of how many laws were codified by each ruler.



This period witnessed the height of the codification process that Daud Khan initiated in 1953. In addition, the Afghan government wrote a criminal code, criminal procedure code, and civil code. You learned about these codes in Chapter 3, and will continue to learn more about them in Chapters 6 and 7. For now, it is important to remember that many of the modern laws of Afghanistan, which are still used today, were

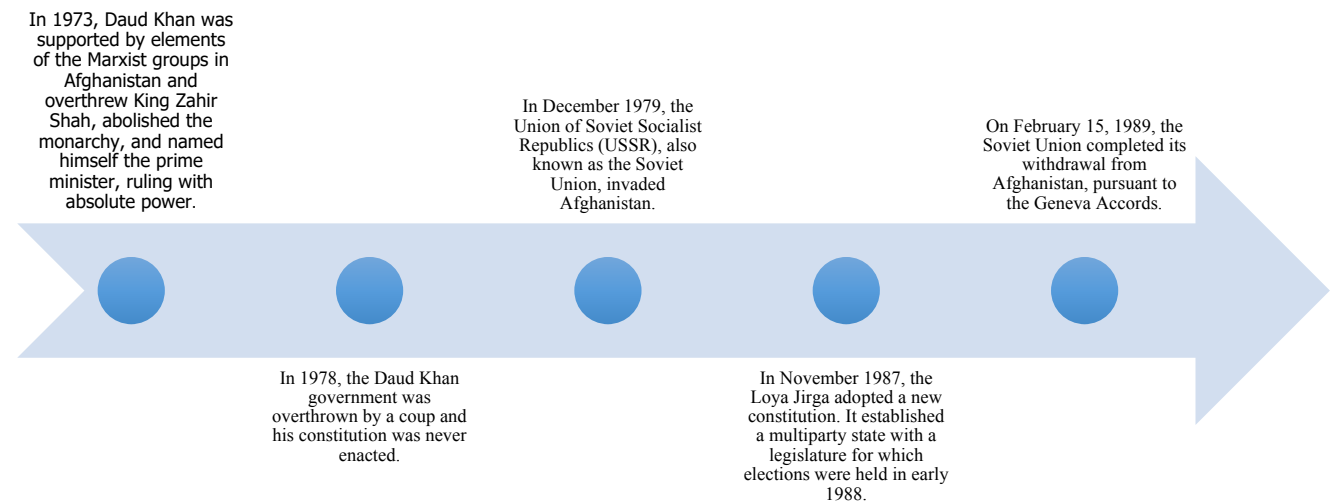
passed by the parliament during this time. Comprehensive criminal codes were passed with definitions of crimes and punishments. The legal system during this period most closely reflects the current modern legal structure of Afghanistan, and many of the laws passed between 1965 to 1973 are still in effect today.

In summary, individual rights were protected in the 1964 constitution and that the Supreme Court was given the right of judicial review.

5. Section V: 1977-1992

5.1 Afghanistan's Government Under Communism

As you read Section V, you will start to understand what communism is and why it was so popular during the late 1900s. You will also contrast communism with traditional Afghan forms of government and develop arguments for why communism gained popularity in Afghanistan and why it was replaced so quickly.



EXAMPLES OF COMMUNISM IN PRACTICE

Imagine two different scenarios. In the first, you are born into a wealthy family in 1961 in Kabul and you grow up with comforts and financial security. Your father constantly tells you about how poor he and your mother grew up and how hard they had to work to obtain professional success and how excited he is to finally own his proper house and plot of land. Then, in 1973, Daud Khan returns to power and declares that he will be taking 90% of your family's land to distribute it to poor peasants and farmers, for which he will pay your family a very small amount of money. If you try and resist, your family will be arrested and the land will be taken by force. How would you feel about his new initiatives? Would you think what he is doing is just?

Now imagine you are born into a poor farming family in 1961 in Jalalabad and you grow up hungry. Your mother is always telling you about how well the rich live in Kabul and how little they care about the problems of the peasants and the farmers. Your family has never owned any land of its own and instead you work for the wealthy land owner along with 12 other families. The land owner is lazy, rude, and disrespectful to your family. Whenever he is rude to you and your father says something to him, he responds by angrily asking if you would like to starve next year because he doesn't have to pay you. Finally, in 1973, you hear that Daud Khan has returned and has promised equality for the peasants and the farmers. He demands that the wealthy land owner give up 90% of his land so that you and your family can take 8% of it and farm it yourselves. The wealthy land owner resists but then soldiers arrive and arrest him and tell you as they are leaving that everything he has left behind is to be split evenly among all the families that work that plot of land. How would you feel about Daud Khan's new initiatives? Would you think what he is doing is just?

WHAT DOES COMMUNISM STAND FOR?

The previous two examples illustrate that what some families consider unfair and illegal, other families might see as a great blessing. We will shortly discuss **communism**, which, in a very simplified form, believes that everyone should share everything and that private property is bad for everyone. During this section, we will learn about Afghanistan's history with communism. Keep in mind who might want these types of changes and who might not and what makes a society and a government successful.

In 1973, Daud Khan was supported by elements of the communist groups in Afghanistan and overthrew King Zahir Shah, abolished the monarchy, and named himself the prime minister. Daud Khan formed a Central Committee to advise him, yet he ruled with absolute power until he established a new constitution in 1977. Daud Khan's major initiative during this period was to install a system of land redistribution with compensation to be paid by the government. In January 1977, the Loya Jirga was called to adopt the new constitution, and on February 24, 1977, Daud Khan proclaimed the new constitution.

This constitution differed from earlier versions. Its two major additions were the explicit (written directly in the document) rights of women as equal to men in Article 27 and the recognition of the right of every citizen to vote in Article 29. The role of religion in the constitution was also diminished, as there was no mention of the *Hanafi* school of Islamic jurisprudence as the official religion, although Article 22 still recognized Islam as the religion of Afghanistan. Articles 17 and 18 encouraged government regulation of the economy and Article 13 **nationalized** all natural resources of the state. To nationalize resources means that private companies or individuals could not own things like petroleum, water, trees, coal, and all other natural resources. Overall, the constitution reflected the communist ideology of the time.

5.1.1 The Communist Period and the Civil War

The 1977 constitution never took force because, on April 27, 1978, a coup was launched against the Daud Khan government. Soon after the coup, the Revolutionary Council of the People's Democratic Republic of Afghanistan was formed as the new government, headed by Nur Muhammad Taraki. That government was soon replaced by a Soviet-style **politburo**, which is defined as the principal policy-making group of a communist government. This government ruled by **decree** rather than through the legislature, with decrees coming from the central planning committee without representation of the people. A decree is an official order by the government in power, often without representation of the people.

The Third Decree on April 30, 1978 abolished the Daud Khan constitution. Subsequent decrees gave equal rights to women (Decree Number 7) and ordered land reform (Decree Number 8). This land reform required the redistribution of about half of all rural land to landless peasants. The decree on women's rights was shocking for the region, setting the marriageable age for a woman at 16 and setting an upper limit, 300 Afghans, on the money payable to a wife in the case of the dissolution of a marriage. Another decree required that each person over a certain age learn to read within one year, a policy that was highly resented in the countryside.

Discussion Questions

1. Why do you think a decree requiring each person over a certain age learn to read within one year might be highly resented in more rural parts of Afghanistan? Do you think this would be a good law to enact now?
2. Do you believe there should be an age limit for women to get married? Why or why not?

This period also involved a rewriting of the existing law of Afghanistan through the communist politburo, although most of the criminal code written during the Daud Khan presidency was still used to prosecute crime. The newly formed secret police of the communist regime strictly enforced this new law. Any person who broke the law or resisted enforcement of the law was subject to summary imprisonment, which meant that the person could be arrested and imprisoned without the right of a jury trial or formal accusation.

In December 1979, the Union of Soviet Socialist Republics (USSR), also known as the Soviet Union, invaded Afghanistan. The USSR, which had coordinated the invasion with leading Afghan Marxist Babrak Karmal, assassinated President Hafezullah Amin and installed Karmal as the president of the country.

In 1980, the Revolutionary Council issued a provisional constitution, the Fundamental Principles of the Democratic Republic of Afghanistan. Article 36 named the Revolutionary Council as the sole governing institution in the country. This constitution reintroduced official recognition of religion into the constitution. Article 5 outlined the role of Islam in the new government:

Respect, observance, and preservation of Islam as a sacred religion will be ensured in the Democratic republic of Afghanistan and freedom of religious rites guaranteed for Muslims. Followers of other faiths will also enjoy full freedom of religious practice as long as they would not threaten the tranquility and security in society. No citizen is entitled to exploit religion for anti-national and anti-people propaganda or other actions running counter to the interests of the Democratic republic of Afghanistan. The government will help the clergy and religious scholars in carrying out their patriotic activities, duties and obligations.

Religion, overall, was given more respect in the government than in the preceding years. During the earlier communist period, the dislike of religion was so fierce that individuals who attempted to practice their

religion by going to the mosque or praying were subject to abuse. Despite this move toward more religious acceptance, the 1980 constitution represents the only time in the constitutional history of Afghanistan that Islam was not recognized as the official religion of the country in a constitutional document.

Almost all governing institutions were remade during this period. Education was made mandatory with required classes in Russian. Religious instruction was supplemented with instruction on communist ideology. High school students of the time recall constant pressure from their teachers and peers to join the communist party and inform the administration about those who were not communist. In general, law was modeled on soviet institutions and lawmaking. Local governance was emphasized with an odd hybrid of the local soviet and the Jirga system. In theory, these local jirgas were responsible for local economic, political, and social administration. However, these local organs were required to receive the approval of the central authorities, giving the local jirgas very little control.

Karmal was soon replaced by Dr. Najibullah to help calm the growing insurgency, or growing revolt, against the communist government. In January 1987, Najibullah formed the Extraordinary Commission for National Reconciliation to draft a new constitution.

In November 1987, the Loya Jirga adopted a new constitution. It established a **multiparty state** with a legislature for which elections were held in early 1988. A multiparty state is a state where there are several parties the voting public can choose from. In contrast, a **single party state** has only one political party. Most Communist countries are single party states. Further, Article 2 of the constitution named Islam the official religion of the state and, like the 1931 constitution, stated that no law shall be made that is contrary to Islam dictates. The 1987 constitution also included a formal legislature, but all lawmaking authority was concentrated in the politburo. The judiciary was to make its decisions in accordance with the law; however, this constitution did not specify whether that law was the codified law of the state or of the *Shari'a*. This constitution showed a clear move away from some of the communist principles discussed earlier in this section and back toward more traditional Afghan governments, although there were still significant elements of communism in the 1987 constitution.

Facing a rising tide of mujahedeen attacks against the government, the Soviet Union completed its withdrawal from Afghanistan, pursuant to the Geneva Accords, on February 15, 1989. Najibullah, the Soviet backed president, remained in power and in control of the country until 1992, although his followers were a minority in the legislature.

Discussion Question

The Soviet invasion is viewed very negatively by Afghans. Some Soviet reforms; however, such as mandatory schooling for both boys and girls and equal rights for men and women, may be valuable. Why do you think the Soviets are remembered with disapproval across so much of Afghanistan?

In Section V, we learned about what communism is, the impact it can have on governments, and how it differs from typical Afghan beliefs in government. In addition, we learned that some of communism's goals can be considered progressive and valuable even though they were unable to make a lasting impact on Afghanistan's history.

6. SECTION VI: 1992-2001

6.1 Changes of the Afghan State and Form of Government Under the Taliban Regime

After reading Section VI, you will be able to describe the type of government the Taliban implemented, understand how the invasion and withdrawal of the USSR allowed for a group like the Taliban to take control, and evaluate the Taliban's influence on modern Afghanistan.

In the aftermath of the Soviet invasion and subsequent withdrawal, a **power vacuum** was left in Afghanistan. A power vacuum is the situation left when a previous ruler withdraws from a state and leaves no one in control, resulting in a somewhat lawless state. In the hopes of preventing a power vacuum, an **interim government** was formed to lead the Islamic State of Afghanistan in 1992. An interim government is a government set up to operate during a period of instability or transition until a more formal government can be fully established to replace the previous government. The Islamic State of Afghanistan was, however, a state in name only, as the interim government could barely exercise control over the city of Kabul. When Burhanuddin Rabbani seized executive power, he introduced a new constitution in 1992. Departing from all previous constitutions, the 1992 constitution stated that the state was based on the Qur'anic verse and sovereignty of the state belonged to God. This contrasted with the 1964 constitution, which stated that the sovereignty of the state rested in the people. The 1992 constitution also allowed no role for codified law in the governing of society and the adjudication of disputes. Instead, the law was understood solely by an extremist interpretation of the *Shari'a*. The government consisted of three executive bodies: the president, the leadership council, and the Jihadi Council.

This constitution was never put into force because of the degree of disarray and anarchy, or lawlessness, existing within the government of Afghanistan in 1992. The official government in Kabul had no control over the rest of the country and numerous battles were being fought between different tribal groups to win control over the government.

6.1.1 The Taliban Take Control

As the civil war continued, another movement began to win battlefield victories and capture many towns outside of Kabul. In 1994, a group of religious students created the Taliban. Led by Mullah Mohammed Omar, the Taliban attracted the support of many refugees and religious students and was financed, reportedly, by the United States, Pakistan, and Saudi Arabia. By September 1996, Kabul had fallen and the Taliban controlled most of Afghanistan. Subsequently, the Taliban set up their government in Kabul and Kandahar. Mullah Omar presided over the Supreme Shura. The Taliban professed that their government aimed to free Afghanistan of corruption and to create a pure society in accordance with Islamic principles.

At the beginning of Taliban rule, the government attempted to root out corruption and establish order. These efforts were successful, as the cycle of fighting between mujahedeen was stopped in many parts of the country and trucking routes into and throughout Afghanistan were reopened. However, this order was established by depriving people of their basic rights and imposing severe and inhumane punishments. There were no impartial judges, no separation of power, no accessible laws, and no procedural justice. Under the Taliban's rule, the former institutions of the state, the ministries, schools, and other public services declined.

To govern through the Shuras established in Kandahar and Kabul, the Taliban established an Islamic state with rule by edict based on a radical interpretation of *Shari'a* law. These edicts controlled most aspects of life, from the clothes that a woman was to wear, to the length of a man's beard, to appropriate family activities. These edicts and decrees were posted around Kabul and Kandahar so that people could be aware of the requirements. The religious edicts were enforced, sometimes through violence, by the Department for the Promotion of Virtue and the Prevention of Vice. Notice how the individual rights discussed in

Section IV were nowhere to be found during this period. The Taliban are not known for their interest in or protection of individual rights.

During this period, women had virtually no rights. For example, in 1997 the Taliban called for a nationwide ban on public education for all women and girls. As a result, women's literacy rates across the country fell drastically to 13 percent in urban areas and 3-4 percent in rural areas. These were some of the lowest in the world. Foreign aid to the country became minimal because of Taliban edicts aimed at driving out foreign NGO workers. For example, on July 10, 2000, the Taliban government issued an edict requiring that all foreign aid organizations fire their female Afghan employees. Law was enforced sporadically and unequally. There was little written law and few formal legal processes, such as formal trials.

PUT YOURSELF IN THAT TIME

All of you likely lived under Taliban rule, even if you were too young to remember it. Do you remember what the government was like back then? Did you grow up in Kabul or the provinces and how did your hometown affect the type of government you lived under? Do you think the Taliban were important to the development of the Afghan state as we see it today? Why or why not?

6.2 The Creation of the Current State

The situation in Afghanistan remained unsettled between 1998 and 2001. In some areas the Taliban held control and ruled through edicts such as the one above, while other parts of the country remained outside Taliban control and the civil war continued. Military commanders controlled most of the areas that the Taliban did not control. On September 11th, 2001, Osama bin Laden and al-Qaeda attacked the United States and because of al-Qaeda's connection to the Taliban, the history of Afghanistan would change forever. We discuss these changes in the next section.

In Section VI, we learned about how the Taliban ruled Afghanistan and how that sort of rule led to the U.S. invasion in 2001. We also learned that the Soviet invasion and withdrawal left a power vacuum that led to a civil war and eventually allowed an extreme group led by Mullah Mohammad Omar to take control.

7. SECTION VII: 2001-PRESENT

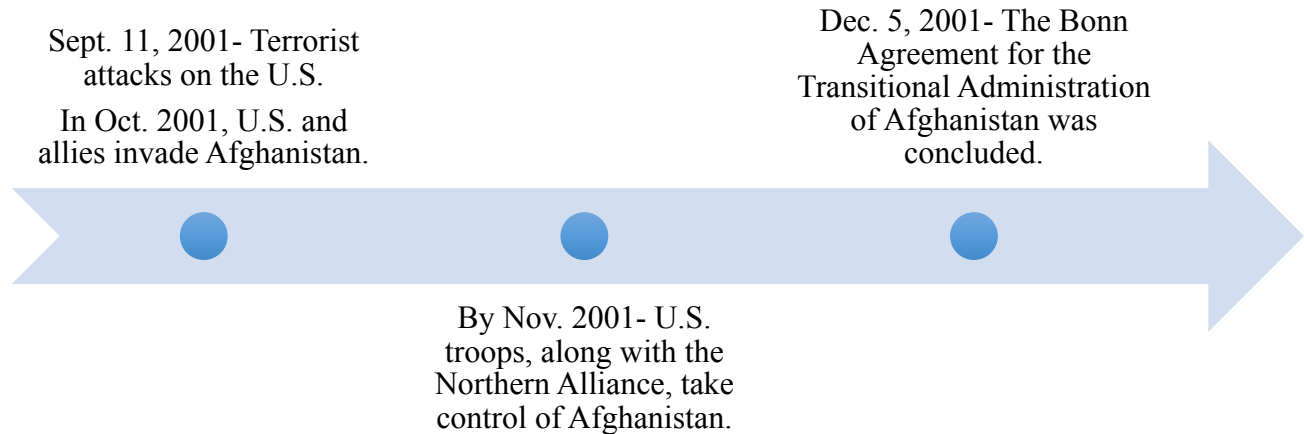
On September 11th, 2001, the structure and priorities of the world changed, as did Afghanistan.

Section VII will be broken into the following three subsections to best explain the implications for Afghanistan's legal system: the Bonn Agreement (section 7.1), the Afghan Interim Administration (AIA) (section 7.2), and the Afghan Transitional Administration (ATA) (section 7.3).



7.1 The Bonn Agreement

In Section VII.I, you will learn what the Bonn Agreement hoped to establish in Afghanistan, understand who decided what this transitional period looked like, and explain why the world felt a transition government was needed in Afghanistan.



After the terrorist attacks on the United States, the U.S. government responded in part by invading Afghanistan with the goal of removing the Taliban from power. The U.S. and its allies took control of Afghanistan by November of 2001. However, the removal of the Taliban left yet another power vacuum, similar to the one after the Soviet withdrawal. In fact, since 1979, no nationally supported government had existed in Afghanistan. Following extensive consultations with international and Afghan counterparts, an interim government was formed.

7.1.1 The Interim Government in 2001

In December 2001, the United Nations (U.N.) agreed to monitor a meeting in Bonn, Germany. Rather than exclude powerful warlords and tribal leaders from the process, all major anti-Taliban actors in Afghanistan were included. By including more groups rather than less, the goal was to find a long-term solution that had the support of the leaders, warlords, and politicians of Afghanistan. The final understanding from this meeting became known as the “Bonn Agreement” which is described below.

TIME FOR YOU TO MAKE THE RULES

Imagine that you are one of the anti-Taliban leaders invited to Bonn, Germany in December of 2001. You are considered a legal expert because of all the knowledge the Intro to Law Textbook has provided you, and you are asked to design a plan for how to get Afghanistan’s government functioning after its previous government, the Taliban, has been expelled. What would be your first step? Who would you appoint to rule or what structure would you recommend for the Afghan people themselves to elect their ruler?
See below for what the different groups agreed on in Bonn.

7.1.2 The Bonn Agreement Explained

The **Bonn Agreement** was a roadmap to try and rebuild the government of Afghanistan following the U.S. invasion and removal of the Taliban from power. Its main goals were:

- a. To establish a new constitution
- b. To form an independent judiciary
- c. To provide free and fair elections
- d. To create a centralized security sector
- e. To protect vital individual rights such as the protection of rights of minorities, including women and religious and ethnic groups.

These were important and ambitious goals for a country that had recently been invaded and was left with few resources and no real government in place. To achieve these goals, it was important to create concrete steps for Afghanistan and the rest of the world to take. Therefore, the Bonn agreement had three major stages:

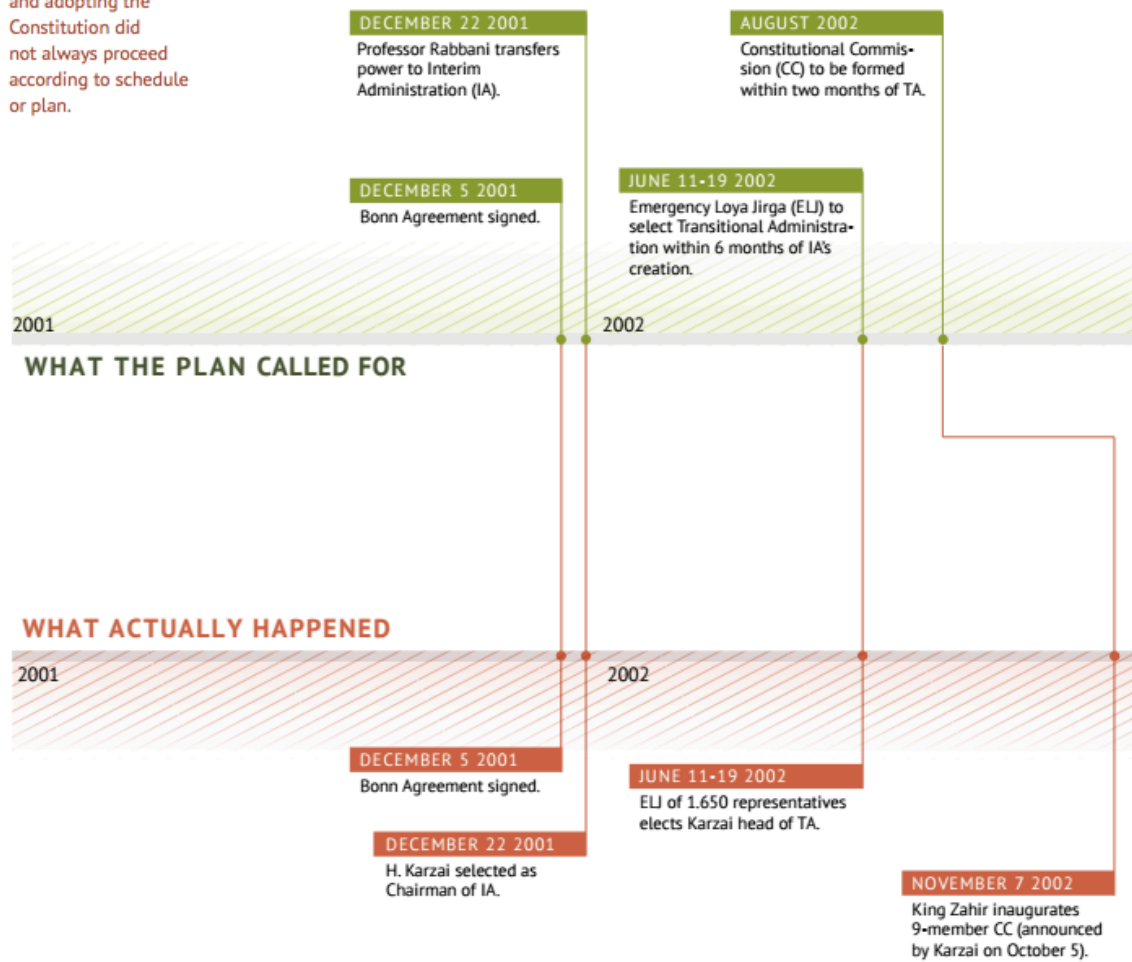
- 1) The first stage was a short-term government, known as the Afghan Interim Administration (the AIA) that would help transition power.
 - a. The AIA was to temporarily operate under the 1964 constitution, excluding provisions relating to the king, executive, or legislature.
- 2) The second stage was the Afghan Transitional Administration (ATA), which would run the country for a maximum of two years until a fully representative government could be elected through free and fair elections.
- 3) The third stage was empowering a fully representative government which would then govern Afghanistan permanently with approval of a new constitution. See below for an example of how the Bonn Agreement played out in Afghanistan.

DO YOU REMEMBER?

You were alive and may remember Afghanistan during this time. Do you remember what it was like to live under the AIA or the ATA? If not, consider asking a parent or teacher about what they remember about the situation. Textbooks may miss some important elements that only people who lived during the time will know. While this is impossible to verify for time periods like the 1880s, it is easy to verify for a time like 2002. Learn from your elders and see if what this textbook says about the Bonn Agreement is what they remember about the time after the U.S. invaded.

**FIGURE 2:
TIMELINE OF 2004
CONSTITUTIONAL
PROCESS**

As this timeline illustrates, the drafting and adopting the Constitution did not always proceed according to schedule or plan.



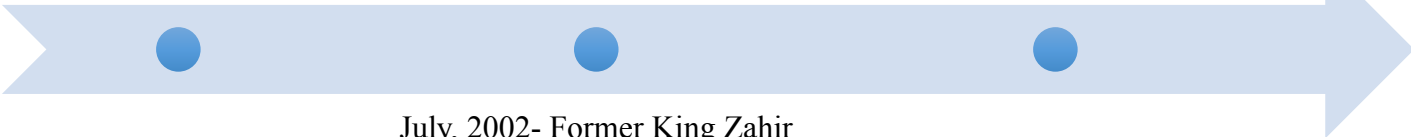
In Section VII.I, we learned that the U.S. invasion of Afghanistan removed the Taliban and left a power vacuum which the Bonn Agreement hoped to fill with a democratic government. In addition, we learned that the Bonn Agreement set out a three-step plan to try and implement the democratic government which included two interim governments, discussed in Section VII.II and Section VII.III.

7.2 The Afghan Interim Administration (AIA)

In Section VII.II, you will learn about the AIA and be able to describe all three relevant parts, explain what happened at the Loya Jirga on July 13, 2002, and compare the AIA to the ATA.

Dec. 22, 2001- The Interim Administration and President Karzai took the oath of office.

August, 2002- Hamid Karzai had named his cabinet and began ruling as President of the ATA.



July, 2002- Former King Zahir Shah convened the Loya Jirga, which reconfirmed Hamid Karzai as president of the ATA.

On December 22, 2001, the Bonn Agreement officially established the **Afghan Interim Administration (AIA)**. The AIA was the first and most important government after the fall of the Taliban from December 2001 until July 2002, when the ATA took effect.

The AIA consisted of three parts:

- 1) The Interim Administration
 - This was the first administration after the fall of the Taliban in 2001 and the highest authority in the country until July of 2002.
 - The Chairman of the Interim Administration was Hamid Karzai, who would eventually become the President in 2004.
 - In addition to the Chairman, there were five Vice Chairmen and 24 other members who were each a head of a department.
- 2) A Supreme Court of Afghanistan
 - This was the highest court of Justice in Afghanistan until July 2002. In theory, the judiciary should have been the same as the one described in the 1964 constitution. In practice, the president was controlling just about everything at this point.
- 3) A Special Independent Commission for the Convening of a Loya Jirga (Grand Council).
 - The most important task for the Loya Jirga was to choose a president for the ATA that would lead the country until the official presidential elections in 2004.

The most important position of this Transitional Administration was the president. Initially, there were three potential candidates for president:

Candidate:	Burhanuddin Rabbani	Hamid Karzai	Zahir Shah
What were they before the election:	Former President of Afghanistan and the Northern Alliance.	Current Chairman of the AIA; backed by the U.S.	Former king of Afghanistan until 1973 who returned after the fall of the Taliban.
Did they run:	No	Yes	No
Why:	Withdrew his candidacy to support Hamid Karzai “for the sake of national unity.”	The U.S. supported him so it was assumed he would win.	The U.S. and U.N pressed Zahir Shah to withdraw from the race which he did despite strong popular support.

7.2.1 The Loya Jirga of 2002

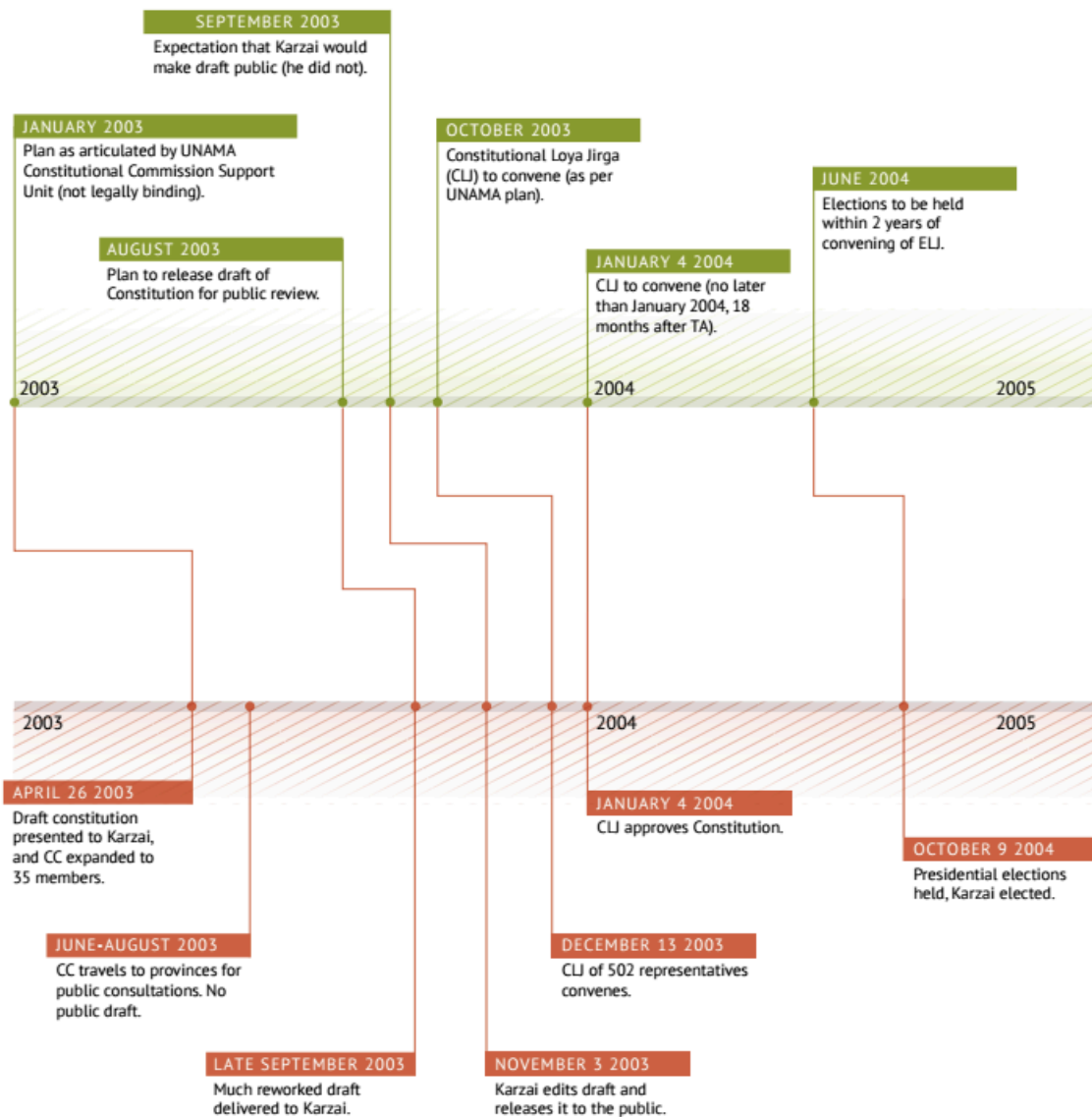
The Bonn Agreement called for an emergency **Loya Jirga in 2002** to elect the leader of the **Afghan Transitional Administration (ATA)**. The ATA was the interim government that the Bonn Agreement established to transition Afghanistan into a full functioning democracy in 2004. Despite several arrests and confrontations during the Loya Jirga, the election for president took place on June 13, 2002. Using a secret ballot with black-and-white photos of the candidates next to their names, Hamid Karzai won with an overwhelming majority of 83% and therefore remained in office as the newly elected president of the Transitional Administration.

As the new president, Karzai was entitled to appoint his **presidential cabinet**. A presidential cabinet are the ministers and advisors that the president gets to appoint to help them with their job of governing the country. In the case of the ATA, the Loya Jirga needed to approve of Karzai's cabinet appointments. Accordingly, on the last day of the Loya Jirga, June 19th, 2002, Karzai announced the names of 14 ministers and vice-presidents he wanted to appoint. He asked the Loya Jirga, "do you accept this cabinet?" and some hands went up. Karzai then concluded by saying that his cabinet had been accepted and that the Loya Jirga was concluded. Although there were some reported disagreements about whether an informal question like that followed by hand-raising counted as sufficient to approve Karzai's cabinet, there were no formal complaints. Therefore, the Loya Jirga of 2002 officially ended the Interim Administration and began the two-year period of the Transitional Administration.

In Section VII.II we learned that the AIA had three main parts: a) The Interim authority, led by Hamid Karzai, b) a Supreme Court of Afghanistan, and c) An emergency Loya Jirga in 2002 that elected Karzai as president of the ATA. We also learned that Karzai's cabinet may not have been officially approved by the Loya Jirga the way the writers of the Bonn Agreement had envisioned.

7.3 The Afghan Transitional Administration (ATA)

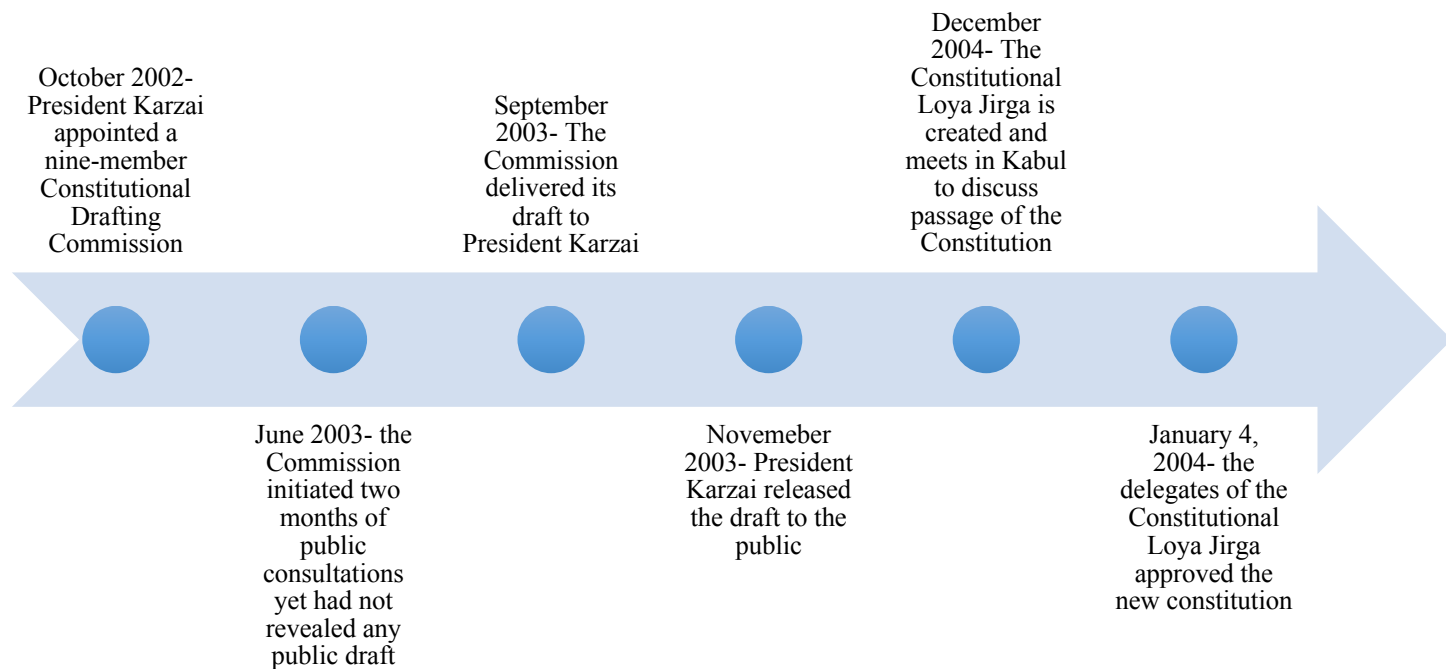
In Section VII, Subsection III, we will explain the steps taken to approve the 2004 constitution, describe how the Bonn Agreement established a permanent government in Afghanistan, and evaluate whether the Bonn Agreement successfully enacted the AIA and ATA.



YOU BE THE LEADER

Imagine that instead of Karzai, you had been elected president of the ATA. What would you want to do first? Think about previous sections in this chapter. Once a new leader took control, what was the first thing they typically did? See below for the answer!

Hopefully you realized the importance of a constitution. That is exactly what the representatives at the Bonn Agreement envisioned, with the goal that the ATA would oversee the writing of the constitution through the Constitutional Commission, and the adoption of the constitution through the Constitutional Loya Jirga within eighteen months of taking control of the country. In this subsection, we will explore how the constitution eventually passed in 2004. This constitution is the same one that governs Afghanistan today, and it was written under the ATA.



7.3.1 The Passage of the 2004 Constitution

As you can see in the timeline above, there was little opportunity for the public to learn about what was in the draft constitutions or to voice their opinion prior to constitutional approval. In fact, the Bonn Agreement endeavored to give the public more opportunity to comment on the drafts but because so many groups were behind schedule, the public never really had an opportunity to express their preferences. The final step was assigned to the **Constitutional Loya Jirga**. Their job was to approve the 2004 constitution which would be, hopefully, the final constitution in this long process.

WHAT DO YOU THINK

The 2004 constitution that is described above is the one Afghanistan currently uses. As someone studying an Introduction to Law class, what do you know or have you heard about the constitution? Is it respected in Afghanistan or do people think it was a mistake? Who do you think played crucial roles in its creation and what do you think were some challenges to its approval? See below for a few answers!

While some articles in the constitution are based on the 1964 constitution, many important elements are new. Powerful groups disagreed over individual rights issues such as the role of Islam, human rights including protection of female rights, the number of vice presidents, national languages, and the structure of government. For example, President Karzai pushed for a constitution with strong presidential powers, while other groups tried to limit the president’s authority by arguing for a strong parliament and constitutional court in which they could share power. Religious conservatives argued that the constitution should be based on Islamic law, with explicit reference to *Shari’a*, while rights groups challenged such an approach, voicing concerns about its impact on women. Nevertheless, despite heated arguments and even walkouts, the delegates of the Constitutional Loya Jirga approved the new constitution on January 4, 2004.

7.3.2 The 2004 Election

Now that the constitution had been approved, the next major step was electing a full-time president. The time for interim governments was over and the time for a legitimate constitution enforced by a democratically elected president had come. As had become typical, the election of a president was twice postponed and finally occurred on October 9, 2004. This would be the first **direct election**, where the citizens voted directly to elect their leader, in Afghanistan's history. Hamid Karzai won the presidential election on October 9, 2004 with 54% of the votes, which was about three times more than any other candidate. However, there were widespread accusations of fraud and many of the candidates threatened to boycott the election until the United Nations announced it would provide an independent panel to investigate the fraud charges. It became clear that there was significant fraud that occurred but Karzai's election was not overturned. Therefore, Karzai became the first directly elected president in Afghanistan's history.

EVALUATING THE BONN AGREEMENT: DID IT WORK?

Some people think that the roadmap established by the Bonn Agreement failed to consider Afghanistan's past and current issues regarding inability to provide basic security and social services. Others view the Bonn Agreement as a good result considering the difficult situation Afghanistan found itself in in 2001. Many years have passed since the constitution was passed in 2004 and Karzai was elected president. The Taliban seems to gain and then lose control of important areas. The U.S. military seems to increase and then decrease and then increase again the number of troops in Afghanistan. Afghan leaders seem to understand the value of a democracy and yet there is so much corruption. How does one decide what success means after being invaded and having your government removed from power?

In Section VII, we learned about the national and international factors that led to the U.S. invasion of Afghanistan in 2001. We also learned about the different agreements and actions taken since then. You and all of your classmates are the future of Afghanistan. You will be the politicians and the lawyers and the decision-makers and the business owners and the bankers. Think critically about the Bonn Agreement and the impacts it could have had on Afghanistan's subsequent decisions. You must decide for yourself how you want to view the aftermath of the U.S. invasion back in 2001. Do you consider the country you are living in better now than it was 2 or 5 or 10 or 20 or 50 years ago? How can you make it better for your children and their children?

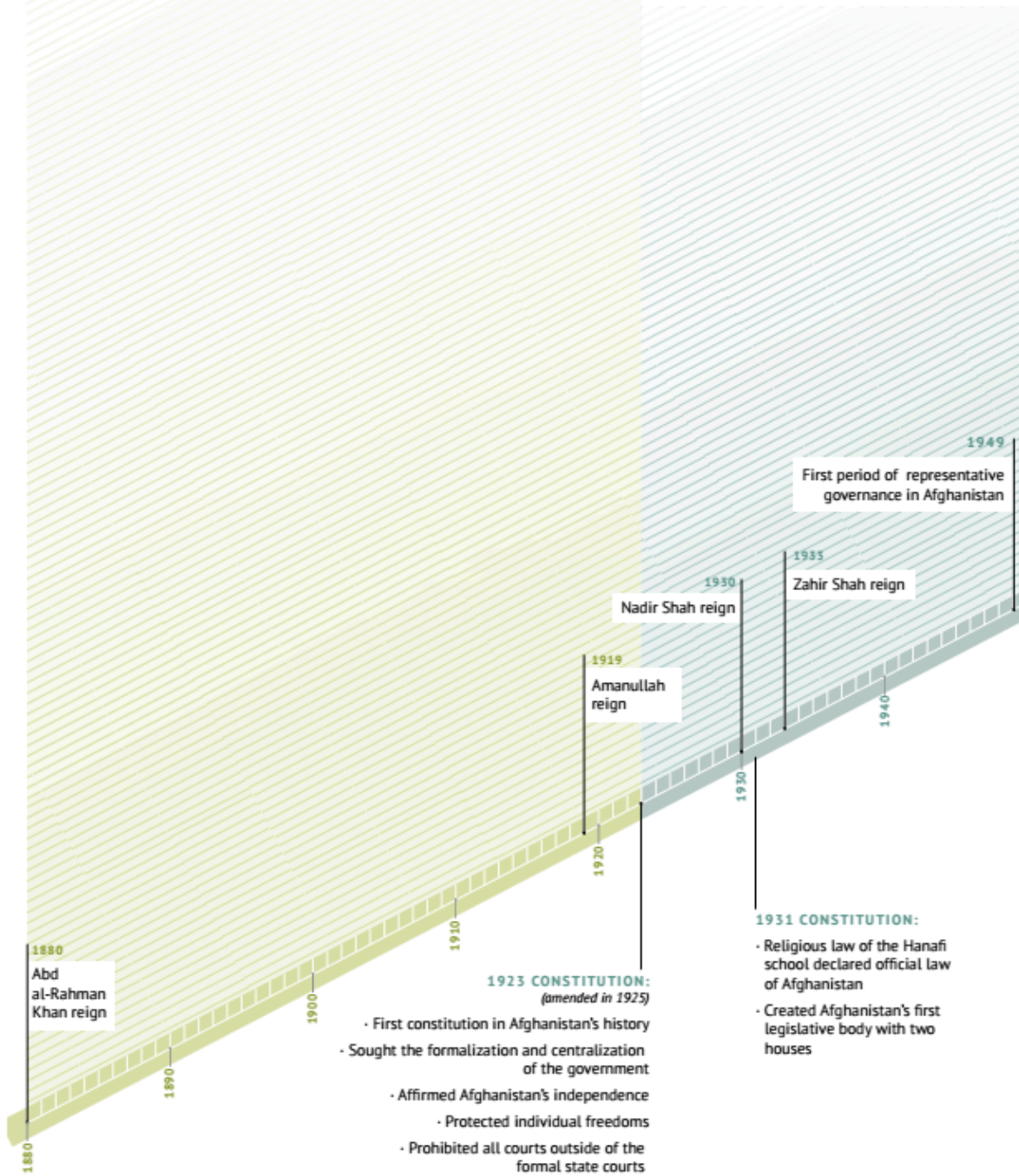
CONCLUSION

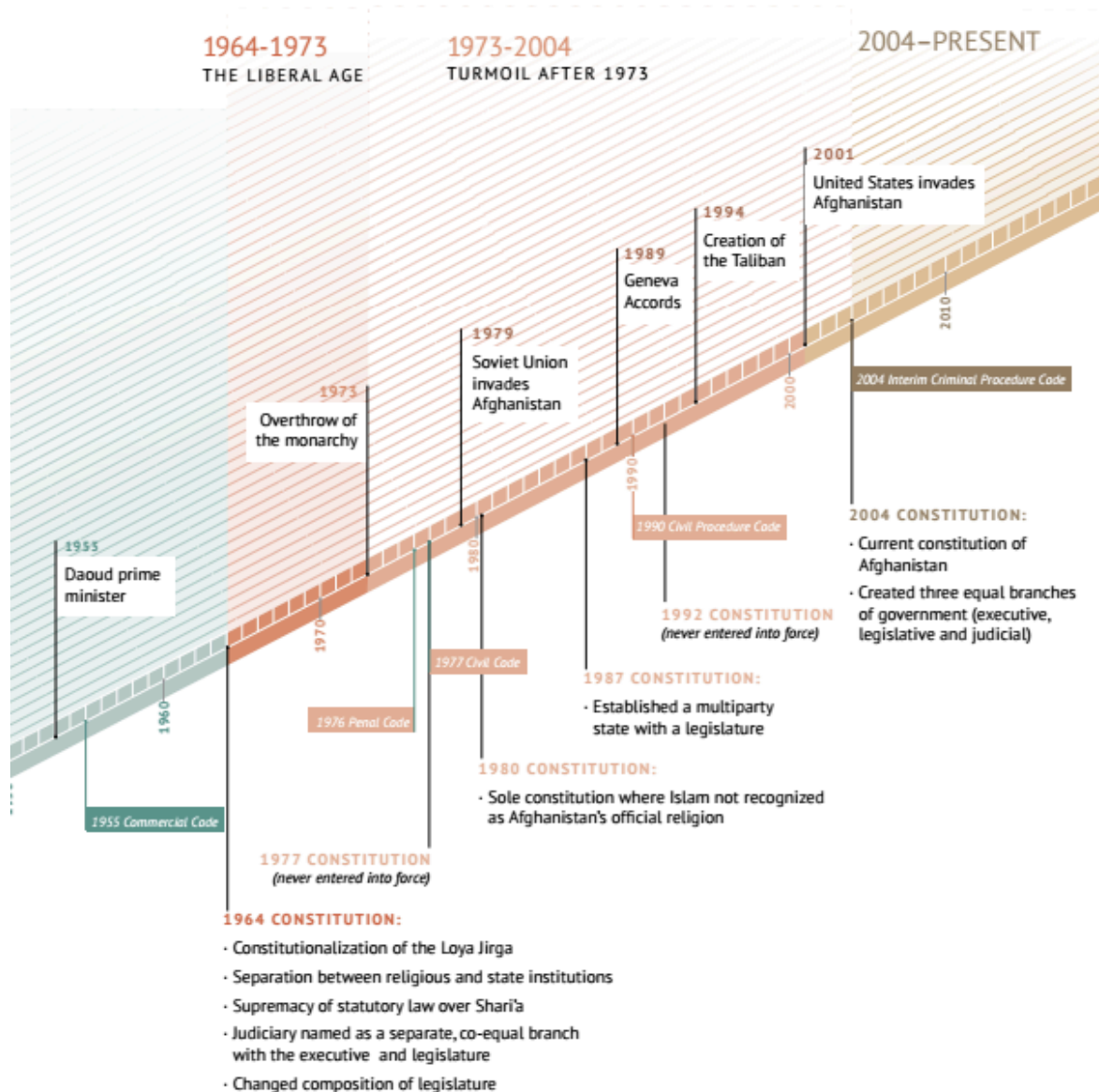
At the beginning of this chapter, you were asked to think about the effect the different constitutions and forms of government have had on Afghanistan. We have studied many influential time periods, leaders, constitutions, and movements. Many of these have had a lasting impact on Afghanistan and continue to play a part in the legal systems of the country. As you move through this book, you will start to learn about what the legal structure in Afghanistan looks like today. With each new concept you encounter, consider which people or constitutions may have played a role in establishing that structure. In addition, in answering the question of if the Bonn Agreement has worked, think critically about each element of the legal system that you study. As you reflect on whether Afghanistan is better off now, consider the laws, the role of the president, the role of the constitution, and the justice system. And as you move forward with this Introduction to Law textbook, don't forget the fundamental guiding question: is this a successful legal system and what can you do to make it better?

PRE-CONSTITUTIONAL PERIOD

1923-1964

THE EARLY CONSTITUTIONS





CONSTITUTIONAL TIMELINE

CHAPTER 5: LEGAL INSTITUTIONS IN AFGHANISTAN

INTRODUCTION

This Chapter will focus on the legal actors and institutions of Afghanistan created by the 2004 Constitution. You will first learn how the Constitution was drafted and the big-picture design the Constitution envisioned for the government of Afghanistan. The next three sections will explore the three branches of government in details: the legislature, the executive and the judiciary. These sections will describe the specific powers each branch has as well as how the branches interact with each other.

In addition to learning about Afghanistan's institutions, you will also explore similar institutions in other countries. You will learn to compare these institutions and analyze which ones fit best in the Afghan context.

Finally, this Chapter will stress how the rules written down in the Constitution are not always applied in practice. As you read this Chapter, as well as the rest of the book, you will learn to evaluate when deviating from these rules is necessary and when the better course of action is to follow the provisions set out in the Constitution.

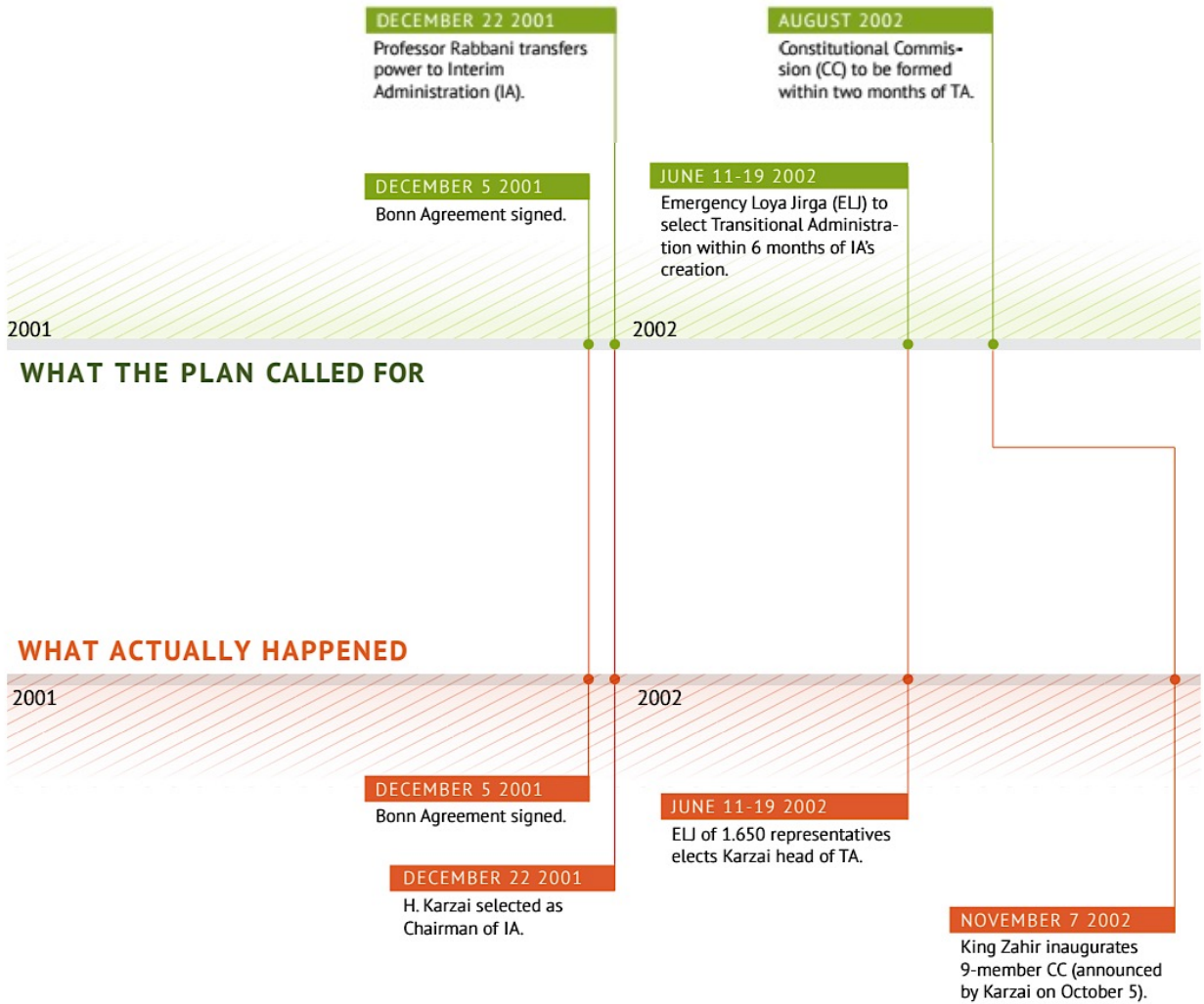
1. THE CONSTITUTION OF 2004

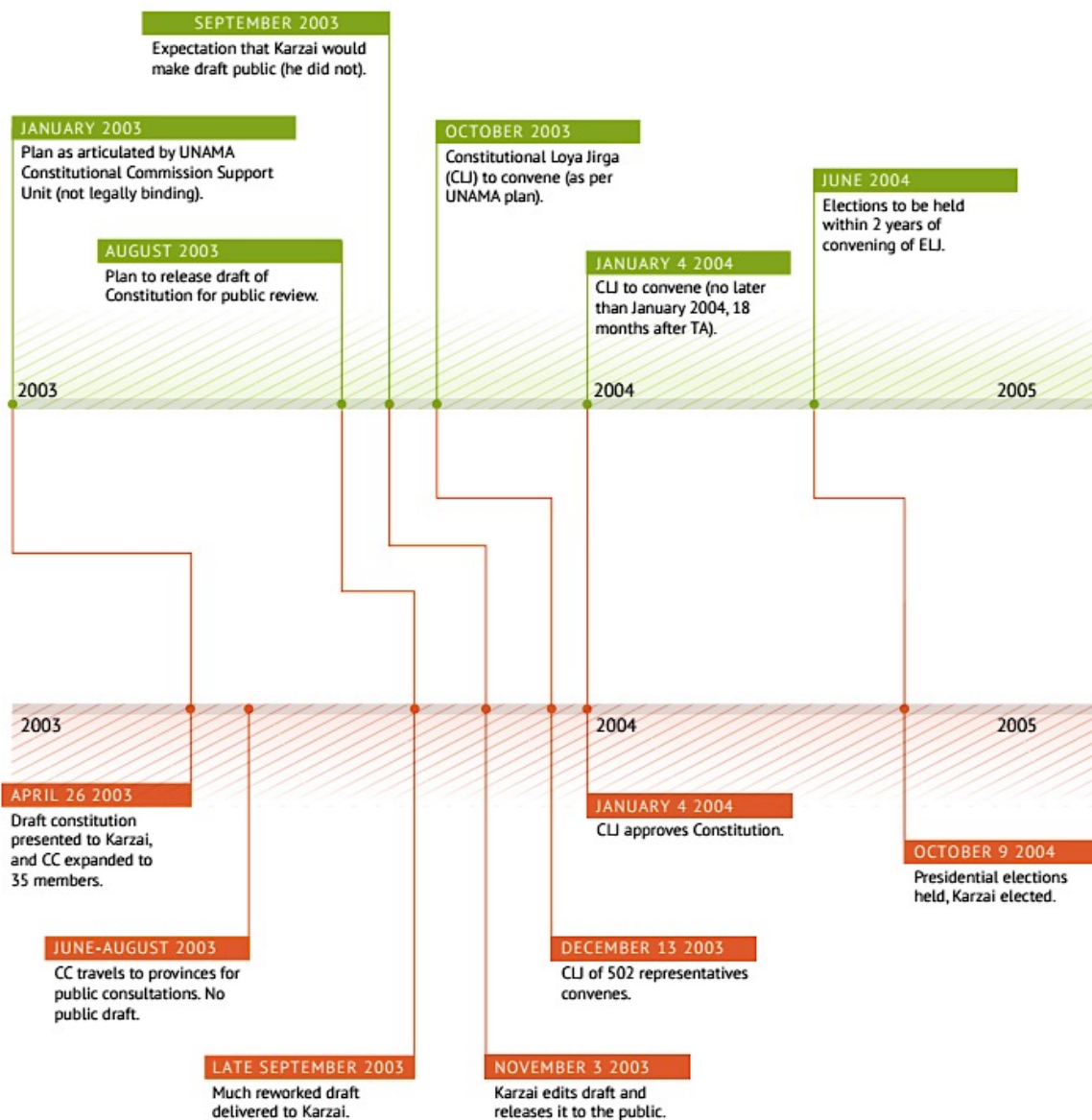
In Chapter 4 you learned about the historical events that led to the Bonn Agreement and about the first phase of the Agreement: the Interim Administration. This chapter begins with the next stage of Afghanistan's development under the Bonn Agreement – the Transitional Administration. In this first section, we will focus on the creation of the 2004 Constitution during the Transitional period as well as the basic governing principles set out in the Constitution.

1.1. The Making of the Constitution

The second stage of the Bonn Agreement began in June 2002, when the Emergency Loya Jirga elected Hamid Karzai President of the Transitional Administration. The powers of the Transitional Administration were identical to the powers of the Interim Administration, but its purpose was different: to draft and adopt a new constitution within eighteen months.

Notably, some deadlines established in the Bonn Agreement were not followed. For example, the Bonn Agreement called for creating the **Constitutional Commission** to draft the Constitution in August 2002. But, the Commission was not actually established until November 2002, resulting in a three-month delay. Similarly, there was a plan to convene the **Constitutional Loya Jirga** to approve the Constitution in October 2003. Yet, the Constitutional Loya Jirga was not actually convened until December 2003. The graph below shows the complete timeline of the constitution-drafting process both as it was planned on paper and as it actually unfolded.





Discussion Questions

1. Notice from the timeline above that various deadlines were missed: creating the Constitutional Commission, delivering a draft to Karzai, releasing a public draft, etc. Nevertheless, the Transitional Administration complied with the planned overall deadline for adopting the Constitution – January 4, 2004. What effect do you think missing the other deadlines had on the process of writing the Constitution?
2. Do you think that the final adoption of the Constitution should have been postponed as well? Why or why not?

1.1.1. Drafting Process

President Karzai appointed nine people to the Constitutional Commission: seven men and two women. These people were responsible for the initial draft of the Constitution. From the very beginning, the group had disagreements over how liberal certain provisions of the Constitution should be. As a result, the group split into two factions: one led by the then-Vice President Nematullah Shahrani and the other led by a constitutional lawyer at Kabul University, Musa Marufi. Each faction worked on its own draft. Six months later, the Commission had made little progress but had to submit a draft to President Karzai in April 2003. There is no record of which of the two drafts was chosen since neither draft was released to the public. However, because seven out of nine people agreed with Shahrani's more conservative positions, it is likely that Shahrani's draft was submitted to President Karzai.¹

After President Karzai reviewed this draft, he created a larger, thirty-five-member Constitutional Commission. This Commission extensively reworked the draft and submitted a new draft to President Karzai in September 2003. The President and his cabinet re-drafted several sections of the draft to secure greater power for the executive branch.

1.1.2. Public Consultation

Before submitting the new draft to President Karzai, the Constitutional Commission devoted two months to public consultations in June 2003. However, at that point, no actual draft was released to the public. Thus, the public debate was limited to discussion of general principles.² The Commission succeeded in reaching a large number of people through public meetings across the country and logged thousands of public comments. However, most citizens were unable to comment substantively even on the general questions regarding the structure of the government or the fundamental human rights since most people were unfamiliar with these concepts due to years of war. It is not clear whether any of these comments were seriously discussed or implemented. The draft itself did not become available to the public until November 2003 – only five weeks before the Constitutional Loya Jirga was formed to formally adopt the Constitution.

Discussion Questions

1. Why do you think the draft of the Constitution was not released to the public sooner?
2. From the start, there was a debate over whether the constitution-drafting process would involve wide public participation. Some believed that such involvement would increase legitimacy and acceptance of the constitution. But others argued that broad participation would block modern liberal positions on social issues. Which position do you agree with and why? Can you think of other arguments for or against involving the public?

1.1.3. Ratification Mechanism

The Constitutional Loya Jirga in charge of approving the final constitution convened on December 13, 2004. There were 502 participants, mostly elected at the district level by community representatives. Women made up approximately twenty percent of the group. The Constitutional Loya Jirga was relatively well organized, but nevertheless had intense debates over the role of Islam, human rights, and the structure of government. For example, President Karzai pushed for a constitution with strong Presidential

¹ International Crisis Group, "Afghanistan's Flawed Constitutional Process" (12 June 2003): 14.

² J. Alexander Their, "The Making of a Constitution in Afghanistan", *New York Law Review* 51 (2006-2007): 568.

powers, while various minorities tried to limit the President's authority by arguing for a strong parliament.³ Religious conservatives argued that the Constitution should be based on Islamic law, with explicit reference to Sharia, while others were concerned about the impact on women's rights.⁴ Nevertheless, despite heated arguments and bitter complaints over government interference, the delegates approved the new Constitution on January 4, 2004.

A number of articles in the 2004 Constitution originate from the 1964 Constitution. But many important provisions are new as a result of the debates described above. The next section will focus on the differences and similarities of the government structure under the 2004 and 1964 Constitutions. And the next chapter will examine constitutional provisions in greater detail when discussing criminal, administrative and contract laws.

Discussion Question

Why might the government have entrusted a Constitutional Loya Jirga with the final authority to approve the new Constitution instead of asking Afghan citizens to vote? What are the advantages and disadvantages of this choice?

1.2. State Institutions under the 2004 Constitution

The big-picture design of the Afghan government in the 2004 Constitution resembles that in the 1964 Constitution, establishing separation of powers between the three branches of government: executive, legislative and judicial. **Separation of powers** means distribution of power among several branches. This provides a “**balance**,” which allows each branch to focus on its specific work. Thus, the legislative branch has the power to make laws. The executive branch implements the laws made by the legislature. And judicial branch applies the laws to individual cases and interprets the laws if they are not clear.

Moreover, separate branches serve as “**checks**” to each other. In other words, each branch has some control over the other two branches so that no one group of people has absolute power. The next two sections will describe such checks and balances in detail.

Despite these similarities, the 2004 Constitution differs from the 1964 Constitution in one important way: the 2004 Constitution combines the powers of the King and the powers of the Prime Minister and gives them both to the President. Therefore, under the new Constitution, the President controls the executive branch as well as serves as the head of state.

Comparative Case Study: Parliamentary and Presidential Systems

There are many different forms of representative governments in the world but the two most common are the parliamentary and the presidential systems. In the parliamentary system, the head of state and the head of government are two different people. The head of state (usually a King) is a public persona who officially represents the country. The head of government (usually a Prime Minister) is the person who actually guides the day-to-day activities of the government. Importantly, the Prime Minister is typically elected by the legislative branch and so can be removed by that branch. The power of the

³ Ibid., 570.

⁴ Jarrett Murphy, “Afghans Struggle Over Islam's Role,” *CBS/AP News*, December 19, 2003, <http://www.cbsnews.com/news/afghans-struggle-over-islams-role/>

legislative branch to remove the Prime Minister often influences Prime Minister's decisions. This system of government is set up in countries like the United Kingdom, Japan and India.

Countries like the United States and Iran have a presidential system, where the President is the head of state and also the head of government. More importantly, the President is typically elected by the people directly. Thus, the legislature has no authority to remove the President from power. How do you think that affects the President's decisions?

As mentioned above, under the 1964 Constitution Afghanistan resembled a parliamentary system because the executive power was divided between the King and the Prime Minister. By contrast, the 2004 Constitution created a Presidential system. Which system do you think is the better choice for Afghanistan today? Why?

1.2.1. Balances in the 2004 Constitution

“Balances” are ways to distribute power between the branches. The most important balances in the 2004 Constitution are: (1) bicameralism, (2) different methods of electing each branch, and (3) different terms of office for each branch.

Bicameralism means establishing two chambers, or houses, in the legislature. Each chamber must pass a bill by a majority vote before it can become the law. Let's say, for example, that the legislature wants to pass a new bill limiting what kinds of weapons police may use. If 60% of members in one chamber vote for the bill but only 42% of members of the other chamber votes for the bill, the bill will not become the law. Rather, more than 50% of members of each chamber must vote in favor of the bill.

The 2004 Constitution establishes two chambers: the Wolesi Jirga (House of the People or the Lower House) and the Meshrano Jirga (House of Elders or the Upper House). The writers of the Constitution believed that the laws would better represent the will of the people if two separate legislative bodies had to approve them.

A second way the Constitution balances the powers of the branches is by prescribing different methods of election for each branch. The President is elected directly by the people and must receive more than 50% of the vote to take office. Members of the Wolesi Jirga are elected by each province. As for the Meshrano Jirga, one-third of its members are elected by district councils, one-third are elected by provincial councils and one-third are appointed by the President. Finally, judges are selected by appointment only. Justices on the Supreme Court are chosen by the President with the approval of the Wolesi Jirga. Other judges are chosen by the Supreme Court and approved by the President.

The different methods of election and appointment ensure that different branches represent interests of different parts of Afghan society. The President is accountable to the Afghan population as a whole and will therefore try to advocate for laws supported by the majority of all people. Members of the Wolesi Jirga are elected by specific districts and thus will seek to represent the interests of those districts. For example, a province that contains a lot of agricultural production may have different preferences for environmental regulations than a province that contains factories. Thus, representatives will advocate for laws beneficial to their own provinces. Members of the Meshrano Jirga are accountable to local governments, which gives the local governments a voice in national law making. Lastly, judges are appointed and not elected by the people. This allows judges to protect minorities through their decisions because they do not have to worry about being re-elected by a majority of the people.

The last balance the 2004 Constitution provides is the different terms of office for each branch of government. The President has a five-year term; members of the Wolesi Jirga have a five-year term; members of the Meshrano Jirga have three-, four-, or five-year terms; and Supreme Court justices have ten-year terms.

Different lengths of office reduce the chance that all three branches of the government will be dominated by the same political party. For example, the current President may be from one political party while the Supreme Court justices may have been appointed by a previous President, who was a member of a different political party. Thus, different interests of the society can be represented at once through different branches in the government.

1.2.2. Checks in the 2004 Constitution

“Checks” are mechanisms by which each branch of the Afghan government restricts the powers of the other two branches to prevent them from acting unconstitutionally. The executive branch has the power of the **presidential veto**, articulated in Article 94 of the Constitution. The veto gives the President the power to reject legislation passed by the legislature.

Let’s see how this power works in practice. For example, the National Assembly may want to pass a law that a valid marriage ceremony requires three witnesses. If the President believes that this law is unconstitutional or if the President simply does not like the law on policy grounds, the President can veto, or refuse, the law. This power is not absolute, since the National Assembly can **override the President’s veto** if two-thirds of members of the Wolesi Jirga (the Lower House of the National Assembly) vote in favor of the law.

THE PRESIDENTIAL VETO (ARTICLE 94)



The legislative branch can check the executive branch by controlling the ministers. Under the Constitution, the President chooses the people who will serve as ministers, but the Wolesi Jirga has the power to reject those choices. Additionally, the Wolesi Jirga can remove a minister currently in power through a procedure called a **no-confidence vote**. For example, if members of the Wolesi Jirga believe that the Minister of Education is acting against the constitution by not allowing all children to have equal access to schools, they can vote to remove the Minister from office. In that case, the President will have to choose a new Minister and the Wolesi Jirga will have the power to approve or reject that choice.

APPOINTMENT & REMOVAL OF MINISTERS



The National Assembly can also vote to remove the President from office. But, it can only do so for crimes or treason. Thus, the National Assembly cannot remove the President simply because it disagrees with the President's policies.

Finally, the Supreme Court has the power to interpret the Constitution and to ensure that all laws passed are consistent with the Constitution. This mechanism, known as **judicial review**, allows the judiciary branch to act as a check on both the legislature and the executive. Article 121 of the Afghan Constitution gives the Supreme Court this power, but only in the limited circumstances where the executive branch requests the Supreme Court to do so. This Article will be discussed in detail in Section IV: the Judiciary.

2004 Constitution

Article 121: At the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law.

Discussion Questions

1. Which of the three balances in the Constitution (bicameralism, different methods of election of different branches, or different terms of office) do you think is most effective in dividing the power among the three branches? Why?
2. Do you think that Presidential veto is a real check on the legislature despite the fact that the Wolesi Jirga can override it with a two-thirds majority? Does your answer depend on whether you think it is easy or difficult to get two-thirds of members to agree on the bill?
3. In the beginning of this Chapter, we learned that President Karzai of the Transitional Administration tried to change the draft of the Constitution to give the executive branch more power relative to the legislative or the judiciary branch. Looking at the specific checks and balances discussed in this section, do you think he succeeded? In other words, is the executive the strongest branch? Why or why not?

2. THE LEGISLATURE

From the previous section you know that the power of the government of Afghanistan is divided between the legislative, the executive and the judicial branches. While the previous section described the big-picture design of the government set up by the 2004 Constitution, the next three sections will examine the three branches in detail.

We first take up the legislature. We will learn about the main actors in the legislative branch – the Wolesi Jirga, the Meshrano Jirga and the Loya Jirga – as well as the role of these actors in the law making process.

2.1. National Assembly

The **National Assembly** of Afghanistan is responsible for discussing, drafting and passing the laws. Article 81 of the Constitution states that the National Assembly was created to represent the “voice of the people” in the government because the will of the people is the basis for any democracy. Article 90 of the Constitution describes specific laws that the National Assembly must consider.

2004 Constitution

Article 90: The National Assembly shall have the following duties:

1. Ratification, modification or abrogation of laws or legislative decrees;
2. Approval of social, cultural, economic as well as technological development programs;
3. Approval of the state budget as well as permission to obtain or grant loans;
4. Creation, modification and or abrogation of administrative units;
5. Ratification of international treaties and agreements, or abrogation of membership of Afghanistan in them . . .

Discussion Question

Article 90 of the Constitution uses the word “duties” to describe the role of the National Assembly in the government. So, the National Assembly has a duty to approve the state budget. What do you think will happen if the National Assembly does not agree on a budget? For example, members of the National Assembly may disagree about how much money to spend on the police department in the next year and therefore do not have support of the majority to pass the budget. Look through the Constitution to see if another branch of the government (executive or judicial) can take over the role of the National Assembly in this case.

From the discussion of the checks and balances in the previous section, you already know that the National Assembly is bicameral: it has a lower house, called Wolesi Jirga, and an upper house, called Meshrano Jirga. Each house has its own election process and its own responsibilities, which we now discuss in turn.

2.1.1. Wolesi Jirga

The Wolesi Jirga is responsible for drafting and approving all legislation. The Wolesi Jirga is also responsible for approving or rejecting Presidential appointments of ministers and Supreme Court justices. Finally, the Wolesi Jirga has the authority to create a special commission to investigate the actions of the government. One-third of the members of the Wolesi Jirga must approve the creation of the commission. For example, if members of the Wolesi Jirga think that an administrative agency, or even the President, has acted illegally, they can authorize an investigation into that behavior under Article 89 of the 2004 Constitution. In practice, however, this power has not been exercised.

Members of the Wolesi Jirga are elected directly by the people in the provinces they represent. They are elected according to the population of that province. This way, provinces that have more people have more representatives in the Wolesi Jirga. For example, people in the Kabul Province elect thirty-three representatives, the people in the Herat Province elect seventeen representatives, and the people in the Nimroz province elect two representatives.

According to Article 83 of the Constitution, each province is mandated to have a certain number of women **proportionate** to its population, but there must be a minimum of two women representatives from each province. In total, the Wolesi Jirga can be comprised of no more than 250 members.

Article 85 of the Constitution sets other requirements for members of the National Assembly – these are the same for both members of the Wolesi Jirga and members of the Meshrano Jirga. The most important requirements are: each member must be a citizen of Afghanistan for at least ten years; members cannot have been convicted of a crime; and members must be at least twenty-five years old.

2.1.2. Meshrano Jirga

The Meshrano Jirga generally plays an advisory role in the Afghan government because its powers are not as significant as those of the Wolesi Jirga. For example, the Meshrano Jirga is limited to simply approving legislation coming from the Wolesi Jirga, as opposed to drafting the legislation.

One-third of the members are elected by the Provincial Councils. Each Council chooses one of its members to be a member of the Meshrano Jirga for a four-year term. The Constitution also requires the District Councils to elect one-third of the upper house. District Council representatives are set to serve three-year terms. When these council members are chosen to be members of the Meshrano Jirga they give up their seats on their District Councils.

The President appoints the remaining one-third of Meshrano Jirga members. They serve five-year terms. Article 84 of the Constitution states that presidential appointees must be selected from among “experts and experienced personalities.” Two seats are reserved for representatives with disabilities and two for members of nomadic groups. Fifty percent of the members appointed by the President must be women.

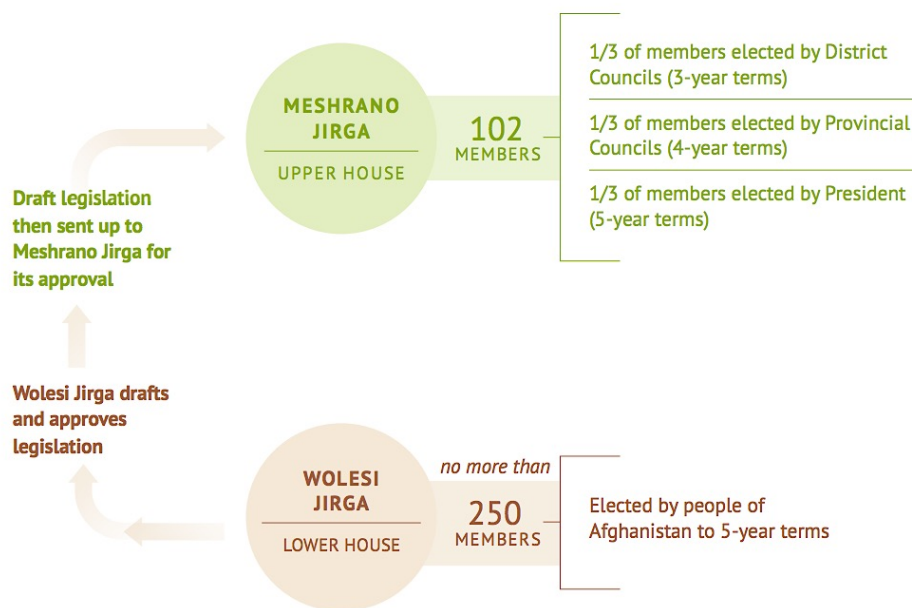
Despite the theoretical composition of the Meshrano Jirga, elections and representation have worked quite differently in practice. In 2005, the district boundaries had not yet been established and therefore District Councils did not elect members to the Meshrano Jirga. To compensate, Provincial Councils each elected two members.⁵ This means that 34 seats that should have been filled by district representatives have in fact been filled by additional provincial representatives.

⁵ International Federation for Electoral Systems, “Islamic Republic of Afghanistan: Election for Meshrano Jirga (House of Elders),” September 18, 2005, <http://www.electionguide.org/elections/id/353>.

The most recent elections to the Provincial Councils were held on 5 April 2014 in parallel with Presidential elections. And on 10 January 2015, 34 representatives were elected by the Provincial Councils. On the same day, the three-year term of the 34 Provincial Council members who had been filling the 34 seats reserved for District Council members expired. No District Councils have yet been elected. However, this time the 34 seats reserved for district representatives were not filled by the provincial representatives. Rather, they will remain vacant until District Council elections are held.

The term of 34 members, appointed on 22 January 2011 for a five-year term, was due to expire in January 2016. On 7 January 2016, President Mohammad Ashraf Ghani extended their term until parliamentary and district elections are held.⁶ Thus, as of January 2017, the Meshrano Jirga consists only of 68 members instead of the constitutionally prescribed 102 members. Eighteen of them are women.⁷

STRUCTURE OF THE NATIONAL ASSEMBLY



Discussion Questions

1. What is the main difference between the powers of the Wolesi and the Meshrano Jirgas?
2. Is it a good idea that members of the Meshrano Jirga are not elected directly by the people? Why or why not? (Hint: think about the checks and balances discussed in the previous section as well as about the different powers the two houses have.)
3. Recall from the section on checks and balances that there are benefits of having different-length terms for members of the Meshrano Jirga. Can you think of any drawbacks?
4. Do you think the overall structure for electing members of the National Assembly truly ensures representation of the “voice of the people”? Are any groups underrepresented?

⁶ Inter-Parliamentary Union “Afghanistan Meshrano Jirga (House of Elders), Last Elections,” last modified 22 August 2016, http://www.ipu.org/parline-e/reports/2382_E.htm.

⁷ Ibid.

Comparative Case Study: Bicameralism in Other Countries

Typically, in countries that have two legislative houses, each house represents a different interest. For example, in the UK, the House of Lords (at least originally) represented the upper class and the House of Commons represented the lower class. In countries like Russia and U.S., one house represents the people and the other administrative territories – such as states or provinces. Thus, each state or province gets the same number of representatives no matter how big or small because all territories are considered equal. In countries like Netherlands and the Philippines, the upper house focuses on reviewing and vetoing the legislation that comes from the lower house. Do you think the two houses in Afghanistan – the Wolesi Jirga and the Meshrano Jirga – represent different interests as well? If so, what are those interests? If not, why are there two houses?

2.2. Loya Jirga

Unlike the National Assembly, the Loya Jirga is not a standing body. Rather, it convenes when Afghanistan is dealing with difficult and important questions. Its purpose is to decide on issues involving Afghanistan's independence, national sovereignty, territorial integrity and any other issues involving important national interests. In addition, the Loya Jirga has the power to amend the Constitution and impeach the President. In recent years, the Loya Jirga was convened to decide on the Transitional Administration under the Bonn Agreement. It was also responsible for adopting the 2004 Constitution.⁸

2004 Constitution

Article 110: The Loya Jirga is the highest manifestation of the will of the people of Afghanistan.

Different branches of the government have the power to convene the Loya Jirga under different circumstances. For example, if the purpose is to impeach the President, the Wolesi Jirga must call the Loya Jirga. But if the purpose is to extend the state of emergency, the President must call the Loya Jirga.

The Loya Jirga is composed of members of the National Assembly, the presidents of the provinces and the presidents of the district assemblies. The Chief Justice, members of the Supreme Court, ministers, and the Attorney General also participate in sessions of the Loya Jirga, but they do not have voting rights.

2.3. Lawmaking Process

Articles 94 – 100 of the Constitution describe the legislative process in Afghanistan. Two of these articles are particularly important, as they set out the general lawmaking structure. Article 94 defines “law” as anything approved by both houses and **ratified** by the President:

2004 Constitution

Article 94: Law shall be what both houses of the National Assembly approve and the President endorses, unless this Constitution states otherwise. . . .

⁸ Michael Schoiswohl, “Linking the International Legal Framework to Building the Formal Foundations of a ‘State at Risk’: Constitution-Making and International Law in Post-Conflict Afghanistan,” *Vanderbilt Journal of Transitional Law* 39 (2006): 819.

Article 94 includes the words “unless this Constitution states otherwise.” There are some exceptions to this rule, such as Executive Decrees written by the President. If you choose to pursue a legal degree, you will learn about this mechanism for making law in the Constitutional Law class.

Article 95 describes how a draft bill can be made into law:

2004 Constitution

Article 95: The proposal for drafting laws shall be made by the Government or members of the National Assembly or, in the domain of regulating the judiciary, but the Supreme Court, through the Government. . . .

As you can see, there are several ways in which a proposed legislation can become law. This section will examine the process that starts with the members of the National Assembly proposing a draft bill. The next section, which focuses on the executive branch, will describe the legislative process of bills that originate with the Government. The two processes are compared side-by-side on page 18.

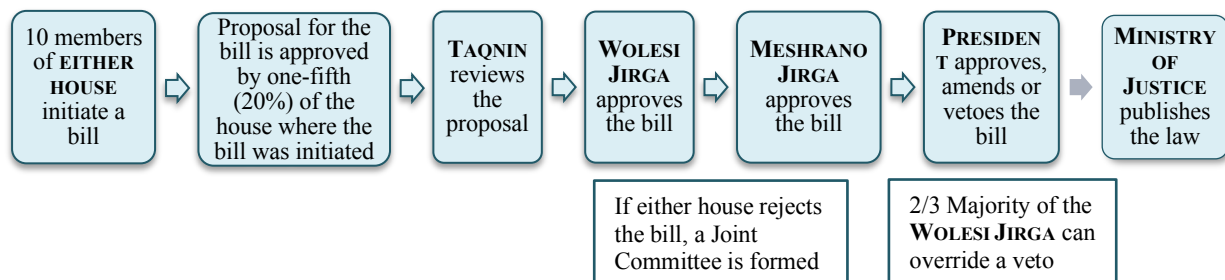
Legislation can originate in either house of the National Assembly. First, ten members of one of the houses must propose a bill. Next, the bill must be approved by one-fifth of that house to be placed on the Agenda for consideration. Once approved for consideration, the bill is sent to the General Department for Law Making and Academic Legal Research Affairs (**Taqnin**). The Taqnin ensures that the proposed legislation does not conflict with the Constitution, international treaties, sharia or existing legislation.

Once approved by Taqnin, the bill comes back to the legislature. The Wolesi Jirga first considers the bill. If the majority of the members of the Wolesi Jirga vote in favor of the bill, the bill goes to the Meshrano Jirga. The majority of the members of the Meshrano Jirga must also approve the bill. If either house rejects the bill, a **Joint Committee** is formed from the members of both Jirgas to reach an agreement.

When both houses of the National Assembly have approved the bill, it is sent to the President for his endorsement. The President has the power to veto legislation. If he exercises his veto power, the bill must be sent to the Wolesi Jirga within fifteen days along with the reasons for the President’s veto. The Wolesi Jirga can override the veto with a two-thirds majority vote.

If the bill is approved by the president or by the two-thirds of the Wolesi Jirga, it will be published in the official gazette. Each law contains a provision that determines how soon after publication the law will become binding. The Ministry of Justice is responsible for publishing and updating the gazette. This system of checks and balances between the executive and the legislature is intended to prevent either branch from having too much power over the legislative process.

SUMMARY OF LEGISLATIVE LAWMAKING PROCESS



Discussion Questions

1. Can the Meshrano Jirga override the Presidential veto?
2. Why do you think the writers of the Constitution required so many steps before a law can be passed in Afghanistan?
3. What would be the advantages of having a less complicated system? Would there be any disadvantages?
4. When discussing the Meshrano Jirga (Section 2.1.2. above), we noted that the Meshrano Jirga has the power to approve laws but not draft them. In this section, however, we said that a member of *either house* can initiate a bill if he or she has the support of nine other members of that house. That means, that a member of the Meshrano Jirga can initiate a bill. What do you think is the difference between “drafting a law” and “initiating a bill”?

Comparative Case Study: The Legislative Process in Turkey

The Turkish legislative process is different from that in Afghanistan. In Turkey, only the Council of Ministers has the power to introduce laws. The Turkish National Assembly does not draft legislation. It only debates and adopts the draft bills that are submitted for its approval.

Once the National Assembly approves laws, they go to the President for his approval. If the President thinks that a law is unsuitable, he can resubmit it to the National Assembly for further consideration with a list of his reasons for disagreeing with the legislation. In that case, the National Assembly can make changes based on the President’s proposals.

Therefore, in Turkey the National Assembly has no power to draft the legislation and the President has no outright veto. How do you think the fact that the Turkish National Assembly lacks the power to introduce legislation impacts the balance of powers? What about the President’s lack of veto power?

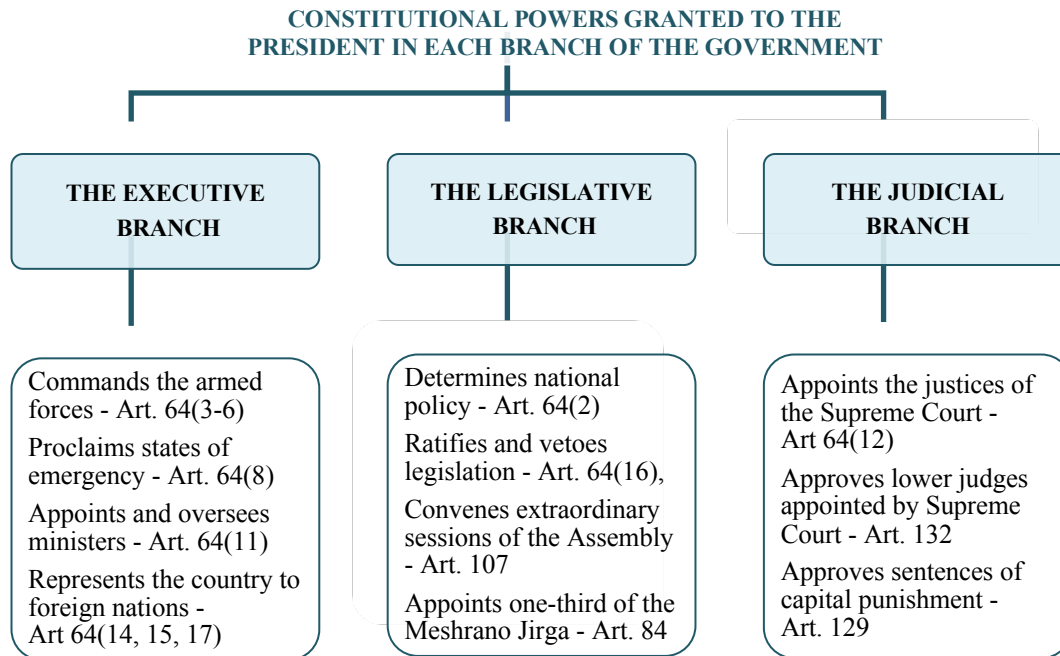
3. THE EXECUTIVE

The executive branch is responsible for enforcing the laws – making sure that the laws are carried out the way they were intended. Traditionally, in countries that have three branches of government, the executive branch consists of the President, the ministers and law enforcement. As you read this section, however, you will notice that the powers of the President in Afghanistan are not confined solely to enforcing the law. In fact, he has the authority to make the law just like members of the National Assembly. The President also has some power in the judicial sphere. In this way, the President of Afghanistan is not truly part of the executive branch. Rather, he almost stands at the head of all three branches.

3.1. The President

Recall that in the beginning of this chapter, we said that one of the main differences between the 1964 Constitution and the 2004 Constitution is that the 2004 Constitution combined the powers of the King and the Prime Minister and gave both of these powers to the President. From the King, the President inherited his position as the **head of state**. As the head of state, the President has such powers as commanding the army, declaring war and peace, and representing the country to foreign nations. From the Prime Minister,

the President inherited his position as the **head of government**. As the head of government, the President has legislative powers to determine national policy, veto legislation, and appoint one-third of the Meshrano Jirga. Moreover, the President has further authority in the judicial branch. For example, the President appoints justices of the Supreme Court, appoints lower judges, and approves sentences of **capital punishment**, or death penalty. The chart below summarizes these Presidential powers and provides articles of the 2004 Constitution that grant the President these respective powers:



Article 61 of the Constitution provides that “the President shall be elected by receiving more than 50 percent of the votes.” So, a candidate must win a **majority** of votes to become President. This is different from other countries, which allow a candidate to become President after winning only a **plurality** of the votes, meaning more votes than the other candidate.

Let’s look at an example to see the differences between these two systems. Let’s say Amir, Baseer and Darya all run for President. Amir receives 40% of the votes, Baseer receives 25% of the votes and Darya receives 35% of the votes. Under a plurality system, Amir becomes President because he received the most votes. Under the majority system, like the one in Afghanistan, there is no clear winner because no candidate received more than 50% of the votes. Thus, under the majority system, there would have to be a second **run-off election** between the candidates who receive the most votes – Amir and Darya. Let’s say that in the second round, Amir receives 45% of the votes and Darya receives 55%. Darya becomes the President.

The President’s term lasts five years and the President can run for a maximum of two terms. Thus, one person can be President for a maximum of ten years. The President is aided by two Vice Presidents, who have the same term limits. Article 62 of the Constitution sets out further requirements for a Presidential candidate: the person must be a citizen of Afghanistan, must be Muslim, must be born to Afghan parents, and must be at least forty years of age.

Discussion Questions

1. What is the difference between head of state and head of government?
2. What are the benefits of the majority electoral system? What are the benefits of the plurality electoral system?
3. Which electoral system – majority or plurality – do you think is better for Afghanistan? Why?
4. Recall from the beginning of this chapter that President Karzai tried to influence the drafting of the 2004 Constitution to give President more power. From the chart above summarizing all the powers that the Constitution gives to the President, it looks like he succeeded. President Karzai said this much power was necessary because Afghanistan is a struggling country that needs a strong central government. Do you agree with that statement? Or, do you think that placing so much power in the hands of the President limits the long-term potential of a strong National Assembly that will truly represent the “voice of the people”? Why?

Case Study: 2014 Election and the Office of the CEO

Both Ashraf Ghani and Abdullah Abdullah claimed victory in the 2014 election. As part of a national unity agreement, it was decided that Ghani will become President and that he will create a new post called Chief Executive Officer (CEO) for Abdullah. The CEO chairs the weekly meeting of ministers and makes policy recommendations to the President, essentially acting like a head of government.

Read the following articles from the 2004 Constitution and then answer the questions below:

Article 60: The President shall be the head of state of the Islamic Republic of Afghanistan, executing his authorities in the executive, legislative and judiciary fields in accordance with the provisions of this Constitution. The President shall have two Vice-Presidents, first and second. . . .

Article 64: The President shall have the following authorities and duties [edited]:

1. Supervise the implementation of the Constitution;
2. Determine the fundamental lines of the policy of the country with the approval of the National Assembly;
8. Proclaim as well as terminate the state of emergency with the endorsement of the National Assembly;
9. Inaugurate the sessions of National Assembly and Loya Jirga.
10. Accept the resignations of vice-Presidents of the Republic;
11. Appoint the Ministers, the Attorney General, the Head of the Central Bank, the National Security Director as well as the Head of the Red Cross . . . ;
12. Appoint the Justice of the Supreme Court as well as justices of the Supreme Court with the endorsement of the House of People;

13. Appointing, retiring and accepting the resignation and dismissal of judges, officers of the armed forces, police, national security as well as high ranking officials according to the provisions of law; **Article 142:** To implement the provisions as well as attain values enshrined in this Constitution, the state shall establish necessary offices.

Does the President have the power to create the office of the CEO under the current Constitution? For example, can we think of the CEO as just another minister? Or, must the Constitution be amended?

3.2. Ministers

According to Article 73 of the Constitution, the President may nominate ministers with confirmation by Wolesi Jirga. Together, the various ministries form what the Constitution calls “the Government.” The ministers’ main task is to assist the President in the implementation of his policies. Unlike the Constitution of 1964, the Constitution of 2004 does not give the ministers any autonomous power.⁹ Article 77 of the Constitution states that the ministers are not only appointed by the President, but they are also responsible to him. In fact, the ministers can be removed by the President alone, without consulting the National Assembly.¹⁰ That means that the ministers will likely refrain from disagreeing with the President for fear of being dismissed. Article 71 of the Constitution similarly states that, “The Government shall be comprised of Ministers who work under the chairmanship of the President.”

The Ministry of Justice, Ministry of Finance, the Ministry of Water, and the Ministry of Education are among Afghanistan’s thirty ministries.¹¹ Ministries are important because they structure much of the day-to-day lives of the people of Afghanistan by setting policy in a certain area.

An important ministry to be aware of in your legal studies is the Ministry of Justice. The Ministry of Justice is primarily responsible for upholding the rule of law. Its other duties include preparing drafts of the laws; advising the President on whether treaties conform with the laws of Afghanistan; defending state property against debtors; and managing prisons.¹²

Perhaps the most important function of the Ministry of Justice is to draft legislation. Recall that the section above explained how legislation can originate with the members of the National Assembly. The Constitution also gives authority to the President (acting through his ministers) to make laws. In fact, the vast majority of laws originate with the Ministry of Justice and not with the National Assembly. The Ministry of Justice typically drafts the legislative plan of action – a big-picture agenda for the law. The separate bills in the legislative plan of action are then prepared by ministerial committees set up by the relevant ministers. If a bill relates to multiple ministries, then a joint committee is established. Once the bill is completed, it is sent to the Ministry of Justice for final scrutiny and then to the Council of Ministers to be confirmed. **Taqnin** reviews proposed legislation for conflicts with the Constitution, international treaties, sharia and other existing legislation.

For example, a bill to change legal curriculum would be most likely introduced by the Ministry of Justice and will be drafted by the committee created by the Minister of Higher Education. Since this bill would

⁹ Rainer Grote, “Separation of Powers in the New Afghan Constitution,” *Heidelberg Journal of International Law* 64 (2004): 907.

¹⁰ *Ibid.*

¹¹ The number of ministries has changed several times since 2004. As of March 2017, there are 29 ministries and a National Procurement Authority. Office of the President, Islamic Republic of Afghanistan, “Ministries,” accessed March 13, 2017, <http://president.gov.af/en/page/1055/8329>.

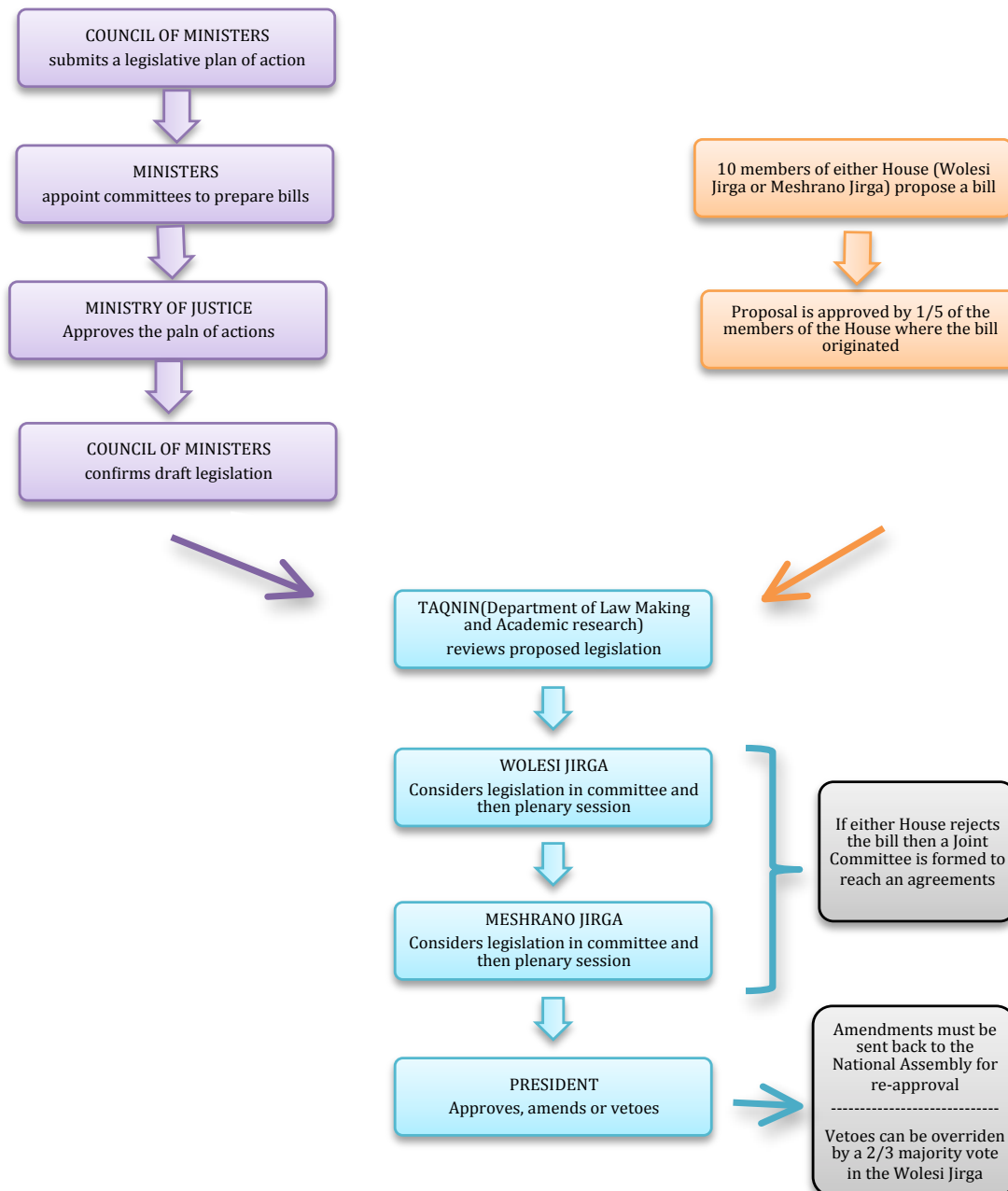
¹² Ministry of Justice of the Islamic Republic of Afghanistan, “Duties and Responsibilities of Ministry of Justice of the Islamic Republic of Afghanistan,” accessed January 25, 2017, <http://moj.gov.af/en>.

probably also touch on legal aspects, a joint committee between the Ministry of Higher Education and the Ministry of Justice may be established. Taqnin would then finally review the bill.

Laws that originate with the executive are submitted first to the Wolesi Jirga. The Wolesi Jirga has one month to decide on the legislation. Next, the legislation is sent to the Meshrano Jirga, which must act within fifteen days. If both houses approve the legislation, it is sent to the President for his ratification.

If one house rejects a law proposed and approved by the other house, a joint committee of members of both houses is created to address the disagreement. If the committee reaches a compromise agreement, the law is submitted to the President for his approval. If they fail to agree on a solution, the legislation is considered to be rejected. However, it can still be passed by a two-thirds majority of the Wolesi Jirga.

COMPARING EXECUTIVE AND LEGISLATIVE LAWMAKING



Discussion Questions

1. Let's say that the Ministry of Justice has developed a legislative plan that includes a potential Law Against Sexual Harassment. What do you think will be the primary ministry in charge of drafting this law? What other ministries would be involved?
2. Describe all the steps the government will have to take to make the Law Against Sexual Harassment official law of Afghanistan. Which branch of government do you think has the most control over what the law will say?
3. Do you think that the time limits imposed on the Wolesi Jirga and the Meshrano Jirga is a good idea? What are the benefits? What are the downsides?

Lawmaking in Practice

The section above stated that most of the laws are initiated by the Ministry of Justice and are then sent to the relevant ministerial committees. In practice, however, many **non-governmental organizations** assist with the drafting or revising of a law. After these organizations provide their advice, the Ministry of Justice proposes the law and then works with Taqin. Some of these non-governmental organizations simply import laws from other countries and translate them. But, what works for another country does not always work for Afghanistan. As a result, many of these laws have to be subsequently amended or repealed. As of January 2017, approximately 3989 laws have been published in the official gazette but 2944 of these are not current anymore.

Why do you think the government started using non-governmental organizations? Do you think the government should stop relying on non-governmental organizations? Or, can the government improve the process but still use non-governmental organizations?

3.3. Law Enforcement

Law enforcement represents another large part of the executive branch. The main actors in law enforcement are: the police, the prosecution, the defense, and the correctional system. Generally speaking, the police investigate crimes. Once the police have identified a person they think committed the crime, the prosecution **brings charges** against that person in court. If the person, now called the **defendant**, cannot afford his or her own lawyer, then a public defender argues in court on the side of the defendant. Finally, if the judge decides that the defendant is guilty, the judge will assign a penalty. (Remember that the judge is not part of the executive branch but is a neutral decision-maker.) If the crime was serious, the defendant will go to prison, which is part of the **correctional system**. This section will now examine the roles and duties of all these actors in detail.

3.3.1. The Police

The Afghanistan National Police (ANP) is often the most visible segment of the executive branch. The ANP is part of the Ministry of Interior and is charged by the President with enforcing the criminal laws of Afghanistan.

The Afghanistan National Police is divided into ten departments: (1) Uniform Police; (2) Border Police; (3) Civil Order Police; (4) Police Special Units; (5) Local Police; (6) Traffic Police; (7) Natural Disasters and Fire Fighting; (8) Criminal Investigation; (9) Counter Terrorism; and (10) Major Crimes Task Force.

The Uniform Police is the largest component of ANP and is responsible for general police duties. Most often, the Uniform Police monitors checkpoints and is the first unit to arrive when an emergency occurs. In 2014, 108,391 out of the total 149,000 policemen in Afghanistan were members of the Uniform Police.¹³

Two other important departments are the Criminal Investigation and the Police Special Units. Officers in the Criminal Investigations are responsible for the discovery and prevention of crime. They often cooperate with the Attorney General's Office (which houses the prosecutors) in the investigation and trial of crimes. Police Special Units combat insurgency, illegal narcotics and organized crime. They often work with international organizations, such as **NATO** to gather intelligence.¹⁴

Police recruits attend an eight-week training program covering the following areas: general police duties; weapons proficiency, first aid, human rights training, community policing, basic border police training, and the law and culture of Afghanistan. Many undergo specialized training courses in bomb disposal, fingerprinting, traffic management, unarmed combat, crime scene investigation, advanced firearms instruction, or riot control skills. ANP officers go through a three-year training program.

In February 2014, the Minister of Interior approved a 10-Year Vision for the ANP. One major goal in the Vision is to change wartime strategies historically taught to the police to more appropriate peacetime tactics.¹⁵ Another area of focus is recruitment of more women.¹⁶

Discussion Questions

1. How do you think the wartime and the peacetime police tactics differ?
2. In Afghanistan, police recruits are trained for 8 weeks. In the United States, most recruits are trained for 19 weeks. And in Europe, recruits are trained for 2 years. Teachers, in contrast, are usually trained for at least 4 years. Do you think that police in Afghanistan should have a longer training program? Are there drawbacks to having a longer program?

3.3.2. The Prosecution

It is important to understand that while police and prosecution often work together to catch criminals and put them on trial, they ultimately have different roles and duties in law enforcement. This is because we do not want a police officer who claims someone is a criminal to be the same person who puts the alleged criminal on trial. After all, a police officer might be trying to protect his or her job and reputation and therefore will always want to try the person he or she identified as the criminal. By contrast, a prosecutor's job does not depend on whether the police officer identified the right person.

The drafters of the 2004 Constitution recognized how important this independence of prosecutors is and so they decided that prosecutors must be responsible to the Attorney General (chief prosecutor in the country) and not to the Minister of Interior. This way, no one in the Minister of Interior's office can coerce a prosecutor to put a person on trial.

¹³ Ministry of Interior, "Afghan National Police: 2013-2014 Annual Report" (2014): 6
<http://moi.gov.af/Content/files/web%20English%20Final%20MoI%202014%20Annual%20Report%20Final%20by%20MPAD%20Final.pdf>.

¹⁴ Ibid., 7.

¹⁵ Michelle Hughes, United States Institute of Peace, "Special Report: The Afghan National Police in 2015 and Beyond" (2014): 1, http://www.usip.org/sites/default/files/SR346_The_Afghan_National_Police_in_2015_and_Beyond.pdf.

¹⁶ Ministry of Interior, 17.

Let's look at an example to see how police and prosecutor work together but still remain independent of each other. Let's assume that police officers suspect that Malia is stealing money from her employer. Police will begin investigating their suspicions by talking to Malia's co-workers, her employer and her family. Police may also watch what Malia does before and after work. During the time when police is gathering evidence, officers may find it useful to talk to the prosecutor and figure out what rights they have and what rights Malia has. For example, police may ask the prosecutor if they can enter Malia's home without her permission. Or, if they can search Malia's purse right after she leaves her work. Thus, police and prosecution can work closely together during the investigation. But, when police decides that they have gathered enough evidence, they will arrest Malia and hand her case to the prosecutor. It is up to the prosecutor to decide if he or she wants to put Malia on trial. If the prosecutor decides to go ahead with trial, he or she will continue working with the police. For example, the prosecutor might prepare the officer to testify at trial or ask the police officer to explain the evidence. But, no one in the Ministry of Interior can pressure the prosecutor to put Malia on trial or dictate what crime she should be tried for.

Attorney General's Office consists of three units: Civil, National Security, and Military. The Civil Unit is responsible for investigating and prosecuting most of the crimes in the criminal courts. The National Security Unit is responsible for investigating and prosecuting terrorism cases in the National Security Courts. Finally, the Military Unit is responsible for investigating and prosecuting criminal cases against police and other law enforcement officers.

Discussion Questions

1. In this section we discussed that it would not be a good idea for the same person to investigate and prosecute the crime because a police officer has an interest in keeping his or her job and reputation and therefore will always want to try the people he or she identifies as a criminal. Are there other reasons for keeping these two roles separate?
2. The prosecutor has great **discretion**, or choice, in deciding when to put someone on trial. Why do you think the prosecutor has that power? In other words, why not always put a person on trial if the police have enough evidence?
3. Why do you think it is important to have a separate Military Unit?

3.3.3. The Defense

While the prosecutors are always employed by the state, defense attorneys can be either private or public. This is because the prosecutors always represent the government when putting someone on trial while the defenders represent the person. The Afghan Constitution guarantees that the government will provide a public defender to any person who cannot afford to hire his or her own lawyer:

2004 Constitution

Article 31: Upon arrest, or to prove truth, every individual can appoint a defense attorney. Immediately upon arrest, the accused shall have the right to be informed of the nature of the accusation, and appear before the court within the time limit specified by law. In criminal cases, the state shall appoint a defense attorney for the **indigent**. Confidentiality of conversations, correspondence, and communications between the accused and their attorney shall be secure from any kind of violation. . . .

To comply with this provision, the Ministry of Justice has established a Legal Aids Office. People who cannot afford their own lawyer, can request a lawyer from this office.¹⁷ Despite providing legal aid, the Ministry of Justice does not have power over the decisions defense attorneys make. Instead, under the 2007 Advocates Law,¹⁸ defense attorneys are governed by the Afghanistan Independent Bar Association (AIBA). Importantly, AIBA is independent from the government and regulates attorneys through a general assembly elected from among the members of AIBA. AIBA's duties include writing ethical rules, providing licenses to attorneys, and ensuring that attorneys follow the law and the ethical rules.¹⁹

Because the Legal Aids Office does not have sufficient number of attorneys to provide representation to every indigent person, various **non-governmental organizations** exist that provide additional defense attorneys. One of the most famous such organizations is the International Legal Foundation – Afghanistan (ILF – A). Since its establishment in 2003, ILF – A has assisted approximately 25,000 people.²⁰ ILF – A focuses specifically on people who have been illegally detained in prisons. Below is an example the kind of work ILF – A does.

Case Study: Fighting Debtors' Prisons

Two days after the Afghan government adopted the 2004 Constitution, ILF – A filed a legal application seeking the release of people who had been imprisoned for failure to repay a debt. Arguing that Article 32 of the new Constitution prohibits debtor's prisons, ILF – A successfully convinced courts to order their clients' release. The first case argued by ILF – A involved a man who had been convicted of fraud, sentenced to a term of imprisonment of four months, and been required to repay the debt. By the time ILF – A met this client, he had been incarcerated for more than six months because he could not afford to repay the debt. ILF – A argued that it was not constitutional to hold the client for longer than four months merely because he could not pay his debt. The court agreed with ILF – A's argument and released him.

Even though several non-governmental organizations provide legal aid, there are still not enough defense attorneys to represent every accused person in court. One way to overcome this problem may be to follow the pro bono requirement set out in the Advocates Law, which directs every attorney to represent three cases for free every year. However, a further problem arises from the fact that many people do not know that they have the right to legal help. As a result, many people appear in court with the help of their friends and relatives who often have little legal knowledge.

Look back to Article 31 of the Constitution above. Notice that Article 31 provides two rights. First is the right to be represented by a defense attorney, which we just discussed. Second is the right to keep any communication with the defense attorney **confidential**. This provision applies to both public and private attorneys. That means that the prosecutor cannot use any words a person says to his or her defense attorney at trial. But it also means that the defense attorney cannot tell anyone what his or her client said. For example, if Yosuf confesses to his attorney that he robbed a store, his attorney cannot tell the police, the prosecutor or the judge what Yosuf said. As you can imagine, this rule may make defense attorneys feel very uncomfortable when they have to represent a person who they know is guilty.²¹

¹⁷ Ministry of Justice, "Free Legal Aids," accessed on January 24, 2017, <http://moj.gov.af/en/page/7966/free-legal-aids>.

¹⁸ Advocates Law, Law No. 934/2007 (17 December 2007).

¹⁹ Sarah Han, Afghanistan Analyst Network, "Legal Aid in Afghanistan: Context, Challenges and Future" (2012): 8, https://www.afghanistan-analysts.org/wp-content/uploads/downloads/2013/08/20120417-SHan-Legal_Aid_in_Afghanistan1.pdf.

²⁰ The International Legal Foundation, "ILF – Afghanistan," accessed January 24, 2017, <http://theilf.org/our-programs/ilf-afghanistan>.

²¹ These matters will be covered more thoroughly in the advanced Ethics course. For more information, see Afghanistan Legal Education Project, "Client Confidentiality," in *An Introduction to Legal Ethics in Afghanistan* (2015), 112.

Discussion Questions

1. Should the prosecutors or the judges treat unrepresented defendants any differently than they treat defendants represented by counsel?
2. Why do you think the Advocates Law declared that defense attorneys must be governed by an independent organization? Is there anything wrong with the Ministry of Justice having power over defense attorneys? (Hint: think about what other organs the Ministry of Justice controls)
3. Is it a good idea to keep all communication between a person and his lawyer confidential? What are the benefits of this rule? What are the problems?

3.3.4. The Correctional System

The Central Prisons Department (CPD) is by far the largest of the ten departments within the Ministry of Justice. It was transferred to the Ministry of Justice from the Ministry of Interior in 2003, and has organized its own structure separate from that of other Ministry of Justice departments.

The CPD is responsible for all detention centers and prisons throughout the nation. In contrast, the Afghanistan National Police are only responsible for smaller lock-ups in police stations, where defendants are held for a maximum of three days (with the exception of the Kabul Detention Center, which can hold defendants for up to 15 days). Besides administering the country's prisons and detention centers, the CPD is responsible for transporting inmates to various courts for trials and hearings.

Discussion Question

As you will learn in the section on the Judiciary, juveniles are tried in special courts, separated from adult criminals. Juveniles are also typically held in separate prisons from adults. Do you think this protection is necessary? Why or why not?

4. THE JUDICIARY

The role of the judicial branch is to adjudicate legal disputes. This means that a person who is merely curious about what some law means cannot simply come to court and ask a judge. Instead, there must be two parties on opposite sides of a real, and not a hypothetical, issue.

The 2013 Law on Organization and Jurisdiction of Judiciary²² governs the powers of the courts and their organization. According to the law, every case starts out at a primary court. After a primary court reaches a decision, that decision can be **appealed to**, or reviewed by, a court of appeals. After a court of appeals reaches a decision, it may again be appealed to the Supreme Court. Most decisions can be freely appealed from the primary court to the court of appeals. The only exceptions are: (1) when the time for appeal has expired, (2) when the disputed property is worth 100,000 Afghanis or less, and (3) when the only punishment is a cash fine of 50,000 Afghanis or less. By contrast, only a few cases are reviewed by the Supreme Court every year. That is because the Supreme Court only has nine justices and thus does not have the time to decide every case. Instead, the Supreme Court focuses on cases that affect a large

²² Law on Organization and Jurisdiction of Judiciary Branch of Islamic Republic of Afghanistan, Law No. 1109/2013 (30 June 2013).

number of Afghans. The following sections describe the organization and powers of the courts in detail.

4.1. Lower Courts

Every case begins in the primary courts. There are primary courts with **general jurisdiction**, called the Central Primary Courts, and primary courts with **specialized jurisdiction**: (1) District Primary Court; (2) Juvenile Primary Court (3) Commercial Primary Court, and (4) Family Primary Court.

General jurisdiction means that a Central Primary Court can hear any legal case. In contrast, specialized primary courts can only hear cases that fall within their area. The 2013 Law on Organization and Jurisdiction of Judiciary mandates each province and urban area to have a Central Primary Court and at least one court with specialized jurisdiction. As of January 2017, however, this goal has not been met.

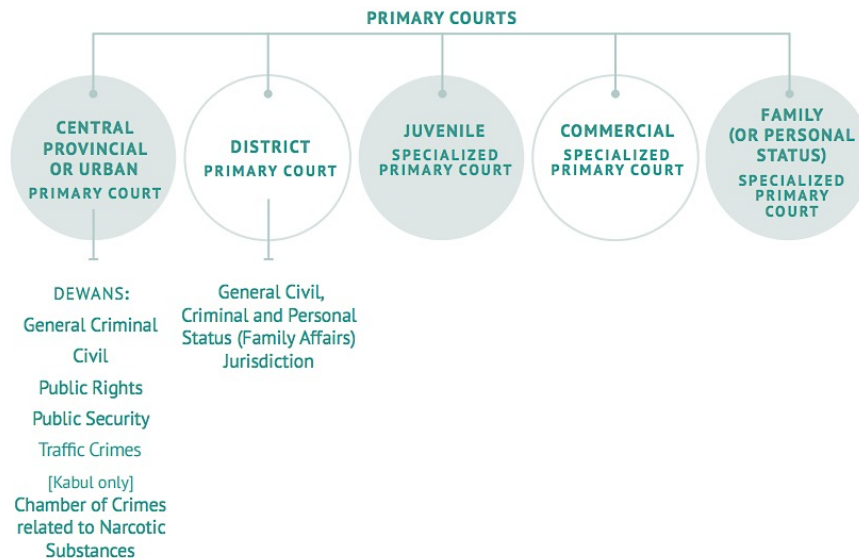
A Central Primary Court can hear any case, but this Court is split into five **dewans**, or departments: (1) General Criminal; (2) Civil; (3) Public Rights; (4) Public Security; and (5) Traffic Criminal. For example, if Sabrina is accused of stealing money, Sabrina will be tried in the General Criminal Dewan of the Central Primary Court. On the other hand, if Rahim and Rashid have a disagreement over where Rahim’s property ends, they will bring the case to the Civil Dewan of the Central Primary Court.

The District Primary Court has specialized jurisdiction and so cannot hear every case. According to the 2013 Law, a District Primary Court can adjudicate only criminal, civil and family cases. Thus, Sabrina can be tried in this court as well as in the Central Primary Court. But, not every district has every type of primary court and so Sabrina will be tried in the court that exists in her province.

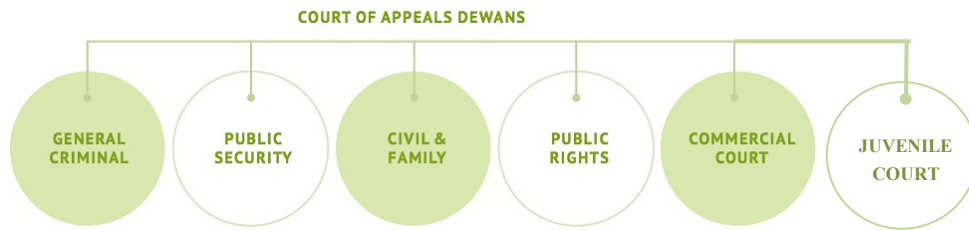
The Juvenile Primary Court is responsible for all criminal cases brought against a minor person. So, if in our example Sabrina was only fourteen years old, she would be tried in the Juvenile Court instead.

The Commercial Primary Court can only hear commercial cases. Rahim and Rashid, in the example above, can bring their case to this court as well as to the Central Primary Court. Again, their decision on which court to use will depend on which court is available in their district.

Finally, the Family Court handles all cases related to family issues, such as marriages, divorces, and property disputes. Below is the chart to summarize the organization of the primary courts:



Once a case is decided by the primary court, it can be **appealed** to the Court of Appeals for review. Unlike with primary courts, there is only one Court of Appeals in each province. But, similarly to the primary courts, the Court of Appeals is organized into dewans:



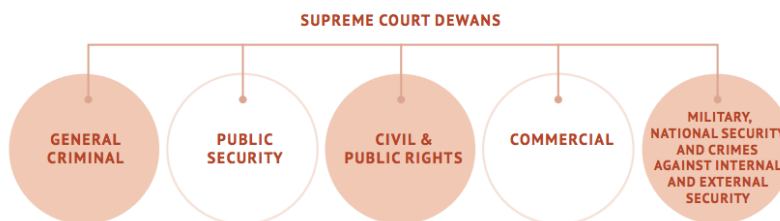
As you probably guessed, each case must be appealed to the proper dewan. Thus, Sabrina’s case would be appealed to the General Criminal Dewan, while Rahim and Rashid would appeal their case to the Civil and Family Dewan. Unlike in the primary courts, these cases are heard by a panel of three judges.

Article 128 of the Constitution provides that all trials are to be open to the public and transparent, with all final decisions available to the public. Article 31 of the Constitution provides that each person is entitled to a defense attorney. In addition, Article 58 of the Constitution sets out several requirements for being a judge. They include: the person must be a citizen of Afghanistan for at least ten years, he or she should not have been convicted of any crime, he or she must hold a degree in law or Islamic law or religious studies center, and he or she must be 25 years of age or older.

4.2. The Supreme Court

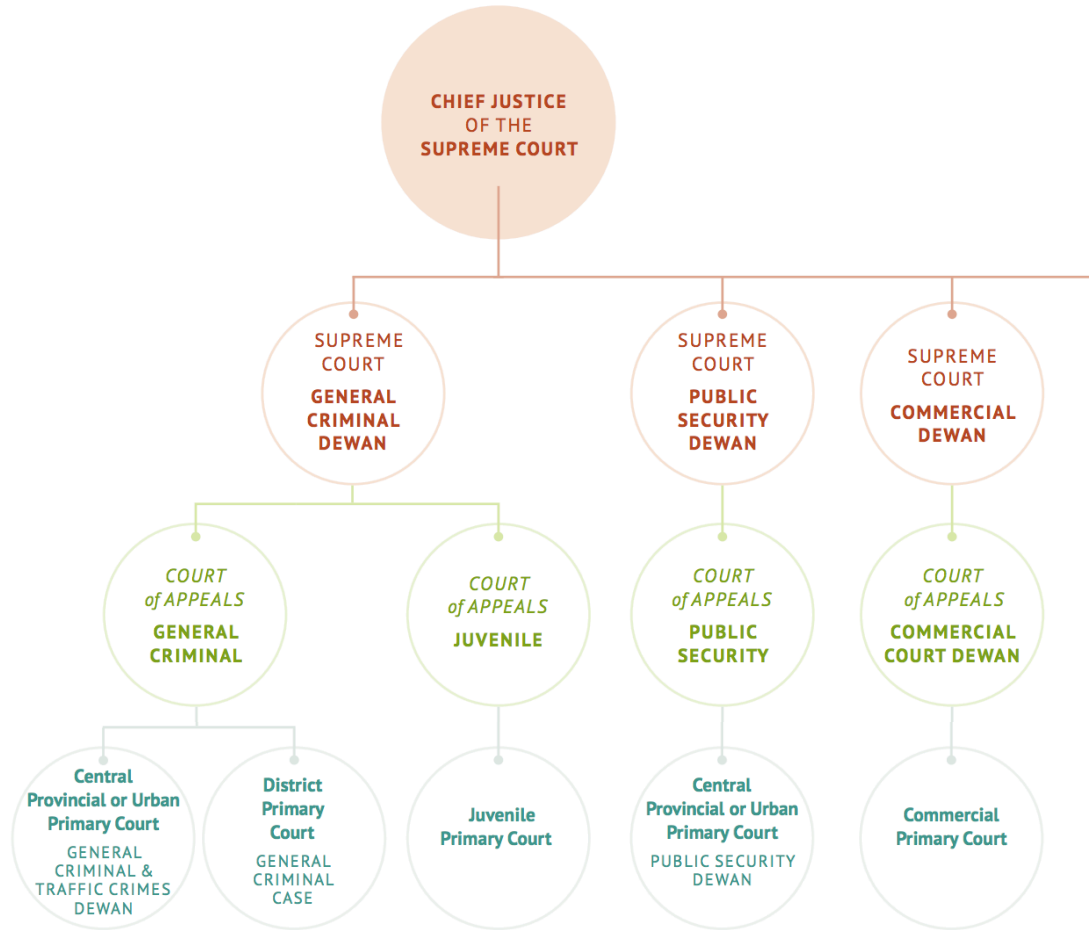
The Supreme Court is the highest judicial organ of Afghanistan. Article 117 of the Constitution states that the Supreme Court shall have nine members appointed for ten-year terms by the President and with the endorsement of the Wolesi Jirga.

Similar to the Courts of Appeals, the Supreme Court is divided into dewans. Criminal cases are handled by the General Criminal Dewan. There is no juvenile dewan and so juvenile cases are also tried in the General Criminal Dewan. Public security questions are appealed to the Public Security Dewan. Civil, family and public rights matters are all combined into one Civil and Public Rights Dewan. Commercial disputes are handles by the Commercial Dewan. Finally, the Supreme Court has a Military and National Security Dewan. This dewan reviews cases from the lower military courts.



The chart below shows the full structure of the Afghan courts together. You can see how a case starts at a specific Primary Court and progresses through the specialized dewans of the Court of Appeals to the specialized dewans in the Supreme Court.

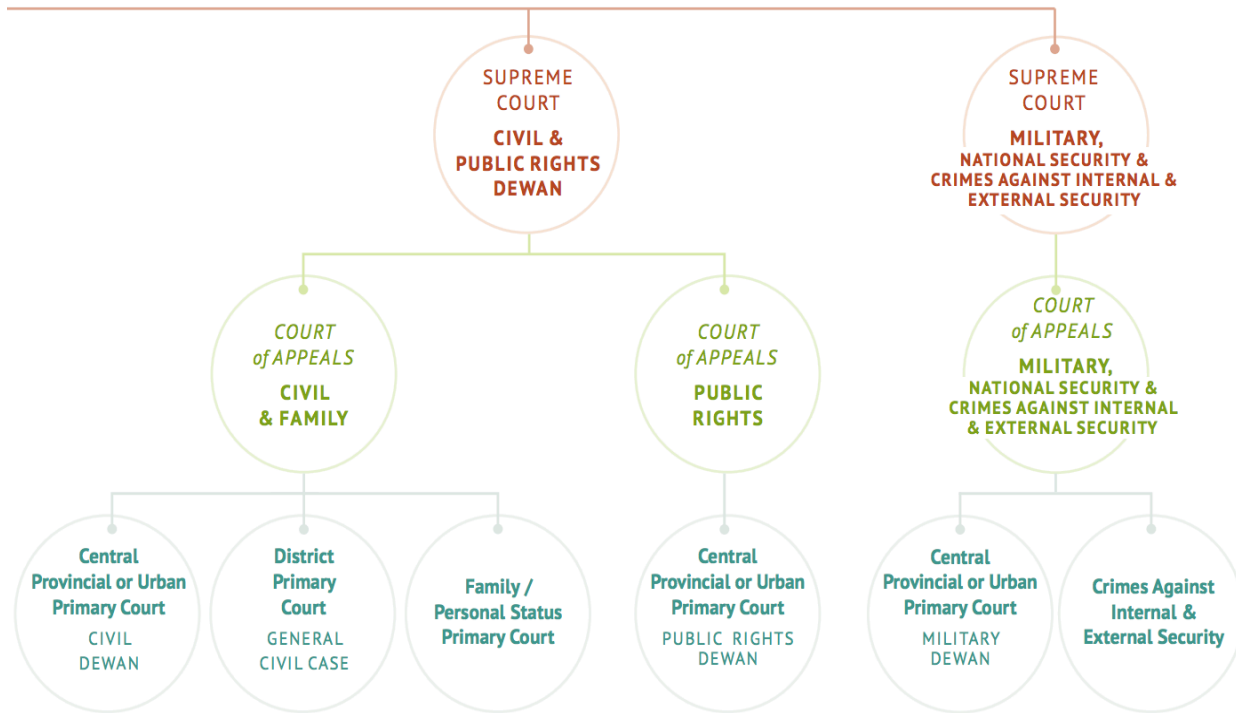
ORGANIZATION OF THE JUDICIARY OF AFGHANISTAN



One important difference between the Supreme Court and the Courts of Appeal is that the Supreme Court does not review the whole case from the beginning. Rather, the Supreme Court only decides whether the Courts of Appeal understood and applied the law correctly. This means that the Supreme Court will not decide any questions of fact. Let's look at an example to understand the difference between **questions of fact** and **questions of law**.

Let's assume that Usma is accused of driving through a red light. Witnesses are brought into court and they testify that they saw a woman who looked a lot like Usma drive through a red light. Other witnesses testify that they saw the light was red while a car that looked like Usma's car drove through the intersection. The judge first has to decide if he believes the witnesses and if they gave enough information to conclude that Usma was the person in car that drove on red light. That is a question of fact. Next, the judge would have to decide what punishment to give Usma. The judge would have to look through a criminal code to see if Usma has to pay a fine or has to be imprisoned. That is a question of law. Questions of law are the only questions that the Supreme Court can review.

A second important difference between the Supreme Court and the lower courts is that the Supreme Court has power to decide if the laws passed by the National Assembly comply with the Constitution:



2004 Constitution

Article 121: At the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law.

For example, if the National Assembly passes a law that the President disagrees with, the President can ask the Supreme Court to determine if the law is constitutional. This power is not used very often since the President can simply veto the law (unless the Wolesi Jirga overrides the veto).

Moreover, in 2009, the National Assembly passed the Law of the Constitutional Supervision Commission²³ by a two-thirds majority. This Law authorized the Commission to interpret the Constitution at the request of the government, the National Assembly or the Supreme Court. At first, the Supreme Court and President Karzai challenged this law and argued that the Constitution gives this power exclusively to the Supreme Court. But, strongly supported by the National Assembly, the Commission continued interpreting the Constitution. It appears that the controversy has subsided.²⁴

²³ The Law of Independent Commission for Overseeing the Implementation of Constitution, Law No. 986/2009 (6 July, 2009).

²⁴ Shamshad Pasarlay, "Constitutional Interpretation and Constitutional Review in Afghanistan: Is There Still a Crisis?", accessed January 25, 2017, <http://www.iconnectblog.com/2015/03/constitutional-interpretation-and-constitutional-review-in-afghanistan-is-there-still-a-crisis>.

Discussion Questions

1. Assume that you have a contract dispute with your employer. In what court can you start your case?
2. If the Primary Court judge rules against you, can you appeal your case? If so, what dewan would you appeal to?
3. Many countries only have courts of general jurisdiction and no courts or departments with specialized jurisdiction. Thus, the same judge would handle a commercial case and a criminal case. Which system do you think is better?

5. ALTERNATIVE DISPUTE RESOLUTIONS MECHANISMS

In addition to the formal litigation that proceeds through the court system described above, Afghanistan has well-developed alternative resolutions mechanisms. “Alternative” simply means that disputes are not resolved by a state judge but by a private individual or by a local council of elders.

There are several reasons why companies as well as individuals may prefer alternative dispute resolution mechanisms to state courts. First, in some areas, the Primary Courts are hard to reach. Second, it may be faster and less expensive to resolve the dispute in an informal system. Third, the formal courts may be more corrupt than traditional courts. Fourth, the formal courts do not take account of restorative justice, but merely announce a winner and a loser. Restorative justice means resolving a dispute in a manner that aims to rebuild the relationship between the wrongdoer and the victim as well as the relationship between the wrongdoer and the community. Finally, some courts specifically encourage individuals, especially those with family issues, to try to resolve their disputes outside the court system and only use litigation as a last resort.

There are two types of alternative dispute resolution mechanisms: formal and informal. Formal mechanisms refer to mediation and arbitration. These processes involve hiring a private individual, usually a highly trained expert in the field, to resolve a dispute. Alternatively, a government agency may be created to help resolve disputes outside the court system. One such agency is the Financial Disputes Resolution Commission, which hears disputes between banks and telecommunication companies. The differences between mediation and arbitration will be described in detail below, but both of these mechanisms are typically used in a commercial setting.

Informal mechanisms involve local **jirgas** and **shuras**. These are typically used by individuals to resolve family, property and certain criminal law disputes. Both the formal and informal are analyzed below.

5.1. Formal Mechanisms

A typical dispute in commercial setting begins with negotiation between the two companies. If the parties fail to arrive at an amicable solution with negotiation, the next step is typically **mediation**. Mediation involves hiring a person who helps the two sides achieve an agreement. That person, called the **mediator**, makes sure that the two parties listen to each other and recognize each other’s needs. The mediator sometimes proposes his or her own solutions. But, the mediator is not a judge and so the parties do not have to adopt the solutions proposed by the mediator. And if the parties do come to an agreement at the

end of this process, they are merely signing another contract.²⁵ In other words, breaking a mediation agreement is the same as breaking any contract and not the same as disobeying a judicial decision. Thus, the reason parties hire a mediator is simply to facilitate their dialog.

If the mediation does not work, the next step is typically **arbitration**. Arbitration is much more structured than mediation and is essentially a private court. Typically, arbitration proceeds through an organization, such as Afghanistan Center for Commercial Dispute Resolution. Such an organization will provide rules and a schedule that must be followed. The organization will also typically supply an **arbitrator**, or a private judge.²⁶ The arbitrator does not have to have legal qualifications because this is a private dispute resolution mechanism. But, typically an arbitrator is a retired judge, a lawyer, or an expert in the field.²⁷ For example, if the two companies have a dispute over an oil pipeline, the arbitrator may be a businessperson or a scientist with experience in pipelines.

As already mentioned, one difference between mediation and arbitration is that arbitration is much more structured. Another key difference is that the arbitrator actually decides a case like a judge would. Thus, parties cannot disregard the decision as they could in mediation. Moreover, an arbitration decision is automatically enforced by the courts. This means that non-compliance with an arbitration decision carries the same punishment as non-compliance with a court ruling. For example, a court can freeze all bank accounts of the losing party until it pays the winning party as required by the arbitration decision.

The sequence from negotiation to mediation to arbitration is not mandatory. Unless a contract requires either negotiation or mediation, a company can proceed directly to arbitration. However, arbitration is much more expensive and time consuming. Thus, most companies try negotiation, mediation, or both before resorting to arbitration.

5.2. Informal Mechanisms

The term informal justice generally includes **shuras**, or permanent and quasi-permanent local councils, and **jirgas**, or ad hoc meetings gathered to address a specific dispute. Both involve groups of community leaders, generally but not always men, who discuss disputes and other political issues within the community. Some scholars believe that up to 80% of all disputes are resolved in such informal settings.²⁸ These disputes most often include property disputes, family and marriage issues, as well as petty crimes.

Across Afghanistan, informal mechanisms tend to be restorative rather than retributive, seeking to promote community harmony through **islahi**, or reconciliation, rather than focusing on individual rights or personal punishments. In this way, informal mechanisms are similar to arbitration and mediation, which usually assign both parties some responsibility to compensate rather than creating winners or losers. There are obvious advantages to rebuilding relationships in the community. Moreover, members of shuras and jirgas tend to be local leaders with intimate knowledge both of parties to disputes and of the social and historical contexts of cases, making them uniquely qualified to resolve cases that require local knowledge.²⁹ The chart below reflects these advantages in the minds of the Afghan people:

²⁵ Afghanistan Center for Commercial Dispute Resolution, "What is mediation," accessed January 24, 2017, <http://www.acdr.af/en/what-is-mediation>.

²⁶ Organizations such as Afghanistan Center for Commercial Dispute Resolution also supply mediators. However, because the mediation process is not as formal and because mediation does not have as many rules, many parties hire mediators not associated with any organizations to keep the costs low.

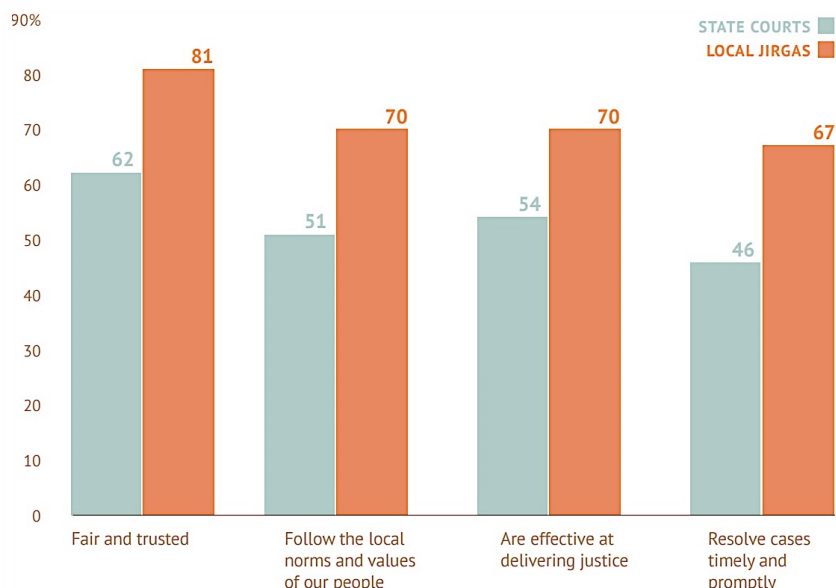
²⁷ Afghanistan Center for Commercial Dispute Resolution, "What is Arbitration," accessed January 24, 2017, <http://www.acdr.af/en/what-is-arbitration>.

²⁸ Noah Coburn and John Dempsey, United States Institute of Peace, "Informal Dispute Resolution in Afghanistan" (2010): 3, <http://www-origin.usip.org/sites/default/files/sr247.pdf>.

²⁹ Ibid.

PERCEPTIONS OF THE FORMAL AND INFORMAL DISPUTE RESOLUTION

Percentages of respondents who agreed with the statement below referring to formal and informal systems of justice:



But, *islahi* also raises serious questions. For example, is it desirable for a person who killed someone to go free, provided that he gives money to the family of the victim? Is it legal? Currently, the law in Afghanistan does not allow serious criminal matters to be decided outside of the courts.³⁰ Another major concern is over women's rights since councils often look to religion and tradition in their decisions.

Discussion Questions

1. Let's assume you have a dispute with your neighbor over a property line. What are your options for resolving this dispute in both the official court system and the alternative dispute resolution system? (Hint: look back the court organization chart on pages 26-27)
2. Which system would you choose? Why?
3. Do you think the court system should oversee the decisions of shuras and jirgas?

CONCLUSION

In this Chapter, we have explored Afghan government institutions under the 2004 Constitution. We began with the making of the 2004 Constitution and learned about how the Constitution allocates power between the executive, legislative and judicial branches. Throughout the Chapter, we especially stressed the concept of separation of powers and learned what authority each branch has over the other branches. Another main theme we explored was the difference between rules as they are written on paper and rules as enforced in practice. Perhaps the most striking example of this difference is the widespread use of alternative dispute resolution mechanisms that are not mentioned in the Constitution. As you turn to more specific areas of law of Afghanistan, keep these themes in mind.

³⁰ Noah Coburn and John Dempsey, 16.

CHAPTER 6: SUBSTANTIVE LAWS

INTRODUCTION

In this chapter, we will discuss areas of substantive law in Afghanistan. **Substantive laws** are the body of rules that determine the rights and obligations of individuals and collective bodies. Substantive law governs many relationships in Afghanistan across many topics. While **procedural laws**, discussed in Chapter 7, are the body of legal rules that govern the process for determining the rights and obligations of parties, substantive laws cover the rights and obligations themselves. For example, in criminal law, a substantive law would make it a crime for a person to steal a bag from another person. But procedural laws would govern things like what police actions are permitted in investigating a crime, what type of assistance they can receive in trial, and how the trial is conducted. In this chapter, we will discuss areas of substantive law in both the field of public and private law. As you will recall from Chapter Three, some substantive areas, address issues of both public and private law.

Some areas of substantive law that you will be introduced to in this section include criminal law, civil law, administrative law, and commercial law. Within civil law, we will briefly discuss some foundational concepts in the law of obligations, family law, and property law. Substantive law is written in bodies of code. For example, the laws that govern criminal conduct are covered, relatively thoroughly, in Afghanistan's penal code. In addition, principles in the Constitution inform areas of substantive law, and we will discuss some Constitutional provisions that confer legal rights. At the end of each section, you should be able to understand what codes govern each area of substantive law, and some of the rights and relationships that each body of law governs.

After reading this chapter, you should be able to:

- Understand the basic concepts underlying criminal law, civil law, administrative law, and commercial law
- Identify where to find the sources of law that govern each of these substantive areas
- Analyze a particular set of facts for the types of substantive law it may implicate
- Be able to discuss why these areas of substantive law are important for Afghan society
- Think critically about improvements that can be made to areas of the law

1. CRIMINAL LAW

1.1. What is Criminal Law?

Criminal law is a body of regulations that defines criminal actions. These criminal actions may be lawfully punished by the state. When charging a person for criminal conduct, and bringing that charge to trial, police and the prosecutors refer to criminal law.

Why do we punish wrongful acts?

One theory is that punishing those who commit crimes, **incapacitates** them, or ensures they are unable to commit crimes. Another theory is that punishment will **rehabilitate** offenders, or helps those who have showed antisocial tendencies to become productive members of society. Examples of rehabilitative programs include job training, counseling, and basic education programs. A third theory is that punishing wrongful acts **deters** those who may wish to engage in that behavior from committing crimes. For example, while a person might want to vandalize property, he might not engage in vandalism if he knows he will spend two years in prison if caught. **Retribution**, the fourth theory of punishment, is based on the idea that society is morally bound to punish people who engage in criminal activity.

1. Which theory makes most sense to you?
2. What types of crimes do you think fit with the rehabilitation model of punishment? Can you think of any crimes where it may be unlikely that an individual will be rehabilitated?
3. Deterrence is based on the theory that human beings act rationally, because it assumes that individuals will not engage in criminal activity as long as the cost of committing the crime (the punishment) outweighs the benefit (the reward of the criminal activity). Do you think individuals act rationally when they commit a crime? Why might someone commit a small theft, if the punishment for that theft is very costly?
4. Can you identify any flaws in any of the four theories of punishment?

1.2. Legislative Sources of Criminal Law

1.2.1. 1976 Penal Code

The process for rewriting the Penal Code is underway in the National Assembly. Until then, the 1976 Penal Code¹ remains in force. The Penal Code gives a relatively thorough accounting of what actions constitute crimes within Afghanistan. It also lays out general principles of application, elements of a crime, types of crime, and what types of punishment are possible for each of these crimes.

1.2.2. Other Legislative Acts

As you learned in Chapter 5, the National Assembly can pass laws and the President can issue a Legislative Decree. Through these two processes, criminal provisions other than those in the 1976 Penal Code can be passed or issued to identify certain conduct as a crime and prescribe penalties for this. For example, the Law on Campaign against Intoxicants, Drugs and their Control² and the Law Against Bribery and Official Corruption of 2004³ are two legislative enactments that prohibit certain conduct as criminal. These legislative acts supplement the Penal Code. For example, there are already provisions in the Penal Code that outlaw bribery. Article 254 of the Penal Code prohibits any public official from receiving any money, good, or service for his own benefit in exchange for the performance or omission of an official duty. It also creates a punishment for bribery of imprisonment between two and ten years and a fine equivalent to the bribe. The Anti-Bribery Act of 2004 supplements this Article by also creating an independent enforcement mechanism. It establishes the Office for the Campaign against Bribery and Administrative Corruption, which has the power to announce and investigate suspects of bribery and

¹ Penal Code, OG # 347 (7 October 1976).

² Law on Campaign against Intoxicants, Drugs and their Control, OG # 1025 (24 June 2010).

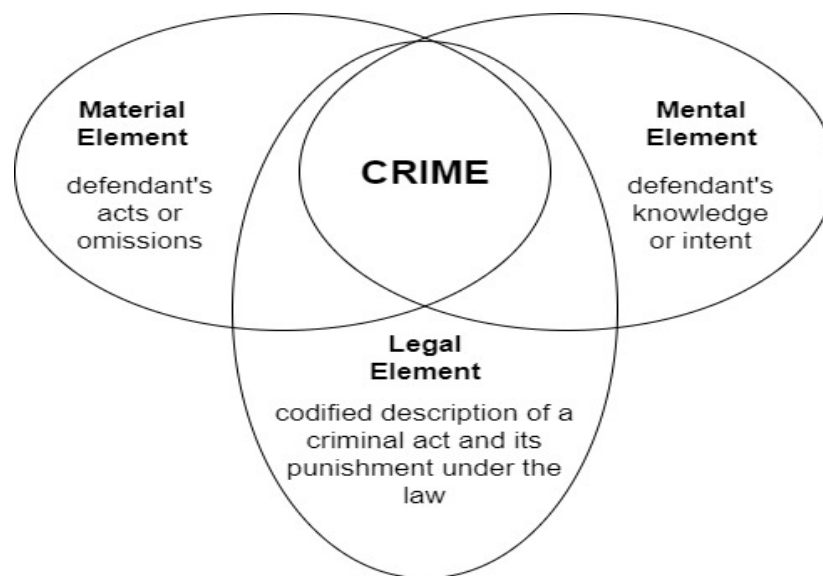
³ The Law of Campaign Against Bribery and Official Corruption, OG # 838 (11 October 2004).

official corruption, and prosecute them. This act also defines activities which entail “official corruption,” and can be investigated by this office.

1.3. Elements of a Crime

Generally, crimes consist of a number of parts, called elements, which all must be proven for a defendant to be convicted of a crime. For example, Article 401 of the Penal Code states: “A person who conceals or buries the body of a murdered person, cognizant of the case of murder and without informing concerned authorities . . . shall be sentenced to short imprisonment . . .” Thus, for a prosecutor to convict someone of the crime of concealing the body of a murdered person, she must prove four elements: 1) the defendant concealed or buried the body; 2) the body was that of a murdered person; 3) the defendant was cognizant of, meaning aware of, the murder; 4) the defendant did not inform the authorities. If the prosecutor fails to prove any one of these elements, the defendant must be acquitted, which means found innocent and set free.

Under Chapter Two of the Penal Code, the elements of an offense are classified as the material element, the mental element, and the legal element. The *material* element concerns the defendant’s acts or **omissions**. The *mental* element concerns the defendant’s knowledge or intent. The *legal* element concerns the codified description of a criminal act and its punishment under the law.



The next sections discuss the material and mental elements of crimes. The legal elements are too numerous to be listed in this chapter, but will be discussed further in a course on Criminal Law.

1.3.1. Material Offense Elements

Acts or Omissions

The material elements of a crime are those acts or omissions that result in illegal behavior. The elements of a crime describe the things that individuals are not supposed to do. For a crime to occur, the act must have an effect. For example, say Wali thinks about pickpocketing the man in front of him on a bus for the entire bus ride, but never actually reaches into his pocket. Merely thinking bad thoughts, such as Wali does, is not a crime. Most of the Penal Code concerns itself with affirmative actions, or acts. For example, Article 360 of the Penal Code states that a person [that] deliberately causes fire . . . such as to endanger

the goods or life of other people shall be sentenced to long imprisonment. The action here is setting a fire. The Penal Code also makes illegal a failure to take action, or omission, when the law creates a duty to act. How can someone be convicted of a crime for *not* doing something. Let's look at an example.

Asad is awoken in the middle of the night by screams from his neighbor's house. He runs outside, and finds that his neighbor's house is on fire. Rather than helping his neighbor contain the fire, however, Asad merely watches. Soon, a police officer arrives and begins fighting the fire. He shouts to Asad for help, but Asad continues to stand and watch. Under Article 354 of the Penal Code, Asad may be charged with the crime of failure to render assistance. Article 354 states: "A person who, at the time of fire or some other big incident, refuses to assist without proper excuse and in spite of the request of an official of public services, shall be sentenced to short imprisonment . . ." Here, Asad's omission, where the Penal Code required that he act, results in criminal liability.

Causation

Imagine a scenario in which Rajibullah is upset with his brother and stabs him in the hand with a kitchen knife. The wound is not critical, but serious enough to require treatment. An ambulance is called and picks up the brother to take him to the hospital. On the way to the hospital, however, the ambulance is involved in a car accident, killing everyone on board. Is Rajibullah **liable**, or legally responsible, for his brother's death?

The principle of causation deals with the connection between conduct and harm. Under the principle of causation, in order for Rajibullah to be criminally liable for his brother's death, a prosecutor must show that Rajibullah stabbing the brother in the hand (conduct) caused the brother's death (harm).

To comply with the principle of causation, the prosecutor must satisfy two inquiries: 1) whether Rajibullah's actions were the *actual* cause of his brother's death; and 2) whether Rajibullah's actions were the *legal* cause of his brother's death?

Actual cause is more easily determined than legal cause because it is actual cause depends on the facts of a situation rather than the law. That is, to show actual cause, the prosecutor must simply show that if Rajibullah had not stabbed his brother, the brother would not be dead. For this reason, actual cause is sometimes called "but for" cause. In other words, the question being asked is: *but for* Rajibullah's actions, would his brother be dead?

Legal cause, on the other hand, is a more difficult concept. Called *proximate cause* in some jurisdictions, legal cause asks whether it is legally fair to hold Rajibullah responsible for his brother's death. In most cases the legal cause inquiry is rather straightforward. Sometimes, however, it can get complicated. Complex cases usually arise due to the existence of an *intervening* cause—any event that happens between the conduct and the harm that contributed to the harm. For example, in the case of Rajibullah and his brother, the ambulance getting into an accident on the way to the hospital is an intervening cause. It is something that happened between Rajibullah stabbing his brother and his brother's death, and it contributed to the death.

The mere existence of an intervening cause, however, is not enough to determine legal cause. Rather, it is necessary to consider the nature of the intervening cause. Do you think it is fair to hold Rajibullah liable for the death of his brother, when he dies in the ambulance accident? Why or why not?

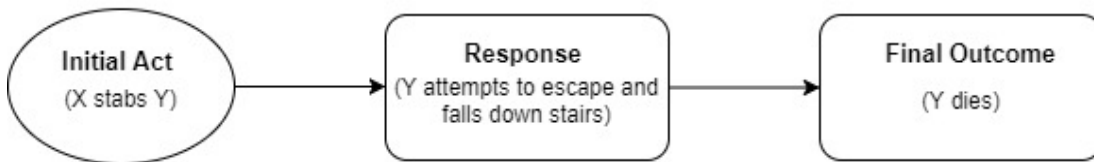
Compare this situation to another scenario. Imagine that when Rajibullah stabs his brother, his brother runs away, and falls down a staircase. The brother then dies from injuries to his head he sustained during the fall

down the stairs. How is this example different than the situation where Rajibullah's brother dies in an ambulance accident?

Rajibullah's brother's fall down the staircase is called a *responsive intervening act* because it was a response to Rajibullah's triggering act. In other words, the brother fell down the stairs because he was trying to escape from Rajibullah. Compare this to a scenario in which Rajibullah stabs his brother in the hand, and then the brother runs outside where he is struck by lightning and killed. This type of intervening act is known as a *coincidental intervening act* because there is no causal connection between Rajibullah's conduct and the intervening act. Rajibullah stabbing his brother did not cause his brother to be struck by lightning. His brother was simply in the wrong place at the wrong time. Is the example of Rajibullah's brother dying in an ambulance accident a coincidental intervening act or a responsive intervening act? How is it similar or different from the lighting example?

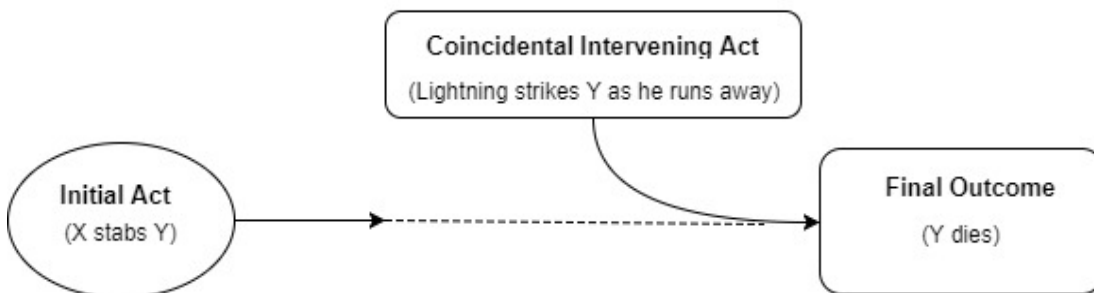
There is no hard rule for determining legal cause, and arguments could be successfully made on both sides of the ambulance problem. Courts will generally be more likely to find legal cause where there is no intervening cause, or where the intervening cause is a responsive act. In the event of a coincidental intervening act, the court will often find that the coincidence interrupted legal causation and therefore the accused is not criminally liable. In other words, if it is just too difficult for the court to determine the real cause of the brother's death: the stab wound or the accident, the court would not hold Rajibullah liable for his brother's death, only for stabbing him in the hand.

A. Responsive Intervening Act



X is more likely to be held criminally liable for final outcome

B. Coincidental Intervening Act



X is less likely to be held criminally liable for final outcome

In sum, the Material Elements of an offense include the act or omission, the effect, and the requirement that the act or omission causes the effect.

1.3.2. The Moral Element of a Crime: Mental State

Penal Code Article 34 – The Moral Element Defined

Criminal intention refers to the impelling will of the doer to commit an act which produced the crime, such that it should result in the effect of the intended crime or another crime.

While the material offense elements concern what a defendant did or did not do, the mental element concerns the defendant's knowledge and intent. Returning to Rajibullah and his brother, imagine that Rajibullah only stabbed his brother in the hand on accident because they were chopping vegetables together in a small kitchen. Should Rajibullah still be liable for stabbing his brother if it was truly an accident? In many cases, the Penal Code prescribes different punishments for intentional offense and unintentional offenses. For example, we discussed above how Article 360 punishes a person that "*deliberately* causes fire" with a long imprisonment. The word "deliberately" describes the required mental element – a person charged with a violation of Article 360 must have intended to start the fire. On the other hand, Article 361 sets the punishment for someone who "causes fire in movable or immovable goods *by mistake*, and . . . endangers the goods or life of people" at medium imprisonment and/or a fine.

A mental element in a crime is usually signaled by words like "intentionally," "knowingly," "deliberately," "cognizant of," etc. When a crime contains a mental element, the prosecutor must prove that element in order for a court to find the defendant guilty. For example, imagine that Yosuf is a chef working in the kitchen of a restaurant when a fire catches at his oven. If a prosecutor wishes to charge Yosuf under Article 360, he must prove that Yosuf intended to start the fire, or Yosuf will be acquitted of this charge. Different crimes have different mental elements, so it is important to consult the specific statute to determine what, exactly, the prosecutor must prove.

Discussion Question

Whether a person intended to start a fire or mistakenly started a fire does not change the destruction that a fire causes. Why then, do we punish an accidental fire differently than a mistaken fire? Which theories of punishment support considering the mental element of each crime?

1.3.3. The Legal Element of a Crime

The legal element of a crime is closely related to the criminal law principle of legality, discussed later. The legal element of a crime requires that a defendant's actions be outlawed by the Penal Code when the act was committed. Each act that is charged by a prosecutor as a crime must be listed in a statute as a criminal act that deserves a specific punishment. What this means is that acts that are not defined as crimes in the Penal Code or another criminal statute are not criminal, and cannot be punished under criminal law. For example, lying to your sister about whether or not you borrowed a book is not a crime, because there is no law in the Penal Code that criminalizes lying to your sister. However, if the legislature passed a law that made it punishable by a fine to lie to your sister, you could be criminally punished for this act, only if you lie to your sister after this law is passed.

1.4. The Principle of Legality

The *principle of legality* requires all laws to be clear, publicly accessible, and prohibits retroactive increases in punishment. The *principle of legality* is found in many legal systems worldwide, and in Afghanistan, is described in Article 27 of the 2004 Constitution.

2004 Constitution

Article 27 “No deed shall be considered a crime unless ruled by a law promulgated prior to the commitment of the offense.” “No one shall be punished without the decision of an authoritative court taken in accordance with provisions of the law, promulgated prior to commitment of the offense.”

The *principle of legality* requires police, prosecutors, and judges to resolve disputes by applying legal rules declared beforehand. For example, imagine that Bahram throws some trash on the street on Monday, and the parliament on Tuesday passes a law banning littering and imposing criminal penalties on anyone who throws trash on the street rather than disposing it in a waste bin. On Wednesday, Donyaa reports to the police that Bahram littered on Monday. Bahram cannot be held criminally liable, because his littering was not a criminal act on Monday. In the context of criminal law, the principle of legality asserts that no defendant should be punished for conduct not proscribed by law at the time the defendant engaged in that conduct. More simply put, no one should be punished for doing something that was not illegal at the time he or she did it.

Discussion Questions

1. Which of the four theories of punishment best supports having a Principle of Legality in our criminal justice system?
2. Why is a principle of legality important for Rule of Law?

1.5. Types of Crimes

The Penal Code classifies crimes into three major groups. The classification of a crime affects how and when this crime can be charged by a prosecutor as well as what type of punishment is appropriate. **Felonies** are serious crimes that are punished by imprisonment for a minimum of five years. Felonies can carry punishments up to a life sentence in prison or the death sentence. Examples of felonies in the penal code include robbery (Article 447) or the embezzlement of goods from the state by a public official (Article 268). **Misdemeanors** are a less serious category of offenses, which carry a punishment of imprisonment from between three months to five years, and a fine of 3000 Afghani or more. Examples include many types of fraud (Article 471) and assault and battery where the victim suffers injuries but not a loss of intellect (Article 408). **Petty Offenses**, also known as **obscenities**, are the least serious crimes, which carry a punishment of imprisonment from twenty-four hours to three months, and a fine of less than 3,000 Afghani. Examples of petty offenses include mistreatment of domestic animals (Article 510) and changing the direction of traffic signs (Article 498).

1.6. Islamic Criminal Law

One important source of criminal law in Afghanistan is Islamic law. Under Islamic law, there are three types of crime: *hudud*, *qisas*, and *ta'zir* crimes. The criteria for classifying these offenses are complex, and include the gravity of the penalty as prescribed by Islamic law, the nature of the interest effected by the prohibited act, and the manner and method used in incriminating and punishing.

From an Islamic law perspective, the Penal Code and other legislative acts regulate *ta'zir* crimes, and Islamic law regulates *hudud* and *qisas* crimes. The Penal Code adopts this point of view and discusses this distinction in the Article 1, describing general principles of the Penal Code.

1976 Penal Code Article 1

This Law regulates the '*ta'zir*' crime and penalties. Those committing the crimes of '*hudud*' and '*qisas*' shall be punished in accordance with the provisions of Islamic religious law [the Hanafi religious jurisprudence].

In practice, however, most judges generally apply the Penal Code to criminal acts, instead of or in conjunction with Islamic law. You will learn more about Islamic Criminal law in a course on Islamic Law, but here is a brief introduction.

In Islamic law, Hudud crimes are crimes committed against the public interest (i.e., against the state). Hudud crimes and their penalties are defined and prescribed by the Qur'an and to some extent through the Sunnah of the Prophet Muhammad (PBUH). Consequently, prosecution of hudud crimes is mandatory, and punishment must be imposed exactly as prescribed. Muslim scholars differ regarding the crimes that fall into the category of hudud. Generally, scholars agree on five hudud crimes (adultery, theft, banditry/highway robbery, apostasy, and defamation), but disagree on two others (rebellion and drinking alcohol). The majority of Muslim scholars, however, maintain that the latter crimes are correctly defined as hudud.

*Qisas crimes are crimes against the bodily integrity of a person. Homicide, intentional physical injury or maiming, and unintentional physical injury or maiming comprise this category. When one person harms or kills another, an alternative to "eye for an eye" punishment (*qisas*) is the payment of *diyya* ("blood money") to the victim or the victim's surviving family members.*

Finally, *ta'zir* crimes are the least serious according to Islamic law, though they still encompass very serious crimes. There is consensus among Muslim scholars that the Muslim state has the right to criminalize and punish all inappropriate behaviors that cause damage to an individual or community as a whole. Thus, the definition of *ta'zir* crimes and the prescription of punishment for these crimes are left to the State. This authority must, however, be practiced within the spirit of the general rules of Islamic law (specifically the Hanafi jurisprudence in Afghanistan) and the public interest of Muslim society (*maslaha*). Because *ta'zir* crimes typically involve less serious claims—often claims of non-physical injury or claims for monetary damages—citizens often take on a more important role in bringing these crimes to the attention of the authorities

1.7. Sentencing

Articles 97 through 120 of the Penal Code describe the six main types of punishment for a crime.

Penal Code – Article 97 (Summarized)

1. Execution;
2. Continued imprisonment (16 to 20 years);
3. Long imprisonment (5 to 15 years);
4. Medium imprisonment (1 to 5 years);
5. Short imprisonment (24 hours to 1 year);
6. Cash payment.

When it comes to punishment, the Penal Code states the punishments available for each crime. Courts generally have some discretion to tailor the punishment to the offense. That is, while the Code may prescribe medium punishment, this merely tells the court that the individual must be incarcerated between one year and five years. Similarly, the Code typically gives either a minimum or maximum for the amount of a cash fine, leaving the exact amount up to the court's discretion. It is up to the presiding judge to decide exactly how many years within this range a person convicted of the crime should serve.

How does a court make the difficult decision of what the **sentence**, or punishment for the crime, will be? There are two criminal law theories that inform the sentencing decision: 1) the theory of aggravating and mitigating factors; and 2) the idea that the punishment should fit the crime, also known as the theory of proportionality.

1.7.1. Aggravating and mitigating factors

The theory of aggravating and mitigating factors relies on the proposition that specific facts surrounding an offense should influence the punishment of the offender. In other words, society recognizes that all crimes of a certain type do not merit equal punishment. Amir's assault case may be very different from Rahim's assault case, and it would be unfair to punish them equally. Instead, punishment should consider the manner in which the crimes were committed and the history and background of the persons involved. Facts that *increase* the severity of punishment are called *aggravating* factors, while factors that *decrease* the severity of punishment are called *mitigating* (or extenuating) factors.

For example, **Article 148 of the Penal Code** provides the following general aggravating conditions:

1. When the motive of the crime is low and corrupt
2. When the crime takes place in realization of weakness of the senses of the person against whom a felony is committed or his inability to defend himself.
3. When the crime is committed in a savage manner or the person against whom a felony is committed has been disfigured.
4. When an official of public services, making use of his official prestige and influence, commits a crime.
5. When, making use of the state of economic crisis, crime is committed.

If any of these factors are present, the court has the option of increasing the punishment described by statute.

In other articles, the Penal Code mentions other aggravating factors, such as using a weapon during a crime, committing a crime between the hours of dusk and dawn, and committing a crime in conjunction with other individuals. Why would each of these factors make a crime more serious? Why should a crime committed with the help of other individuals be punished more severely than a crime committed alone?

Articles **141 through 147** concern the judicial treatment of mitigating factors. While the Code does not list specific mitigating factors as it does aggravating factors, it states that “judicially extenuating conditions are those instances where the crime is committed on the basis of honorable motives or where the criminal has acted because of unlawful incitement of the person against whom the crime has been committed”

For example, if a court finds that an employee assaulted his employer after years of being beaten, belittled, and otherwise mistreated, the court may find the existence of mitigating factors. In other words, the assault was not justified or excused, but for reasons of mercy and fairness it does not deserve to be punished as harshly as the typical assault case. Other mitigating factors might include the offender’s lack of criminal history, his honorable service in the armed forces, or his dedication to public service and his community.

1.7.2. Theory of Proportionality

There is a longstanding legal principle that the punishment should fit the crime. For example, an offender should not be sentenced to death for simple vandalism, nor should an offender be made to pay a small cash fine when convicted of murder. The sentence should be sufficient to achieve the goal of punishment, but should not be excessive. Think back to the theories of punishment – how does each theory support the idea that excessive punishment is harmful to society?

The Penal Code attempts to ensure that the punishment always fits the crime by prescribing appropriate sentencing ranges for specific offenses. In most cases, the law prescribes a punishment range, and leaves the exact punishment to the court’s discretion. For example, Article 349 of the penal code prescribes a punishment of three to six months imprisonment or a cash fine of three to six thousand Afghanis or both for a person who is found guilty of using alcoholic or narcotic substances. Statutory sentencing ranges have the advantage of standardizing of punishment. For example, if courts follow the Penal Code as required, an offender sentenced for arson in Herat will receive a punishment similar—if not equal—to an offender sentenced for arson in Kabul. Sentencing ranges allow judges to take into account facts specific to a convicted person’s case, such as aggravating and mitigating factors, to determine what specific sentence would be most proportional to the case at hand.

Discussion Questions

1. Imagine the Penal Code stipulated a single sentence for each crime rather than a punishment range. (For example if the punishment for use of alcoholic substances is four months for everyone found guilty rather than somewhere within the range of three to six months). Would this system be preferable? Why or why not?
2. One of the products of mandatory sentencing ranges is the standardization of punishment. Is this fair? In other words, should judges be allowed to institute punishments more or less severe than the sentence range if they believe it is necessary?
3. Does the existence of sentencing ranges rather than a single mandated punishment contradict the principle of legality? Why or why not?

2. ADMINISTRATIVE LAW

Administrative Law is the body of law concerned with the legal regulation of exercises of governmental power.⁴ In administrative law, “governmental” commonly refers to the executive of the central government (the President or Prime Minister), and central government departments (headed by Ministers).⁵ It can also refer to any public body vested with power under the law, such as a local city police force. The purposes of administrative law are two-fold. First, it ensures that governmental decision-makers act within the law, and do not attempt to wield power they do not legally have. Second, the role of courts in reviewing decisions of governmental bodies or officials safeguards the individual rights of citizens, in making sure that power remains balanced among branches of government. Here are some examples of provisions in the Afghan Constitution that regulate the balance of power between branches of government, and prescribe the authority of the courts:

2004 Constitution

Article 71

The Government shall be comprised of Ministers who work under the chairmanship of the President. The number of Ministers as well as their duties shall be regulated by law.

Article 76

To implement the fundamental lines of the policy of the country and regulate its duties, the government shall devise as well as approve regulations, which shall not be contrary to the body or spirit of any law.”

Article 76 describes the power of Ministers of the executive branch to make and approve regulations. Regulations made by the government are different than laws passed by the legislature, and are subordinate to them. Therefore, if a regulation is contrary to any law, then it is not a valid regulation.

Afghan Constitution

Article 77

The Ministers shall perform their duties as heads of administrative units within the framework of this Constitution as well as other laws prescribe. The Ministers shall be responsible to the President and House of Representatives for their specified duties.

Article 77 describes the role of Ministers, who are accountable both to the President, the head of executive branch of government, and to the House of Representatives, an arm of the legislative branch. This is one way in which the legislature provides oversight of governmental decisions.

Article 120 gives the judiciary authority over cases filed by the state or against the state, allowing it to be a check on government action.

Afghan Constitution

Article 120

The authority of the judicial organ shall include consideration of all cases filed by real or incorporeal persons, including the state, as plaintiffs or defendants, before the court in accordance with the provisions of the law.

⁴“The Nature and Purpose of Administrative Law” in *Principles of Administrative Law*, 2, available at <http://ebooks.narotama.ac.id/files/Principles%20of%20administrative%20law/CHAPTER%201%20THE%20NATURE%20AND%20PURPOSE%20OF%20ADMINISTRATIVE%20LAW.pdf>.

⁵ *Id.*

2.1. Who oversees the executive?

Imagine the Ministry of Health, an agency in the executive branch controlled by the President, decides to make a new health regulation. The Ministry of Health has read reports that a certain pain drug is dangerous, and have banned the drug from being used by doctors in hospitals. Do they have the power to ban this drug in hospitals? Does it matter if the hospitals are public or private? If the manufacturer or the drug wants to challenge this decision how does she do so? These are all questions about the oversight of the executive. Administrative accountability is about making sure the President and the President's Ministers only make decisions that are in their legal powers. As you learned in Chapter 5, in Parliamentary systems, the role of ensuring accountability of the executive often falls upon the legislature. Regardless of whether we understand Afghanistan to resemble a Parliamentary or Presidential system today, there are many provisions in Afghanistan's Constitution that provide for legislative oversight of the government. Here is a couple:

Afghan Constitution

Article 92

The House of People, on the proposal of twenty percent of all its members, shall make inquiries from each Minister. If the explanations given are not satisfactory, the House of People shall consider the issue of a no- confidence vote. The no- confidence vote on a Minister shall be explicit, direct, as well as based on convincing reasons. The vote shall be approved by the majority of all members of the House of People.

Article 93

Any commission of both houses of the parliament can question any Minister about special issues. The individual questioned shall provide an oral or written response.

One concern with this division of responsibility is that if the executive is of the same political party as the majority in Parliament, then this political bond can make legislative supervision ineffective.⁶ Judicial review from the courts is a way to correct for this.⁷ There are two models that describe the ways that courts can review the legality of an administrative act, like the Ministry of Health's decision to ban the drug. The first is through suits initiated by private individuals. In this example, the manufacturer of the drug can bring a suit to the court. The basis for her suit would be that the administrative act violated her interest. In order to be successful, she would have to show that this act was unlawful, and that it negatively affected her interest. The Constitution of Afghanistan provides for judicial review of state actions against individuals in Article 51.

Afghan Constitution

Article 51

Any individual suffering damage without due cause from the administration shall deserve compensation, and shall appeal to a court for acquisition. Except in conditions stipulated by law, the state shall not, without the order of an authoritative court, claim its rights.

⁶ Tom Zwart, "Overseeing the executive: Is the legislature reclaiming lost territory from the courts?" in *Comparative Administrative Law*, edited by Susan Rose-Ackerman and Peter L. Lindseth (2010).

⁷ *Id.* at 149.

The second way for courts to review the legality of administrative acts is through institutional review, which is a model of review that has been gaining traction in the high courts of some countries.⁸ It is based on the idea that courts have an obligation to make sure that other branches only act within the powers given to them by the Constitution. Here, an individual need not be harmed to bring a case, and courts are enabled to review every potentially unlawful act.⁹

Discussion Questions

1. Let's return to the example of the Health Ministry's new drug regulations. If a legislator wanted to challenge the validity of this regulation, how may she do so?
2. In your opinion, should courts review an act of the government, even if no harmed individual files a suit? What are the advantages and disadvantages to an institutional model of judicial review?

Unlike many other Civil Law systems, administrative law in Afghanistan does not consist of judicial review of administrative decisions or executive action, and there are no administrative courts in Afghanistan. Rather, "administrative law" in Afghanistan largely refers to its institutions and the internal laws and regulations of the administration. The sources of administrative law are the Constitution, which provide the legal basis for an administrative state, and codified laws. Throughout Afghanistan's history there have been various administrative structures and different institutions during the different historical eras, and administrative law, like all law can shift over time to adapt to different social and political conditions.

2.2. Centralization v. decentralization (central and local administration)

A strong centralized state is one where the central government has the ability and resources to successfully administer the state.¹⁰ Sometimes, this requires decreasing the power of local provincial governments. A decentralized government, on the other hand, is one in which local or provincial administrators function in lieu of, or predominate over, a central government. Throughout Afghanistan's history, Afghanistan has been governed in both a centralized and decentralized fashion. A goal in building a strong Afghan state is to build the legitimacy and capacity of the central government while also not neglecting local government structures, which are essential to delivering local services and understanding local needs and priorities.¹¹ In this way, a central government, and successful decentralized government (as administered through provincial administrators), are not incompatible, but can both be strengthened.

Under the 2004 Constitution, Afghanistan is a "centralized unitary state."¹² While the Constitution has outlined Afghanistan's vision for a centralized state, there have been some challenges to centralizing the governance of Afghanistan. One such factor is the security situation and political make-up of rural Afghanistan.¹³ Afghan's central government is not present in many areas due to its lack of financial resources. In addition, regional warlords, militias, the Taliban, and Al Qaeda have, since Afghanistan's centralized vision was outlined in 2004, threatened the ability of the central government to exist in many

⁸ *Id.* at 150.

⁹ *Id.*

¹⁰ Rani D. Mullen, "Centralization versus Decentralization: The Importance of Sequencing and Timing" in *Building State and Security in Afghanistan*, edited by Wolfgang Danspeckgruber and Robert P. Finn (2010).

¹¹ *Id.* at 75.

¹² *Id.*

¹³ *Id.* at 79

places.¹⁴ These groups have attempted to challenge Afghanistan’s central power by exerting local and regional power over provincial administration.

Discussion Questions

1. List some advantages and disadvantages to a centralized form of government.
2. Think about some traditional government functions – education, a taxation system to fund civil servants, a military or police force, the building of public roads. Which of these functions do you think is better administered through the central government, and which would be better administered through local, provincial governments? Why?

2.3. The Government Cases Law

Codified Laws are another source of administrative law. One such law is the Law on Government Cases, the most current version of which was approved by the National Assembly in 2013.¹⁵ The first Law on Government Cases was passed one year after the 1964 Constitution was approved. It paved the way for the establishment of the Directorate of Government Cases, which had the primary responsibility to represent the government in cases before the judiciary. The 2013 Law on Government Cases further builds out the administrative capacity of the government. The purposes of this law are to “(1) support and protect public properties; (2) To regulate affairs related to filing lawsuit and preparing defense and its prosecution on behalf of the Government before courts; and (3) To regulate affairs related to resolution of legal disputes between institutions of the three branches of Government, independent commissions, enterprises, government and mixed companies, and municipalities.” Article 2. This law outlines some rules and procedures for litigating against the Government and the duties of the Government in litigation. It also reinforces the legal authority of the Government Cases Department to represent the government in court in civil cases, and the ability of Government Cases Department to sue for the recovery of government land. Chapter 3 also outlines rules to be used in resolving and addressing disputes between Government organizations. For example, Article 17 in this chapter requires that government institutions must first try to resolve their dispute by negotiation and compromise before requesting that the Government Cases Department gets involved. In this way, this is a body of administrative law in setting down general principles that govern the distribution of power between other branches of government.

In this body of law, the Ministry of Justice is given the responsibility of implementing the provisions of this law, and “other institutions of three pillars of State, independent commissions, enterprises, government and mixed companies, and municipalities shall be obligated to assist the Ministry of Justice in implementation of the provision of this law.” Article 4. This law also makes it a criminal offense for an individual to provide false information to or conceal evidence from the Government Cases Department or courts. Article 35. It also provides for disciplinary action in the case that any professional member of the Cases Department acts negligently in collecting information, acts with impartiality, or unnecessarily delays proceedings. Article 36.

2.4. Civil Service – Hiring of Employees in Government

The Civil Service Law of Afghanistan, passed in 2008, defines the duties and employment terms of civil service.¹⁶ Civil servants are defined as “person[s] appointed by the Government to perform its executive

¹⁴ *Id.*

¹⁵ Government Cases Law, OG # 1115 (21 September 2013).

¹⁶ Civil Servants Law, OG # 951 (8 June 2008).

and administrative duties.” This law creates the Independent Administrative Reform and Civil Service Commission (IARCSC), which consists of 4 agencies and is responsible for creating a system of public administration. The agencies that make up the IARCSC are all staffed by civil servants and include the Civil Service Management Department, the Civil Service Appointments Board, the Civil Service Appeals Board, and the Administrative Reform Secretariat. In sum, these agencies develop and implement policy, recruit and promote civil servants (with the approval of the President), hear and monitor decisions at the ministries, and monitor administrative reform programs. The Civil Servants Law regulates the recruitment procedures of civil servants, defines the ranks and educational requirements of civil servants, and specifies their benefits and salaries. This law also grants civil servants certain rights, such as requiring that there be legitimate grounds for any dismissal of civil servants from work.

3. CIVIL LAW

Civil Law is largely contained within the 1977 Civil Code of Afghanistan,¹⁷ and spans many substantive areas of law. In this chapter, we will discuss the law of obligations, including the law of contract and the law of civil responsibility, property law, and family law.

An **Obligation** is a two-ended relationship. On one end of this relationship is a personal right to claim something. On the other end, there is a duty to render a performance.¹⁸ The law of obligations governs contractual liability, which is the duty owed by individuals who enter into a contract together to each other. Imagine if Mohammad agrees to renovate Layla’s office for 80,000 Afghanis. Mohammad has a personal right to claim 80,000 Afghanis, and Mohammad has a duty to renovate Layla’s office. What if Layla doesn’t like the way Mohammad is renovating her office, and decides halfway through the project that she wants Mohammad to stop working on her office? Can Layla do this? Would Layla owe Mohammad any payment? These questions would be governed by the law of obligations.

The law of obligations also governs civil responsibility. This is also referred to sometimes as extra-contractual responsibilities or obligations. This is the liability that arises from causing harm to the person or property of someone else. For example, imagine one day you are driving to work, and about one hundred meters ahead of you, a child runs into the street. You quickly press on the brake to avoid the child. The driver behind you is not paying attention and does not notice that you stopped, and crashes into the back of your car. Who is responsible for the damage to your car – you, the driver behind you, the child, or maybe the child’s parent? The law on civil responsibility determines who is liable, or responsible, for damages that result from people’s actions. The answer may well be that no one is liable. It also determines how those at fault should compensate those who are injured.

3.1. Law of Contracts

In this section, we will cover how a contract is different from any other agreement between two parties. The Civil Code outlines many rules for forming contracts.

Civil Code

Article 506

- (1) Contract shall be concluded with offer and acceptance of the two parties
- (2) Offer and acceptance are the terms used customarily in authoring a contract

¹⁷ Civil Law of the Republic of Afghanistan (Civil Code) 1977/01/05 (1355/10/15 A.P.), Official Gazette No. 353

¹⁸ Afghanistan Legal Education Project, *Law of Obligations*, 1 citing Zimmermann, Reinhard, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, 1.

The law of contracts is an important part of both civil law and commercial law. A **contract** is an agreement that is legally enforceable. It is created when an **offer** is connected with an **acceptance** of that offer so that the intentions of both parties are clear. A party who does not fulfill the promises in a contract is said to have **breached** the contract. When a party breaches a contract, he or she is required to compensate the other party or parties to the contract for the damages caused by the breach. The ultimate goal of contract law is to provide the damaged party with the benefits they should have received had the promises been fulfilled. This is one key way in which contract law is different than criminal law. Unlike criminal law, in many countries, contract law does not intend to penalize the breaching party for wrongdoing. Rather, the focus is on how to fulfill whatever promises were agreed to by the parties. Commercial contracts will be discussed later in the chapter. However, the rules for forming a contract discussed here are the same in both commercial and civil contracts.

An **offer** is an expression of someone's willingness to enter into a contract, or agreement, with another person. Once a person extends an offer to enter into a contract, she can be held to the terms to which she agreed. The law of contracts allows for certain exceptions to this rule. For example, if Parisa extends an offer to Nadia to pay her money for the computer, she can revoke, or take back the offer, before Nadia communicates that she would like to accept this offer. In the Law of Obligations, you will learn more about when and how an offer can be revoked. Offers can also expire, or become invalid, after a certain amount of time, or the contracting parties can agree to an amount of time for which the offer will remain open.

We see examples of offers in our everyday lives:

Parisa says to Nadia: "I will pay you five-thousand Afghanis for your computer"

Ramin says to Makai: "I will rent you a room in my apartment for one-thousand Afghanis a month.

An **acceptance** of an offer is a manifestation of agreement to the terms made by the person who made the offer. Acceptance must be made in the manner invited by the offer, and need not always be verbal. For example, if Parisa had specified that Nadia must bring her computer to school the next day to accept the offer, then Nadia would have to bring her computer to Parisa to create a contract. Had Parisa not specified a manner of acceptance, any communication of agreement such as "I agree" would suffice for acceptance. Acceptance can be manifested in writing, by words, or by customary signals if a mode of acceptance is not specified in the offer beforehand. An offer may also only be accepted by the person to whom it is directed. If Omid had overheard Parisa's offer to Nadia, and brought his computer to school the next day, there would be no contract, because Omid does not have the ability to accept the contract between Parisa and Nadia. The person to whom the offer is directed can also reject the offer instead of accepting it.

Practice Problems

1. Parisa tells Nadia she will buy her laptop for 5,000 Afghanis. Parisa immediately hands Nadia 5,000. What is the offer? Is there an acceptance?
2. Parisa tells Nadia she will buy her laptop for 5,000 Afghanis. Nadia immediately hands Parisa her laptop. Is Parisa now bound by a contract to give Nadia 5,000 Afghanis?
3. 1) Ramin says to Makai, "You can rent a room in my apartment for 1,000 Afghanis a month." 2) Makai responds, "1,000 Afghanis a month is too expensive." 3) Ramin tells Makai, "Ok, you can rent the apartment for 1,000 Afghanis a month and I will include utilities in that price." 4) Makai says to Ramin, "Ok that sounds good. I will move in next week." Identify each numbered statement as an offer, acceptance, or rejection.

Another key feature of contracts is that they require **voluntary assent**, so the accepting party must always have the option of rejecting an offer. Article 551 of the Civil Code of Afghanistan states "A contract must be entered into with the consent of the contractee [or the person agreeing to the contract]." Consent means more than just agreement. It also requires that the person agreeing is not doing so out of **coercion** or intimidation. Consider the following examples and decide whether the contract is valid.

Contract Hypotheticals

1. Asa has a small plot of land in a large city and wants to build an addition to his home that will extend it almost one meter into his neighbor's land. He approaches his neighbor, Sadaf, and offers to compensate her for the lost land. Sadaf is not happy about the addition, but really needs the extra money so she enters into a contract with Asa. He pays her 10,000 Afghanis and she allows him to extend his home. Is this a valid contract?
2. Consider the same example as above, except that now Asa does not tell Sadaf about the extension. Sadaf does not know how to read, and Asa is aware of this, so he tells her that a construction crew will be working near her property and he wants her to be aware that it will be noisy. He offers to compensate her for the noise so long as she signs an agreement with him. He pays her 500 Afghanis and she signs the agreement. She does not know that the agreement is actually a contract in which she agrees to allow him to build on her land. Is this a valid contract?

The first contract is valid, but the second contract is invalid. In the first scenario, Asa fully discloses the incursions that he plans to make on Sadaf's property. Though she is unhappy about the incursion, she prefers to be compensated than to deny Asa's offer. Because she consented to the agreement, it is a valid contract. In the second scenario, Asa does not tell Sadaf about the incursions he plans to make on her property. It does not matter that Asa pays Sadaf, because Sadaf misled Asa. **Fraud** arises when a party is induced to agree to a contract due to the intentional misrepresentations of another party to the contract. When fraud is proven, the defrauded party, (Sadaf) may **rescind**, or cancel, the contract. Under a valid contract, Sadaf would have the opportunity to decide whether the compensation was sufficient for the land she would lose. Because she was not given the opportunity to make this decision, the contract is invalid.

3.1.1. Contractual Capacity

The Civil Code requires that each person that enters into a contract has **capacity**, or the right to form legal relationships. For example, the Civil Code, in Article 39 states that “A person is mature after 18 Shamsi years. A mature person, while healthy minded, shall be recognized to have complete legal capacity in performing transactions.” The motivation underlying a capacity requirement is that everyone who can enter into legal obligations should understand the nature of the commitments they are making. Not everyone can enter into contracts. For example, the Civil Code does not allow children to enter into contracts on the same terms as adults. It also restricts individuals with illness or disabilities that impair their intellectual, emotional, or psychological functioning from entering into contracts. A person with such an illness or disability does not lose his or her legal capacity until a judge first registers the person under Article 545 of the Civil Code. The Civil Code, in Article 41, also prevents persons who are “financially inept,” or irresponsible with money, from having legal capacity. A judge also may register a person as financially inept. In this way, judges play an active role in applying the Civil Code’s rules on capacity.

3.1.2. Subject and Cause

For a contract to be valid, something of value must be given by the person on each side of the agreement. This thing of value is the **subject**. The subject can be a physical object, like a vegetable or a car, or it could be a promise to perform a service. It could also be a promise to refrain from a certain activity. For example, one person could pay another in exchange for her agreement not to initiate a lawsuit. These are referred to as peace contracts under Afghan law, and is an exchange of money for an agreement not to take a certain action the party has a legal right to take.

Civil Code Article 579

For every kind of obligation resulting from a contract, existence of a subject to which the contract is attributed, and is eligible for conclusion of contract, is essential. An object, debt, benefit, or other financial rights can form the subject of a contract. Also, execution of an action or refraining from execution of an action can be subject of a contract.

The subject can also be financial, such as when a bank loans money to a person. Articles 580 to 590 describe additional conditions on what can or cannot be the subject of a contract. Two types of subjects that make a contract invalid are impossible subjects and subjects contrary to the public order. An impossible subject is one that can never occur, either because it is physically impossible or the technology required to deliver it does not exist. If one person promises another a cow that lives forever or a flying car, these subjects would be impossible to deliver and the contract would be void. However, if the subject is generally possible, but is only impossible for a particular contract, the contract is still valid. For example, if Jamil borrows money from Zia but then does not have money later to repay him, he is still bound by the valid contract, and must furnish some other compensation. Subjects contrary to the public order are those that promise to do something that is against the any body of the law, such as criminal law, inheritance law, or the civil code. Say Inzir made a contract and agreed to sell Jamshid 10 cases of alcohol he made in his home in exchange for 3,000 Afghanis, but then Inzir does not give Jamshid the alcohol he promised him. A court could not enforce this contract, because the subject is prohibited in Afghanistan’s penal code, so is contrary to the public order.

A valid contract must also have a **cause**. The **cause** of a contract is the goal that subject is supposed to fulfill for the person conveying it. It is the reason that a person chooses to enter into a sale, lease, service, or other type of contract.

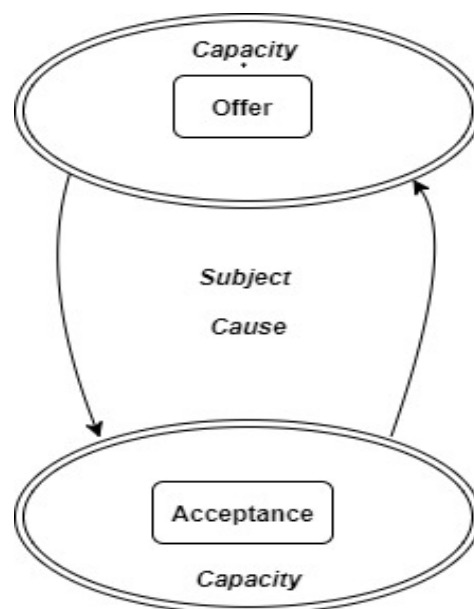
Civil Code Article 591

Cause constitutes the principle objective for which the contract stands as a legal attainment instrument.

An objective cause is necessary to create a contract, but contracts usually also contain personal or subjective causes as well. For example, if a person buys a home, the subjective cause for buying the home could be that the person needs a place to live. A person could also want the home to rent out to other tenants for income. This could be another subjective cause. The subjective cause can be understood as the home's usefulness. The cause that is needed to form the contract, however, is the objective cause. In this example, the home buyer's objective cause for paying money is to secure the rights to the deed of the land and the right to occupy it.

In the transfer of goods, the subject of the contract is the physical good, and the objective cause of the contract would be the transfer of rights related to the goods. For example, consider a contract for the sale of a watch. Nadya buys a watch from a Mohammad and pays him cash. The subject of this contract is the watch itself. The objective cause is the transfer of rights to the watch, but the subjective cause is the watch's usefulness as a fashionable and reliable means of telling the time for Nadya. If the watch is broken and cannot tell the time, then the subjective cause is not fulfilled, and the obligation is not fulfilled. Mohammad would be required to compensate Nadya for the expected benefit of a working watch that she did not receive. However, imagine that both Mohammad and Nadya knew that the watch was broken when they made the contract. Nadya wanted to buy a broken watch that she would fix herself later. Then the acquisition of a working watch to tell the time immediately was not the subjective cause of the contract, and some other cause would be understood (like Nadya's intention to buy a broken watch she will repair later).

The Requirements to Forming a Contract



3.2. Law of Civil Responsibility

We have just finished discussing obligations that arise through contracts. The law of civil responsibility, on the other hand, deals largely with duties people have in society even without contracts. While contractual obligations are legal duties that are accepted voluntarily between parties, civil responsibility incurs as a matter of law. In other words, you do not have the ability to consent to or opt out of civil responsibility. Everyone is responsible for actions that cause harm as a matter of law. It is in an area of private law, and usually involves a private party suing another in court. This lawsuit arises when one party believes the other has caused it financial, physical, or emotional harm, and the two parties disagree about the facts and who is at fault for the harm.

For example, imagine that Amir is driving on a highway going through a rural area. Amir sees someone walking a horse along the side of the road, and all of a sudden the horse gets spooked and runs in front of his car. Amir quickly presses the brake, to avoid hitting the horse, but the brakes on his car are bad, and he cannot stop in time and hits the horse. The driver behind Amir, Ghous, is not paying attention and also does not stop. Instead, Ghous runs into the back of Amir's car, causing damage to Amir's vehicle. When this incident is over, Amir surveys the damage. One horse is dead, his car has damage to the front and back and Ghous's car is damaged in the front. This chain of events may have caused a lot of costly damage, but the question remains: who is *responsible* for the results? Is it the horse owner, for letting the horse escape into the road? Amir for not stopping quickly enough? The car manufacturer of Amir's car for having poor breaks installed in the car? Ghous for not paying attention to the road and hitting Amir? The civil responsibility branch of the law of obligation seeks to establish who, if anyone, is liable for damages that result from people's actions. The person that is liable, or responsible, will usually have a duty to compensate those who are injured. The law of obligations also seeks to establish how liable individuals should compensate those that are injured, and what a fair amount of compensation is.

3.2.1. The Dual Objectives of the Law of Civil Responsibility

One objective of the law of civil responsibility is to offer an injured party **compensation**. This usually takes the form of monetary payment, and is aimed to help an injured party recover from an accident, or make up for financial loss caused by the harm. When the main form of damage is financial, monetary payment is a good remedy. Going back to the example with Amir and the spooked horse, the financial damage Amir experiences is the physical damage to his car. He will have to pay a repairman to fix the car, and the sum of money necessary to pay for this repair will put him back to the state he was before the accident happened. On the other hand, imagine that Amir was seriously injured, and broke both his arms in the accident. He may not be able to work, and will have to pay some hospital bills. Financial compensation can make up for his lost wages while he recovers from the injury and for some hospital bills. However, it is difficult to put a price on the pain and suffering Amir endures, and any lasting effects on his body from the injury. Because compensation is often in financial terms but injuries are not always financial, finding the appropriate compensation can be a difficult task.

Discussion Questions

1. How would you decide on the appropriate “price” for a physical harm, such as a broken arm, or permanent bodily damage?
2. Imagine that Layla was not paying attention while driving and hit Diba, who is walking across the street, causing her to fall and break her leg. The judge rules that Layla must compensate Diba 70,000 Afghanis for her broken leg. Do you think Diba should be paid more if she is a football player on the Afghan Olympic team and will lose her ability to play? Why or why not?
3. Why might we compensate those who are injured, even though it is hard to put a price on certain harmful results?

Another objective of the law of civil responsibility is deterrence. Similar to criminal law, **deterrence** aims to make people more careful in their conduct, to avoid actions that could cause harm to others. A fine, or obligation to pay someone that is harmed by your actions, makes one less likely to take part in potentially harmful actions. For example, imagine that Rashid is a store owner, debating whether he should put up a sign warning people that he just mopped the floor in his store, and that it might be slippery. Going to buy a sign to put up would cost Rashid time and money, so he might not be incentivized to do so, especially if he thinks it’s unlikely that anyone will slip in his store. However, if Rashid knows that he may have to pay the cost if anyone slips on his wet floor and is injured, he decides to go buy a sign to warn people to walk carefully since the floor has just been mopped. Likewise, say Sadiq is a painter hired to paint an office building. His paint lasts longer if he mixes with a chemical, and is cheaper and easier for him to use. However, the chemical is more flammable and may create a fire hazard in the office building. If Sadiq knows that he will be held responsible to compensate individuals in the office, if he goes with the easier, cheaper, but less safe option, he is more likely to choose the safer option and not mix the paint with a chemical.

Discussion Question

Does deterrence only work when an act is intentional? For example, imagine that Jamil is driving and texting at the same time. Because he is distracted typing a text, he accidentally runs a red light and hits a car at the intersection. He did not intend to run the red light. Do you think holding him responsible for the damages caused when he runs the red light, even if on accident, would cause him to change his driving behavior? In other words, how can the law of civil responsibility deter unintentional acts like Jamshid accidentally running the red light?

3.2.2. Liability – A Comparison

Liability in civil responsibility differs from liability in contract law and in criminal law. Civil responsibility is an obligation that each person has to every other person and their belongings not to cause harm. A person is liable, if she breaches, or breaks, the obligation that she has to other persons and their belongings not to cause harm.

Some Differences between Law of Civil Responsibility, Criminal Law, Contract Law

	Law of Civil Responsibility	Criminal Law	Contract Law
Parties involved in the lawsuit	Usually two private parties, for example: a person and a person or a person and a corporation	The government and a person – government brings a lawsuit against an individual for violating a criminal law	Two private parties
Does liability require a specific intent?	No, you can be liable for negligent, or careless, actions. For example, texting while driving makes you a careless driver, and if you hit something while texting, even if on accident, you are liable	Generally requires a specific intent	Generally not a requirement, but it depends on the contract
Punishment or Remedy	Paying monetary compensation or returning property	Usually probation or prison time, though it can also be a fine	Paying monetary compensation or fulfilling the contract

3.2.3. Liability in the Law of Civil Responsibility

In the law of civil responsibility, to assess whether or not a person carries liability for her actions, we look to both the conduct and the intent. The conduct is the action that causes the harm. The intent is the mindset of the actor in carrying out the action. The act is usually easy for a court to analyze objectively. It requires determining what action causes the harm. The intent, on the other hand, requires a court to look into the subjective mindset of an actor. The court must determine whether a person acted differently than what would be expected of a reasonable person in the same situation. There are different levels of intent that are required for different types of liability, which will be discussed in an advanced course. For now, let's look at one example of how intent can confer liability.

Imagine that Waheed and Omar are sitting at a café in Kabul drinking coffee together. As Waheed picks up his cup of very hot coffee to take a sip, a car on the street honks its horn loudly and startles Waheed. Waheed reacts to the noise and accidentally throws his hot cup of coffee all over Omar. Omar's suit is ruined, and he also has burns that require medical attention. Is Waheed liable for the action of throwing coffee and obligated to compensate Omar? If Waheed and Omar cannot agree on fault, Omar may sue Waheed in court for compensation. The court would first identify the act that causes the harm: Waheed throwing his coffee. Next, the court needs to look to the intent. Was Waheed being negligent, or careless, when he threw his coffee, or was he just acting in the same way that any other reasonable person would act after hearing a loud car horn? If the court finds that Waheed was not acting negligently, he is not liable, and does not need to compensate Omar. This is true even though his action of throwing the coffee causes the harm. Liability is about determining how careful we expect a person to be. A person is usually only liable if they act with less care than we expect a reasonable person to act with in any given situation.

On the other hand, imagine Waheed picked up a cup of coffee from the counter, and decided to run back to the table that Omar was sitting at. As he approaches the table, he trips and spills the coffee on Omar. If you were carrying a cup of hot coffee, would you run with it or walk? Chances are you would walk. In this example, it is more likely that Waheed was being negligent when he chose to run with his hot cup of coffee in his hand, and breached his obligation to not cause harm by doing so.

3.2.4. Principles of Civil Responsibility in the Civil Code

There are some articles in the Civil Code that describe the exercise of rights, and are important to determining Civil Responsibility. These articles articulate which actions if carried out by one person, may impede on the rights of another person, and create liability for harms that are caused. They also lay down principles for determining what civil responsibility is in certain situations.

Civil Code

Article 5

State of emergency does not invalidate rights of another.

Article 6

Loss shall not be compensated by reciprocal same action.

Article 7

Repelling evils have priority over securing benefit.

Article 8

Legal permission negates responsibility. One who exercises his rights within legal limits is not liable for ensuing damages.

Article 9

- (1) A person who transgresses his rights shall be responsible.
- (2) Transgression of rights occurs in the following cases:
 - 1–Actions against custom
 - 2–Having the intention to infringe rights of another
 - 3–Triviality of interest of the person as compared with the harm inflicted on another
 - 4–Impermissibility of interest

The Civil Code tries to balance individual interests against a broader social interest. For example, Article 5 requires that the rights of others are respected even in a state of emergency. For example, even if there is a natural disaster, each person has an obligation to not act in a way that causes harm to other people or their belongings. Article 6 prevents an individual who has suffered a harm from retaliating. Instead this person must use the court system or come to an agreement for compensation of the harm. Article 7 requires that a person avoid doing something, even if they get a benefit out of it, if it causes a harmful result. For example, if someone likes to play Rubab in the middle of the night, and the noise disturbs all his neighbors, Article 7 limits this person's ability to pursue this musical interest when it causes widespread suffering for his neighbors. How do Articles 8 and 9 also create principles of civil responsibility that serve the public interest?

3.3. Family Law

Family Law governs the legal relations that result from marriage and the legal relations between a parent or guardian and a child. It also addresses the rights and the obligations of different family members. It addresses a range of issues that may come up within the family, including conditions under which a marriage can be dissolved or kinship terminated.

3.3.1. Sources of Family Law

The Constitution, Civil Code, and international treaties are all sources of Family Law, in addition to Islamic law and Customary law.¹⁹ The 1977 Civil Code of Afghanistan contains the first comprehensive legislation on family law in Articles 56-336. This Civil Code includes provisions on the conclusion of marriage, effects of marriage, dissolution of marriage, and consequences of a marriage dissolution. It also discusses child law, custody, and guardianship. Below are examples of three Civil Code provisions that describe relationships encompassed by civil family law:

Civil Code

Article 56

A person's family consists of relatives gathered together on the basis of a common ascendant.

Article 57

Direct relation is a relation between ascendant and descendant and indirect relation is a relation between persons who have a common ascendant without one being descendant of the other.

Article 59

Relative of either of the spouses are considered to be relatives of the other spouse in the same line and of the same degree.

Family law is also discussed in the Afghan Constitution of 2004. Article 54 of the Afghan Constitution states: "The family is a fundamental unit of society and is supported by the state. The state adopts necessary measures to ensure the physical and spiritual well-being of the family, especially the child and the mother, the upbringing of children and the elimination of traditions contrary to the principles of the sacred religion of Islam." Article 22 of the Afghan Constitution states "The citizens of Afghanistan, man and women, have equal rights and duties before the law."

There are currently efforts underway to prepare a family law code in Afghanistan.²⁰ This code is currently estimated by news sources to have 13 chapters and 220 articles, and if approved, will largely replace the Civil Code as the primary source of family law in Afghanistan.²¹ This code, currently estimated by news sources to have addresses some new issues in family law that have not yet been addressed by the civil code. For example, discussions on this code have included whether marriage and divorce through Skype or e-mail is permissible, given the number of Afghan citizens living abroad. This proposed code also changes some marriage laws by proposing to increase the minimum age for marriage for boys and girls, and requiring all marriages in Afghanistan to be officially registered.

Discussion Questions

1. Why is it important to define the relationships such as those described above in family law?
2. Brainstorm: How might being a part of a family affect your legal obligations and legal rights as they pertain to other members of the family?

¹⁹ Tarek Azizy, *Max Planck Manual on Family Law in Afghanistan* (Max Planck Institute for Comparative Public Law and International Law February 2011).

²⁰ BBC News "Government Family Law Formulates" (4 January 2017), <http://www.bbc.com/persian/afghanistan-38504753>; "Minister of Justice convenes a Scientific and Research Seminar on Draft of Family Law" (8 January 2017), Ministry of Justice, <http://moj.gov.af/en/news/290225>.

²¹ BBC News "Government Family Law Formulates" (4 January 2017), <http://www.bbc.com/persian/afghanistan-38504753>.

3.3.2. Marriage Law

Marriage law is discussed in Articles 60 to 216 of the Civil Code, and regulates the legal relations between the parties involved in a marriage, including requirements of a valid marriage, matchmaking, engagement, and dissolution of the marriage. We are only going to touch on some of these issues covered by the Civil Code on marriage. Article 60 of the Civil Code describes marriage as “a contract that legalizes relationship between man and woman with the aim of forming a family, and establishes rights and duties of the parties.” Like other civil contracts, it is a consensual agreement that requires offer and acceptance. This offer and acceptance can be expressed by the individuals getting married, their legal guardians, or proxies. For a marriage to be valid, or recognized by the Afghan government, it must meet the requirements stipulated in the Civil Code. These requirements include things such as both parties must be competent individuals of legal marital age, two witnesses must be present for the marriage, and the marriage cannot be a forced marriage. A forced marriage is one that occurs against the will of either party. To be valid, the marriage must also not have any impediments, or prohibitions at the time of marriage. These impediments are listed in Articles 81 to 89 and include things such as a prohibition on marrying a blood-relative or temporary prohibition in cases of certain differences of religion.

Discussion Questions – Gaps between law and practice

The registration of marriages, divorces, deaths, and births are very important for accurate census data that inform governance decisions in a modern state. Marriage registration also creates legal security, by establishing with the government your legal rights in the case of the death of a spouse, guardianship issues, or divorce. However, current reports in Afghanistan show that only 5% of all marriages in Afghanistan have been registered.

1. What are some reasons that you can think of that may explain why the rate of registration of marriages in Afghanistan may be so low?
2. What are some ways in which courts or local government can encourage individuals to register their marriages or facilitate the process?

A valid marriage must also be registered with a competent authority (as described in **Article 46** of the Civil Code), which is usually the district court of the area where the married couple resides. In this process, the competent authority, the wife, and the husband each receive a copy of an official marriage contract. A marriage is still valid even if it is not registered. But registering a marriage is beneficial as it helps individuals in legal proceedings establish the existence of a marriage. The registration of a marriage also helps authorities to guarantee that all legal provision regarding the creation of a valid marriage in the Civil Code are observed. For example, the authority with which the marriage is registered can check that there are no impediments to marriage and that both marrying parties are of legal marriage age.

Effects of Marriage

Marriage is a legal contract that changes the rights and obligations of the contracting parties. Once a valid marriage is created, a husband and wife assume different rights and obligations, which are dependent on one another. One of these is the creation of a duty of the *Mahr*, which is money or a physical asset that the husband owes a wife, and is negotiated before a marriage. Another legal right created by a marriage is the *Nafaqa*, or maintenance that a husband must pay to support his wife which includes food, clothing, accommodation, and medical care in an amount that is related to the husband’s income (Civil Code

Articles 117-118). However, a wife's right to the *Mahr* and the *Nafage* is dependent on her obligation to obey the husband as the head of the family. Article 122 states that a wife forfeits her right to any maintenance if she leaves the home without the permission of the husband, disobeys him in marital matters, and during a period in which she does not stay at her husband's home.

Dissolution of Marriage

Talaq, or repudiation, is the process by which a valid marriage is dissolved (Article 135). The husband has the right of repudiation, and can end a marriage without a reason if he follows certain conditions. A husband may end a marriage without any assistance from a court. A witness is not required, and under the Hanafi tradition, the wife's presence is not required either. A wife only has the right of repudiation if she specified in the marriage contract that she would like to reserve that right. To repudiate a marriage, a wife needs a court to grant her a judicial divorce, which is given only under certain legal conditions.

Another way to dissolve a marriage, is *Khol*, or divorce by consent of both parties (Article 156). Under *khol*, the marriage is dissolved in exchange for a payment or physical asset from the wife to her husband. The compensation can be provided in a number of ways including the dower or any asset of the wife, or services from the wife such as custody or maintenance of their common child. *Khol* does not require the involvement of courts or a court order.

Discussion Question

Article 22 of the Afghan Constitution states that "Any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan, man and woman, have equal rights and duties before the law." Do you think the provisions of the Civil Code regarding the effects of marriage and the process for dissolution of marriage can be reconciled with Article 22 of the Afghanistan Constitution? If yes, how so? If no, why not?

3.3.3. The Relationship Between Parents and Children in Family Law

There are a number of laws in the Civil Code that regulate the parent-child relationship, including laws that regulate inheritance from parents to children and vice-versa, a parent's duty to a child, and laws regarding custody of a child. There are many ways to show proof of descent, or legally establish who the parents of a child are. The rules for establishing descent are described in Articles 217-228 of the Civil Code. Once descent is established, rights and obligations are created both for the child and for the legal parents. For example, a child that is financially capable, must provide maintenance to parents, grandparents and great-grandparents that are indigent, or lacking financial resources to support themselves. Article 264. In turn a parent also has a number of legal obligations to the child. Article 235 describes the breastfeeding obligation of the mother. Article 256 describes the obligation of a father to pay maintenance for children until a son is capable of working or until a daughter is married. Parental Custody is another obligation a parent owes to a minor, and it describes the protective relationship that a parent owes to a child to serve the child's interests. There are different types of parental custody in Islamic law that you can learn more about in other law classes.

3.4. Property Law

Consider a small piece of land in Kabul with a home built on top of it. The property law of Afghanistan tells us who the property belongs to, how it may be used, and to what extent an owner may prevent other people from using it. Property law also covers transfers, telling us how the property may be disposed of by one owner and acquired by a new owner. Property law is significant because people generally strive to

own property. Suppose Ahmed wanted to buy a piece of land in Kabul from Mohammad. How does he know that the next day, Mohammad's family member won't come to try to claim the land as their own? Do you think Ahmed would be likely to buy this land if he thought someone might take it? Property laws are important for making sure that property ownership be secure. Without secure property ownership, people are unlikely to purchase and cultivate land. Secure ownership is best achieved through a functional system of property law.

3.4.1. The Scope of Property Rights under the Constitution of Afghanistan

Afghanistan's Constitution articulates the right of every person to own property. It also describes some principles for creating a secure system of property ownership.

Constitution of Afghanistan

Article 40 (Excerpts)

Property shall be safe from violation.

No one shall be forbidden from owning property and acquiring it, unless limited by the provisions of law.

No one's property shall be confiscated without the order of the law and decision of an authoritative court.

The Civil Code goes into more depth, describing types of property. Article 427 broadly defines property protected by the Civil Code and Constitution.

Civil Code

Article 427

Property is a physical object or right that has material value among people.

3.4.2. Security of Property

In a secure system of property ownership, a property owner will be able to easily and effectively prove that he or she owns a particular piece of property, and the government will act to enforce ownership.

In a system where property law may be inadequate or applied unequally, property ownership may not be secure. Where property law is inadequate, a property owner may not be able to produce sufficient evidence to validate her claim of ownership. She will risk losing her right to own property if her claim of ownership is challenged. For instance, she may have purchased the property under an oral agreement and lack any documentation evidencing her claim of ownership. In contrast, under a secure property ownership system, if the owner is challenged she will be able to quickly point to a legal document that proves the property is hers, and she will face no real risk of losing the property. Even if property law is adequate it must still be applied equally.

Consider a situation in which the law is applied unequally. For example, a property owner has strong evidence of her claim to a piece of property, but her ownership claim is challenged by an individual who is wealthy, powerful, and connected to the government. She may still worry about losing the property if the government system is corrupt. A secure system will recognize a valid claim of property ownership regardless of the identity of the challenger.

Discussion Questions

1. What are some benefits you can imagine for property owners or prospective buyers from having a secure system of property?
2. When people are secure in their ownership claims, they may also be more willing and able to make investments in their land and their families. A secure system of property also gives a land owner more time to work and earn a living for her family, because she does not need to spend much time defending her property rights. These are some ways in which individual property owners are better off. Can you think of ways a secure system of property benefits society as a whole?

3.4.3. Registration

One of the key elements of a workable property law system is reliable system of registration. There are two prevalent types of property registration systems—titles and deeds. A **title system** is a registry of property ownership that serves as the primary evidence of ownership. In a title system, each piece of property is cataloged and its owner listed, minimizing the chance that competing claims will arise. A valid title is assumed to be evidence of ownership.

In Afghanistan, however, property has been recorded through a deeds system. Deeds are kept largely in registries at the provincial level. A **deeds registry** is a public depository where documents providing evidence of land transactions are stored, numbered, dated, indexed, and archived. The key distinction between a titles system and a deeds system is that the government does not take responsibility for errors in a deeds system. As a result, deeds systems are less expensive for the government to maintain. Conversely, they may be more expensive for property owners because a valid ownership claim is not guaranteed under a deeds system, and potential buyers and creditors have to expend resources verifying that the seller or borrower has a valid ownership claim. Article 5 of the **Law on Managing Land Affairs**²² describes the types of legal documents that establish property ownership in Afghanistan. Most often, valid ownership does not come into question unless there is a property dispute. There are several different types of documents that are deemed valid by Afghan courts to resolve property disputes. The law also looks to less formal records to validate ownership claims. To learn more about these, you can look to the Law on Managing Land Affairs.

3.4.4. Challenges in Afghanistan's Property Law

Afghanistan's property law system faces three key challenges that are specific to the current situation in Afghanistan. First, Afghanistan has a weak central government with limited capacity especially in more rural areas of Afghanistan. Therefore, property laws may not be readily enforced, and when they are, they may not be enforced in a uniform way. Second, the political future of Afghanistan is unclear; thus laws could change quite dramatically in the near future.²³ People are hesitant to make large investments in light

²² Law on Managing Land Affairs, Article 5, OG # 958 (31 July 2000).

²³ As of publication, the most recent change to Afghan property law was Law on Granting State Properties, OG # 1241 (28 December 2016) that explains the authority of the President and a Commission in determining who is eligible to receive state property.

of a high probability of future instability. Third, as a post conflict society, Afghanistan has a large displaced population and disputes often arise between those currently in possession of property and those who may have had claims to the property in the past but were forced to evacuate the region. There are many situations where two or more people have good claims to a single piece of property and the law is expected to help resolve the dispute efficiently and fairly. You should keep these challenges in mind as learn more about property law in future classes.

4. COMMERCIAL LAW

Commerce is the exchange of goods or services for money or other goods or services. Every time you go to the market or buy internet credit, you are taking part in commerce. Commercial law is a broad set of legal rules that governs commerce and business relations in a country. It covers commercial contracts, company formation and dissolution, property purchase and sale, bank transactions, loan and guarantee matters, tax matters, as well as dispute resolution. Commercial law is essential to a stable economy in any country. It is a subset of civil law, which includes both public and private law issues. It is governed by the Civil Code and the Commercial Code of 1955. Commercial law is also governed by many newer statutes that address specific topics as Afghanistan's economy has changed and modernized. Some of these commercial law statutes are the Private Investment Law (2013), Partnership Law (2007), Corporations and Limited Liabilities Company Law (2007), the Negotiable Instruments Law (2007), and the Law on Commercial Contracts and Sale of Goods (2014), Commercial Mediation Law (2007), and Commercial Arbitration Law (2007). This list is not exhaustive, and you will have the opportunity to learn about these laws and others in a course on Commercial Law.

4.1. Commercial Contracts

We have already discussed some rules for contracts between individuals in the Law of Obligations Sections. Contracts in Afghanistan are governed either as commercial contracts or civil contracts. We already discussed the Civil Code on Contracts in the Law of Obligations section. Rules regarding the formation, enforcement, and termination of commercial contracts are generally the same as those we discussed in civil contracts. The Civil Code applies to contracts as a default. However, there are certain types of contracts that are commercial and follow their own rules from sources such as the Commercial Code and Commercial Contracts and Sale of Goods Law. Articles 14–23 of the Commercial Code lists transactions that are “commercial transactions” and governed by this code instead. Examples of commercial transactions include distribution of water, gas, or electricity, agreements for transportation, and bank transactions. These types of contracts are governed by the Commercial Code and by the Law on Commercial Contracts and Sale of Goods. The Law on Commercial Contracts and Sale of Goods also requires the five elements of offer, acceptance, subject, cause, and time required by Civil Contracts.

4.2. Types of Commercial Organizations:

Imagine you would like to open up a small petrol station that sells fuel and snacks. What types of laws would govern your responsibilities and obligations as a business owner? What type of business would you be allowed to create under Afghan law? If you want to include your friend, Ahmed, as a business partner, what type of agreement must you and Ahmed create to share the profits of this business? Suppose the petrol station catches fire and you lose a lot of money and cannot pay back the loan you took out to start this business. Are both you and Ahmed liable, or accountable financially, if something goes wrong?

The law of commercial entities (“company laws”) addresses questions such as these which are very important to starting and growing a business. The law of commercial entities determines the form of business to be created and structures agreements among multiple business owners. In this section, we will briefly discuss a couple types of commercial entities that can be created under Afghan Law.

4.2.1. Sole Proprietorship

The simplest form of a business is a **sole proprietorship**, where a single person owns a business. Say Diba owns a small car dealership in Kabul called Great Cars where she buys and sells used automobiles. Because there are no owners other than Diba, her car dealership is a sole proprietor. Family businesses, where a single family owns the business, are treated similarly to a sole proprietorship under Afghan law. One advantage to this type of business is that Diba, as the sole owner, can make decisions quickly without having to consult with other owners or investors. Another advantage is that whereas most types of business must register with the Ministry of Commerce, a sole proprietorship does not need to do this, and must only register with their local authorities. Sole Proprietorships are also taxed at a lower rate than other forms of business. Suppose Diba wants to grow her business, and decides to open up a second car dealership outside of Kabul. She needs more money to buy property to open up the second car dealership, and needs help to run the second dealership. She may look for a business partner to help her grow this business. Suppose Diba decides to take on her friend, Ehsan, as a partner because he has experience selling cars and money to invest that he can invest purchasing the second property. Now the car dealership would change from a sole proprietorship to a partnership.

4.2.2. Partnerships

A **partnership** is a business form where two or more people are co-owners. The partners to the business agree on what their rights and obligations are to each other and to the business in a **partnership agreement**. The partnership agreement is the foundational document of a partnership. The Partnership Law of 2007 governs the types of partnerships that can be created, how to form a partnership, and how a partnership can be dissolved.

Discussion Question: Decision Making

In a partnership, each partner can enter into contracts on behalf of the partnership and bind the other partner. For example, say Ehsan finds a plot of land to locate the second car dealership just north of Kabul, and purchases this lot on behalf of the partnership without consulting Diba. Even if Diba does not like this plot of land, or thinks this is a poor location for a second dealership, the partnership is obligated to fulfill the contract and pay the landowner for the plot. In a partnership, how can partners prevent other partners from acting unilaterally on these issues?

This discussion question highlights one reason why the partnership agreement is so important. Diba and Ehsan can specify in the agreement how they will make decisions such as these. Diba can require Ehsan to consult with her before carrying out any major transactions on behalf of Great Cars. Article 43 of the Law of Partnership requires that partners designate one individual, also called a **manager**, to “administer the affairs of the Partnership.” This manager is responsible for controlling activities of the company on behalf of the owners. Diba and Ehsan should decide ahead of time who will be the manager, and thus responsible for making these major decisions.

4.2.3. Corporations and LLCs

Corporations and LLCs in Afghanistan are governed by the Corporations and Limited Liabilities Company Law (2007). Both corporations and LLC's are "commercial legal persons." This means, that like a real person, they can enter contracts and incur obligations from them. Furthermore, if they breach these

obligations, they can also be held accountable by judicial processes like a real person. These obligations are held by the business entity, not the individual owners associated with the business.

A corporation is legally created when the founders of the company, or **incorporators**, sign a document called the Articles of Incorporation, and register it with the Central Business Registry. Just as a partnership agreement creates a partnership, the Articles of Incorporation is the foundational document of a corporation and establish how a company will govern itself. While in a sole proprietorship a single owner can make decisions, in a corporation or LLC, there are many stakeholders. Rules are required to govern how a company will make decisions to achieve its objectives, and who has the power to make these decisions.

Corporate Governance describes the procedures for making company decisions and the rights and responsibilities of the participants of the company. These participants can include board of directors, managers, or shareholders (part owners of the company). The Articles of Incorporation establish how the company will govern itself, but often additional rules are needed for governing the company as it grows or changes. The incorporators can enact bylaws, which are additional rules, as long as these bylaws do not conflict with the laws of Afghanistan or the company’s Articles of Incorporation.

4.2.4. Corporations and LLCs- Key Differences

There are a few key differences between corporations and LLCs. A corporation’s capital is divided into **shares**, which indicates a percent ownership of the company. Each **shareholder**, or part owner of the company, has liability that is limited to the amount of her shares. For example, if Great Cars became a corporation, and Halima decided to purchase 5% of the company for 10,000 Afghanis, Halima is liable for no more than 10,000 Afghanis. An LLC’s capital, on the other hand, is not divided into shares. Each shareholder in an LLC is liable for whatever amount she has agreed to be liable for. Corporations can sell shares to the public, but an LLC can have no more than 50 shareholders. This means that if a company wants to raise a large amount of capital from the public, it is better to be a corporation than an LLC.

Comparing the Division of Shares in Corporations and LLCs

Corporations and LLCs are both forms of commercial entities that allow the owners to have less liability

	Corporation	LLC
Shares	Can be sold to the public → can have many, many shareholders	Can have no more than 50 shareholders
Liability of the Shareholder	Limited to number of shares	Capped at an amount agreed to by the shareholder and company

than they would in a partnership. While sole proprietors and partners are liable to pay the entire debt of their business, a corporation or an LLC are not liable in this same way. Their liability for debts from their business, should the business go bad, is limited to a fixed amount. You may be asking yourself - why do we tolerate companies not being liable for their full debts? In other words, why should an individual not be liable for paying the full debts of their business if a business goes bad?

Limited liability companies have many economic benefits for a society as a whole. Say you are looking to start a small business and want to invest your savings in the business. If you know that you will be personally liable to pay off significant debts from this company if it fails, you will be unlikely to want to start the business. Having limited liability encourages prospective business owners to take risks and start

business that could be very successful and valuable. The economy benefits when more people start and develop businesses, produce goods and services, and employ other people. Can you think of any arguments against having limited liability companies?

4.3. Tax Law

Just as any citizen of Afghanistan must pay taxes, commercial legal persons must also pay taxes. Tax law is generally discussed as part of public law, and describes the laws governing how much each individual or legal entity must pay the government. Because business entities are bound to pay taxes, commercial lawyers should be familiar with the rules pertaining to the tax duties of businesses.

Constitution of Afghanistan

Article 42

Every Afghan is obligated to pay taxes and duties to the government in accordance with the provisions of law. No taxes and duties are levied without the provisions of law. The rate of taxes and duties and the method of payment are determined by law on the basis of observing social justice.

Article 42 of the Constitution of Afghanistan, reproduced above, provides the basis for levying income tax, and gives the legislature the power to pass tax laws.

The Income Tax Law of 2009,²⁴ was adopted in accordance with Article 42 of the Constitution, and specifies tax rates and exemptions. It distinguishes between **natural persons**, who are individuals, sole proprietors, and partners of a partnership and **legal persons**, which include corporations and LLCs, in determining how much tax one must pay. Article 4 of the Income Tax Law sets the taxable income rate of natural persons to vary based on the person's income, and ranges from 0 to 20%. If a natural person has a higher income, she is taxed at a higher rate than a person with a lower income. On the other hand, all legal persons are taxed at a fixed rate of 20 percent. Say Diba hired you as a commercial lawyer to advise her on whether she should form an LLC or a partnership for Great Cars. Which type of commercial entity would provide for the optimal tax rate? What other types of information would you consider in deciding whether an LLC or partnership is better for Great Cars?

As a commercial lawyer, you may also be asked to advise a business on what types of expenses are deductible from one's taxable income. Suppose that Diba receives 10,000 Afghani from a customer, Layla, for a car. However, prior to selling the car, she had to purchase it from Ahmed for 7,000 Afghani, and spent 1,000 Afghani to give it a fresh coat of paint, and 500 Afghani to the employee who worked on the lot and sold the car. Will she have to pay taxes for the entire 10,000 Afghani income or only on the 1,500 Afghani profit she made? The Tax Law of Afghanistan allows business expenses such as those for wages paid to employees, the cost of materials used to make a product, rent paid on property used for a business to be deducted, or taken out of, the income you are taxed. Generally, this means that taxpayers like Diba can deduct expenses incurred during the production of the income, so she is not taxed on the entire 10,000 Afghani she was given for the car. There are many types of tax deductions for businesses. A good commercial lawyer will become familiar with these deductions and the accounting methods used to calculate taxable income in order to properly advise a business about their tax obligations.

²⁴ Income Tax Law 2009, OG # 976 (18 March 2009).

CONCLUSION

The purpose of this chapter was to introduce you to different areas of substantive law in both the realm of public and private law in Afghanistan, to give you a sense of what to expect in future courses in different areas of the law. You have learned basic concepts in 1) criminal law, 2) administrative law 3) civil law, including the law of obligations, family law, and property law, and 4) commercial law. Each area of substantive law finds its roots in the Afghan Constitution, codes, and other legislative acts. As you move forward in your study of law, think critically about why these areas of substantive law are important for Afghan society and continue to think critically about improvements that can be made to each area of the law. In your future courses, look for connections between these areas of substantive law. In the next chapter, you will learn about procedural laws that interact with these substantive areas of laws in the administration of justice.

CHAPTER 7: PROCEDURAL LAWS

INTRODUCTION

Imagine that you are a newly licensed lawyer. As you finish unpacking your new office, your first client walks in the door. Your client, Guljaan, explains that her husband recently died of a heart attack. Her brother-in-law now claims her house belongs entirely to him, and your client is worried about her future. You know from your studies in inheritance law that Guljaan has first priority to the property, but your client wants to know what she should do to protect that right. The question of *what to do* requires you to apply your knowledge of procedural law.

Procedural laws, ultimately, are about process. In this Chapter, you will learn about the basic principles of procedural law and explore four different types of procedural law. This Chapter begins with a description of procedural laws and describes how procedural laws differ from substantive laws. The Chapter then discusses the major provisions of the Civil Procedure Code and Criminal Procedure Code. These overviews provide a foundation for further study in advanced classes on civil procedure and criminal procedure. Lastly, this Chapter introduces two other types of procedural laws: administrative procedure and commercial procedure.

1. INTRODUCTION TO PROCEDURAL LAWS

1.1. What are procedural laws?

Procedural laws are the laws that regulate the process by which a court hears and determines what happens in a civil lawsuit, criminal proceeding, or administrative proceeding. In other words, procedural laws define the steps that litigants and courts must follow in order to enforce a duty or right through the judicial system. For example, the Civil Procedure Code requires an individual to first petition the court through an official request letter before the court considers the case.¹ As this provision describes the *process* of a lawsuit, it is a procedural law.

In contrast, **substantive laws** refer to the laws that create, define, and regulate the rights, duties, and powers of parties. For example, the Civil Code states that property left behind by the deceased shall be transferred to his or her heirs. Therefore, if Guljaan's husband dies, Guljaan has a right to a portion of his property left behind as his heir. Because this law defines a *right*, it is a substantive law.

Substantive law defines the remedy and right, whereas procedural law determines how an individual can assert that right. For instance, if Guljaan has a right to her husband's property under the Civil Code, procedural laws would tell her how she can go to a court to acquire the property that rightfully belongs to her if someone else currently occupies the property. As a first step, she would submit an official request letter to the court so that the court can consider her case.

Procedural laws may differ depending on the type of proceeding. For instance, Afghanistan has both a Civil Procedure Code and Criminal Procedure Code. The process for a civil lawsuit is different than the process for a criminal lawsuit. Similarly, there are also different rules for administrative procedure and commercial procedure.

Lawyers must study procedural laws to know how to best advocate for their clients. Think of a game of playing cards. The procedural rules of the game determine when players can take a turn, when players can receive new cards from the deck, and when you can exchange cards with another player. The substantive rules of the game may determine whether a King is worth more than a Queen. In order to win a game,

¹ Civil Procedure Code, Article 12, Law No. 10/722 (22 August 1990).

however, you cannot just have lucky cards. You must also know and understand the rules of the game. Similarly, success as a lawyer depends on your ability to know and understand procedural laws. Skillful lawyers know how to navigate procedural laws for their clients' success.

Procedural Law or Substantive Law?

For each excerpt below, would you classify the law as procedural or substantive? Why?

1. "The testimony of the witness is heard individually in the presence of the parties in the session of judicial panel."²
2. "Water rights for the purpose of irrigation may be transferred through inheritance or bequeathing."³
3. "If the parties to the claim settle their differences prior to the commencement of the claim and the proceedings, their settlement is put in writing and their dispute is brought to an end."⁴
4. "The witness is not obligated to answer any questions that could lead to their or one of their relative's prosecutions. The judicial officer, prosecutor and/or court shall inform the witness of this right."⁵
5. "Freedom of expression shall be inviolable. Every Afghan shall have the right to express thoughts through speech, writing, illustrations as well as other means in accordance with provisions of this constitution."⁶
6. "In order for a commercial contract to take place, the consent of both parties is sufficient. Preparation of a contract or other ceremonies is not necessary."⁷
7. "Presumption of innocence is the original state in which accused persons are innocent unless they are convicted by a final decision of a competent court."⁸

1.2. Why do procedural laws matter?

Procedural laws are more than just a set of rules on how to submit a petition or conduct a trial. Rather, procedural laws play a fundamental role in ensuring a just and fair legal system. By requiring that all legal proceedings follow the same set of rules, procedural laws affect the likelihood of achieving a just outcome.

Imagine, for instance, that you have a dispute with a business partner over an investment. Your business partner then sues you in court. How would you want the dispute to be resolved? If you were to design the process, what would it look like? How long would it take to resolve the dispute? What kind of evidence would you allow each side to present? What kind of qualities would you want the judge to have?

Procedural laws address these kinds of questions to ensure that the judicial system treats participants fairly and resolves disputes efficiently. If the courts are disorganized, the legal process may prove to be frustratingly slow and ineffective. Procedural laws therefore have an important role in ensuring that the courts operate smoothly and that all parties before the court receive a fair hearing.

Procedural laws therefore have an impact on individuals' *substantive* rights. As you learn in this Chapter about the rules that govern the phases of litigation—such as when, where, and how to file a lawsuit—notice how these rules impact the outcome of a case and the rights of the individuals involved. We will

² Civil Procedure Code, Article 322.

³ Civil Code, Article 1915.

⁴ Civil Procedure Code, Article 231.

⁵ Criminal Procedure Code, Article 27(1).

⁶ Constitution, Article 34.

⁷ Commercial Code, Article 608.

⁸ Criminal Procedure Code, Article 5.

first discuss two fundamental substantive rights that all procedural laws aim to protect: due process and equality before the law.

1.2.1. Due process

Due process is a course of legal proceedings according to rules and principles that have been established for the enforcement and protection of private rights. The government must follow the procedures established by law. These basic rules and principles include the right to adequate notice of a lawsuit, the right to be present during testimony, and the right to an attorney, among other protections. The “due” in due process roughly means “promised in advanced.”

The Afghan Constitution protects the right to due process in criminal proceedings as a foundational principle of Afghanistan’s legal system. Similarly, the Civil Procedure Code promotes due process in the civil context.

Constitution

Article 27

“ . . . No one shall be pursued, arrested, or detained without due process of law.”

Civil Procedure Code

Article 2

“The principal objectives of this Code are as follows: . . . Management of the due process in judicial proceedings.”

Fundamentally, due process emphasizes that the legal system must follow certain procedures. For example, even if a man actually committed a crime, the government cannot punish unless it follows certain procedures, such as providing him with a fair trial. If the government fails to follow these procedures, the man can go free without punishment. Similarly, if two parties have a dispute over who owns a piece of property, the party who actually owns the property under the law cannot force the other person off the property without following certain legal procedures.

In some ways, due process is a radical concept. It does not matter who is right or wrong for purposes of due process. Rather, a right to due process guarantees certain procedural safeguards to everyone. The legal system may not get the correct result in every case or proceeding. Therefore, due process requires that the parties and judge follow certain procedures in order to increase the likelihood of reaching a fair and just result.

Discussion Questions

1. Some have argued that due process results in the release of known criminals due to a “technicality.” Others, however, argue that due process is necessary so that innocent persons are not imprisoned. This viewpoint can be summarized by the statement: “It is better to let ten guilty men go free than to imprison an innocent man.” Do you agree with this statement? Or do you feel that imprisoning an innocent man on occasion is a small price to pay to convict the guilty?
2. Often, the bigger question is how *much* process is due. What factors do you think matter in determining how much process an individual should have? Should there be different levels of process depending on what right (such as life, liberty, or property) is at stake?
3. In Chapter 4, you learned about the legal history of Afghanistan. Recall the legal systems in place during the communist regimes and Taliban rule, where there were few due process protections in place. What impact did this have on justice in Afghanistan?

For Further Consideration

The origins of the term “due process” in English comes from the Magna Carta. King John of England agreed to the Magna Carta in order to make peace with a group of rebel noblemen. The document placed a number of limitations on the King’s power. Clause 39 of the Magna Carta states:

No freeman shall be arrested or imprisoned or disseised⁹ or outlawed or exiled or in any other way harmed. Nor will we [the king] proceed against him, or send others to do so, except according to the lawful sentence of his peers and according to the Common Law.

Note, however, that the phrase “due process of law” appears nowhere in the text. The early American states included a due process clause in the United States Constitution, but few other countries use the phrase “due process” in their Constitutions. Instead, most countries use the language “in accordance with law,” rather than refer to “due process.”

Only countries which expressly modelled their constitutions on U.S. precedents, such as Liberia or Puerto Rico, inserted the words “due process of law.” When the United Kingdom Parliament considered adding the phrase “due process” to a bill creating Ireland’s government, the Parliament rejected the addition on the grounds that “Nobody seemed to understand what . . . [the words “due process of law”] really meant.” Lawmakers rejected similar proposals for the Australian Federal Constitution of 1898, the Government of India Act 1935, and the Indian Constitution of 1946. Canada and Israel dispensed with the idea entirely, whereas Pakistan merely referred to “in accordance with law.”¹⁰

Questions:

1. The English translation of the Constitution uses the phrase “due process,” but sometimes Afghans also use the phrase “in accordance to provisions of law.” Is there a difference? Does “due process” mean something more than “in accordance with law”?
2. Choose a country and look up its constitution. Does the country’s constitution contains a clause similar to Article 27 in the Afghan Constitution? How does it differ?
3. While the phrase “due process” has origins in common law, many of the fundamental principles that underlie the concept also have significant roots in Islam. For instance, Islamic law provides for notice of the claim, the right to remain silent, the presumption of innocence, and a fair and public trial before an impartial judge. Why is due process important?¹¹

1.2.2. Equality before the law

Equality before the law is the principle that the law must treat everyone equally. In other words, discrimination is prohibited throughout the judicial proceedings. For instance, the courts should not treat

⁹ *Disseised* means to wrongfully remove a person from his or her property.

¹⁰ For a more detailed discussion of the history of constitutional due process clauses, see “The Trouble History of the Constitutional Due Process Clause,” in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld & András Sajó 930–933 (2012), 930–933.

¹¹ For a discussion of due process in Islamic criminal law, see Sadiq Reza, “Due Process in Islamic Criminal Law,” *George Washington International Law Review* (2013): 1.

someone differently because someone is rich or comes from an important family. Rather, before the law, all individuals are the same.

The Constitution recognizes the right of all Afghan citizens to equality before the law:

Constitution

Article 22

“Any kind of discrimination and distinction between citizens of Afghanistan shall be forbidden. The citizens of Afghanistan, man and woman, have equal rights before the law.”

Article 22 of the Constitution recognizes the right of all to equality before the law. The Constitution also clarifies that courts or government officials cannot use gender as a reason to justify different treatment. The law must treat women and men equally.

Reading Focus

As you read the following overviews of the Civil Procedure Code and Criminal Procedure Code, focus on how the specific provisions achieve the larger goals of due process and equality before the law. How do these procedural laws ensure that individuals are treated fairly by the courts?

2. CIVIL PROCEDURE

2.1. What is civil procedure?

When two parties, whether individuals or companies, have a disagreement, they may ask a court to settle their dispute. When the parties bring their dispute to a court, the dispute is then called a **lawsuit** or a **case**. The process of taking the dispute to court is called **litigation**. The parties to litigation can be individuals, companies, or even the government. For example, if the government takes a private citizen’s land without paying just compensation as required under Afghan law, a private citizen can initiate a lawsuit to ask a judge to settle the matter. Just as custom and tradition govern *shuras* and *jirgas*, litigation is regulated by a set of rules, known as civil procedure.

Civil procedure refers to the procedural laws that govern the process of litigation in civil disputes. Civil procedure includes procedural laws that describe what disputes courts can hear, how parties submit their dispute to the court for a resolution, and how the court should notify parties about the lawsuit. Civil litigation typically refers to disputes between private parties, whereas in criminal law, the government files a case against an individual for a crime.

2.2. Overview of Civil Procedure Code

Courts of law in Afghanistan operate according to a codified set of rules and regulations. The 1990 Civil Procedure Code provides an extensive set of formal rules that parties and the court must follow in the course of litigation. The Civil Procedure Code governs all phases of the legal process, including how to bring a case to court, how to file court documents, how to determine which courts have authority to consider a particular case, and how to file an appeal.

The rest of this section provides an overview of Civil Procedure Code, which governs the process for a civil case. As we follow the various steps in a civil case, we will consider the case of Daoud and Pamir and follow their lawsuit through the various steps of the trial.

Daoud and Pamir are neighbors in Kandahar. Recently, Daoud built a new shed near the edge of his property, about fifty feet from Pamir’s house. After Daoud built the shed, Pamir approached Daoud and

told him that he believed the shed had been built on Pamir’s property, not on Daoud’s land. Pamir asks Daoud to remove the shed, but Daoud refuses. Pamir decides to bring a lawsuit to force Daoud to remove the shed.

Since Pamir decided to begin the lawsuit, he is the **plaintiff**, or the party who is asking the court for relief. Daoud is the **defendant**, since he is the party *against* whom the the plaintiff seeks relief. While both Pamir and Daoud are individuals, plaintiffs and defendants can also be a group of individuals, a company, or a government. A **claim** refers to the grounds that entitle a plaintiff to bring a suit. In this case, the claim is that Daoud is wrongfully occupying Pamir’s property.

2.2.1. First steps

When two parties have a dispute, they might first try to settle the disagreement between themselves without involving the courts. But if they fail to reach a settlement themselves, and if they decide not to use traditional institutions like *shuras* or *jirgas*, they may decide to go to the courts. What are the first steps required to initiate a lawsuit? How do the parties inform the court that they would like it to settle their dispute? How does the court determine that it has the power to resolve the dispute?

Initiating a claim

The first step in a lawsuit is for the plaintiff to file an official request letter. The request letter can be submitted either directly to the Primary Court or the Hoqooq Department.¹² The plaintiff’s legal request must contain basic information about the parties to the case, including the plaintiff’s name, the name of the plaintiff’s father, and the plaintiff’s place of residence, occupation, and national identification number.¹³

The request letter must also contain background information about the claim, including a summary of the purpose of the claim.¹⁴ The letter also specifies the requested **remedy**, or the means through which the plaintiff requests the court to enforce a right. For instance, Pamir might ask that the court command Daoud to remove the shed. If the claim pertains to moveable property, the request letter must contain a declaration of the nature, type and price of the subject of the claim.¹⁵ If the claim regards a piece of land, as is often the case in Afghan courts, the request letter must contain information about the location and size of the land.¹⁶

For example, in order to initiate a lawsuit against Daoud, Pamir might file the following official request letter, written on an official government form:

		Serial No. 71911	
		Date: 24/02/2017	
PETITIONER		DEFENDANT	
Name: Pamir		Name: Daoud	
F/name: Hakim	Grand F/name: Paiman	F/name: Abdullah	Grand F/name: Kabir

¹² Civil Procedure Code, Articles 6, 12, 13. In cases against the government over property issues, the plaintiff could also send the request letter to the Government Cases Department of the Ministry of Justice. If the plaintiff does not accept alternative dispute resolution through the Ministry of Justice, the Ministry then refers the request letter to the competent court. *See* Civil Procedure Code, Article 125.

¹³ Civil Procedure Code, Article 13.

¹⁴ Civil Procedure Code, Article 13.

¹⁵ Civil Procedure Code, Article 13.

¹⁶ Civil Procedure Code, Article 13.

Address: Shahr-e-Nah, District 6, Kandahar-Herat Road, Kandahar

Address: Shahr-e-Nah, District 6, Kandahar-Herat Road, Kandahar

To: Director of District, Civil Tribunal of Primary Court of Herat

My property is registered with a legal deed of date 09/11/1983 in Kandahar. The property is 1000 square meters located across the street from Al-Jadeed Market. On 12/11/2016, Mr. Daoud, son of Abdullah, grandson of Kabir, built an illegal shed on my land. I want him to be summoned to court and ordered to remove the shed on my land.

Sincerely,
Pamir

After the plaintiff files the request letter, the court then informs the defendant that he has been sued. Once the defendant has received notice of the claim against him, he must decide whether to contest the case or admit wrongdoing. If the defendant denies the truthfulness of the claim and refuses to grant the plaintiff the requested relief, the case proceeds to the next phase.

In some cases, the defendant may also file a counterclaim against the plaintiff, which asserts the plaintiff somehow wronged the defendant and should pay damages. For instance, after Pamir files a legal request letter against Daoud, Daoud might file a separate legal request letter against Pamir, perhaps arguing that Pamir trespassed onto Daoud's property when Pamir came to inspect the new shed.

Grounds for dismissal

In the next phase of litigation, the defendant can make **preliminary objections**, which are challenges to either the court's competence to hear the case or to the propriety of the claim. If the defendant succeeds in making a preliminary objection, the court either dismisses the case or transfers it to another court. Procedural rulings at this stage are called *qarar*.¹⁷

The Civil Procedure Code establishes a number of different preliminary objections that the defendant can make to challenge the court's authority to hear the case.¹⁸ One of the most important preliminary objections is that the court lacks jurisdiction to hear the case.

Jurisdiction is the official power to make legal decisions and judgments. To decide a case, the court must have the power, right, or authority to interpret and apply the law, either under the Constitution or some statutory law. In other words, the court must have *jurisdiction*.¹⁹ If the court does not have jurisdiction, the court will dismiss the claim and the plaintiff must file it in another court. A court without jurisdiction is powerless to decide the case.

Courts may also have jurisdiction that is exclusive or concurrent (shared). Where a court has exclusive jurisdiction over a territory or a subject matter, it is the only court that is authorized to address that matter. Where a court has concurrent or shared jurisdiction, more than one court can possibly adjudicate the matter. Where a concurrent jurisdiction exists in a civil case so that two or more courts have jurisdiction, a party may attempt to engage in "forum shopping." Forum shopping means that the plaintiff brings the case in the court that he thinks is most likely to rule in his favor.

¹⁷ Civil Procedure Code, Article 267.

¹⁸ Civil Procedure Code, Article 21.

¹⁹ Civil Procedure Code, Article 21.

For instance, after Daoud receives notice from the court that Pamir filed a request letter against him, Daoud would have the opportunity to raise preliminary objections to Pamir's claim. Imagine that Pamir filed the request letter at the Primary Court in Herat. Daoud has property in both Kandahar and Herat, and Pamir thinks that the Herat Primary Court would be more sympathetic to his claim, so he tries to initiate the lawsuit there. Consider the following provision in the Civil Procedure Code:

Civil Procedure Code

Article 81

- (1) Civil claims are resolved in the defendant's place of residence.
- (2) In case the defendant possess multiple residences, civil claims against him/her are heard in such court in whose jurisdiction the defendant resides while making the claim.

Daoud's place of residence is in Kandahar, not Herat, so Daoud could make a preliminary objection before the first hearing that the Herat Primary Court lacks jurisdiction to hear the case. The Court would then hear arguments from Daoud and Pamir on whether the court has jurisdiction. Pamir might argue that Daoud has a second house in Herat, so the court properly has jurisdiction. Daoud might respond that he lives and resides in Kandahar, so only the Kandahar Primary Court can hear the claim.

The Court would then issue a legal ruling and announce it to Daoud and Pamir. In this case, the Herat Primary Court would likely announce that it lacked jurisdiction to hear the claim. Pamir could then file another request letter in the Primary Court in Kandahar, where the court has jurisdiction to hear the case as Daoud is a resident of Kandahar.

The defendant must make a timely objection in order to challenge the court's jurisdiction. Consider the following provision:

Civil Procedure Code

Article 88

If either of the parties to the claim has an objection to the jurisdiction of the court to hear the claim, it shall present its objection to the same court before the commencement of the hearing; otherwise, the jurisdiction of the court is considered accepted.

For example, imagine that Daoud failed to make a preliminary objection that the Herat Primary Court lacked jurisdiction. The court then held a hearing. After the hearing, Daoud's lawyer suddenly remembers that Article 81 requires claims to be resolved at the place of residence and files a preliminary objection. The court would reject Daoud's objection, however, because the objection is too late. Since the court already held the hearing, the jurisdiction of the court is considered accepted. In other words, Daoud's objection is considered **waived**. To waive means to intentionally or voluntarily relinquish a known right or engage in conduct that allows the court to infer that the individual has surrendered the right.

Recusal of judges

In order for the parties to have a fair trial, the case must be heard by a disinterested judge. A judge who is related to one of the parties or who has a financial or personal interest in the outcome of the case might not be impartial. In such instances, the Civil Procedure Code either requires or enables judges to recuse himself or herself from the case. **Recusal** means to excuse oneself from a case because of a possible conflict of interest or lack of impartiality.

The Civil Procedure Code describes a number of circumstances where the law *requires* a judge to recuse himself or herself. In addition, the judge *may* recuse himself or herself for reasons other than those outlined in the Civil Procedure Code.²⁰ The table below summarizes the situations where the Civil Procedure Code requires the judge must recuse himself or herself from the case:

Recusal of Judge is Required²¹
<ul style="list-style-type: none"> • If the judge is an interested party in the case before the court. • If the claim is related to the judge’s principals and proxies, husband, wife, or their relatives. “Relatives” means brother and sister and their respective children (nephew/niece), uncle and aunt (on both the mother’s side and the father’s side), father-in-law, and mother-in-law. • If the judge has written or signed a document related to the case before the court. • If the judge, acting as a prosecutor, has already made a judgment as to the subject matter of the claim or, as an expert or witness, has already expressed an opinion. • If there is a conflict between the president and the members of the court or one of the parties to the case. • If there is an existing enmity between the president and the members of the court or one of the parties to the case. • If the judge is related to other judges on the panel.

For example, consider that one of the judges assigned to Pamir’s and Daoud’s lawsuit is Jamila. Jamila is Daoud’s aunt. Pamir could then file a written demand for the judicial panel to reject the selection of Jamila as a judge for the dispute.²² The judicial panel would then examine reasons for the rejection and issue a decision.²³ Since Daoud is related to Jamila, she must recuse herself from the case under the Civil Procedure Code.

Conversely, imagine that one of the judges is Ibrahim. Ibrahim and Pamir are close childhood friends. Ibrahim and Pamir are not related to each other, but the two are extremely close. Daoud could still file a written demand to reject Ibrahim as a judge, but the Civil Procedure Code does not require recusal in such a situation. Daoud might also want to carefully consider whether he should request Ibrahim’s removal, as the Civil Procedure Code enables the court to levy a fine of up to 3,000 Afghani if the court determines that Daoud requested the rejection in bad faith.²⁴

Recusal Required?

Consider the situations below describing different judges and their relations to Pamir and Daoud. Is recusal required under the Civil Procedure Law? If it is not, does the party have a good reason to argue that the judge should recuse himself or herself anyways? Why or why not?

1. Judge Inaara married Daoud’s brother, Ikhlas. Daoud and Ikhlas, however, had a bad argument several years ago. They have not spoken to each other since. Judge Inaara has never spoken to Daoud.
2. Judge Jafaar is the son of Pamir’s uncle.
3. Pamir, who is also the plaintiff, is chosen to be a judge for the lawsuit between Pamir and Daoud.
4. Pamir personally dislikes Judge Durkhany and wishes to remove her as a judge.

²⁰ Civil Procedure Code, Article 67.

²¹ Civil Procedure Code, Articles 65 & 66.

²² Civil Procedure Code, Article 71.

²³ Civil Procedure Code, Article 72.

²⁴ Civil Procedure Code, Article 77.

5. In a different lawsuit, Judge Inzir is suing Pamir over a contract dispute. Now, Judge Inzir has been selected as a judge for the case between Pamir and Daoud.

2.2.2. Notice, summon, and appearance

In order for the judge to question the parties and arrive at a fair and just decision, the parties must be present. After hearing arguments from each party, the court is better equipped to issue a well-informed decision. In addition, a party who is not present during the court proceedings does not have the opportunity to challenge the other party's claims and may be at a serious disadvantage. For these reasons, the Code requires the court provide notice to defendants about any litigation and then requires both the plaintiff and defendant to appear in court.

Notice to defendant

Above, we assumed that the court had notified Daoud that Pamir had filed a request letter against him in court. Imagine, however, that Daoud had never received such notice. One day, Daoud receives the following message:

Dear Sir:

We write to inform you that the Court has determined that the property in Kandahar on which you built a shed rightfully belongs to Mr. Pamir Sahar. The Court reached this decision after Pamir filed a lawsuit against you. Because thirty days have passed from the date of the Court's decision, you are not entitled to an appeal and you must vacate your land immediately.

Sincerely,
The Primary Court of Kandahar

While Pamir had told Daoud that he thought Daoud built the shed on Pamir's land, Daoud was unaware that Pamir had initiated a lawsuit. Even though Daoud might have documents and witnesses to prove that the land actually belongs to him, it is too late. The court has already reached a final, binding decision. Daoud no longer has a right to appeal because thirty days have passed. Is this a fair result?

To avoid that scenario, the Civil Procedure Code requires **notice**. Notice is a legal concept describing a requirement that a party be aware of any legal process affecting the party's rights, obligations, or duties. The Civil Procedure Code, Article 128, requires that the court directly inform the party to a claim or summon him or her through relevant authorities.

To **summon** means to command someone to appear in court through the delivery of a summons form. If a person does not appear in court on a specified day, the court can summon them to appear.²⁵ The Civil Procedure Code describes the steps the court must take to summon an individual to court. For instance, the court should request "in any manner possible, including telephone and telegraph, the presence of the parties to the claim, witnesses and experts."²⁶ The court also delivers a summons form to the individual with relevant information about the case, including the name and address of the court, the parties' addresses, the date and time of appearance, and a description of the issues in the lawsuit.²⁷ The individual must then sign and return the form. If the individual fails to appear, the court may issue a request for his

²⁵ Civil Procedure Code, Article 130.

²⁶ Civil Procedure Code, Article 132.

²⁷ Civil Procedure Code, Article 131.

or her presence in the newspaper or on the radio.²⁸ As a last resort, the court may issue a judgment without the individual's presence.²⁹

Discussion Questions

1. What are the most reliable ways of informing a person in Kabul about a court claim? Would this differ in the provinces? What might be the most reliable way to provide notice in rural areas?
2. Since the Civil Procedure Code dates back to 1990, some of its provisions might seem outdated today, such as the use of telegraphs to provide notice. How might technology improve the court's ability to inform a party of a pending claim? Should courts use Facebook or the internet to provide notice? Why or why not?

Failure to appear

When a plaintiff files a claim in court, it is his or her responsibility to pursue that claim. Within thirty days of filing a claim, the plaintiff must "follow his/her application in the court" or else the claim will be dismissed.³⁰ If the plaintiff misses the first hearing of his or her claim, the plaintiff gets one more chance to appear. If the plaintiff, however, misses a hearing for the second time and does not inform the court of a valid excuse for the absence, then the plaintiff's claim is dismissed.

If a defendant fails to appear, despite the court's attempts to provide notice or summon the defendant, the case can still proceed. The court may also issue judgments *in absentia* regarding the defendant. "In absentia" is a Latin phrase meaning "in one's absence." For a court to issue a decision "in absentia" means it will issue a decision without the presence of one of the parties. The court may also be required to appoint a representative to advocate on behalf of the absent defendant's interests, such as a close relative.³¹ If the court is unable to contact the defendant's relatives, the court will assign the civil prosecutor to represent the absent defendant.³²

The Mysterious Case of Missing Pamir and Daoud

Think back to the case between Pamir and Daoud. Using the rules introduced above, consider the following situations:

1. The court has been unable to contact Daoud, but the court discovers that Daoud's brother lives nearby. What could the court do?
2. Pamir misses the first hearing. The court schedules a second hearing, and Pamir fails to appear again. How would the court respond?
3. The court cannot find Daoud, and it appears that Daoud has fled Kandahar to avoid the trial. Daoud has no relatives in Kandahar. Who would the court appoint to represent Daoud in the claim?

2.2.3. Pleadings

Before the plaintiff and defendant appear in person before the court, both the plaintiff and the defendant prepare **pleadings**, which are the formal written documents prepared by lawyers that state the parties' basic positions.³³

²⁸ Civil Procedure Code, Articles 146 & 147.

²⁹ Civil Procedure Code, Articles 146 & 147.

³⁰ Civil Procedure Code, Article 153.

³¹ Civil Procedure Code, Article 158.

³² Civil Procedure Code, Articles 159.

³³ Civil Procedure Code, Article 213.

The plaintiff submits the first pleading when he or she files the legal request letter, as described above. The pleading describes the plaintiff's version of the facts and specifies the requested remedy. The Court reviews the plaintiff's version and asks for any corrections if necessary. The Court then sends a copy to the defendant. The defendant must submit a written response, which enables the defendant to explain why the plaintiff should not prevail. The defendant's written response may offer additional facts to show the case should be decided in his or her favor, or plead an excuse. After the defendant submits a written response, the court sets a date for the trial proceedings.³⁴

2.2.4. Trial

The preceding sections address the pre-trial phase of litigation: filing a legal request letter, the bases for preliminary objections, providing notice, and summoning the parties to appear. This section turns to the procedures that govern the trial phase of litigation. In the trial phase, the court hears the arguments advanced by each of the parties, evaluates the evidence, and announces a decision.

The trial phase of litigation is described using two terms: the judicial proceeding and the judicial discussions. The **judicial proceeding** refers to the first part of the trial, where the judges and parties enter the courtroom and the court receives evidence and proof documents. The **judicial discussion** refers to the final part of the trial where parties present statements and summarize their arguments.

During the trial, the court receives and evaluates evidence from both parties to help determine its ultimate judgment. As the court receives and evaluates evidence, the court must follow rules that govern the submission of evidence and expert testimony to the court.

Format of trial

On the announced day of the judicial proceedings, both the plaintiff and defendant appear before the judges. First, the court reads aloud the written pleadings of the plaintiff and defendant. Then, each party then has a chance to further explain his or her claim and present any relevant documents. The plaintiff speaks first, and the defendant has time to explain his or her response to the plaintiff's claim.³⁵ The judicial panel then questions the parties about any issue that remains unclear or any points of conflict between the plaintiff and defendant.³⁶ A secretary keeps a record of the proceedings.³⁷ During this beginning phase of the trial, the parties must submit all their evidence.³⁸

After the judicial panel investigates and scrutinizes the case, the presiding judge may demand additional explanations from the parties.³⁹ If there are no further explanations, the presiding judge ends the investigation of the case and proceedings with judicial discussions.

The judicial discussions comprise the final part of the trial, after all evidence has been submitted. During this period, all parties give formal statements to the judicial panel. The plaintiff first gives a statement, and then the defendant gives a statement.⁴⁰ Afterwards, the court may also hear statements from an interested third party or involved prosecutor, as well as statements on other issues that assist with a speedy trial.⁴¹ No new evidence can be introduced at the judicial discussions.⁴²

³⁴ Civil Procedure Code, Article 212.

³⁵ Civil Procedure Code, Article 213(2).

³⁶ Civil Procedure Code, Article 213(3).

³⁷ Civil Procedure Code, Article 213(4).

³⁸ Civil Procedure Code, Article 238.

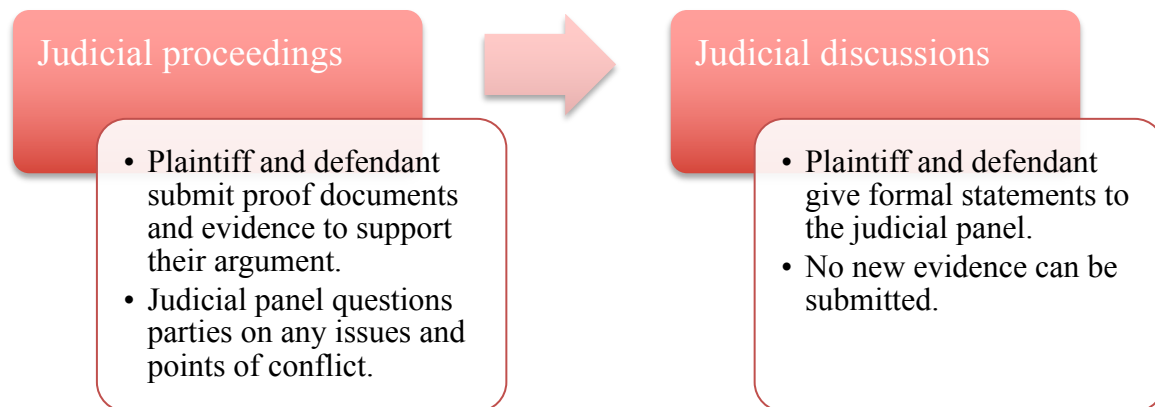
³⁹ Civil Procedure Code, Article 236.

⁴⁰ Civil Procedure Code, Article 237.

⁴¹ Civil Procedure Code, Article 337.

⁴² Civil Procedure Code, Article 238.

After the judicial discussions and the plaintiff and defendant finish their statements, the presiding judge announces the end of the trial.



Evidence

In order to demonstrate or prove that an assertion is true, both the plaintiff and defendant will present evidence, otherwise referred to as “proof documents” in the Civil Procedure Code. **Evidence** is something that tends to prove or disprove the existence of an alleged fact and may include oral testimony, documents, and tangible objects. Evidence can come in a variety of forms, depending on the type of claim at stake.

For example, in a property case like the one between Pamir and Daoud, Pamir might present the deed to his property, photographs of his land and the shed, and oral testimony from neighbors in order to prove that Daoud’s shed is on his property. Daoud might present other evidence that proves that the land actually belongs to him, such as the deed to his property and photographs of how his family used the land over the years.

The Civil Procedure Code describes three sources of proof: (1) documents, (2) testimony of witnesses, and (3) evidences. **Documents** are written, printed, or electronic matter, such as the deed to Pamir’s property or an email between Pamir and Daoud about the dispute over the land. **Testimony** refers to an oral or written statement. Either **lay witnesses**, who have first-hand knowledge of the facts of the case, or **experts**, who testify based on their expertise, may give testimony. For example, a neighbor of both Pamir and Daoud may testify that he remembers that the Pamir’s property included the location of Daoud’s shed. An expert on the technique, profession, and science of surveying may testify that land belongs to Daoud based on a land survey of the two properties.⁴³

The third category, **evidences**, refers to other types of proof that are neither documents or testimony. For example, if Daoud had destroyed a fence belonging to Pamir in order to build the shed, the broken fence posts from the destroyed fence might fall into this third category if Pamir presented the broken fence posts as evidence in court.

Source of Proof	Description
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⁴³ See Civil Procedure Code, Article 276 (“In claims related to land, the court can seek information from the experts about the price of land, determination of limits, area and structural matters and in case of the emergence of difference between the parties to the claim.”)

Documents	A piece of written, printed, or electronic matter that provides information or evidence. May include either “official documents” or “customary documents.” ⁴⁴
Testimony of Witnesses	A formal written or spoken statement given in a court of law. May come from witnesses, who have first-hand knowledge of the facts of the case, or experts, who testify based on their expertise.
Evidences	Other tangible items that can be used to prove or disprove facts.

In order for the court to consider evidence that supports or undermines a claim, the evidence must be admissible. The Civil Procedure Code contains a number of admissibility criteria that govern whether a court will consider a piece of evidence.

First, the evidence must be submitted to the court in a certain time and manner to be considered. Generally, parties must present evidence or “proof documents” as part of the written pleadings, before the trial begins. Once the trial begins, the court may only accept proof documents that were not part of the written pleadings if it was not possible to deliver the documents at the time of the written pleadings or if the party has another reasonable excuse.⁴⁵

Second, the evidence must be authentic. For written documents, the Civil Procedure Code establishes a number of requirements that help ensure a document is reliable. For instance, official documents are generally valid if they are clear of forgery and falsification and if they have been safely recorded in a government office.⁴⁶ Customary documents are valid if they have been signed, or if the individual’s seal or fingerprint has been placed on the document, and if the signature, seal, or fingerprint can be confirmed.⁴⁷

For testimony, the Civil Procedure Code similarly provides a number of rules to ensure that witness provide true and accurate testimony to the court. Witnesses must give their testimony “in the presence of the parties” to ensure that information is available on an equal basis⁴⁸ and their identity must be revealed to all parties.⁴⁹ Expert testimony must be given by professionals who have sufficient expertise and experience in the specific field in which they testify.⁵⁰

Burden of proof


Trials are not like mathematics or science. In other words, judges often have to decide cases based on subjective criteria, such as whether a witness appears to be telling the truth. In some cases, both the defendant and the plaintiff might have plausible arguments. Who wins the case if both sides have a persuasive case? The answer depends on who bears the “burden of proof.”

Burden of proof refers to a party’s duty to prove a disputed assertion or charge. In a civil trial, the plaintiff bears the burden of proof if the defendant denies the claim.⁵¹ This means that the plaintiff must both produce evidence and persuade the judges that the court should grant his or her claim. Since Pamir is

⁴⁴ Civil Procedure Code, Article 282.
⁴⁵ Civil Procedure Code, Article 216.
⁴⁶ Civil Procedure Code, Article 287.
⁴⁷ Civil Procedure Code, Article 289.
⁴⁸ Civil Procedure Code, Article 322.
⁴⁹ Civil Procedure Code, Article 323.
⁵⁰ Civil Procedure Code, Article 4.12.
⁵¹ Civil Procedure Code, Article 280.

the plaintiff in our case, he would bear the burden of proof. Because Pamir bears this burden, if both Pamir and Daoud present equally plausible claims, Daoud would win the case. Daoud could provide no evidence and still win if Pamir fails to persuade the judges that the land actually belongs to him.

The burden of proof is separate from the standard of proof. The **standard of proof** refers to the degree or level of proof required for the party to prevail. The Civil Procedure Code itself does not specify what standard of proof is required. In other legal systems, however, courts apply a variety of standards of proof, depending on what standard is required under the law for the particular circumstances of the case. For instance, if the standard of proof is a preponderance of the evidence, the plaintiff will have to prove that his or her version of the facts is more likely than not. There are various levels of standard of proof, as the chart below shows. Each specifies how much the plaintiff must persuade the court in order to succeed.

	Standard of Proof	Description
Least demanding  Most demanding	Preponderance of the Evidence	Must establish more evidence in your favor than the other side establishes in its favor. For example, if the plaintiff can prove his or her case by 51%, the plaintiff wins.
	Clear and Convincing Evidence	Must establish the truth of a disputed fact by a high probability. The fact must be proved to be highly probable or reasonable certain.
	Beyond a Reasonable Doubt	Must establish proof of such a convincing character that a reasonable person would not hesitate to act upon it in the most important of its own affairs.

What factors should determine what standard of proof the court should apply? Typically, the standard of proof is lower in a civil case (such as a “preponderance of evidence” standard) than in a criminal case (which usually requires proof of guilt “beyond a reasonable doubt”). Do you think the difference is justified?

2.2.5. Resolution of dispute

Litigation ends in one of two ways: settlement or judgment. In a **settlement**, the parties reach an agreement to the pending claim without the court’s participation. If the parties cannot reach a settlement, however, the court will issue a **judgment**, which is the court’s final determination of the rights and obligations of the parties in a case.

Settlement

Parties may reach a settlement at any point in the litigation before the court issues its judgment. Once the parties reach a settlement, they prepare a written agreement and the dispute ends.⁵² Judges may also play a role in encouraging the parties to settle. If a judge senses a willingness on the parties for settlement, he or she might recommend that the parties meet with a conciliator to discuss settlement.⁵³

There may be significant benefits to settlement. First, even though a party may believe he or she has a strong case, the party cannot guarantee that the judge will rule in his or her favor. For example, although Daoud might believe the land rightfully belongs to him, it may be cheaper for him to pay a nominal fee to Pamir to settle the dispute than continue to pay attorney fees to defend the lawsuit and risk an unfavorable judgment. Second, a settlement agreement may enable the parties to create a mutually favorable outcome.

⁵² Civil Procedure Code, Article 231.

⁵³ Civil Procedure Code, Article 230.

In contrast, a court's judgment imposes an all-or-nothing result. Settlement enables parties to have more flexibility in finding a solution. For instance, Pamir and Daoud could agree through a settlement to share the shed equally, so that they both can use the shed for storage. A court would not be able to issue such a solution as a judgment under the law.

Judgment

If the parties cannot agree to settle their dispute, the court will continue with the proceeding and issue a decision.⁵⁴ After reviewing the pleadings, relevant proof documents, and oral statements made by the parties during the judicial discussions, the judges deliberate privately and issue a decision. Substantive decisions by the court are called *faisla*, as opposed to *qarar*, or procedural decisions, made at an earlier stage.⁵⁵

All members of the judicial panel must participate in the decision, and a majority of judges must agree in order to issue a decision.⁵⁶ At least two judges on a three-judge panel must agree to issue a decision. A judge who disagrees with the conclusion of the majority must file a dissenting opinion that explains his or her reasons for not joining the majority.

The judges announce the decision publicly as well as provide a copy of the decision to the parties in written form.⁵⁷ The written decision includes an introduction, description of the facts and claims of the case, the judges' reasoning, and conclusion.⁵⁸

Discussion Questions

1. What is the difference between a settlement and a judgment? Why might parties agree to settle their claim before the court makes a decision?
2. Why should a judge announce the decision publicly? In some countries, courts also publish all decisions of judges so that individuals can access and read the decisions in other cases. What would be the benefits and disadvantages of publishing all decisions in a civil law country like Afghanistan?

2.2.6. Appeal

After the court issues a judgment, a dissatisfied party may **appeal** or ask the Court of Appeals to review the lower court's decisions. Appeals courts are split according to subject matter so that an individual must appeal to the court that fits the subject of their case. There are five *dewans* in the Court of Appeals: General Criminal, Public Security, Civil and Family, Public Rights, Commercial, and Juveniles. The Court of Appeal may affirm the Primary Court's decision, reverse the trial court's decision, or remand the case to the Primary Court based on that court's legal reasoning of the decision and the facts of the case.

Grounds for appeal

In order to have the Court of Appeals reconsider the lower court's judgment, the party must have a valid reason to appeal the decision. The Civil Procedure Code defines the proper grounds on which a party may seek appeal:

⁵⁴ Civil Procedure Code, Article 232.

⁵⁵ Civil Procedure Code, Article 246.

⁵⁶ Civil Procedure Code, Article 250.

⁵⁷ Civil Procedure Code, Article 42 & 254.

⁵⁸ Civil Procedure Code, Article 254–258.

Civil Procedure Code

Article 399

The grounds for invalidity of a decision are as follows:

1. Lack of the essential pillars of justice in the decision.
2. Absence of capacity on the part of one of the parties to the claim to litigate.
3. Issuance of a judicial decision without the possibility of proof or against objective reality regarding the subject matter of the claim.
4. Issuance of a decision by a judicial panel without jurisdiction.
5. Issuance of a decision by a court without jurisdiction.

Article 400

The situations where a decision is overruled are as follows:

1. The decision was not based on evidence.
2. Absence of explanation for situations which are necessary to clarify the case.
3. Non-conformity for situations which are necessary to clarify the case.
4. Inappropriate use of the rules of the law.
5. Issuance of a decision of dismissal due to absence of the plaintiff.
6. Other decisions that can legally form the grounds for overruling the decision.

For example, if the Kabul Primary Court still found that it had jurisdiction over Daoud, even though his place of residence was Kandahar, Daoud might file an appeal on the grounds that the court issued a decision without jurisdiction. If the court had issued a judgment against Pamir without explaining the rationale for its decision, Pamir might appeal on the grounds that there was an absence of explanation for situations which are necessary to clarify the case.

Filing an appeal

To appeal a judgment, the appealing party (known as the **appellant**) must file an official request letter with the Court of Appeals, similar to the legal request letter filed to initiate litigation. The request letter for an appeal describes the judgment of the lower court.⁵⁹ After the appealing party files a request letter, he or she must then file a detailed objection that summarizes the trial court's decision, the reasons that the trial court reached an erroneous decision, and supporting documents.⁶⁰

In limited cases, a party may file an appeal based on a preliminary objection, known as an **interlocutory appeal**, before the court issues a judgment. An interlocutory appeal enables a party to appeal a ruling on a preliminary objection and takes place before the court issues a judgment on the merits of the case. As discussed in section 2.2.1.2, the defendant may challenge the court's ability to hear a case through preliminary objections. Once the trial court has ruled on the preliminary objections, a party dissatisfied with the ruling has twenty days to present its objections to the superior court.⁶¹ For example, if the Kabul Primary Court found that it had jurisdiction over Daoud—even though Daoud does not reside in the city—Daoud could challenge the trial court's ruling through an interlocutory appeal.

Interlocutory appeals help ensure a speedy and efficient legal system. If the Civil Procedure Code did not allow interlocutory appeals for preliminary objections, the parties could spend a great deal of time, energy, and money litigating a case, only for the appellate court to determine that the trial court did not have jurisdiction. Allowing interlocutory appeals for preliminary objections improves judicial economy.

⁵⁹ Civil Procedure Code, Articles 369,.

⁶⁰ Civil Procedure Code, Article 377 & 378.

⁶¹ Civil Procedure Code, Article 23.

Considering an appeal

The Court of Appeals then reviews the detailed objection and hears arguments from both parties in order to evaluate the trial court's decision. The appellate court uses the detailed objection to prepare a report, which is read at the commencement of the appeals proceedings.⁶² After the report is read, the appellate court then hears the explanations of the parties involved in the case.⁶³

While the appellant's detailed objection may help the appellate court form its decision, the appellate court may reverse the trial court for reasons *not* contained in the appellant's written objection.⁶⁴ The Code permits the appellate court to review all of the lower court's decisions, including whether the lower court correctly applied the law and whether the evidence submitted supports the trial court's decision.⁶⁵

The appellate court can decide a case in one of three different ways. If the appellate court finds that the trial court did not err, then the trial court's judgment is affirmed and the parties must respect its decision.⁶⁶ If, however, the appellate court finds that the trial court erred, it can **remand** or send the case back to the trial court for a retrial or more fact-gathering.⁶⁷ The appellate court can also **reverse** the decision of the trial court.⁶⁸

If the losing party in the case after the Court of Appeal's decision wishes to appeal, he or she may do so to the Supreme Court, although the Supreme Court will only review the decision for compliance with the law. In addition, according to Article 404 of the Code, the appeals court's decision to overrule the lower court's decision "is not subject to complaint and is final." A decision by the Supreme Court is final and cannot be appealed.

3. CRIMINAL PROCEDURE

3.1. What is criminal procedure?

Criminal procedure refers to the body of law that sets out the rules and standards that courts follow when adjudicating criminal lawsuits. In other words, criminal procedure is the set of rules that govern the mechanisms under which the government investigates, prosecutes, adjudicates, and punishes crimes.

The goal of criminal procedure is to ensure that the government treats the accused person fairly and that the criminal justice system is impartial, effective, and efficient. To explore how criminal procedure achieves these goals, we will begin with an examination of some major principles of criminal procedure: the presumption of innocence, the principle of legality, and the right to counsel. We will then further examine how the Criminal Procedure Code functions to achieve these goals.

Discussion Questions

Unlike a civil lawsuit, the government is *always* one of the parties in a criminal case. In a criminal lawsuit, a defendant's liberty may be at stake, rather than a property interest. Should this cause courts to handle criminal cases differently than civil cases? Why or why not? What kind of different procedures do you think are warranted?

⁶² Civil Procedure Code, Article 392.1.

⁶³ Civil Procedure Code, Article 394.

⁶⁴ Civil Procedure Code, Articles 393.2.

⁶⁵ Civil Procedure Code, Article 393.1.

⁶⁶ Civil Procedure Code, Article 398.4.

⁶⁷ Civil Procedure Code, Article 398.1 & 398.2.

⁶⁸ Civil Procedure Code, Article 398.3.

3.1.1. Presumption of innocence

Consider the following scenario. Suppose you have just finished your last exam of the semester when the president of your university calls you into his office. He tells you that another student—whom he cannot name—has accused you of cheating on your exam. The president admits that his only proof is the anonymous student’s tip. He tells you that unless you can prove you did not cheat, you will fail the exam and be immediately expelled from the university. Is the president’s reaction fair?

For those who believe the president is acting unfairly, you already have a sense of one of the most important assumptions of criminal law in Afghanistan: the **presumption of innocence**. The presumption of innocence is well-established under both international and Islamic law. The Constitution states:

Constitution

Article 25

“Innocence is the original state. The accused shall be innocent until proven guilty by the order of an authoritative court.”

“Innocence is the original state” means that the court begins the proceedings by assuming that the accused person is innocent. The burden of proof rests with the prosecutor. Unless the prosecutor can prove that the accused person is guilty, the accused person remains innocent and unpublished. The accused person does not have to prove anything. Therefore, if a prosecutor fails to prove that the accused person is guilty of a crime, the accused person must go free, even if the accused person cannot prove her own innocence.

Discussion Questions

1. Why does criminal law in Afghanistan contain a presumption of innocence? What are the moral reasons? The practical reasons?
2. It is often said that it is better for ten guilty persons to escape than for one innocent person to suffer. Do you agree? Why or why not? What about one hundred guilty persons? One thousand?
3. In Islam, the principle of *istishab*, or the principle of continuity, is a presumption in the law of evidence that a state of affairs known to exist in the past continues to exist until the contrary is proved. How does the presumption of innocence connect to the principle of *istishab*?

3.1.2. Legality of crimes

The **principle of legality** requires all laws to be clear and publicly accessible and prohibits retroactive increases in punishment. The principle requires police, prosecutors, and judges to resolve disputes by applying legal rules declared beforehand. The principle of legality is specifically embodied in the Constitution:

Constitution

Article 27

“No deed shall be considered a crime unless ruled by a law promulgated prior to commitment of the offense. . . . No one shall be punished without the decision of an authoritative court taken in accordance with the provisions of the law, promulgated prior to the commitment of the offense.”

In the context of criminal law, the principle of legality asserts that the government should not punish defendants for conduct that was not illegal at the time the defendant engaged in the conduct. For example, imagine Elina buys a chocolate bar on January 1. On January 2, the legislature passes a law that makes it

illegal to purchase chocolate. The prosecutor cannot convict Elina for the chocolate bar purchase on January 1 because it was not illegal to purchase chocolate when Elina bought it.

Further, the principle of legality's ban on retroactivity applies in cases where the state attempts to increase the punishment for a certain crime after the crime occurred. While the government has the power to increase the punishment for a crime (assuming the punishment is not excessive), any new punishment cannot apply to those who committed a crime before the punishment was increased by law. The principle of legality's general ban on retroactivity does not, however, forbid the government from retroactively decreasing punishment.

Legality and Laily

1. Laily commits a theft on Monday. On Tuesday, the legislature passes a new law that raises the punishment for theft from one year in prison to two years in prison. Laily is caught and convicted on Wednesday. What should her punishment be? What if the new law lowered the punishment for theft from one year to six months?
2. On July 1, Laily hacks into Medina's email and sends fake emails from Medina's account. On July 30, the legislature passes a new law that makes it a crime to hack into someone's email. There is already a law that makes it illegal to send fake letters under someone else's name. For what crime(s) could the prosecutor convict Laily?

3.1.3. Right to counsel

The right to counsel means that every individual has the right to access and communicate with an attorney. Access to counsel helps ensure that the individual's rights are respected, as an attorney can help determine how long the suspect will be detained, what the allegations brought against the suspect actually mean, and what consequences there might be if the suspect refuses to give a statement. A suspect or accused person without counsel is often unaware of all his or her rights and will therefore often be more compliant with investigative authorities.

The Constitution recognizes this right and guarantees it for those who are not able to pay:

Constitution

Article 31

“Upon arrest, or to prove truth, every individual can appoint a defense attorney . . .
In criminal cases, the state shall appoint a defense attorney for the indigent.”

Under the Constitution, every person has the right to qualified legal counsel. If the suspect or accused cannot pay for his or her own defense, then the government must appoint a free defense attorney. While the Constitution states that every individual has the *right* to counsel, the Constitution does not explicitly say that there is any *duty* to inform the suspect or accused of this right. The Criminal Procedure Code, however, specifies that the prosecutor must request that the accused person have a defense lawyer before any investigation request and assign legal aid provider if the accused cannot afford a lawyer.⁶⁹

For Further Consideration

While the Constitution guarantees the right to counsel to all Afghans, there is a lack of defense attorneys in some parts of the country, especially in the provinces.⁷⁰ Courts and legislators have adopted several strategies to address this problem. The Juvenile Code, for instance, enables

⁶⁹ Criminal Procedure Code, Article 152 (26 January 2014).

⁷⁰ Alexandra H. Guhr et al., *Max Planck Manual on Fair Trial Standards* (3d ed. 2006), 46.

suspected or accused minors to consult educated people having knowledge of legal issues.⁷¹ The previous version of the Criminal Procedure Code (now superseded by the 2014 version) provided the opportunity to appoint an “interim defence counsel” for adult suspects until there were enough defense attorneys in the country. While these makeshift solutions provide some relief, they do not fully fulfil the right to counsel guaranteed under the Constitution.

Imagine that you are working for a non-governmental organization that works to promote the rule of law in Afghanistan. Your project aims to increase the number of defense attorneys in order to guarantee the right to counsel for all Afghans. What kind of proposal would you develop? How would you recruit more defense attorneys?

3.2. Overview of Criminal Procedure Code

Criminal procedure is governed by the Criminal Procedure Code, a relatively new law that was passed in 2014. The Criminal Procedure Code specifies how investigators, the prosecutor, and the court must conduct a criminal investigation and trial in order to protect the rights of those suspected or accused of a crime. Accordingly, the Criminal Procedure Code requires that the defendant be informed and explained his or her rights at three separate occasions during the criminal process. The police should inform the suspect at time of arrest, the prosecutor should inform the suspect prior to the commencement of an investigation, and the judge should inform the defendant prior to the start of trial.⁷²

Just like we followed the story of Pamir and Daoud to learn about the stages of a civil lawsuit, we will use the same characters to follow the process of a criminal proceeding. Imagine that Pamir won his claim against Daoud, and the court declared that the land rightfully belonged to Pamir. Daoud had to remove his shed from the land. Understandably, Daoud was upset. About a month later, a neighbor finds Pamir dead in his bedroom. Pamir has a gunshot wound in his stomach. Pamir’s wife later discovers that some of her valuable gold jewelry is missing from the house.

3.2.1. Initiation and Investigation of a Crime

The Criminal Procedure Code specifies the process by which the police and Prosecutor’s Office must investigate the crime. As you read, think about how these provisions promote the presumption of innocence.

Initiating a criminal case

When citizens discover a crime, they are obligated to report the crime to the police, judicial officer, or prosecutor.⁷³ In this case, the law requires the neighbor who discovered Pamir’s body to notify the police of the crime.

The police then go to the location of the crime and begin to examine evidence at the crime scene. The police photograph and observe the crime scene; identify the circumstances that led to the incident; identify the type of crime, perpetrator, and victim; arrest and search the suspect, if necessary; and collect identifying evidence.⁷⁴

After the police are notified about Pamir’s suspicious death, they must notify the Prosecutor’s Office within 24 hours.⁷⁵ At that time, the investigation prosecutor initiates a criminal case. A criminal case may

⁷¹ Juvenile Code, Article 65.

⁷² Criminal Procedure Code, Article 8.

⁷³ Criminal Procedure Code, Article 57.

⁷⁴ Criminal Procedure Code, Article 80.

⁷⁵ Criminal Procedure Code, Article 80(3).

be initiated for a number of reasons, including someone witnessing of a crime, a victim's call for help or rescue, someone seeing signs of a crime, or an individual's confession to a crime.⁷⁶

After the Prosecutor's Office learns about the crime, the investigation prosecutor may also go to the crime scene and issue further instructions about how the police should continue its investigation.⁷⁷ For example, officials from the Prosecutor's Office might go to Pamir's house to coordinate how to interview witnesses to the crime.

Investigation

An investigation is required for all felony and misdemeanor crimes. In the investigation, the prosecutor assesses the facts of the case, achieves certainty on the commission of the crime, and identifies the perpetrator.⁷⁸ In the course of the investigation, the prosecutor may interrogate the accused person, question and cross-examine witnesses, examine evidence and items collected at the crime scene, and request comments from experts.⁷⁹ Typically, an assigned investigation prosecutor conducts the investigation. A different trial prosecutor then prosecutes the case in court.

Questioning of witnesses

The prosecutor may question witnesses as part of the investigation. However, the Criminal Procedure Code places limits on who the prosecutor can question. For instance, the prosecutor cannot question the accused person's defense lawyer, the defendant's physician, a psychiatrist, or a journalist if those individuals have obtained confidential information during the performance of their duties.⁸⁰

Under the law, witnesses must tell the truth.⁸¹ Before the witness gives testimony, the witness must take an oath to Allah to state the truth and nothing but the truth.⁸² A non-Muslim individual takes an oath based on his or her beliefs.⁸³ If the witness fails to tell the truth or gives false testimony, the witness may be legally prosecuted.⁸⁴ If there are more than one witnesses, the prosecutor should separately hear and record their testimonies.⁸⁵

The witness should give testimony in their own words.⁸⁶ The prosecutor cannot ask leading questions during the questioning of the witness.⁸⁷ **Leading questions** are questions that prompt or encourage a desired answer. A prosecutor would ask leading question if she asked, "Daoud killed Pamir, right?" Often, leading questions can be reframed in order to not lead the witness, such as asking a witness, "Who killed Pamir?"

One important right granted to accused persons in the course of an investigation is the right to remain silent. The accused person may remain silent in response to any question asked by the prosecutor or police.⁸⁸ In other words, the accused person does not have to answer any questions from the prosecutor.

⁷⁶ Criminal Procedure Code, Article 56.

⁷⁷ Criminal Procedure Code, Article 59.

⁷⁸ Criminal Procedure Code, Article 145.

⁷⁹ Criminal Procedure Code, Article 146.

⁸⁰ Criminal Procedure Code, Article 26.

⁸¹ Criminal Procedure Code, Article 31.

⁸² Criminal Procedure Code, Article 43.

⁸³ Criminal Procedure Code, Article 43.

⁸⁴ Criminal Procedure Code, Article 31.

⁸⁵ Criminal Procedure Code, Article 34.

⁸⁶ Criminal Procedure Code, Article 35(1).

⁸⁷ Criminal Procedure Code, Article 35(3).

⁸⁸ Criminal Procedure Code, Article 150.

For instance, if the prosecutor asked Daoud whether he murdered Pamir, Daoud does not have to provide an answer.

After the prosecutor finishes questioning the witness, the prosecutor prepares a written report of the witness's statement and testimony.⁸⁹ The witness then reviews the written statement and signs it.⁹⁰

Working with Witnesses

Imagine you are an intern in the Prosecutor's Office in 2014, and the legislature recently passed the new version of the Criminal Procedure Code. Your boss, the Head Prosecutor, wants to make sure that he conducts investigations in accordance with the provisions of the Criminal Procedure Code, but he is not entirely familiar with all provisions in the new Code. What would be your advice in the following situations?

1. Daoud is a primary suspect because he had a dispute with Pamir in the past. The Head Prosecutor discovers that Daoud went to his physician on the evening that Pamir was discovered dead. The Head Prosecutor wants to question the physician to see if Daoud had any injuries from a possible struggle or if Daoud told the physician anything about what happened earlier in the day. Can the Head Prosecutor interview the physician?
2. The Head Prosecutor asks you to review a list of questions that he plans to ask Pamir's wife to make sure that they are not leading questions. Which questions are acceptable to ask?
 - a. You were mad at your husband that day, correct?
 - b. Why were you angry with your husband?
 - c. To your knowledge, did your husband usually lock the door to the house when he was home?
 - d. What jewelry was missing from your home?
 - e. You think the missing jewelry was probably a decoy to make the murder look like a robbery that went wrong?

Subpoena or summons

The prosecutor's office and court may summon or subpoena any witnesses who are necessary for the investigation and court proceedings.⁹¹ A **subpoena** is a written document that orders a person to give a testimony.

For example, imagine that the police decided it would be helpful to interview Daoud about Pamir's mysterious death, particularly because Pamir and Daoud had a previous dispute. The prosecutor could summon Daoud to appear, and the police would deliver a summons letter to Daoud that contains his name, the name of the administration issuing the summons warrant, the cause for the summons warrant, and the time, place, and date of appearance.⁹² If Daoud failed to appear and ignored the summons letter without good cause, the court may issue an arrest warrant that enables the police to arrest him.⁹³

⁸⁹ Criminal Procedure Code, Article 37.

⁹⁰ Criminal Procedure Code, Article 37(2).

⁹¹ Criminal Procedure Code, Article 28 & 92.

⁹² Criminal Procedure Code, Article 93.

⁹³ Criminal Procedure Code, Article 97.

Search warrant

The police and prosecutor can only access a person’s residence with a **search warrant** from a court.⁹⁴ Courts may grant search warrants if someone has violated their summons and lives in the residence, if the person has a pending arrest warrant and is hiding in the residence, if a crime has been committed in the residence, or if there are “definite indications” that the residence is hiding a person or concealing banned objects or objects related to a felony or misdemeanor.⁹⁵ When someone has witnessed a crime, however, the police may enter the building without a search warrant or following all the required procedures.⁹⁶

After the police obtain a search warrant, they must adhere to certain procedures when they inspect the residence. A policewoman must be present.⁹⁷ The police must use the minimum force necessary to enter the residence, and the residence can only be searched for objects relating to the crime being detected and investigated.⁹⁸

Detention and bail

If, in the course of the investigation, the police decide they need to detain a suspect like Daoud, the law restricts how the police can detain individuals. Detention center officials can only detain individuals with a detention warrant. The prosecutor’s office and court may issue a detention warrant when one of the following conditions are met: (1) there is evidence that a suspect or accused person has committed a felony, (2) when there is an evident crime (for example, someone is caught in the act, sometimes referred to as “*in flagrante delicto*”), (3) when the identity of a suspect or accused person is unknown, (4) when there is a risk of flight or concealment of a suspect or accused person in a misdemeanor crime, (5) when there exists a fear of losing or alteration of evidence related to the crime, and (6) when a suspect or accused person does not have a permanent address in the neighborhood.⁹⁹

Detention Warrant	
Match each example to the situation where a prosecutor’s office may issue a detention warrant.	
<i>Situation</i>	<i>Example</i>
1. There is evidence that a suspect or accused person has committed a felony	A. The police arrest a suspicious man who was near Pamir’s house at the time of the murder. The man refuses to tell the police his name.
2. There is an evident crime (<i>in flagrante delicto</i>)	B. The police catch a man just as he exits Pamir’s house. The police discover Pamir’s wife’s jewelry in the man’s pockets.
3. The identity of a suspect or accused person is unknown	C. The police discover text messages on Daoud’s phone that say he is so angry at Pamir that he could kill him.
4. There is a risk of flight or concealment of a suspect or person in a misdemeanor crime	D. Pamir and his brother had a longstanding feud, and the police determine that Pamir’s brother is a suspect in the murder. Pamir’s brother was visiting other family in the neighborhood at the time of the

⁹⁴ Criminal Procedure Code, Article 119.

⁹⁵ Criminal Procedure Code, Article 120.

⁹⁶ Criminal Procedure Code, Article 124.

⁹⁷ Criminal Procedure Code, Article 121(1).

⁹⁸ Criminal Procedure Code, Article 121(2) & 121(3).

⁹⁹ Criminal Procedure Code, Article 99.

5. There is a fear of someone losing or altering evidence related to the crime
6. A suspect or accused person does not have a permanent address in the neighborhood

- murder, but he does not have a permanent address nearby.
- E. Pamir’s wife refuses to leave the crime scene alone and says she wants to burn everything in the bedroom because it reminds her of her lost husband.
 - F. The police discover that Daoud is planning to flee the town to go to his brother’s home in Kabul.

The law places limits on the length of time that a prosecutor can detain a suspect before the prosecutor charges the suspect with a crime. The prosecutor can issue a detention warrant for 7 days for a misdemeanor and 15 days for a felony.¹⁰⁰ If that time period is not sufficient, the prosecutor can request a limited extension.¹⁰¹

In some cases, the prosecutor or court might allow the temporary release of the accused person.¹⁰² Even though there is evidence that the accused person committed the crime, the court may allow the person to post bail and have a temporary release from detention.¹⁰³ **Bail** is the temporary release of an accused person awaiting trial on the condition that a sum of money be deposited with the court to guarantee their appearance in court. The presiding judge determines the amount of bail, based on the severity of the accused crime and the incurred loss to the victim.¹⁰⁴ If the accused person does not appear during the investigation, trial, or enforcement of the verdict, the court deposits the bail amount into the government bank account or uses the bail amount to pay fines from the crime or compensate victims for loss.¹⁰⁵

Conclusion of investigation

After the prosecutor concludes that the investigation is complete and no more information is needed, the prosecutor informs the accused person, the victim, and their attorneys. At the conclusion of the investigation, the prosecutor creates a registry, or report, that contains all of the statements and collected information about the crime.¹⁰⁶ The prosecutor also prepares a charge sheet, which summarizes the crime and relevant articles of the law that make the act a crime.¹⁰⁷ The prosecutor provides a copy of the charge sheet to the accused person and the investigation prosecutor submits the document to the trial prosecutor’s office so that the trial prosecutor may file an indictment.¹⁰⁸

3.2.2. Trial

After the investigation prosecutor prepares the registry and charge sheet, the trial prosecutor reviews the case.¹⁰⁹ If there is not enough evidence to bring a criminal case against the accused person, the trial prosecutor may ask for further investigation or dismiss the case.¹¹⁰ Otherwise, the trial prosecutor will proceed by filing a criminal case in the court.¹¹¹ This commences the trial phase of a criminal case.

¹⁰⁰ Criminal Procedure Code, Article 100(1).

¹⁰¹ Criminal Procedure Code, Article 100(3).

¹⁰² Criminal Procedure Code, Article 105.

¹⁰³ Criminal Procedure Code, Article 105.

¹⁰⁴ Criminal Procedure Code, Article 106.

¹⁰⁵ Criminal Procedure Code, Article 107.

¹⁰⁶ Criminal Procedure Code, Article 161.

¹⁰⁷ Criminal Procedure Code, Article 165.

¹⁰⁸ Criminal Procedure Code, Article 166 & 167.

¹⁰⁹ Criminal Procedure Code, Article 168.

¹¹⁰ Criminal Procedure Code, Article 168 & 169.

¹¹¹ Criminal Procedure Code, Article 175.

Preliminary assessment

After the court receives the criminal case, the presiding judge will assign one of the judges on the panel to conduct a preliminary assessment of the case and prepare a report.¹¹² In his or her report, the assigned judge evaluates whether there is sufficient evidence for the criminal case against the accused person.¹¹³ If not, the court may dismiss the case and release the accused person.¹¹⁴ If there is sufficient evidence, the court then notifies the accused person, the defense attorney, and other relevant individuals of the date for the judicial proceeding.¹¹⁵

The court may dismiss criminal cases for reasons similar to the preliminary objections made by a defendant in a civil case. The Criminal Procedure Code establishes a number of reasons for dismissal, including if the statute of limitations has passed, if the accused person has died, or if the legislature has repealed the law that made the action a crime.¹¹⁶ The **statute of limitations** refers to the limited time period in which a person can be convicted of a crime. The statute of limitations for a criminal case depends on the type of crime. It is 10 years for a felony, 3 years for a misdemeanor, and 1 year for petty crime.¹¹⁷ For example, the statute of limitations would be 10 years for murder, which is a felony. If the investigators did not discover that Daoud actually murdered Pamir until 10 years and 1 month after Pamir's death, the court would dismiss the criminal case because the statute of limitations has passed.

Judicial proceeding and judicial discussion

In the trial, or otherwise known as the judicial proceeding, the judges review the evidence and the accused person has an opportunity to challenge the accusations. Trials are typically open to the public, unless the judges decide that the proceeding should be private.¹¹⁸

Trials follow a particular format. First the judges question and hear testimony from witnesses in the judicial proceeding phase of the trial. For instance, at Daoud's trial, the judge would begin the hearing by stating: "I begin this judicial session in the name of the righteous and almighty Allah."¹¹⁹ The judge would then identify Daoud as the accused person, Pamir as the victim, and any other witnesses.¹²⁰ The trial prosecutor first presents witness testimony and then Daoud would have an opportunity to call any defense witness testimony.¹²¹

For example, the trial prosecutor might call the neighbor who discovered Pamir's body as a witness for the prosecution. The neighbor would first take an oath, stating, "I will say nothing but the truth."¹²² The judges would then question the witness.¹²³ After the judges complete their questioning, the prosecutor, victim if feasible, and the accused person may also question the witness directly or through their legal representatives.¹²⁴ While Daoud may testify in court if he chooses, he may refuse to answer any questions.¹²⁵ The judges may ask for an explanation from Daoud if necessary.¹²⁶

¹¹² Criminal Procedure Code, Article 202.

¹¹³ Criminal Procedure Code, Article 202.

¹¹⁴ Criminal Procedure Code, Article 203.

¹¹⁵ Criminal Procedure Code, Article 206.

¹¹⁶ Criminal Procedure Code, Article 71.

¹¹⁷ Criminal Procedure Code, Article 72.

¹¹⁸ Criminal Procedure Code, Article 213.

¹¹⁹ Criminal Procedure Code, Article 217(1).

¹²⁰ Criminal Procedure Code, Article 217(2).

¹²¹ Criminal Procedure Code, Article 219.

¹²² Criminal Procedure Code, Article 218.

¹²³ Criminal Procedure Code, Article 218.

¹²⁴ Criminal Procedure Code, Article 218.

¹²⁵ Criminal Procedure Code, Article 221.

¹²⁶ Criminal Procedure Code, Article 221.

After the court hears from the witnesses, the trial proceeds with the judicial contemplation and discussion phase.¹²⁷ In this portion, the trial prosecutor and accused person may make a statement to the court.¹²⁸ This provides a last chance for the trial prosecutor and accused person to argue why the judges should or should not find the defendant guilty.

Decision, sentencing, and punishment

After the judges hear all the evidence, they make a final decision and, if the defendant is found guilty, sentence the defendant to appropriate punishment.

After hearing the last speech of the accused person, the judicial panel announces the conclusion of the judicial session.¹²⁹ The judges then go into the deliberation room, where they make a decision by a unanimous or majority vote on whether the accused person committed the crime.¹³⁰ The judicial panel then announces the sentence in front of an open court.¹³¹ The judges must also state the reasoning and grounds for the sentence.¹³² If the judicial panel determines that the accused person did not commit the crime, the judicial panel may issue an **acquittal** of the accused person.¹³³

¹²⁷ Criminal Procedure Code, Article 227.

¹²⁸ Criminal Procedure Code, Article 228.

¹²⁹ Criminal Procedure Code, Article 230.

¹³⁰ Criminal Procedure Code, Article 230.

¹³¹ Criminal Procedure Code, Article 234.

¹³² Criminal Procedure Code, Article 239 & 243.

¹³³ Criminal Procedure Code, Article 235.

Example of a Decision in the Supreme Court

<p style="text-align: center;">قرار قضائی نمبر (861) 1387/8/29 دیوان جزای عمومی</p> <p style="text-align: center;">ستره محکمه ج.ا.ا.</p> <p style="text-align: center;">شہرت خارنوال: محمد ناصر خارنوال مؤظف لوی خارنوالی.</p> <p style="text-align: center;">شہرت مدعی علیہم: امین اللہ، نعمت اللہ و محمد وزیر.</p> <p style="text-align: center;">نوع واقعہ: قتل</p> <p style="text-align: center;">تاریخ واقعہ: 1385/1/4-3</p> <p>اوراق نسبتی موضوع ذریعہ مکتوب (7714) 1387/4/30 مدیریت عمومی جزای لوی خارنوالی اصل قید واردہ (1623) 1387/5/1 آمریت تحریرات این دیوان گردید.</p> <p>رویداد قضیہ: از ملاحظہ اوراق تحقیق و فیصلہ محاکم تحتانی بر می آید کہ اسامی عبدالغانی مشہور بہ توریالی ہمراہ با ہمایون غرض حل معضلہ و جنجال عبدالسمیع و جانداد ولدان . . . بہ طرف صافی های جنگل میرود ساعت شش شام لیل 3-4/ 11/ 1385 حرکت کردہ در حصہ نہر آب چشمہ صافی ہا با سہ نفر ہریک محمد وزیر، نعمت اللہ و امین اللہ مقابل شدہ وقتیکہ از نزد شان عبور کردہ بالای موتر فیہ صورت گرفتہ کہ در نتیجہ اسامی ہمایون بہ قتل رسیدہ . . .</p> <p>تحلیل و ارزیابی: قرار شرح فوق از یکطرف موضوع حق العبدی موضوع در حصہ کبار بہ ابراء خط نمبر فوق و در حصہ صغار قرار فیصلہ نمبر فوق محکمہ ینگی قلعه بہ فدیه یمین قطع و خاتمہ گردیدہ و از جانب دیگر دو نفر متہمان مذکوران ہریک نعمت اللہ و محمد وزیر نامان در جریان قضائی بہ قتل خطا اعتراف نمودہ اند، قصدی و عمدی بناء نظر بہ نوعیت و کیفیت جرم و حالت دو نفر متہمان مذکوران و اینکہ سابقہ جرمی شان بہ نظر نرسید، با در نظر داشت مادہ (145) قانون . . .</p> <p style="text-align: center;">نص حکم:</p> <p>ما هیئات قضائی دیوان جزای عمومی ستره محکمہ در جلسہ مؤرخ 1387/8/27 فیصلہ (12) 1386/2/9 محکمہ استیناف ولایت تخار را متکی بہ فقرہ (3) ایزادی مادہ (26) قانون تشکیلات و صلاحیت محاکم با در نظر داشت تحلیل و ارزیابی مستشاران قضائی تصحیح نمودیم و دو نفر متہمین ہریک نعمت اللہ و محمد وزیر نامان را تعدیلاً ہر واحد و فرداً، فرداً بہ مدت (ہفدہ سال حبس تنفیذی) محکوم بہ جزا نمودیم.</p>	<p>Decision date and number</p> <p>Parties Type of Case Date</p> <p>A one line summary of the case reached to this Dewan of the Supreme Court.</p> <p>Facts of the Case and Proceeding of the lower Courts</p> <p>Legal Analysis of Judicial Advisors</p> <p>Holding</p>
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After the court has issued its decision, the prosecutor and police then enforces the acquittal or punishment.¹³⁴ If the accused person is acquitted, then the police and prosecutor must immediately release the person from detention.¹³⁵ If the court decided that the accused person owes a cash fine, the accused person must pay the fine immediately, even if the accused person plans to appeal to a higher court.¹³⁶ The law requires that the prosecutor and police execute punishments in a humane manner and respect human dignity.¹³⁷ The prosecutor's office supervises imprisonment. A person sentenced to imprisonment, however, may in certain cases apply for an alternative punishment, such as community service outside of the prison.¹³⁸

If the accused person or prosecutor are not satisfied with the court's decision, they may appeal the decision to an appellate court.¹³⁹ On appeal, the defendant cannot receive a higher punishment, but the appellate court may lower the punishment or acquit the defendant entirely.

For Further Consideration

In 2014, Afghanistan revised its Criminal Procedure Code. One of the most controversial provisions of the draft law provided that relatives could not testify against each other in criminal cases.

The original version of Article 26 was as follows:

¹³⁴ Criminal Procedure Code, Article 303.

¹³⁵ Criminal Procedure Code, Article 308.

¹³⁶ Criminal Procedure Code, Article 305.

¹³⁷ Criminal Procedure Code, Article 302(2).

¹³⁸ Criminal Procedure Code, Article 325.

¹³⁹ Criminal Procedure Code, Article 246.

(1) The following people cannot be questioned as witnesses:

...

4. Relatives of the accused person.

After the President endorsed the new Criminal Procedure Code by Presidential Decree, he immediately issued a second Presidential Decree that replaced the old version of Article 26 with new text:

(1) The following persons may refuse to testify:

...

2. Ancestors and descendants of the accused up to two levels and husband and wife even if the matrimonial relationship has ended. A relative who has been victimized as a result of the crime in question and/or is a complainant or informant regarding the crime is exempted from this provision.

What is the difference between these two versions? Why do you think the original version was so controversial and why did the President immediately issue a new version?

Research online to see if you can find articles or blog posts from different groups opposing the original version of Article 26 in 2014. What critiques do these groups have about the provision?

Connect this criticism back to the discussion at the beginning of this Chapter about the fundamental principles that underlie procedural law. How does the revised version of Article 26 help achieve these goals?

4. OTHER PROCEDURAL LAWS

In the previous two sections, you learned about the two major procedural laws: the Civil Procedure Code and the Criminal Procedure Code. However, there are a number of other procedural laws. In this section, we will briefly introduce two other types of procedural laws: administrative procedure and commercial procedure.

4.1. Administrative Procedure

As you learned in Chapter 6, administrative law is the body of law concerned with how the government exercises its power. The administration has many duties. It provides people with power and water, builds and runs schools and universities, and steers social and economic plans. Substantive administrative law describes the roles and responsibilities of executive bodies. As discussed in Chapter 5, the executive bodies that undertake these responsibilities are the government agencies or **ministries**, under the direction of a Minister.

Administrative procedure, in contrast, determines the process through which the government performs these duties. Administrative procedure deals with the following types of questions: How should a Ministry implement a particular law? What should a Ministry consider when it makes a decision? How can citizens challenge a Ministry's decision?

You will learn more about administrative procedure in an Administrative Law course, but this section briefly introduces you to the major principles of administrative procedure, the process for administrative legislation, and judicial review of administrative decisions.

4.1.1. Core principles

Recall the concept of due process that you learned about in the beginning of this Chapter. These core principles extend to administrative procedure as well. For instance, citizens should have the right to a fair decisionmaker and an opportunity to have their grievances heard. Ministries should administer laws in a way that respects citizens' rights.

At the same time, there are two major differences between administrative procedure and the procedure for private property disputes like the one between Pamir and Daoud. First, the government may be both a decisionmaker and an interested party. For example, the Ministry of Finance may determine that Daoud owes a particular sum for income tax. If Daoud challenges the amount with the Ministry, the Ministry is both a decisionmaker (since the Ministry must determine what amount Daoud actually owes) as well as an interested party (since the Ministry has brought a tax claim against Daoud). Second, despite being a party, the administration cannot act in its own interests. Instead, the administrative must act for the benefit of the people. Administrative procedure, therefore, must provide oversight and accountability over the administration.

Many countries have a separate code that specifies administrative procedure. While Afghanistan has separate codes for civil procedure and criminal procedure, there is no procedural code for administrative procedure. Nevertheless, the Constitution enshrines several principles that determine the required process for administrative procedure. These principles include due process, the obligation to effectively fulfill the State's tasks, the promotion of democratic legitimacy, and the protection of the rights of concerned citizens.¹⁴⁰ Consider Article 6 of the Constitution, which establishes several obligations for the State:

Constitution

Article 6

“The State is obliged to create a prosperous and progressive society based on social justice, the protection of human dignity, the protection of human rights, and the realization of democracy, and to ensure national unity and equality among all ethnic groups and tribes and to provide for balanced development in all areas of the county.”

The main goal of administrative procedure is to enable ministries to effectively fulfill their tasks. By obliging the State to fulfill “the realization of democracy,” the Constitution integrates citizens into the decisionmaking process of the administration. Accordingly, citizens have a right to be heard and given reasons for any decision made by the State. The “protection of human dignity” further requires the State to provide each citizen with all necessary instruments to protect his or her rights. At the same time, the State must fulfill its obligations efficiently, making fair use of public resources and providing citizens with speedy resolutions.

4.1.2. Passing regulations and bylaws

Imagine that the legislature passes a new law that aims to increase access to the internet at all public schools across the country. The law tasks the Ministry of Education with the responsibility of allocating money to public schools to allow them to purchase new computers and equipment so that more students have access to the internet.

¹⁴⁰ Tarek Azizy, *Max Planck Manual on Administrative Law in Afghanistan* (2011), 80.

To implement this new law, the Constitution empowers the Ministry of Education to pass regulations:

Constitution

Article 76

“In order to implement the main policies of the county and regulate its duties, the Government shall devise and improve regulations. These regulations should not be contradictory to the text and spirit of any law.”

For example, the Ministry of Education may propose a series of regulations to help implement the new law, such as requirements schools must meet to receive a grant or restrictions on how schools may spend any money received through the program. Regulations are a form of administrative legislation.

There are two types of administrative legislation: **regulations** (*muqarara*) and **bylaws** (*layha*).¹⁴¹ While Article 76 empowers the Government to issue regulations, the Constitution does not specify a particular procedure. In practice, however, the Ministry will draft regulations for the Government to approve. For instance, the Mining Laws gives responsibility for the law’s implementation to the Ministry of Mines and Petroleum, which may also propose regulations under the law.¹⁴² The Mining Laws also provide a number of provisions that determine who can receive mining licenses under the law.¹⁴³ For instance, the Ministry of Mining and Petroleum can only grant exploration licenses through a bidding process.¹⁴⁴ Because the Mining Laws do not specify the form of the bidding process, the Ministry of Mining and Petroleum has developed regulations on the bidding process. For example, the Ministry must publicly announce the beginning of bidding on its website and in the national and international press.¹⁴⁵

Bylaws are also rules that a Ministry drafts and approves. In contrast, however, the Government does not approve bylaws. The government instead empowers a ministry to enact a bylaw to implement a relevant regulation. For example, to implement the bidding process for mining exploration licenses, the Ministry of Mining and Petroleum might establish bylaws that determine what particular official in the Ministry will oversee the bidding process and on what time frame the Ministry will select the winning bid.

¹⁴¹ Tarek Azizy, *Max Planck Manual on Administrative Law in Afghanistan* 88 (2011), 88.

¹⁴² Minerals Law, Article 7 & 116, Law No. 1143 (16 August 2014).

¹⁴³ Minerals Law, Articles 16-22.

¹⁴⁴ Minerals Law, Article 19.

¹⁴⁵ Mining Regulations, Article 9 (14 February 2010).

Reviewing Regulations

Imagine that you have just been hired at the Ministry of Education. Your first assignment is to review a series of proposed regulations for the new Law on School Technology. The relevant provision of the law states:

The Ministry of Education will implement a process to disburse 10 million Afghanis to public schools. These grants will enable schools to purchase computers, internet routers, and other equipment to increase students' access to the internet. In disbursing the funds, the Ministry should consider geographic diversity, current available technology at the school, and students' access to the internet at home.

Your supervisor would like you to review a series of regulations to make sure they conform to Article 76 of the Constitution, which requires that regulations are “not contradictory to the text and spirit of any law.” What problems do you spot with the following regulations?

1. The Ministry of Education will only disburse grants to schools within Herat.
2. The Ministry of Education will give grants for schools to update existing technology so that schools can have faster internet service.
3. The Ministry of Education will use the funds to develop a new curriculum for computer classes at secondary schools.

4.1.3. Judicial review

A citizen may challenge an administrative decision in court through a process called **judicial review**. In some countries, like France and Germany, there are separate courts to decide disputes under administrative law. In Afghanistan, however, ordinary courts have jurisdiction over administrative law cases.¹⁴⁶ The Civil Procedure Code outlines the requirements for a case to be heard by a court: The court must have jurisdiction¹⁴⁷ and the party bringing the suit must have a sufficient interest in the dispute to bring a lawsuit.¹⁴⁸

The Civil Procedure Code contains several provisions that specifically apply to disputes against the government, sometimes referred to as “public interest cases.” In public interest cases, courts conduct a more intensive inquiry of the evidence at the preliminary hearing to determine whether a further court hearing is necessary.¹⁴⁹ Unlike private parties in a case, a government representative cannot settle the dispute or confess against the state.¹⁵⁰ These provisions provide greater protection to government than private parties on the theory that the government represents the interests of all Afghans, whereas private parties are self-interested.

In some cases, the claimant may have to exhaust his or her administrative remedies, such as appealing an administrative decision to a special body within the Ministry itself, before he or she seeks judicial review. For example, the Environment Act enables the National Environmental Protection Action to either grant or refuse permits for certain activities that have an adverse impact on the environment. A person who wants to challenge the grant or refusal of a permit must first appeal to the Director-General of the

¹⁴⁶ Tarek Azizy, *Max Planck Manual on Administrative Law in Afghanistan* (2011), 119.

¹⁴⁷ Civil Procedure Code, Article 121.

¹⁴⁸ Civil Procedure Code, Article 21.

¹⁴⁹ Civil Procedure Code, Articles 121-123.

¹⁵⁰ Civil Procedure Code, Article 171.

National Environmental Protection Agency.¹⁵¹ After the Director-General makes a decision, then person may bring a claim in court.¹⁵²

4.2. Commercial Procedure

The Commercial Procedure Code regulates proceedings in the commercial *dewan*. The Commercial Procedure Code has many similar provisions to the Civil Procedure Code. Parties submit pleadings, enter evidence, and appear before a judge at a hearing. The Commercial Procedure, however, contains some unique provisions to better facilitate the resolution of commercial disputes.

First, the Commercial Procedure Code aims to streamline the civil dispute process so that parties can reach a resolution more quickly and efficiently. The Commercial Procedure Code establishes a limited series of pleadings by which parties can set forth and refine their claims and defenses. After making pleadings and entering evidence, the judge holds a hearing and sets a trial date. According to the provisions of the law, most cases should take no more than six months, absent legitimate, approved delays. In practice, however, these cases can last for years.

Second, the Commercial Procedure Code adopts several measures to save claimants costs on the expense of resolving a dispute. Claimants are not required to have counsel. There is no initial fee required for filing a lawsuit. Instead, the court awards fees as part of judgement as a percentage of the award against the losing party. If the plaintiff is successful, the defendant must pay 11% of the award as a fee to the court. If the plaintiff is unsuccessful, the plaintiff pays 1% of the claim as a fee. This fee-shifting provision enables successful plaintiffs to get a resolution without having to spend large sums to the court.

Discussion Question

How are the differences between the Civil Procedure Code and Commercial Procedure Code tailored to address commercial disputes?

CONCLUSION

Procedural laws govern the process by which a court resolves a dispute, whereas substantive laws determine the rights and duties that courts apply to decide who should prevail in a dispute. Procedural laws play an important role in ensuring a just and fair legal system, such as by promoting due process and equality before the law. Procedural laws like the Civil Procedure Code, Criminal Procedure Code, and Commercial Procedure Code specify the exact processes that parties and courts must follow to resolve disputes. In contrast, there is no code for administrative procedure in Afghanistan, but the Constitution requires the government to act in accordance with fundamental principles.

¹⁵¹ Environment Act, Article 20.

¹⁵² Environment Act, Article 20.

CHAPTER 8: CRITICAL THINKING, LEGAL REASONING, & LEGAL ANALYSIS

INTRODUCTION

This chapter introduces critical thinking, legal reasoning, and legal analysis. But they are not separate concepts. Each concept builds on a prior one. Legal reasoning is critical thinking in a legal context. It is how lawyers consider a problem, apply the law, and create a legal solution. Legal analysis is how lawyer's structure and present an argument. Each uses the skills that critical thinking teaches—considering an issue, evaluating evidenced, and weighing assumptions.

The chapter is therefore abstract. It about how to think. It is about building confidence—confidence in evaluating evidence and arguments. The tools the chapter provides are the foundation of structuring and presenting an argument. With them, you should feel comfortable stepping into the arena of ideas.

The abstract, yet practical, nature of this chapter raises some important points. First, confidence is not mastery. This chapter will not make you a master of critical thinking or legal argumentation. Mastery only comes about through practice. Critical thinkers habitually consider everything they hear or read or write. They, after hearing a statement or reading a theory or making an argument, stop and say, “Does that make sense? Is that right?” Hopefully, this chapter helps you cultivate this habit.

Second, thinking critically is satisfying, but also frustrating. In many circumstances, there is no right answer. That is the nature of abstract things. Critical thinking may yield a number of answers that might be right or might be wrong. Such uncertainty can paralyze you. Do not let it. Critical thinking and, by extension, legal argumentation require arguing and defending a position while honestly acknowledging its weaknesses.

Third, critical thinking is part of discovering the truth. Critical thinkers try to reach the right conclusion. They weigh evidence and arguments. As part of that process, critical thinkers consider alternative points of view. They challenge the views of others, and are happy when others challenge their views. And they are willing to alter their position. Have that willingness. Without it, you will not grow as a critical thinker.

In sum, this chapter gives you tools. They are important tools. They will help you think through arguments, whether another's or your own. But whether you use those tools is up to you. Hopefully, you find what you learn here fun and rewarding.

After reading this chapter, you should be able to:

- To learn “how to think” by looking past the surface of an argument
- To have confidence when evaluating evidence and arguments
- To be comfortable structuring an argument
- To know the basics of how to structure a legal argument

1. CRITICAL THINKING

Amir and Hussein are walking along the street. They pass a store and see a pomegranate display. Amir pauses and, saying he is hungry, suggests they buy some of the fruit. Hussein says, “We cannot.” What should Amir say? How would Hussein respond?

This is likely not the situation you would think of when you visualize “critical thinking.” It seems like an everyday event. But critical thinking is important even in a debate between two friends about buying pomegranates. Amir is going to have to create an argument about why the two can buy the pomegranates.

To do that, he will have to understand why Hussein thinks they cannot buy the fruit and his argument's strengths. Amir will also have to consider what Hussein will say in response. Hussein will then have to do the same thing to reply to Amir's counter-argument. Both parties must evaluate evidence and arguments to build a successful argument about whether to buy or not to buy the pomegranates. That is critical thinking.

This section will help develop those skills. It will first define critical thinking. Then, it will provide some tools for evaluating other's arguments. It will then discuss how to create your own argument. But as you go through this chapter, remember to engage with the text and question what it says. Start cultivating the habit of critical thinking now.

1.1 What Is Critical Thinking?

So far, the discussion has talked about critical thinking without defining it. This section attempts to do so. However, critical thinking is not easy to define. It is, itself, an exercise in critical thinking to define the term. But first, write down your definition of critical thinking:

Keep this definition for later. Now is time to develop a definition of critical thinking.

Start by looking at the words "critical thinking." A definition of critical thinking includes thinking. But is it right to say that critical thinking is just thinking? It is not. Why? It ignores the word "critical." Looking only at "thinking" ignores some evidence—the word "critical" in the term.

Thus, there needs to be content to the word "critical." The word has a common understanding. It can mean "important," as in "that was a critical piece of information."¹ It can also mean something like "exercising . . . careful judgment or . . . reasoning,"² as in "he looked at the plans with a critical eye."

Of those definitions, which do you think is best? Why? Think back to the list at the start of this section. Which of the definitions of "critical" comes closest to the idea you had?

The best definition of "critical" is "a close analysis of." Why? Because the context suggests so. Look at the previous sections. Critical thinking appears with words like "evaluate." "Evaluate" suggests that critical thinking involves analysis. Moreover, "important" does not add to the term "thinking." If "critical" meant "important," then there is no reason to differentiate between "critical thinking" and "important thinking." But thinking, by itself, is important. A person can think important things without thinking about them critically. Because "important" does not add content to "thinking," it is not a definition of critical.

Thus, the definition of "critical thinking" is now "a close analysis and judgment of thinking." But the definition is not quite complete. The definition does not say whose thinking receives the "close analysis and judgment." Consider again the context of the previous sections. The sections discuss critical thinking in the context of the arguments of others and yourself.

This leads to a satisfactory definition of critical thinking. **Critical thinking** is a close analysis and judgment of the thinking of yourself or others. The process that led to that definition is an example of "close analysis."

¹ Merriam-Webster, s.v. "Critical," accessed April 28, 2017, www.merriam-webster.com.

² Merriam-Webster, s.v. "Critical."

First, the process looked past the surface of the words to the ideas underlying those words. For example, upon closer examination, it was clear that thinking was not the definition of “critical thinking.” That definition missed the word “critical.” Second, the process looked at the context of this chapter. That context provided the best definition from two separate ones. Critical thinkers use context to understand an argument. Third, the process used logic and creativity. Looking at all the evidence, like the word “critical,” and drawing conclusions from their presence—that “critical thinking” was not just thinking—is logic. But it took creativity to determine that “important” is an improper definition of “critical.” It involved thinking outside the box and drawing on the word’s context.

To summarize, critical thinking has three parts and is: 1) a close analysis and judgment 2) of the thinking 3) of yourself or another

This chapter hopefully helps you develop tools to perform that “close analysis.” This includes instructing you what to consider when critically thinking of another’s argument: the meaning of words, the reasoning behind an argument, and the strength of an argument’s evidence.

Exercise

Go back to your definition of critical thinking. Compare it to the definition this section developed. Think about how the two differ. Do you think your definition is worse, better, or as good as the definition this section developed? Use some of the tools from this section to make that determination.

1.2 Evaluating Other’s Arguments

The core of critical thinking is evaluating the strength of other’s arguments. Lawyers, who must be able to think critically all the time, are always evaluating another’s argument. Sometimes, they must counter the argument. Other times, they draw on the argument to bolster their own. Regardless of your career, however, you will have to be able to evaluate arguments.

But what is an argument? “It is 12:00” is not making an argument. In contrast, “It is 12:00, time for lunch” is an argument. What’s the difference? One is that the second statement states a conclusion. An argument must have a conclusion. Another is that conclusion arises from a fact or facts. Here, it is the fact that it is 12:00. That fact couples with reasoning. Together, the facts and reasoning support the conclusion that it is time for lunch. It might be something like: “Most people eat lunch at 12:00,” or, “The person who made the statement always eats lunch at 12:00.” Regardless of the reason, that it is 12:00 supports the conclusion that it is time for lunch. This gives us the three elements of an argument. An **argument** is the facts, reasoning using those facts, and a **conclusion** that results from the exercise of that reasoning. **Reasoning** is “the drawing of inferences or conclusions through the use of reason.”³ And **reason**, in this context, is thinking in an “orderly rational way.”⁴

Is it right to conclude that because it is 12:00 it is time for lunch? At first it seems so. But that is why it is necessary to probe deeper. The connection between the fact that it is 12:00 and the conclusion that it is time for lunch may be weak. There are three things to consider when probing an argument:

- What is the meaning behind the words? Part of critical thinking is going beyond the words comprising an argument and examining the reasoning behind the words. Consider “time.” Is it a reference to time in general—that is, it is always lunch time at 12:00—or is it specific to the moment—that is, 12:00

³ Merriam-Webster, s.v. “Reasoning,” accessed May 19, 2017, www.merriam-webster.com.

⁴ Merriam-Webster, s.v. “Reason,” accessed May 19, 2017, www.merriam-webster.com.

means it is time for lunch today? Knowing what the author means may allow you to better evaluate his reasoning or evidence.

- What is the reasoning of the author? Like words, reasoning may be explicit or implicit. Critical thinking requires you to understand how an author got to his conclusion. For example, perhaps the fact that it is 12:00 means it is time for lunch because the author always eats lunch at 12:00.
- What is the evidence behind the statement? It is important to know some of the potential weaknesses in the facts that might support a conclusion. For example, it matters whether the clock a person is looking at is not fast.

This subsection will give you tools to use in evaluating an argument. You should be able to use the tools in this section to determine if an author’s argument is strong or weak.

1.2.1 The Meaning Behind Words⁵

Identifying ambiguous words or phrases is important when evaluating an argument. Some words are clearly ambiguous. Terms that lack a definition, **undefined terms**, are an example. Absent a definition, such ambiguity can make an argument weak. Without definitions, it is impossible to understand an argument.

But common words may also be ambiguous. Finding that ambiguity requires looking “below the surface” of a word. That is, moving beyond the meaning that the words convey. Metaphors are an example of this. For example, saying someone “is a mountain” does not mean that they are actually a mountain. Rather, it means that the person is reliable and stable.

Ambiguity can also exist outside of metaphors. Colors are an example. Consider this statement, “The shirt is blue.” Could you envision the shirt the author of the statement meant? At first, you might think you can—you know what blue looks like. But that ignores the many shades of blue. There is the light blue of the noonday sky and the navy blue of the sunset—and infinitely more. All of them are valid colors of blue. The infinite variety of blue shirts the author might refer to when he says “the shirt is blue” make it impossible to know what he means.

Thus, what a word means to you is not what it necessarily means to the person who said it. The same applies to phrases. An apparently clear statement may be unclear because a key word or term might have multiple meanings. Such ambiguity makes for a poorer argument.⁶ Vague terms or phrases might lull you into agreeing with what the author says, not because you agree with what the author believes, but because you substituted your meaning for the vague term for the author’s meaning. Consider the shirt example again. When you read “blue shirt,” did you think of a blue shirt? You did. But you probably filled in the color of the shirt with your choice shade of blue. If asked, you likely would have said the blue you thought of was the blue the author referenced. But it is possible—perhaps likely—that it was not. That lack of specificity made the author’s argument unclear.

Discovering unclear words or phrases requires a close analysis of the text to identify undefined words or terms. That includes considering an argument’s context. Consider the following statement, “The shirt is

⁵ Drawn broadly from Lisa Mendelman, “Critical Thinking and Reading,” *Journal of Adolescent & Adult Literacy* 51, no. 4 (2004): 300. It also draws from “Strategy List: 35 Dimensions of Critical Thought,” Foundation for Critical Thinking, accessed Jan. 27, 2017, <http://www.criticalthinking.org/pages/strategy-list-35-dimensions-of-critical-tought/466>.

⁶ George Orwell, “Politics and the English Language,” last accessed Jan. 27, 2017, http://www.npr.org/blogs/ombudsman/Politics_and_the_English_Language-1.pdf.

blue. But there is some green shading.” Now, the “some green shading” qualifies “blue.” While not completely clear, the statement is clearer.

These examples help determine a definition for an ambiguous word or phrase. An **ambiguous word or phrase** is reasonably subject to significantly different meanings given the context of the statement. The different meanings must be significant. And significance depends on the context. For example, the phrase “the shirt is blue” is ambiguous only if there are many different shirts colored shades of blue. If the shirts come in one shade of blue, the statement is clear. Now consider the following statutes and constitutional provisions. Try to identify the ambiguous words and phrases. Answers and explanations follow.

Exercises

1) Civil Code, Article 39, OG # 353 (5 January 1977): A mature person, while health minded, shall be recognized to have complete legal capacity in performing transactions.

Ambiguous words and degree of ambiguity:

2) Constitution of Afghanistan, Article 14, Section 2 (26 January 2004): The state adopts necessary measures for housing and distribution of public estates to deserving citizens within its financial resources and the law.

Ambiguous words and degree of ambiguity:

Answers

In example one, “mature” and “legal capacity” are ambiguous words. But the context suggests that “healthy minded” qualifies “legal capacity.” While “healthy minded” is somewhat ambiguous, it is clear that it means that the individual is not insane or otherwise mentally incapacitated. It is harder to discern the meaning of “mature” from the context. It might refer to a mentality or age. But it is still unclear. A later statute clears up that ambiguity. It defines a mature person as one who is at least 18 Shamsi years. But see how difficult it is to understand the meaning of that statute without the definition.

The second example has two ambiguous terms: “necessary measures” and “deserving citizens.” There are no definitions of those phrases anywhere else.⁷ This illustrates the problems with undefined terms. Those unclear terms leaves it up to the statute’s reader to determine who should get property or how they get it.

These examples highlight the judgment and flexibility critical thinkers must have. Determining whether a word or phrase is ambiguous requires judgment. Only with judgment is it possible to determine if, given the context, a definition is outlandish. For example, defining “deserving citizen” to mean “a few elites” makes no sense. The statute is about providing housing. Elites likely have their own homes. Determining ambiguity also requires flexibility. The reader must be able to move past the definition that initially springs to mind and see if there are other, plausible meanings.

To summarize, ambiguous words or phrases obscure the meaning of an author’s argument, making it weaker. What a reader thinks a phrase means may not comport with what the author thought. The author’s

⁷ Afghanistan Legal Education Project, *An Introduction to the Law of Afghanistan*, 3rd ed. (Stanford: Stanford Law School, 2011), 113-14.

stated conclusions might not follow from what a reader assumed the author meant. Or, a reader might assume a definition that provides unwarranted support for an argument.

Here are some more statements. Identify any ambiguities in them and the degree of ambiguity. Then consider some of the follow-up questions. Also take some time to talk to a classmate to see if they agree and what you two think the ambiguous terms mean.

Exercises

1) Baktash is running for a seat on the Provincial Council of Parwan. He argues that, in order to make the province flourish, all forms of energy must be embraced. In addition to identifying ambiguous words or phrases, consider how Baktash's argument first sounded to you. Was it appealing? Does the vagueness make it less appealing?

2) Article 76 of the Constitution requires that "[t]o implement the fundamental lines of policy . . . the government shall devise . . . regulations, which shall not be contrary to the body or spirit of any law." What words may be vague?

3) Article 506(2) of the Civil Code requires that, in order for a contract to be binding, one party must accept all the terms of another's offer. Elias offers to sell Fahim a car for 67,000 Afghanis. Could Fahim fulfill the contract by giving Elias a toy car?⁸ To put it another way, is the meaning of "car" ambiguous?

1.2.2 Evaluating Other's Reasoning

The last section introduced ambiguous words and phrases. But remember the key point: Look below the surface. You need to do that when evaluating arguments. Return to this example: "It is 12:00, time for lunch." The argument does not explain the connection between lunch and the fact that it is 12:00. Determining that connection requires analyzing the author's reasoning. Analyzing reasoning is a two-step process. First, you must identify an argument's assumptions. Second, you must evaluate those assumptions.

Identifying Assumptions

You must always identify any assumptions in an argument. An **assumption** is something that a person would take for granted; that an argument assumes is true.⁹ To illustrate, consider the following: You hear a knock at your door and go to let the person knocking in. You have made two assumptions. First, you assumed only people knock on doors. Second, you assumed that anyone knocking on the door wants to come inside. But neither may be true. For example, a loose object could have hit your door and caused the knocking sound. Or the person at the door was delivering a letter. He did not want to be let in. He just wanted to hand you a letter. Note that the two assumptions do not come from an argument's facts. Rather, they are beliefs about how the world operates. They always exist, regardless of an argument's facts. But they interact with the facts to provide the conclusion.

The law contains many explicit assumptions. Article 39 of the Civil Code says that "[a] person is mature after 18 Shamsi years" and can make binding contracts. Here, the assumption is that those over 18 are

⁸ This example is loosely based on an American waitress who won a sales contest at her restaurant. She thought the prize was a "Toyota"—a type of car. She received a "toy Yoda"—a small doll. "Former Hooters Waitress Settles Toy Yoda Suit," *USA Today*, May 9, 2002, accessed Jan. 27, 2017, <http://usatoday30.usatoday.com/news/nation/2002/05/09/toy-yoda.htm>.

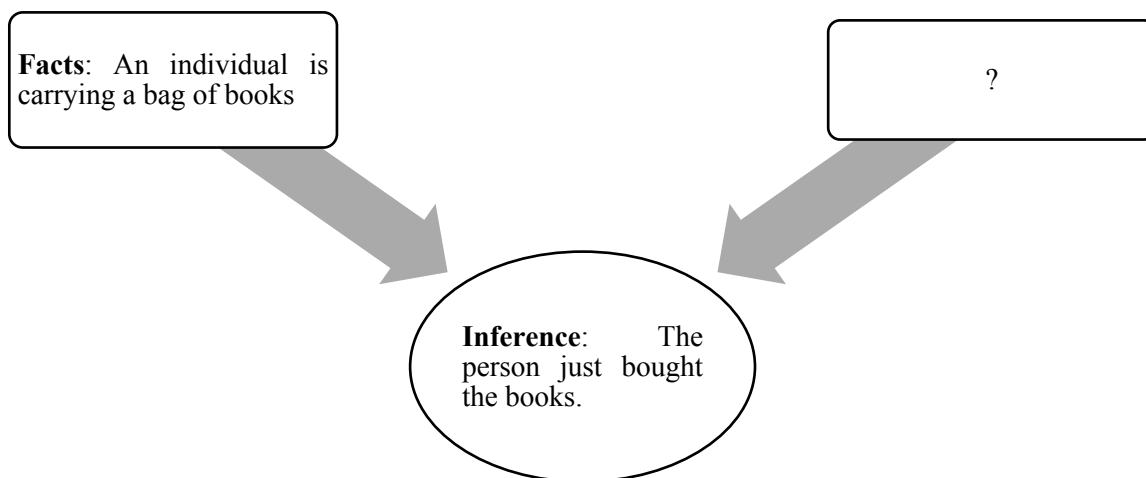
⁹ "Making Critical Thinking Intuitive," Foundation for Critical Thinking, accessed Jan. 27, 2017, <http://www.criticalthinking.org/pages/making-critical-thinking-intuitive-using-drama-examples-and-images/600>.

mature enough to contract. But why 18? There are likely mature 14 year olds and immature 40 year olds. Moreover, even if maturity were an explanation, 18 seems arbitrary. And if the law is drawing an arbitrary line, why 18? There is little difference between an 18 and 17 or 19 year old. Why not pick one of them? Overall, then, would it not make more sense for the law to say “only a mature person may form contracts” instead of defining an age of maturity?

The reason for the arbitrary line drawing is the role assumptions play. Assumptions are necessary to reach a conclusion. If only mature people can make contracts, and 18 year olds are mature, then when an 18 year old makes a contract the contract is binding. That is an easy analysis for a court. Instead of having courts determine if contracting parties are mature, a court simply determines a person’s age. By limiting what a court must determine, it is easier for a court to reach other issues about a contract’s validity. The assumption also makes it easier to form contracts. Parties to a contract do not make exhaustive investigations into each other’s maturity. They simply look at each other’s ages.

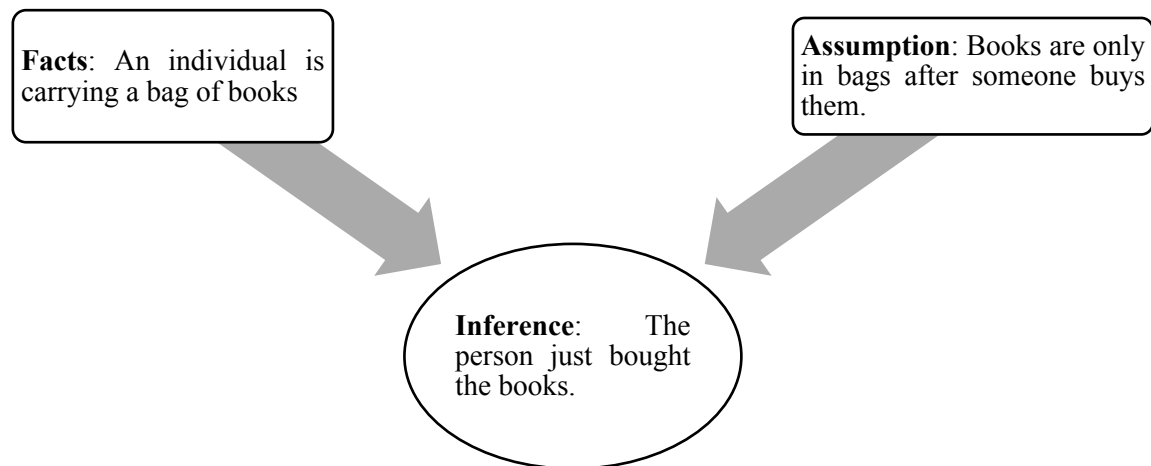
With the law, a judge can take a set of facts—an 18 year old made a contract—and assumptions—that only mature people can make contracts and 18 year olds are mature—and conclude that a contract is binding. Reaching a conclusion based on assumptions and facts is called making an **inference**.¹⁰

The facts, assumptions, and resulting inferences make up an argument. Think of it like a recipe. Facts plus assumptions result in an inference, just like how eggs, flour, and milk can combine to make a cake. Sometimes, however, assumptions are not explicit. Then it is important to identify them. Consider this example: You see a person walking along the street with a bag of books. You conclude the person just bought the books at the book store. Here is a diagram of the argument.



Alone, the argument presents only facts and an inference. The assumption should bridge the gap between the two. It should therefore contain elements of both. In the example, the assumption must connect books and purchasing them. It should also exclude other explanations of the facts. The assumption must therefore mean that *any* time someone is carrying a bag of books they have just bought them. Below is an assumption that works.

¹⁰ “Making Critical Thinking Intuitive.”



The assumption meets all the necessary criteria:

- 1) It connects the fact that an individual is carrying a bag of books and the inference that he just bought them. To do that, it contains the key elements of both: books in a bag and buying them.
- 2) The assumption also excludes any other conclusion. People carry books in a bag *only* after buying them. This assumes that there are no other times when a person would be carrying a bag of books.

Use the examples below to practice. Remember that the assumption must connect the facts and the inference and exclude all other explanations for the inference.

Exercises

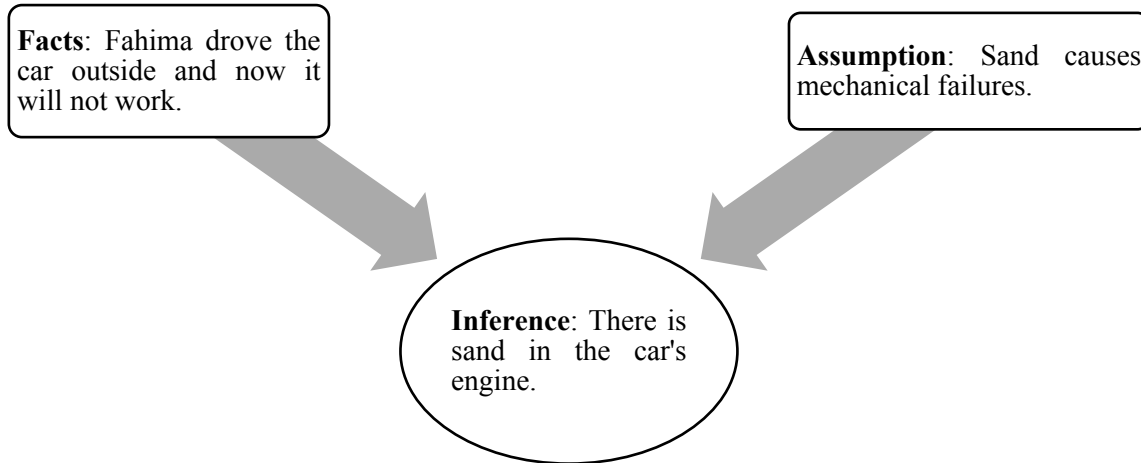
- 1) You are talking with your friend Bashir. After noting that many of the people in his village are impoverished, he says “if only the villagers were educated, they would not live in poverty.” What assumption is he making?
- 2) Consider the proverb, “Every day is not Eid that you eat cookies.” What assumptions does it make?
- 3) Article 67 of the Penal Code says “a person who, while committing a crime, lacks his senses and intelligence due to insanity or other mental diseases has no penal responsibility and shall not be punished.”¹¹ What assumption does this law make?
- 4) Article 57 of the Penal Code says, “commitment of a criminal act for the purpose of exercising the legitimate right of defense shall not be considered a crime.” What assumption does this law make?

Evaluating Assumptions

Evaluating assumptions comes after identifying them. Bad assumptions generally fall into two categories: 1) those that exhibit failures of reasoning, such as not addressing the problem, and 2) those that run counter to outside evidence.

¹¹ OG # 347 (7 October 1976).

Failures of reasoning are assumptions that do not consider important aspects of the problem an argument addresses. Usually, this is an assumption’s failure to bridge completely the gap between the facts and the inference. The connectivity between the facts and inference is therefore missing. Consider the following:



Here, the assumption above fails to bridge the facts and the inference. First, the assumption talks about sand. But the facts do not say that Fahima drove in an area with sand. She could have driven on city streets, for example. Thus, the assumption fails to connect the inference that there is sand in the engine with any facts.

Second, the assumption talks about mechanical failures. However, the facts do not say why the car will not work. Perhaps it is out of gas. That is not a mechanical failure. The assumption fails to address the facts. It also fails to address the conclusion. There are many mechanical parts in a car—brakes, spark plugs, transmission, and so on—that have nothing to do with the engine. Therefore, the “mechanical failures” the assumption mentions does not address the fact that the car will not work or the inference that the car’s engine is the problem.

One way to illustrate an assumption’s inadequacy is to consider other assumptions that are necessary to bridge the facts and conclusion here. To name a few, one necessary assumption is that Fahima drove the car in a sandy area. Another is that all other parts of the car work fine. Are there others?

Another failure is an assumption that runs **counter to external evidence**. These are assumptions that do not accord with reality. Consider the book example again. What if there are no bookstores in the city? The assumption that people only carry books in their bag after buying them at a store becomes unreasonable.

An easy way to see if an assumption accords with reality is to construct a **counterexample**. A counterexample is an attempt to explain an inference using another, reasonable assumption that the argument does not use. In short, it is an attempt to provide an alternative link between the facts and the conclusion. For example, people may carry books in their bags because they are walking home from class, not because they just bought the book. This contradicts the assumption that books are in bags *only* after a person buys them at the store. Thus, the original assumption does not completely fit with reality. Finally, be aware that an assumption can be counter to external evidence and exhibit failures of reasoning.

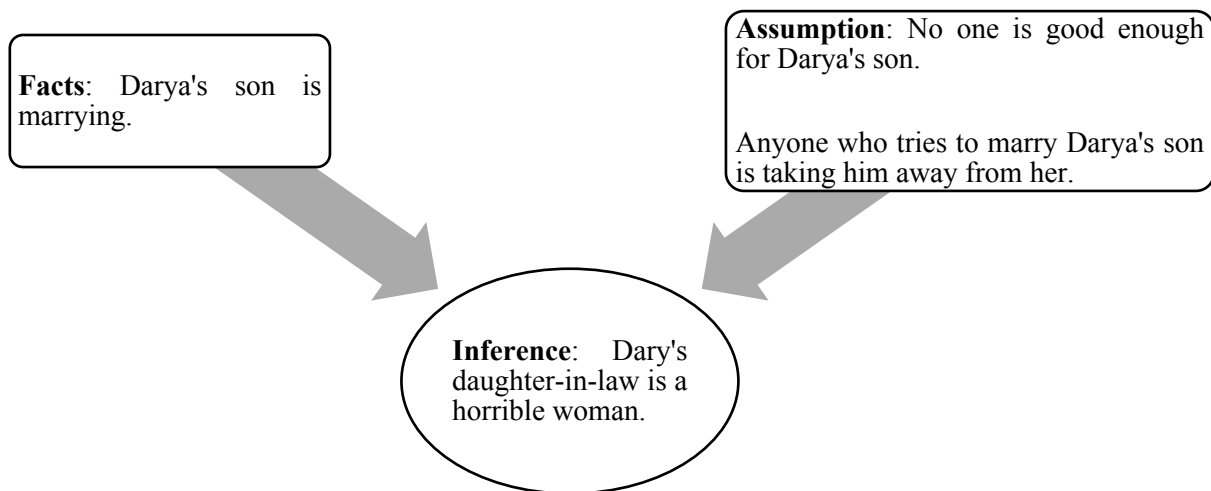
Exercises:

Consider the following arguments and evaluate their reasoning. Identify any failures of reasoning and the type of failure.

- 1) “This book uses long words. What it says must be intelligent and sophisticated.”
- 2) “The train is running on time. Yalda will meet us at the restaurant as scheduled.”
- 3) “Daoud would never kill his wife. It is against the law.”

Biases: A Specific Bad Assumption

Biases can be examples of a bad assumption. A **bias** is “an inclination of temperament or outlook; a personal and sometimes unreasoned judgment.”¹² Consider the following argument. Darya’s son is getting married. Darya disapproves; no one is good enough for her son. Without meeting her son’s new bride, she begins plotting to separate him from the horrible woman. Here is the argument diagram:



Intuitively, this is unfair to the bride. Darya is inclined against anyone who marries her son—they are not “good enough” for him. Instead, they are stealing him away from the only person who truly loves him: Darya. This is an example of bias. That bias leads Darya to conclude, before meeting the new bride, that she is horrible. Whether her new daughter-in-law is actually a good person is irrelevant.

This illustrates some hallmarks of bias. Biased individuals do not consider outside evidence when making an inference. And even if a person considers evidence, a bias may lead them to a wrong conclusion. Using the above example, suppose that Darya’s new daughter-in-law was nice to her and gave her gifts. Darya now says the bride is “not so horrible.” That is still unfair. The evidence suggests that the new bride is a very nice person.

¹² Merriam-Webster, s.v. “Bias,” accessed Apr. 28, 2017, www.merriam-webster.com.

1.2.3 Evaluating Evidence¹³

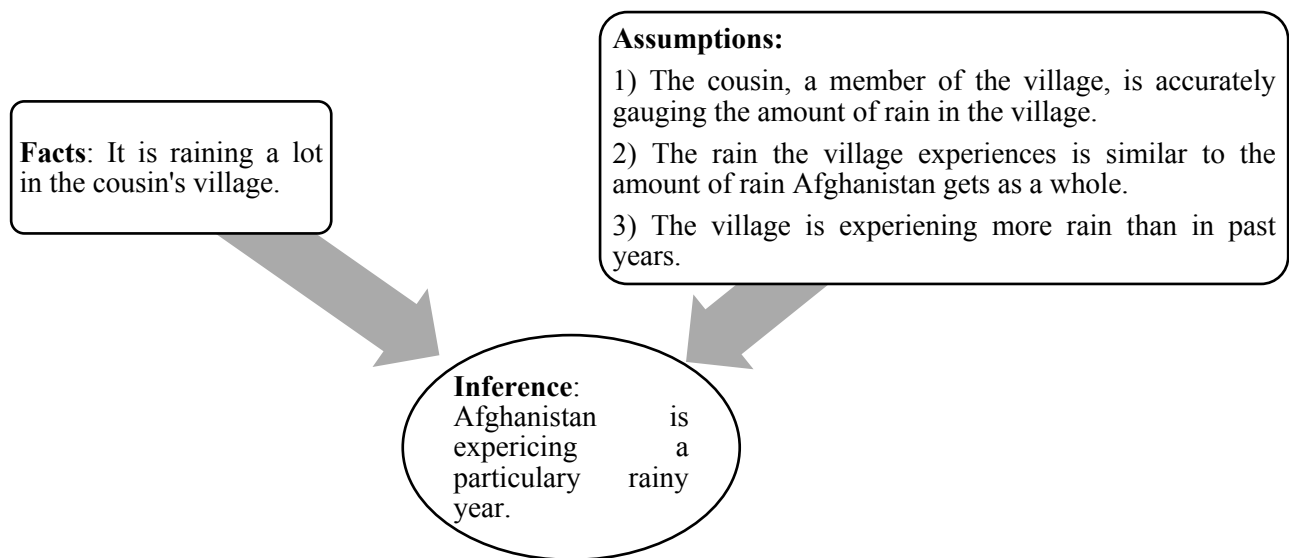
But analyzing an argument is more than evaluating its reasoning. It also requires judging the supporting evidence. Strong evidence is important. The stronger the evidence, the smaller the assumption an argument needs to reach a conclusion. And smaller assumptions are harder to attack. To see this, remember that one way to attack an assumption is to create scenarios that show the assumption is untrue. The broader the assumption, the easier it is to make scenarios that disprove that assumption. The strength of the evidence and the assumptions behind an argument are therefore tied together. The stronger the former, the better the latter are likely to be.

This section introduces some things that make evidence strong or weak. It will focus on evidence a person uses to reach a conclusion—that is, the facts that combine with the assumptions to reach an inference. But there is a second way to use these tools. Assumptions must accord with reality. An argument may provide evidence for an assumption's truth as well as an inference. These tools apply to that evidence, too.

Anecdotal Evidence

Beware of anecdotal evidence. **Anecdotal evidence** is “evidence in the form of stories that people tell about what has happened to them.”¹⁴ For example, what an argument's author heard from others is anecdotal. Another example are single acts the author witnessed.

The following example will show why anecdotal evidence is comparatively weak. A friend told you that Afghanistan was experiencing a lot of rain because his cousin said it was raining a lot in his village. Here is a full argument diagram:



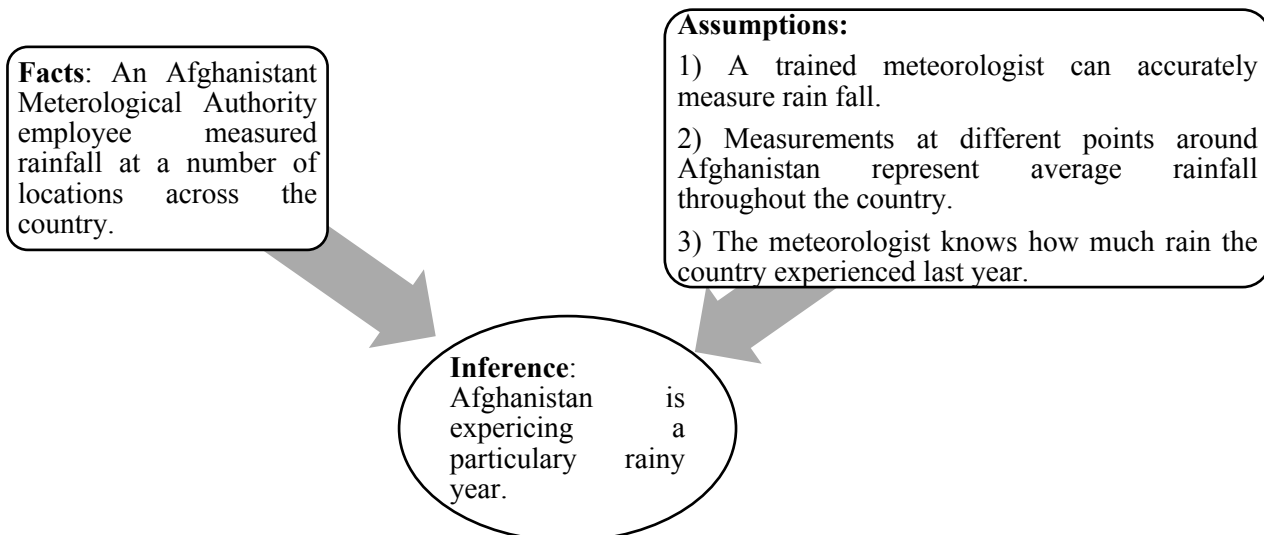
The arguments makes many questionable assumptions. For example, it is impossible to know that your friend's cousin accurately measured the rain. And if it did, there is a question of whether he accurately compare it to past years. Moreover, it is unlikely that the village represents the rainfall in the entire country.

¹³ The factors discussed here are from Carol Wade, “Using Writing to Develop and Assess Critical Thinking,” *Teaching of Psychology* 22, no. 1 (Feb. 1995): 2.

¹⁴ *Merriam-Webster*, s.v. “Anecdotal Evidence,” last accessed Apr. 28, 2017, www.merriam-webster.com.

Afghanistan is a large, diverse nation. Total rainfall varies from region to region. A wet year for one village might be a dry one for another.

In contrast, here is a good argument. Your friend's cousin works in the Afghanistan Meteorological Authority as a meteorologist. He measured the rainfall in a number of different villages scattered across the country. His measurements indicate that Afghanistan was receiving more rain this year than last year. The facts, assumptions, and conclusions now look like this:



Those are plausible assumptions. A trained meteorologist likely makes correct measurements and knows last year's rainfall. Moreover, measurements in a number of different spots around the country likely does represent the average rainfall of the nation. That controls for a number of variables, specifically that rainfall measured in one village may not represent rainfall in Afghanistan. The village could be an outlier. But rainfall measurements across a number of villages are more likely to represent the country as a whole. The data controlled for the chance that the village would be an outlier. Thus, the argument no longer relies on the broad—and weak—assumption that one village represents the nation.

Caution: The example above highlights the strength of scientific over non-scientific evidence. Scientific experiments, when the experimenter conducts them properly, provide strong evidence and eliminate the need for broad assumptions. But do not fall into another trap: **appeal to authority**. An appeal to authority is an argument that something is correct because an expert or expert source says it is. It is a particularly appealing error when using scientific authority. The value of scientific evidence is that the experiments that generate it should control variables and result in accurate measurements. However, whether a scientist accurately engaged in scientific evidence gathering is an assumption. Even when you are confronted with scientific evidence, you must test those assumptions. For example, make sure that the scientist did control for external variables.

This is also a trap that many lawyers can fall into as well. The statutory code is not free from error or logical fallacies. For example, the 2008 Law on Managing Land Affairs, Article 3, defined grazing land as land that no one owns and where a loud person's voice could be heard.¹⁵ The statute defines grazing land entirely

¹⁵ Afghanistan Legal Education Project, *An Introduction to the Property Law of Afghanistan*, 1st ed. (Stanford: Stanford Law School, 2015), 147.

by anecdotal evidence. If you become a lawyer, you have to use these definitions, but you should also be aware of their weaknesses.

Finally, do not reject anecdotal evidence out of hand. Though not the best evidence, it is evidence. When weighing the strength of anecdotal evidence, consider the number of anecdotes. More anecdotes provide greater support for an inference than fewer.

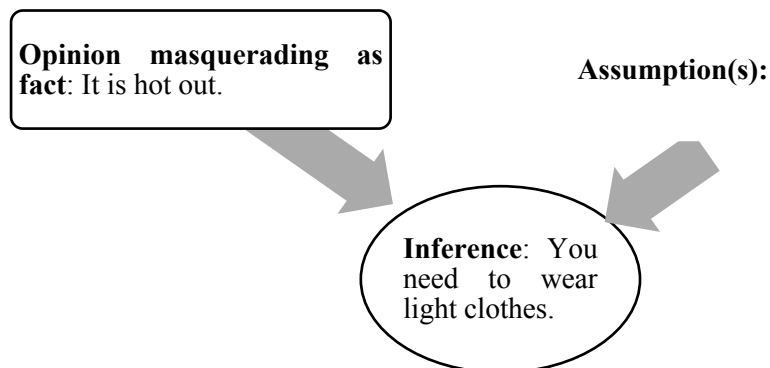
Relevant facts vs. opinions:¹⁶

Let's return to your friend's cousin measuring rainfall. In the second scenario, is it relevant that the meteorologist is your friend's cousin? It is not. What is relevant is that he is a meteorologist because a meteorologist has special skill in measuring rainfall. That strengthens the facts supporting the inference that Afghanistan's rainfall increased.

This is an example of a **relevant fact**—a fact that supports a conclusion. In contrast, an **irrelevant fact** is a distraction—it takes focus away from facts that do matter. It does not affect the conclusion. When evaluating another's argument, look for irrelevant facts that the person believes supports an inference.

Similarly, it is important to separate facts from opinions. Facts are independent of the observer. For example, the temperature is a fact. It is, or it is not, 32 degrees. But it is an opinion about whether it is hot out, because an **opinion** depends on an observer's unique perspective. Someone who lives in a climate with temperatures of 40 degrees might view 32 degrees as relatively chilly. But someone who lives where it is always 20 degrees might think a 32 degree day is extremely hot.

In terms of evaluating an argument, opinions are not as helpful as facts. They provide some evidence for an inference, but they require extremely broad assumptions. To see this, fill-in the assumptions in the following argument diagram.



Remember that assumptions bridge facts and inferences. Here, the assumption must connect the "fact" that it is hot out with the conclusion that you should wear light clothes. The key assumption is that what feels hot to the speaker is hot to you. It is an assumption that is easy to attack. Like anecdotal evidence it provides, at best, some weak evidence for the inference it supports.

¹⁶ "35 Dimensions of Critical Thought" (see n.5).

Exercises

Determine whether the facts in the following arguments are opinions. If they are facts, determine if they are relevant facts.

- 1) Durkhany was traveling recklessly on Darulaman Street and therefore should get a ticket.
- 2) That dress is a pretty shade of blue. It will go well with your eyes.
- 3) I have three classes tomorrow. I do not want to be sleepy, so I better get to bed early.

Assuming causality:

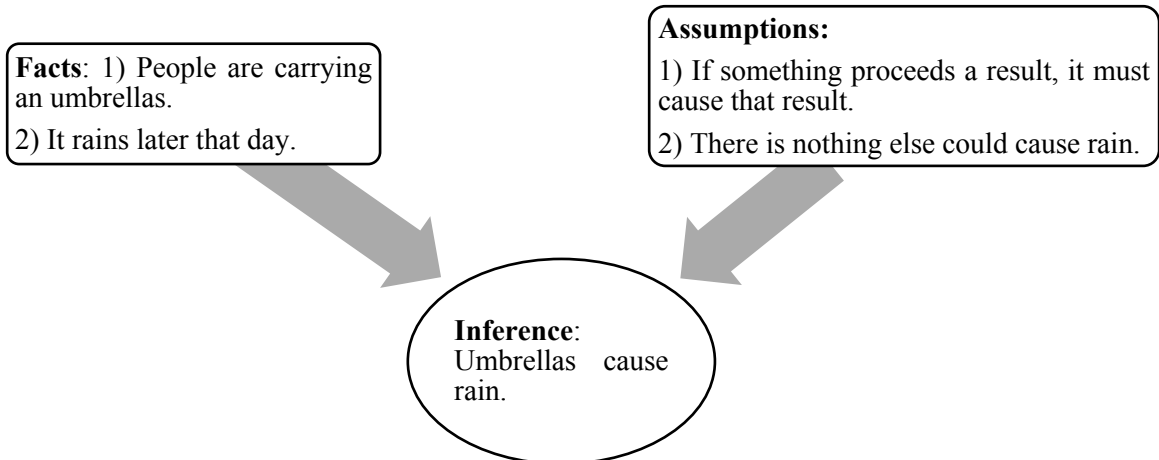
Causation is a familiar concept. If you push a bottle at the edge of your desk, it falls off. The push caused the fall. **Causality** refers to that causal force; the force or agent that caused the bottle to fall.¹⁷ Many arguments, especially about policy and the law, contain a similar concept. It is a central focus in criminal law. To be criminal, a person's criminal act needs to cause a prohibited result. For example, if an individual stabs someone who then dies, the stabber is a murderer. If instead the individual stabbed the person in the hand and, the next day a car hits the injured person who then dies, the stabber is not a murderer. The stabbing did not cause the death.

That is an example of causation. A specific act did or did not cause a specific result. But for an argument, a problem arises when generalizing from the fact that an act, like stabbing, caused a specific result, death. An argument may assume that because an event once caused a result, the event will always cause the result. This is a **causal argument**—an argument that a specific act will cause a specific result. But generalizing is not always proper. It is improper, for example, to say that because stabbing caused a death, stabbing always causes death. There are circumstances where a stabbing may not cause death.

Improper causal arguments therefore usually result in broad, questionable assumptions. The weakness of the assumptions is similar to the weakness of assumptions in arguments relying on anecdotal evidence. The amount of evidence may be small and the method of acquiring that evidence may fail to control for certain variables.

Generalization is also a problem with causal arguments. Another common error confuses the effect with the cause. For example, if many people are carrying umbrellas, and it rains later, it is wrong to argue that the umbrellas caused the rain. People carry umbrellas when they expect it to rain later in the day. The rain caused the umbrellas. This is an example of **reverse causality**—where the arguments calls the causal act the result and vice versa. Such errors usually appear where one event precedes another, as in the umbrella example above. Like assuming that just because an action caused one effect it causes all effects, reverse causality results in broad, questionable assumptions. The diagram below illustrates this.

¹⁷ *Merriam-Webster*, s.v. "Causality," accessed Apr. 28, 2017, www.merriam-webster.com.



The second assumption runs counter to external evidence. There are other explanations for rain besides carry umbrellas. Reality disproves the assumption. When determining if a conclusion of causality is proper from the evidence, compare assumptions with reality.

So when is it fair to believe a causal argument? Scientific evidence is significantly better than anecdotal evidence in proving causality. Scientific evidence, for example, can control for other explanations for a result. As a general rule, the more observations of causality, and the more scientific those observations, the stronger the evidence.

Exercise

Smoking and tobacco use can cause cancer and death according to scientific research.¹⁸ The government passes a law increasing the tariff on cigarettes and other tobacco products by 50%.¹⁹ What are the basic assumption or assumptions behind the law and do you think it is valid?

Oversimplification: An Example of a Causal Fallacy

Causality issues relate to another argumentation error: oversimplification. **Oversimplification** occurs when an argument excludes important, qualifying facts or assumptions. Almost all examples of incorrect assumptions of causality are examples of oversimplification. They tend to ignore factors that might contribute or cause a particular effect.

Consider the stabbing example. It oversimplifies the argument to assume that there are no other causes of death besides stabbing. Or to say that all stabbings are similar. Those assumptions ignore important facts—for example, the location of the wound and its depth.

¹⁸ “Dr. Dalil: Tobacco Is Second Major Cause of Death,” *Ministry of Public Health: Islamic Republic of Afghanistan*, Jun. 4, 2012, <http://moph.gov.af/en/news/10209>.

¹⁹ Tobacco Control Law, Article 20, § 2, #1162 (2015), <http://www.tobaccocontrollaws.org/files/live/Afghanistan/Afghanistan%20-%20TC%20Law.pdf>.

1.2.4 Review Exercises

You have now learned some ways to evaluate another person's argument. As you go through the following review exercises keep in mind what you should look out for in evaluating an argument. First, look for ambiguous words or phrases. They will be terms that are susceptible to more than one meaning. Phrases without a clear term generally require broad, questionable assumptions.

This leads directly into evaluating an argument's assumptions. Remember to identify them all. Then see if any demonstrate a failure of reasoning or are counter to external evidence. Then, evaluate the evidence an argument uses. See if there is any anecdotal evidence, and what its value is. Also see if the facts are opinions or relevant to the argument's inference.

Finally, see if the argument is assuming causality. If it is a causal argument, see if it is proper.

Now, take what you have learned about evaluating arguments and apply them to these exercises.

Exercises

For all of these exercises, evaluate the argument.

1) For this exercise, assume that you are a representative in the *Wolesi Jirga*. A vote is coming up on a bill to limit smoke production at factories. The smoke contains potentially hazardous chemicals. The current bill would require that factories use modern filtering technology to limit the amount of harmful chemicals they emit to 10 parts per million (ppm). You want to make the right decision, so you listen to many different advocates. Here are the different arguments.

A national health organization, composed of reputable doctors and researchers, supports the rule. You read a pamphlet they left at your office. "Industrial smoke is a threat to the health of Afghan citizens everywhere. Industrial smoke is heavier than air, so it sinks to the ground. And when people breathe it in, they get sick. Their lungs close up and they develop asthma. This bill would prevent that."

Curious, you call a friend of yours from AUAF, Elina, who is a doctor in the country. "There are not many factories around here. But the children here do seem to have a higher rate of asthma than the kids I hung around with while I lived in Kabul. I suspect the dust is doing that. Industrial smoke containing harmful chemicals likely has a similar effect. So, limiting the harmful the amount of the chemicals in the smoke would likely help. I would vote for the bill."

Another friend, Isaaq, calls you. He works for an association of industrial firms. You ask him about the health effects of the smoke. "Most factories already have installed the technology," he said, "The smoke the rest emit only contains 12 to 20 ppm of the harmful chemicals. That's not much more than the 10 ppm the bill requires. There is no need to vote for this law—it would not improve people's health and only impose unnecessary costs."

Who has the better argument? Why?

2) To provide some context for this exercise, sections of the Commercial Code are provided below. Assume that the excerpts are the only law on the issue.

Statutory Background: Article 619 of the Commercial Code says, "If the meaning of the statement of a commercial contract should be explicit and logical, the apparent meaning is assumed. Otherwise the real

purpose is honored. If the content of the statement is inconsistent with that of the contract, the interpretation of purpose is held applicable.”²⁰

Article 620 provide that, “In case a statement has [multiple] interpretation[s], the common purpose is determined from the contents of other contracts, [from] custom, or [from] the transactions and circumstances prevailing at the time of the preparation of the contract, or according to previous applications.”

Facts: You are a judge settling a contract dispute between Abdul and Habib, both merchants. Abdul agreed to deliver 500 gears to Habib for 50,000 Afghanis. The written contract said that Abdul had to deliver the gears in a “manner to ensure their good condition.” Upon delivery, Habib found that 10 of the gears were chipped. He sued, arguing that Abdul’s failed to ensure that the method of delivery would ensure the gear’s good condition. Both parties agree that the phrase “manner to ensure their good condition” is vague. Moreover, it was the first time they contracted with each other. The only issue is what the purpose of the contract was. Their arguments are below:

Habib: “The purpose of the phrase was to ensure that all of the gears were delivered in proper condition. And “proper condition” means not broken, as the circumstances at the time of contracting illustrate. It is not a term that gear purchasers normally put into a contract. It was important to me. At the time, I told Abdul I needed these gears in working condition to allow my factory to function. I also ordered the exact number of gears I needed, no more. One bad gear would harm my ability to operate. It is illogical that I would mean otherwise when I insisted on the contract term.”

Abdul: “The purpose of the phrase was to ensure that I, the deliverer of the merchant, took all necessary precautions in ensuring that the gears arrived in good condition. It did not guarantee that the gears would not break. As a matter of custom, I insert the phrase in all of my contracts. I do not remember what Habib told me when we made the contract, but even if what he says is true, I had no way of knowing that he ordered the exact number of gears.”

What evidence do the two parties present, and how strong do you think it is? What other information would you like the parties to provide to bolster their arguments?

1.3 Creating Your Own Argument

You now have some tools for evaluating another’s argument. But critical thinking is more than evaluating arguments; it is creating them. Arguing well is an important skill to possess. It the core of the legal profession. Much depends on a lawyer’s skill at arguing. In court, a person’s liberty, property, and reputation are at stake. Whether a court rules for someone may depend on the quality of her advocate’s argument. The law is just one example where knowing how to argue is important. Arguing well is a life-skill, and arguing is part of everyone’s daily life. People may argue for some grand vision of humanity or whether to have lamb or chicken for dinner.

Regardless of what you are arguing for, you need tools to craft your own argument. This section provides them. There are two steps in developing your argument. This section covers both. The first step is identifying the problem. The second is building your own argument. When building an argument, remember to evaluate it critically. Approach the argument like it was someone else’s, using the tools this chapter provides you.

²⁰ Osulnama # 115 (13 December 1955).

In addition, do not become attached to your argument. Constantly criticizing and revising your argument is key to making it the best it can be. Approach your argument as skeptically as you would someone else's. Apply every tool to discover weaknesses with your assumptions and evidence.

Finally, make your argument clear. It will aid in your review of the argument. It will also help others understand your argument. Clarity requires that you state assumptions and lay out each step in your argument. Do not use ambiguous words, even if they sound intellectual.²¹

With those points in mind, it is time to begin.

1.3.1 Identifying the Problem

Arguing begins with the problem (or the “issue” or “question”).²² Everything else in an argument depends on the issue. Determining the proper conclusion requires determining what question your argument is addressing.²³ A problem also tells an audience why they should care. In certain situations, identifying the problem is easy. If your friend asks you for help, you ask her what she needs. You now have the problem. More difficult are **nested problems**—a problem whose solution requires answering other questions.

For example, assume you are a lawyer at a law firm. Your boss asks you to determine whether a contract is valid. Do you know what the problem is? Without any more facts, you do not. A contract may be void for a number of reasons: absence of offer or acceptance,²⁴ incapacity,²⁵ if subject or cause of contract are unlawful,²⁶ and so on. Your boss might want answers to all those issues or just some of them.

One way to determine the issue is to ask your boss. But he may not know; that is why he gave the task to you. Your job is therefore not just determining the contract's validity. It is determining what facts raise questions of the contract's validity. That is, the issue really is, “The contract is valid (or invalid) because of ____.” Answering the question about the contract's validity requires answering the question of what might make it invalid. To see this, try to answer the first question without answering the second. The answer may be, “Well, the contract may be invalid because consent or acceptance is missing. There might be question of incapacity. And perhaps the contract concerns an unlawful thing.” That is not helpful.

Answering the second question in the hypothetical requires looking at the facts. For example, assume the contract is between two businesses. Both are sophisticated. Both extensively negotiated the contract. The contract is an exchange of ammonium nitrate fertilizer. You can eliminate a number of potential issues with the contract. Sophisticated businesses are capable of contracting. The negotiation also made offer and assent likely. But the subject of the contract may be unlawful. The government has, in certain circumstances, outlawed ammonium nitrate fertilizer sales, because the fertilizer can double as an explosive.²⁷ The unlawfulness of the contract's subject may void it. This is the blank.

By addressing the second issue, you can address the broad issue—the validity of the contract. You may need other facts, but the unlawful subject of the contract may make it invalid. That highlights the “nesting” nature of the analysis. The bigger issue, the validity of the contract, contains narrow questions about what

²¹ George Orwell, “Politics and the English Language.”

²² Jennifer Moon, *Critical Thinking: An Exploration of Theory and Practice*, (New York: Routledge, 2008) 136; Wade, “Using Writing to Develop and Assess Critical Thinking,” 2.

²³ Moon, *Critical Thinking*, 136; Wade, “Using Writing to Develop and Assess Critical Thinking,” 2.

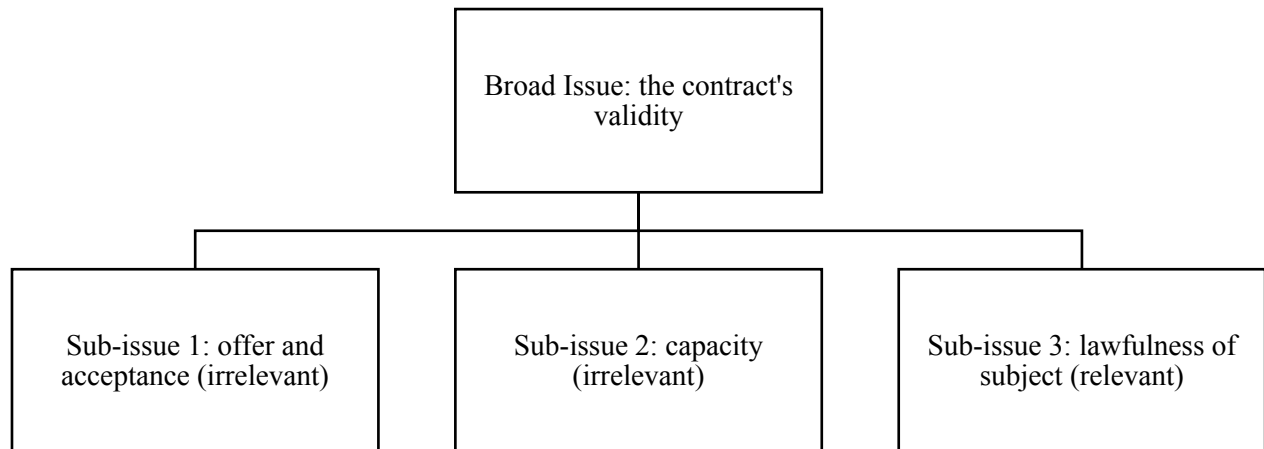
²⁴ Civil Code, Article 506, § 1.

²⁵ Civil Code, Article 502, § 2.

²⁶ Civil Code, Article 579.

²⁷ Greg Jaffe, “Ammonium Nitrate Fertilizer Is Being Smuggled into Afghanistan for IEDs,” *Washington Post*, Sept. 27, 2012, accessed Jan. 27, 2017, http://wapo.st/PvET1Q?tid=ss_tw.

characteristics of the contract raise doubts about its validity. Answering the narrow questions then permits application of the law to the broader question of the contract's validity. A diagram is helpful.



The diagram shows that that sub-issues 1 and 2 are irrelevant. That does not mean they are inapplicable. Sub-issues 1 and 2 are always necessary to show a contract's validity. If you were arguing in court, you would say both are present. However, they are irrelevant *in this case*. The facts clearly show that both are present. It is the contract's subject that raises doubts about its validity. And because the subject is the issue, your argument should focus on that.

Excluding sub-issues 1 and 2 increases the efficiency and focus of your argument. The research becomes easier. Instead of spending time looking into the capacity of two businesses, you consider only the lawfulness of the contract's subject. In addition, determining the real issue allows you to focus your argument. Certainty about the question makes it easier to determine what evidence is relevant and what assumptions are necessary. This, in turn, helps prevent ambiguity. It is easier to make a clear argument when you focus on the actual issue.

The following two examples of the introduction to the memo in the hypothetical above illustrate the difference focus makes in an argument. The first only discussed sub-issue 3 in analyzing the contract's validity. The other did not.

<p>1) The contract is invalid. Here, the likely problem is the subject of the contract. Afghan law prohibits the sale, in certain contexts, of ammonium nitrate. But the contract concerns exactly that. Because it is a contract to sell an illegal product, its subject is unlawful and the contract is void.</p>	<p>2) The contract is invalid. There are many ways to determine whether a contract is valid or not. For example, lack of capacity or missing offer and acceptance. Those do not appear to be serious issues here. The parties are sophisticated and engaged in lengthy negotiations. Sophistication implies capacity, not its absence. Moreover, the presence of negotiations, and the sophisticated nature of the parties, make it probably there was offer and assent. But there is no need to go into too much depth there. The real issue is whether the contract's subject is lawful. It may not be, which would invalidate the contract.</p>
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Do you see why the first is better? It gets to the point. It focuses the reader on the problems—the subject of the contract and the contract's validity. In contrast, the second is unfocused. It wanders through unnecessary

points. The reader is left in the dark about the issue until midway through the argument. It is not seriously confusing here, but think about how confusing it can be for a complex problems with many sub-issues. In that case, the meandering nature of the argument can lose the reader. She not be aware of the argument's point or know it addresses the problem.

Exercises

Identify and state clearly the problem presented in the following hypotheticals.

1) Article 29 of the Penal Code says “initiation of a crime is the starting of an act with the intention of committing a felony or misdemeanor, but whose effects have been stopped or offset by reasons beyond the will of the doer.” This is an example of the crime of “attempt.” The crime of attempt occurs when an individual sets out to commit a crime and is stopped before he does it. For example, if a person starts to steal a bike, but the police stop him before he runs away with it, he is guilty of attempted theft of the bike.

You are asked to determine if a criminal suspect is guilty of attempted murder. What is the general problem? Identify the subsidiary questions you must answer in order to answer the general problem.

2) You are a legal advisor for President Ashraf Ghani in September 2014. As the audit process for the election continues, he asks you about an agreement to share executive power between himself and a CEO who comes from the opposition party. He wants to know your thoughts on its legality. What questions do you need to answer to give him a complete answer?

1.3.2 Structuring Your Argument

After gathering the elements of your argument—the problem, evidence, assumptions, and conclusion—it is time to structure it. There are many ways to structure an argument. But each way focuses on making the argument “flow.” Think of the argument as a river that the reader must travel. The reader would prefer going gently from each point to arrive at the conclusion. In contrast, a poorly structure argument thrashes the reader around. In trying to navigate such turbulent arguments, the reader must strain to make out the argument's points, and may miss some. That is frustrating. The reader should not strain to understand the argument.

“Flow” requires structure.²⁸ **Syllogistic reasoning** is good basic structure. Syllogistic reasoning uses a major premise and a minor premise to reach a conclusion. That sounds technical. However, they are familiar concepts. **Major premises** are similar to assumptions. It is an assumption about reality; the guiding principle of the argument. Likewise, **minor premises** are like facts. The **conclusion** is the result of comparing the minor premise and major premise. This is an example of a classic syllogism:

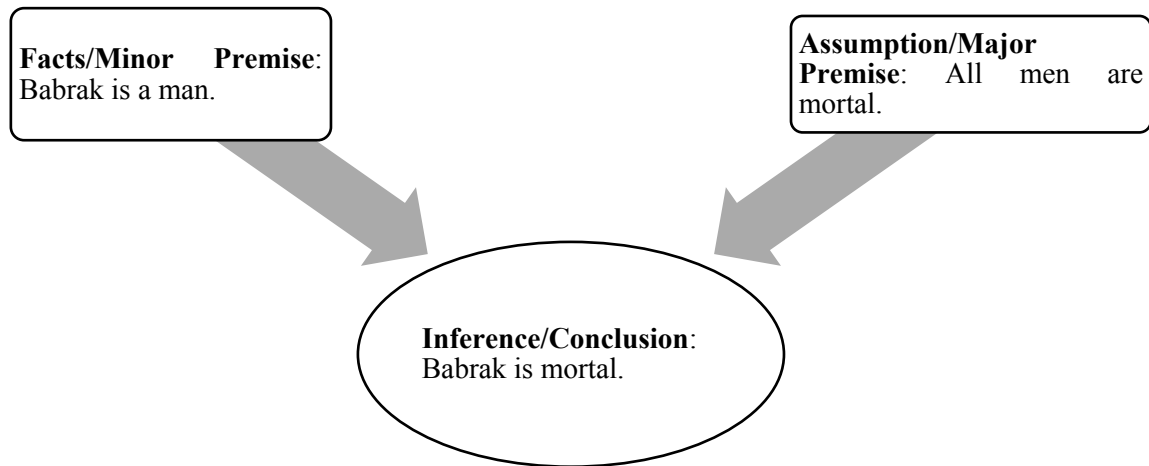
Major premise: all men are mortal

Minor premise: Babrak is a man

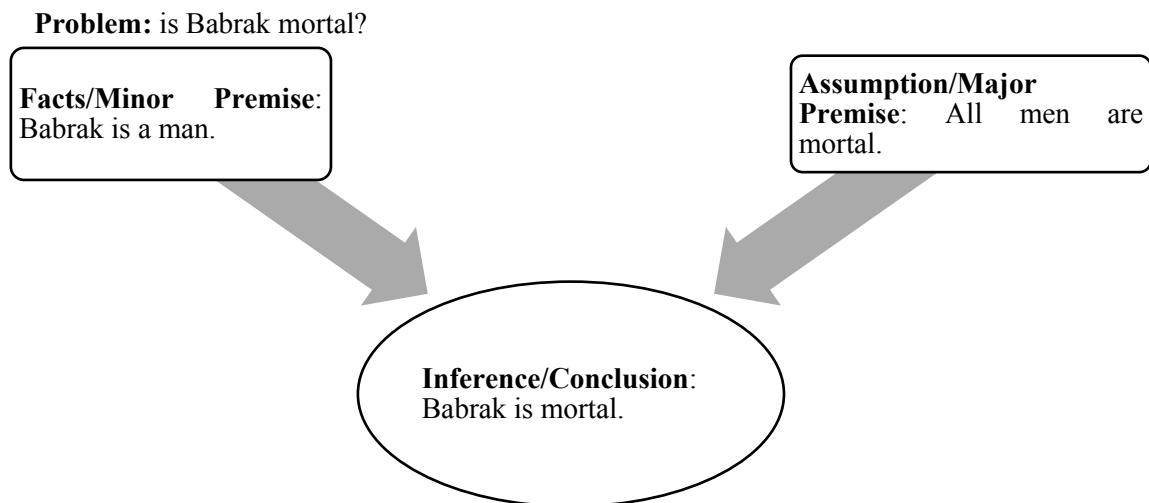
Conclusion: Babrak is mortal.

Now here is the syllogism in the argument diagram.

²⁸ Moon, *Critical Thinking*, 39.



The syllogistic form of reasoning promotes clear thinking. Important assumptions are explicit, as are the relevant facts. Moreover, the conclusion is clear as well. The only issue is that the problem is not explicit. To fix this, the next diagram adds it:



The diagram makes it easy to transfer the argument into writing:

The issue is whether Babrak is mortal. All men are mortal. And Babrak is a man. Therefore, Babrak is mortal.

See how the argument flows. It moves the reader from the problem, to the key assumptions, to the relevant facts, and to the conclusion. Each step is clear.

Exercise:

Write an argument using syllogistic reasoning. It can be on any topic you want. You can diagram it, or simply write out the steps. Then, exchange the arguments with a partner. Both partners, using the tools from the earlier section, should critique the other's argument. What weaknesses exist? Did your partner overlook something?

1.3.3 Revising Your Argument

After structuring an argument, it is time to review it. But first, get into the right mindset. This is not *your* argument, it is a stranger's. Once you can treat an argument as a stranger's, criticize it; use every tool you now know. However, there are two items that will help you specifically in reviewing your own argument. One is a tool: considering alternatives. The other is a trap to look out for: emotional reasoning.

Considering alternatives²⁹

Considering alternative arguments is a good way to ensure you have the best argument. There are two ways to consider alternatives. The first focuses on the question: "Why do I not win?" It does not, however, involve reweighing the argument's evidence. You should have already done that. Rather, what you are doing here is evaluating your assumptions. The goal should be to construct an argument that uses all of your evidence but makes equally plausible, or more plausible assumptions, to reach a different conclusion. It will highlight especially weak assumptions that you may want to better support.

The second question to ask when considering alternatives is, "How else do I win?" That identifies whether your argument is the best argument. You need to determine if there are better ways of reaching the same conclusion or alternative ways to reach the conclusion. For the latter, you may want to include them in your argument as an alternative basis for your conclusion. As you do this review, note whether there are stronger arguments you could make if you had some extra evidence or could make a different assumption. If there are, see if you cannot get that evidence or whether that assumption is unreasonable. In short, use this question to identify areas where you could do more research and bolster your conclusion.

Exercises

The following are different statements from earlier chapters and an alternative argument. For each, fill-in the missing piece from the syllogistic reasoning. Can you come up with any other alternative arguments?

1) Statement: The deterrence model of punishment best explains why we punish criminal acts.

Argument for:

--Minor premise: Criminals are humans. Humans react to incentives.

--Major premises: ?

--Conclusion: Punishments deter crime. Therefore, deterrence is why society punishes.

Alternative argument:

--Minor premise: Certain people will not reform. Society does not want people to commit crime.

--Major premises: ?

--Conclusion: Punishments prevent repeat offenders from committing crimes. Therefore, incapacitation is why society punishes.

²⁹ Robert H. Ennis, "Critical Thinking Assessment," *Theory into Practice* 32, no. 3 (Summer 1993): 179-80.

2) Statement: It is better to let ten guilty men go free than find one innocent man guilty.

Argument for:

--Minor premise: The criminal justice process will make mistakes.

--Major premise: Society values not jailing innocent people more than jailing the guilty.

--Conclusion: ?

Alternative argument:

--Minor premise: The criminal justice process will make mistakes

--Major premise: Society values punishing criminals. Letting a significant number of guilty people go free undermines that societal interest.

--Conclusion: ?

Emotional reasoning

Emotional reasoning uses emotion as a major premise or assumption in your argument. For example, consider the following argument: “I get so angry when people waste food. There should be a law against it!” What is the major premise of the argument? It is that things that make the argument’s author angry should be illegal. That is a poor assumption. The assumption displays a failure of reasoning. Remember the definition of “law” from Chapter 2—laws are a body of rules that regulate human behavior and that the government enforces. Here, the assumption does not indicate why one person’s anger justifies regulating the behavior of all people. It does not indicate, for example, that food waste makes almost everyone angry.

Emotional reasoning, however, is an easy trap to fall into, especially in the law. The law is personal. And personal arguments tend to stimulate emotions. But do just because you should avoid emotional reasoning does not mean you must dispassionately argue. Quite the contrary; argue passionately. As a lawyer, you are an advocate. So advocate! Stand in front of the judge and say, “Your honor justice does not tolerate a fraud, and the defendant defrauded my client. He intentionally misled my client into believing she was buying one thing when she was receiving an inferior good.³⁰ He said she was buying a car for 67,000 Afghanis. He did not say it was a toy car, and my client had no idea it would be. That is fraud.”

That is not a bad argument. Look at the diagram for it.

³⁰ Civil Code, Article 750.

Problem: did the defendant commit fraud?

Facts/Minor Premise: The defendant told plaintiff she was buying a car, knowing that he meant a toy car.

The plaintiff agreed to buy the car not knowing it was a toy car.

Assumption/Major Premise: Fraud occurs when one party intentionally misleads another party to induce a contract.

Inference/Conclusion:
The defendant committed fraud.

The argument is logical. It is also a passionate. A good argument can be both. What a good argument cannot do is use personal emotions as universal truths.

1.4 Checklist and Review

Summarized below is your “toolbox.” It summarizes some of the tools and steps you should use when evaluating an argument or structuring your own. But remember, the tools are not exhaustive; there are many more out there.

Critical Thinking Tool Box	
<p><u>Evaluating other’s arguments:</u></p> <ol style="list-style-type: none"> 1) Identify ambiguous words or phrases. 2) Identify the argument’s assumptions. <ul style="list-style-type: none"> • See if any of them exhibit failures of reasoning by not bridging the facts with the inference. • See if any of them do not correspond with external evidence. • Determine if any of them exhibit bias. 3) Identify an argument’s evidence. <ul style="list-style-type: none"> • Identify any anecdotal evidence and determine what assumptions it requires. • Identify and reject an irrelevant facts that do not support an argument’s conclusion. • See if the author is using the facts to improperly assume causality. 	<p><u>Structuring your own argument:</u></p> <ol style="list-style-type: none"> 1) Identify the problem you are solving. <ul style="list-style-type: none"> • Determine if it is a nested problem and, if so, what secondary issues you will need to address. 2) Structure your argument. Use syllogistic reasoning to create a clear flow that your reader can follow. 3) Revise your argument. <ul style="list-style-type: none"> • Treat your argument like a stranger’s and use all of the tools you learned for evaluating another’s argument. • Consider alternatives; both why you do not win and how else you could win. • Make sure you are not using emotional reasoning in your argument.

Practice makes perfect. That is especially true for critical thinking. Below is a review exercise that will test your ability to use all of the tools in your toolbox. Use the checklist as you go through these problems.

Exercises

It is election season, and Jamil and Inaara are running to represent your district in the *Wolesi Jirga*. You live in a moderately well-off agricultural district in the country. Its agricultural products are in high demand. However, only one road connects the district to a city. That road is in dire need of repair.

The area also lacks a school. The district's children have to go to the city's school, which is far away and along a dusty road. It is a good school, however. Some individuals in the district have looked into building a new school. The national government would subsidize half the cost of constructing the school, but the rest would have to come from taxpayers in the district. The taxpayers would have to pay 50,000,000 Afghanis. They would also be responsible for paying operating expenses for the school (teachers' salaries, textbooks, and so on).

You want to help the best representative get elected, and indicate that you are willing to volunteer on someone's campaign. You want someone who best represents the district. Because you are known for your ability to evaluate and structure arguments, each candidate wants your help. They come to you to tell you why they are the best candidate.

First is Inaara. She says, "Education is very important to me, and would be the focus of my work in the *Wolesi Jirga*. We need education in the district. And the lack of a school building is preventing that. I realize that it would be expensive to build it, so I would push the *Jirga* to repeal the law requiring districts to provide half the funding for new schools. I believe it is possible. I have talked to almost all the members of the *Jirga* and they agree with my position. After the repeal, we can build the schoolhouse. With a school in the district, the children will receive a valuable education."

Before proceeding, evaluate Inaara's statement. Point out weaknesses.

Second, Jamil comes to talk to you. He says, "I think that Inaara has a point about education. But the problem is not the lack of a school, it is the lack of a good infrastructure—specifically roads. If we fixed the road and got more than one road from the district, we could sell more of our products. The district would become richer. As a result, we could afford the new school building and afford to operate it at the highest levels."

What do you think of Jamil's argument?

After hearing out Inaara and Jamil, you must make a choice. Whatever candidate you choose then asks you for a memo that sets out the best possible argument for their position. The memo should tell the average voter why they should vote for him or her. As part of that, they ask you to suggest what facts or evidence they would need to acquire to make their argument even stronger. The only constraint is that you must adhere to message they conveyed to you.

1.5 Critical Thinking—Conclusion

Two points before closing this section. The first is cautionary. There is not always a clear answer to a problem. Arguments addressing those problems will always have weaknesses. You will have to make such arguments. When you do, explain why any weaknesses are not fatal, but be honest about their existence.

The second is an encouragement. Critical thinking removes uncertainty. You, and other critical thinkers, by evaluating arguments and putting forward your own, are discovering what does or does not best align

with reality. It may not be possible to reach a single answer. But it is possible to narrow the answer to a range of good ones. And removing that uncertainty is key to determining proper answers to questions both big and small, from national policy to helping a friend with her homework.

2. LEGAL REASONING AND ANALYSIS

Critical thinking is important in everyday life. However, it is elemental to the law. Lawyers evaluate other attorney's arguments. They also make their own, using statutes and facts to argue for a particular result. Judges have to weigh facts and evaluate arguments. They then decide the legal rights of the parties before them. Both lawyers and judges use rules and evidence to reach, support, and communicate legal conclusions. The importance of argumentation in the legal profession makes critical reasoning skills indispensable.³¹

Legal reasoning and legal analysis are legal examples of critical thinking. **Legal reasoning** is how legal professionals consider facts and issues in order to reach a conclusion. **Legal analysis** explains that conclusion. Legal reasoning provides the answer; legal analysis communicates it. This section covers one method of legal reasoning: rules-based reasoning, and one method of legal analysis: IRAC.

The best way to approach this section is to view it as an application of the critical thinking tools from earlier. Legal reasoning and legal analysis are about structuring a legal argument. Both require identifying and explaining a problem, major premises, relevant facts, and a clear conclusion. Those are all things you now know. Use this section as a chance to hone your critical thinking skills.

2.1 Legal Reasoning—Rules-Based Reasoning

Afghanistan is a civil law country. Statutes are the source of all its legal rules. It also means that rules-based reasoning is the key form of legal reasoning. **Rules-based reasoning** applies facts to the components of a statute to see if the statute's required result occurs. It is like a formula. Each statute has certain elements, which are the ingredients of the rule. If the facts show those ingredients are present, then the statute applies and demands a specific result.

2.1.1 Breaking-Down the Rule

The first step in rules-based reasoning is breaking down a statute to identify its parts. There are three parts: the result, the causal term, and the elements. The **result** is the legal consequence the statute specifies if the elements are present. A result comes with a **causal term**, a verb that links the statute's test with the result and that may be mandatory, prohibitory, discretionary, or declaratory.³² For a simple example, consider the familiar syllogism: major premise: all men are mortal; minor premise: Babrak is a man; conclusion: Babrak is mortal. The major premise, "All men are mortal," is our "statute." Mortality is the result term. If the facts indicate that an object is a man, the statute says he is mortal.

The causal term is "are." It is a declaratory causal term; it states something that is true. There are a number of potential causal terms, as the table shows.

³¹ Alan M. Lerner, "Law & Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solver," *Akron Law Review* 32, no. 107 (1999): 111.

³² Stanford Law School, *Legal Research and Writing Program* (New York: Wolters Kluwer, 2014), 25.

Types of Terms	Result
Mandatory (e.g., shall, must)	If the elements exist, the mandatory causal term mandates the result the statute specifies.
Prohibitory (e.g., shall not, must not)	If the elements exist, the prohibitory causal term prohibits the result in the statute.
Discretionary (e.g., may)	If the elements exist, the decision-maker may choose to follow the result the statute provides.
Declaratory (e.g., is)	If the elements exist, the declaratory causal term simply states that something is.

Finally, Babrak is mortal because he is a man. The statute says that the fact a person is a man gives rise to the result that he is mortal. “Man” is therefore an element of the statute. An **element** is a fact whose absence means the statute does not apply. There can be one element, or many. The syllogism has only one element: humanity. If a thing is not a man, the statute says nothing about its mortality. It does not apply.

If there are many elements, then the statute may require that they all apply, or that only one needs to be present. The former is called a **conjunctive test**. For example, if the hypothetical statute said, “All those who are men and alive are mortal,” it creates a conjunctive test. Mortality requires more than manhood. It also requires that the man be alive. That a list of elements concludes with the word “and” suggests that the statute requires them all.

The second test is a **disjunctive test**. It is a test that requires one of the listed elements to be present in order for the result to occur. For example, if the hypothetical statute said, “Every man or animal is mortal,” it would be a disjunctive test. If something is either a man or animal, it is mortal. A list of elements that uses the word “or” suggests that the statute is using a disjunctive test.

For example, the Civil Code, Article 10, Section 2, says, “Provisions of law shall not be retroactive”³³ The element here is that there is a provision of law. The causal term is “shall not.” It is a prohibitory term. The result is that the law is not retroactive. Now it is your turn. Identify the different parts of the statute, and whether the test is conjunctive or disjunctive.

Exercises

1. Identify the component parts (elements, causal term, and result) of the following rules. Remember to identify them separately. Make sure to specify the type of result (mandatory, prohibitory, discretionary, or declaratory).

(a) Civil Code Article 265

Alimony of a poor person who is not able to work due to physical, mental or nervous illness shall be provided by solvent relatives proportionate to their portions of inheritance.³⁴

(b) Civil Code Article 269

Guardians may exercise rights of guardianship when he has complete capacity to exercise the same rights regarding his own properties.³⁵

³³ Civil Code, Article 10, § 2

³⁴ Civil Code, Article 265.

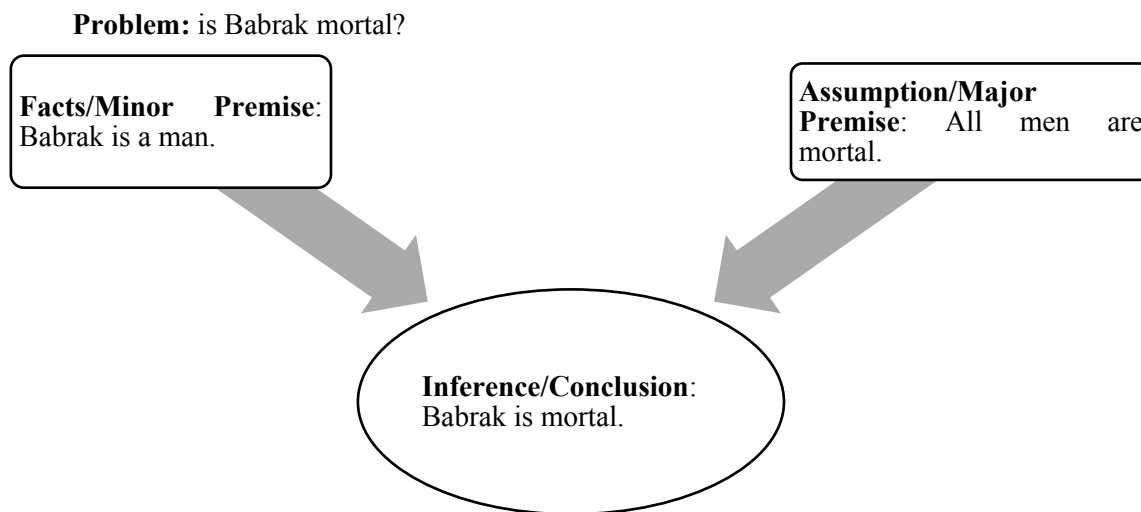
³⁵ Civil Code, Article 269.

After you have broken down a rule, it becomes easy to apply. Compare the facts with the elements. If the facts pass the test, the statute applies. And, if it does apply, the result is what the statute requires.

2.2 Legal Analysis—IRAC

Legal reasoning determines that a statute applies and that a particular result follows. Legal analysis presents that conclusion. Like any argument, a legal argument must flow. To get that flow, lawyers often use the IRAC method. IRAC is an acronym. It stands for 1) Issue, 2) Rule, 3) Application, and 4) Conclusion.

IRAC works the same way as syllogistic reasoning. The issue is the legal question. The statute's elements are the major premise. The facts are the minor premise. Application compares the facts to the elements. The statutory result is the conclusion. To see this, consider again Babrak's mortality.



Here is the transformation of the syllogism into IRAC form.

Issue:	Is Babrak mortal?
Rule:	All men are mortal.
Application:	We know that Babrak is a man. He therefore meets the rule's criteria of being a man.
Conclusion:	Therefore, Babrak is mortal.

In substance, the difference between legal reasoning or making a non-legal argument is form. Everything else remains the same. The form of a legal argument can get complicated because legal arguments often require addressing many sub-issues. Unfortunately, this is not the place to delve into detail about structuring those arguments. In brief, however, stick to the umbrella structure that connects a broad question with secondary ones. Each sub-issue is an application of the rule that applies to the broader question. Thus, put each sub-issue argument in the broader issue's application discussion. An example best illustrates this.

Statutory Background: The Civil Code, Article 10, Section 2, says that provisions of law shall not be retroactive (that is, the law changes the legal consequences of past acts), except in cases explicitly stated in the law or cases wherein the provisions relate to the public order.

Example:

Imagine that the National Assembly passed a law prohibiting anyone from playing loud music at night. It went into effect in June. The law is as follows:

Law of Peaceful Sleep, Article 1000

(1) In order to prevent anyone from being unable to sleep, it is illegal to play music at such a volume that people in other rooms can hear it from 10:00 P.M. to 6:00 A.M.

(2) If someone plays music at such a level, his or her neighbors can sue them in court. If the plaintiff proves that the defendant caused harm by playing music at that volume, the guilty party must pay the neighbor up to 7,000 Afghanis for each night the guilty party has played the music.

Diba moved and became Omar's neighbor in January. Omar likes rock music. He plays it every night. Diba can hear the music and, though it does not always keep her up, it is distracting. After Article 1000 became effective, she sued Omar. She wanted the court to require he pay compensation for every night he has played the music since January. Omar argues that her request makes Article 1000 retroactive. It is therefore invalid.

Here is Omar's argument in IRAC form. Pay attention to how it layers the argument. It sets out the broad application, then puts the sub-issues under it. As the arrows indicates, after the argument resolves the sub-issues, it uses them to reach a conclusion on the broad question.

Broad Issue: The issue is whether making Omar pay compensation for playing his music from January to June would apply the Law of Peaceful Sleep retroactively, which the Civil Code in Article 10 prohibits.

Rule: The Civil Code Article 10, Section 2, prohibits retroactive application of laws unless the law explicitly states that it will be retroactive or the provision relate to the public order.

Application: Retroactive means that the law punishes behavior that occurred before it went into effect. The Law of Peaceful Sleep went into effect in June. Fining Omar for actions taken between January and June would punish him for that behavior that occurred before the date the law became effective. It is retroactive, and therefore prohibited unless one of the two exceptions to the rule against retroactivity is present.



Sub-issue #1: Does the Law of Peaceful Sleep explicitly say it applies retroactively?

Rule—sub-issue #1: The Civil Code, Article 10, Section 2, allows retroactive application of laws if the law in question says it will apply retroactively.

Application—sub-issue #1: The Law of Peaceful Sleep does not contain an express retroactivity clause.

Conclusion—sub-issue #1: The Law of Peaceful Sleep does not fall into the first exception.

Sub-issue #2: Does the Law of Peaceful Sleep relate to public order?

Rule—sub-issue #2: The Civil Code, Article 10, Section 2, prohibits retroactive application of laws unless the law in question relates to the public order.

Application—sub-issue #2: The Law of Peaceful Sleep does not reference the public. Rather, Section 1, says the law’s purpose is to ensure that individuals get sleep. Section 2 also does not refer to the public. It provides that individuals have a right to sue. Both provisions, therefore, suggest that the law is meant to protect individuals. It does not protect the public order like criminal law does.

Conclusion—sub-issue #2: The Law of Peaceful Sleep does not fall into the second exception.

Conclusion: Because fining Omar would punish past behavior, it is retroactive application of the law. The Civil Code prohibits that application unless one of two exceptions apply: The new law expressly says it operates retroactively or relates to the public order. Neither exception is present here. Diba cannot get compensation under the Law of Peaceful Sleep for Omar’s music playing between January and June.

Exercise

Necessary Statutes: The Civil Code, Article 41, declares that a person who is financially inept—that is, “prodigal”—or forgetful in the workplace shall have incomplete capacity to make a contract. A “financially inept” person is someone who cannot handle money responsibly.³⁶

Facts: Arash and Bahara are a married, middle-aged couple. Arash is an avid collector of bags. Last year Farhad made a contract with Arash. Farhad would sell a unique blue bag to Arash for 60,000 Afghanis. The bag was obviously used—it was beat-up and worn down. Upon hearing of the contract, Bahara became fed-up. Arash was constantly buying used, brightly covered bag for excessive sums of money. The year prior, he had bought a bright yellow purse. She did not need the purse, and was it worth anything. He paid 40,000 Afghanis for it. He did something similar the year before that, and something every other year before that. He had a whole room full of bags.

When she confronts Arash, he says that it is his hobby. He has a good job, and makes 120,000 Afghanis a year. He thinks he should be free to indulge in his hobby. Moreover, he thinks that the blue bag is a valuable collector’s piece.

Bahara goes to court to get an order of incapacity for Arash. You are the judge. Do you grant the order? Give your reasoning in IRAC format.

2.3 Legal Reasoning and Analysis—Conclusion

This section had two purposes. First, it was an introduction to legal argumentation. If you choose to pursue a legal career, you will learn more ways to make legal arguments. Second, the section provided critical thinking practice. This reflects the importance of critical thinking to the legal profession. Critical thinking is central to the law. Law is where critical thinking has the greatest impact. Individual’s rights and liberties hinge on the quality of legal argumentation. And the quality of a lawyer’s argument depends on her critical thinking skills.

³⁶ Afghanistan Legal Education Project, *An Introduction to the Law of Obligations of Afghanistan*, 1st ed. (Stanford: Stanford Law School, 2014), 37.

CONCLUSION

Hopefully, this chapter has provide some tools for critical thinking. It should make you more comfortable evaluating another's argument and evidence, and structuring your own. Furthermore, you should have some grasp of how critical thinking works in the legal context.

But these are just tools. To become experts, you must practice and learn. Grapple with problems and question what people say. Make arguments and accept criticism. Such practice takes time, effort, and patience, but it is worth it. As a good critical thinker, you will be part of a group of people who are attempting to discover the truth. Each argument makes a critical thinker reconsider her position and test the evidence and assumptions supporting it. The end result is a conclusion that better conforms to reality. Those conclusions can be the foundation for national policy, legal arguments, or personal fulfillment. Make that foundation as strong as possible.

Happy thinking.

CONCLUSION

Afghanistan is undergoing a crucial phase in its history. The country experienced its first non-violent transfer of power in 2014 – a key milestone in the conflict-ridden country’s history. The problems surrounding the 2014 presidential elections, however, also demonstrated the bumpy road towards a democratic and stable state. Major challenges, including insecurity and corruption, persist. Despite these significant hurdles, efforts have been made to advance the rule of law.

The rule of law is a cornerstone of any democratic and well-functioning society. Promoting justice, order and stability, and economic development – the key objectives of the rule of law – demands, among other things, a robust legal profession. Afghanistan needs well-trained defense attorneys, prosecutors, judges, and other legal professionals, to effectively institutionalize the rule of law.

This book marks the first step in your journey as an aspiring legal professional. In this introductory textbook, you have developed a solid preliminary foundation in law generally, and in Afghan law in particular. This foundation is also reinforced by a crucial skill that we have tried to inculcate throughout the textbook: critical analysis of new concepts and the law. Let’s recap what we covered in this book.

We began our substantive discussion by introducing foundational concepts in law. These preliminary principles included notions of law, morality, and social norms. You also learned about rights and obligations, rules and standards, and legal personality. This chapter also explained the distinctions between legal systems and legal traditions. Familiarity with these distinctions is crucial in a world where Afghanistan’s legal and political climate is inextricably intertwined with developments elsewhere. Indeed, globalization necessitates comparative law perspectives grounded in widely-held core legal concepts. This chapter also introduced you to one of the key themes of this book: the rule of law.

Building on these core concepts, we then explored the rule of law in Afghanistan. You also learned about the pluralistic nature of the Afghan legal system and how different sources of law interact with one another. In navigating the maze of rules, it is imperative that you understand the hierarchy of laws based on the constitution. Two broad categories of law were also presented: the public and private law category as well as the domestic and international law classification.

To further understand Afghanistan’s present legal system, we examined the country’s legal history. You learned about major developments in three periods: the pre-constitutional period, the constitutional period, and the post-2001 evolution. In analyzing these different periods, we observed how different governments’ stance on many issues – from fundamental rights and the role of the judiciary to the hierarchy of different sources of law – evolved over time.

After acquiring a big-picture understanding of the overall context and undergirding legal principles, we explored Afghanistan’s legal institutions. In particular, we examined the country’s three branches of government established by the 2004 constitution: the legislature, the executive, and the judiciary. You also learned about the formal and informal alternative dispute resolution (ADR) mechanisms. It is important to consider how key legal concepts and Afghan legal sources play out within the ADR processes. As Afghanistan strives to institutionalize the rule of law, coordination between formal and informal justice systems becomes increasingly important.

Against the backdrop of the wider legal context and key actors in the legal system, you were introduced to substantive laws and procedural laws of Afghanistan. As a legal professional

committed to pursuing justice, it is not sufficient to merely know substantive laws; you must also master the process for enforcing them. Building on your understanding of rights and obligations from the initial chapters, we examined some key aspects of these concepts under Afghanistan's criminal law, civil law, administrative law, and commercial law. Moreover, you learned the general process for determining those rights and obligations in court.

In addition to developing your knowledge of legal concepts and principles, you also polished your critical thinking, reasoning, and analytical skills. These are crucial skills for any aspiring professional, especially those in law. This book supplemented new concepts with numerous instructional tools to further enhance your understanding and critical thinking. You refined your understanding of materials through many examples, discussion questions, case studies, and application exercises. Moreover, you gained a deeper and broader grasp of the concepts through comparative examples and cases. The increasing interconnectedness of the global village requires familiarity with different legal systems and approaches.

As you have learned throughout this book, law is a vast, dynamic, and powerful variable in daily life. Overall, you have acquired a strong general base in preliminary legal concepts and Afghan law. Now you are ready to pursue further studies in specific areas of law. As you continue your studies keep in mind the importance of critical inquiry. Constantly evaluate new concepts and the law. Every Afghan has an important role in institutionalizing the rule of law in the country. Play your part.

GLOSSARY

Acceptance: A manifestation of agreement to the terms made by the person who made the offer.

Acquittal: A judgment that a person is not guilty of the crime with which the person has been charged.

Administrative procedure: The process through which government bodies perform their roles and responsibilities and through which citizens can challenge administrative decisions.

Afghan transitional administration: The interim government that the Bonn Agreement established to transition Afghanistan into a full functioning democracy in 2004.

Alliance: An agreement that demonstrates joint interests. As they relate to international law, alliances can be agreements across multiple countries to promote peace and stability.

Alternative dispute resolution: The process of resolving disputes outside of the formal court system. “Alternative” simply means that disputes are not resolved by a state judge. Instead, they are resolved by a private individual or by a local council of elders.

Ambiguous word or phrase: A word or phrase reasonably subject to significantly different meanings given the context.

Amend: To change a law.

Anecdotal evidence: Evidence in the form of stories that people tell about what has happened to them.

Appeal: The act of asking a higher court to review and overrule a lower court’s ruling.

Appellant: A person who applies to a higher court for a reversal of the decision of a lower court.

Appeal to authority: Argument that something is correct because an expert or expert source said it is.

Arbitration: A formal alternative dispute resolution method between where a neutral third party (known as arbitrator) settles a dispute. Essentially a private court because the decision of the third party is binding.

Arbitrator: A third party that acts as a decision maker in arbitration proceedings. Usually a retired judge, lawyer, or expert in the field.

Argument: The facts, reasoning using those facts, and a conclusion arising from the facts and reasoning.

Assumption: Something that a person would take for granted; that an argument assumes is true.

Bail: The temporary release of an accused person awaiting trial on the condition that a sum of money be lodged to guarantee their appearance in court.

Bias: An inclination of temperament or outlook; a personal and sometimes unreasoned judgment.

Bicameralism: The practice of having two separate houses (chambers) in a legislature. Generally speaking, each house must pass a bill by a majority vote before it becomes a law.

Bi-lateral treaty: An agreement between two state parties, such as countries or international organizations.

Binding legal sources: Sources of law that judges must follow, if they apply to the legal question that the judge is considering.

Boxes of justice: a large, locked mailbox in which petitioners could place sealed letters, allowing them to directly petition the king for aid in resolving disputes by writing him a letter.

Bringing charges: To accuse someone of a crime in a court.

Burden of proof: A party's duty to prove a disputed assertion or charge. In a civil case, the plaintiff has the burden of proof to produce evidence and persuade the judges that the court should grant the plaintiff's claim.

Bylaw: Laws that are created by administrative bodies to help implement regulations. They do not require approval from the Council of Ministers.

Capacity: The right to form legal relationships, and a requirement of forming a valid contract.

Capital punishment: Punishment of death for a crime.

Case: A legal action, especially one to be decided in a court of law.

Caselaw: Judicial decisions in prior cases; considered an authoritative source in the common law tradition.

Causal argument: An argument that claims a specific act will cause a specific result.

Causal term: In rules-based reasoning, it is a verb that links the statute's test with the result and that may be mandatory, prohibitory, discretionary, or declaratory.

Causality: A causal agency, force, or quality.

Cause: The goal of a contract that the subject is supposed to fulfill for the person conveying it.

Checks and balances: A system that allows each branch of a government to influence acts of another branch to prevent any one branch from exerting too much power.

Civil action: A dispute between private parties.

Civil procedure: The set of procedural laws that govern the process of civil litigation.

Civil rights: Citizens' legal entitlements, such as Afghan citizens' constitutional rights to liberty, dignity, and freedom of expression. Civil rights often restrict the government from infringing on civil rights.

Code: A compilation of statutes intended to comprehensively cover a particular area of the law; for example, the Penal Code covers criminal law.

Codification of the law: Writing down the laws with clear directions on how and when they apply so that the government and citizens will always know what the laws are.

Coercion: Persuading someone to do something by using intimidation, force, or threats.

Commercial procedure: The set of procedural laws that govern the process of trials in a commercial court.

Communism: In very simplified form, the idea that everyone should share everything and that private property is bad for everyone.

Conclusion: When discussing syllogistic reasoning, it is the result of comparing the minor premise and the major premise.

Confidential: Private or secret. With regards to communication between a lawyer and a client, confidential means that the lawyer keeps all communication secret.

Conjunctive test: In rules-based reasoning, a test that requires all the listed elements be present in order to reach the stated result.

Consent-based laws: Laws that only apply to those who agree to them. For example, states are only bound to international treaties if they agree to them.

Constitution: A set of fundamental rules that govern all other rules within a legal system and cannot be changed by regular legislative action.

Constitutional commission: Commission created by the Transitional Administration of Afghanistan to draft the 2004 Constitution.

Constitutional Loya Jirga: Created to approve the 2004 constitution which would be the final constitution in this long process.

Constitutionalized: Explicitly written into a constitution.

Contract: An agreement that is legally enforceable.

Corporate governance: The rights and responsibilities of the participants of the company, as well as the procedures for making company decisions.

Correctional system: Agencies responsible for overseeing prisons. In Afghanistan, correctional system consists of the Central Prisons Department of the Ministry of Justice.

Corruption: Abuse of a position for private gain.

Court of equity: In the common law tradition, a court in which a person who failed to receive an adequate remedy in a court of law could ask a chancellor, who acted in the name of the king, to grant whatever remedy (monetary or injunctive) was fair under the circumstances.

Court of law: In the common law tradition, a court in which a judge used rigid procedures, applied legal rules that developed over time, and could grant only monetary remedies.

Criminal procedure: The body of law that sets out the rules and standards that courts follow when adjudicating criminal lawsuits.

Critical thinking: A close analysis and judgment of the thinking of yourself or others.

Customary law: Traditional practices or modes of conduct that have been followed from generation to generation within a particular community and are now mandatory within that community. Customary law varies by place and is a source of informal law that is enforced by local councils such as shuras and jirgas.

Decree: An official order by the government in power, often without representation of the people.

Deeds registry: A public depository where documents providing evidence of land transactions are stored, numbered, dated, indexed, and archived.

Defendant: A person accused of misconduct in a civil or criminal trial.

Deter: To discourage or to create incentives that decrease the likelihood of an individual choosing a particular course of action.

Dewan: Subject-specific department in a court. For example, family dewan, meaning department that handles cases related to family issues.

Direct election: Where the citizens voted directly to elect their leader.

Disjunctive test: In rules-based reasoning, a test that requires one of the listed elements be present in order to reach the stated result.

Distinguish: In the common law tradition, the act of determining that a new case is not governed by a certain precedent because some aspect of the case is different enough to justify a different ruling.

Documents: Written, printed, or electronic matter that are presented to the court as evidence.

Domestic law: Governs individual citizens and corporations within a country. In Afghanistan, it includes the Constitution of Afghanistan, Shari'a sources of law, custom, state codes and statutory law, and other formal decrees or regulations.

Due process: A course of legal proceedings according to rules and principles that have been established for the enforcement and protection of private rights.

Elements: In rules-based reasoning, they are the facts whose absence means the statute does not apply.

Emotional reasoning: Using emotion as a major premise or assumption in your argument.

Evidence: Something that tends to prove or disprove the existence of an alleged fact and may include oral testimony, documents, and tangible objects.

Expert witness: A person who is permitted to testify at a trial because of special knowledge or proficiency in a particular field that is relevant to the case.

Failures of reasoning: Assumptions that do not consider important aspects of the problem an argument addresses.

Felony: Crimes punished by imprisonment for a minimum of five years.

Fiqh: Islamic jurisprudence, the body of Islamic scholarship that attempts to understand and apply God's law (sharī'a) to situations that are not explicitly addressed by the Qur'an and Sunna.

Fraud: When a party is induced to agree to a contract due to the intentional misrepresentations of another party to the contract.

Freedom of the press: Freedom of communication and expression through published sources including the internet and newspapers.

Fundamentals for Judges: A 140-page instruction manual containing 136 rules for court procedure and the deciding of cases.

General jurisdiction: Ability of the court to hear a case on any subject. In Afghanistan, Central Primary Courts have general jurisdiction.

Guidelines and manuals: Binding, detailed documents that guide implementation of regulations.

Ḥadīth: Accounts of the sayings of the Prophet Muḥammad (PBUH) that have been transmitted from generation to generation.

Head of government: The leader of the government. Typically, the head of government oversees all domestic policy, while the head of state focuses on representing the country to international leaders. 2004 Constitution combines the authorities of the head of government and the head of state and gives them both to the President. But, since the last election, the new CEO may take more duties of the head of government.

Head of state: Generally speaking, the role of the head of state is to represent the sovereignty of the nation, particularly by signing treaties, receiving foreign ministers, and appointing government officials. This is in contrast to the head of government, who is usually in charge of domestic policy. 2004 Constitution combines the authorities of the head of government and the head of state and gives them both to the President.

Ijtihād: In the Islamic legal tradition, the process by which a qualified scholar strives to derive specific legal rules from the Qur'an and Sunna.

Incapacitate: To deprive the ability of someone to do something, in criminal law to make a person unable to commit a crime.

Incorporators: The founders of a corporation.

Indigent: Poor, unable to pay for necessary services.

Inference: Reaching a conclusion based on facts and assumptions.

In flagrante delicto: A legal term (Latin: “in blazing offense”) used to indicate that a criminal has been caught in the act of committing an offense.

Injunction: A judicial decree requiring or forbidding a party to perform a particular action.

Interim government: A government set up to operate during a period of instability or transition until a more formal government can be fully established to replace the previous government.

Interlocutory appeal: An appeal filed before a final judgment based on the court’s ruling on a preliminary objection.

Irrelevant fact: A fact that takes focus away from facts that do matter.

Islahi: Idea of reconciliation. In this book, used in the context of informal justice system where the local councils direct a wrongdoer to compensate the victim (or the victim’s family) to rebuild the relationship with the family and the community.

Jirga: Gathering of elders or leaders who resolve a dispute or make collective decisions about an issue of community-wide importance, often applying customary law.

Joint committee: A committee composed of members of the Meshrano and the Wolesi Jirgas. This committee forms any time either the Meshrano or the Wolesi Jirga rejects a bill in order to come to an agreement.

Judgment: A court’s final determination of the rights and obligations of the parties in a case.

Judicial discussion: The portion of the trial where parties present statements and summarize their arguments.

Judicial impartiality: A state of governance in which judges decide cases based on the law, not based on their personal interests or preferences.

Judicial independence: A state of governance in which judges are free to decide cases according to the law without being pressured by political leaders.

Judicial proceeding: The portion of the trial where judges and parties enter the courtroom and the court receives evidence and proof documents.

Judicial review: The power to decide whether the laws passed by the parliament violate any provision of the constitution and if they do, then the law is invalid. Also means the process under which executive actions are subject to review by the judiciary.

Jurisdiction: The official power to make legal decisions and judgments.

Justice: Fairness, reasonableness, and equality; treating each person as he or she deserves to be treated. One of the main purposes of law is to promote justice within a society.

Laches: The idea that if a party waits too long after a dispute to make a claim, then that party loses its right to sue.

Law: A body of rules that regulate human behavior and are enforced by the government.

Lawsuit: A claim or dispute brought to a court of law for adjudication.

Lay witness: A person who is permitted to testify at a trial because they have first-hand knowledge of the facts of the case.

Legal analysis: How legal professionals explain the conclusion they reached through legal reasoning.

Legal element: Element of a crime which means that is lawfully a crime within the written law of Afghanistan.

Legal person: An abstract, non-physical entity that can have legal rights and legal obligations; for example, a corporation.

Legal reasoning: How legal professionals consider facts and issues in order to reach a conclusion.

Legal system: A set of laws and institutions that a state uses to regulate human activity within its borders.

Legal tradition: A set of historically rooted attitudes about what the law is, where it comes from, how legal institutions should be structured and operate, and what role the law plays in society.

Legislative decree: Laws that the government proposes during a National Assembly recess. Legislative decrees become binding if the President endorses them, unless they are later rejected by the National Assembly.

Litigation: The process of taking a dispute to court.

Madhhab: One of the five major schools of Islamic jurisprudence; the Ḥanafī, Mālīkī, Shāfī'ī, and Ḥanbalī madhāhib are the primary Sunnī schools, and the Ja'fari madhhab is the primary Shi'ī school.

Majority: More than 50%. A vote requiring a majority means more than 50% must vote in favor of the bill or the candidate.

Major premise: An assumption about reality; a guiding principle.

Manager: The individual designated to administer the affairs of a partnership.

Material Element: The acts, either positive acts or omissions, required to punish someone for a crime.

Mediation: Alternative dispute resolution mechanism that uses a third party but that is less formal than arbitration. The third party (known as mediator) guides the negotiation and may propose solutions. But, these solutions are not binding and so the parties do not have to adopt them.

Mental element: Element of a crime that concerns the intention of the person committing it.

Ministry: A government department headed by a minister of the state.

Minor premise: When discussing legal reasoning, the facts.

Misdemeanors: Crimes that carry a punishment of imprisonment from between three months to five years and a fine of 3,000 Afghani or more.

Morality: A set of beliefs about what acts are good and what acts are evil, often rooted in religion.

Multi-lateral treaty: A treaty amongst more than two states and/or international organizations.

Multiparty state: A state where there are several parties the voting public can choose from.

National Assembly: The Constitution of Afghanistan defines the National Assembly as “the highest legislative organ” that “manifests the will of people as well as represents the entire nation”. The National Assembly of Afghanistan has responsibility for drafting and passing legislation, among other crucial tasks. The National Assembly is made up of two houses, an upper house (Meshrano Jirga) and a lower house (Wolesi Jirga).

Nationalize: Nationalization of resources means that private companies or individuals could not own things like petroleum, water, trees, coal, and all other natural resources.

NATO: North Atlantic Treaty Organization – an alliance between most European countries with the United States and Canada formed in 1949. The countries agree to defend each other against any attacker.

Natural person: A human being who can have legal rights and legal obligations.

Negative rights: Rights that create a duty for others not to act a certain way. For example, citizens’ rights to peaceful un-armed demonstrations means that the government has a duty to abstain from putting restrictions on peaceful un-armed demonstrations.

Nested problem: A problem whose solution requires answering other questions.

No-confidence vote: A vote, usually by the legislature, that a person in the government is no longer fit to hold his or her position. In Afghanistan, the Wolesi Jirga (the Lower House of the legislature) can remove any minister by a vote of no-confidence.

Non-governmental organization: Organizations independent from the government or any international organization. These are usually funded by donations that support a specific political or social cause. An example is the International Legal Foundation that uses donations to provide a free defense attorney to people who do not have money to hire their own attorney.

Obligation: Something that a person is legally required to do or not to do; for example, a father has an obligation to provide his children with the basic necessities of life until they become old enough to provide for themselves.

Offer: An expression of someone’s willingness to enter into a contract, or agreement, with another person.

Omission: A failure to commit a duty or task.

Opinion: Something that depends on an observer's unique perspective.

Order: Security, organization, and stability; the opposite of chaos. One of the main purposes of law is to promote order within a society.

Overriding presidential veto: A process when the Wolesi Jirga (the Lower House of the legislature) can pass a bill even if the President opposes, or vetoes, that bill. To pass a bill, two-thirds of the members of the Wolesi Jirga must vote in favor of that bill. The Meshrano Jirga (the Upper House of the legislature) does not have this power.

Oversimplification: Exclusion of important, qualifying facts or assumptions in an argument.

Overtturn: To invalidate a decision of a lower court.

Partnership: A form of business where two or more people are co-owners.

Partnership agreement: The foundational document of a partnership that outlines the rights and obligations of each partner to each other and a business.

Perpetrator: An individual who commits a criminal offense.

Persuasive authority: A source that courts do not need to apply but may find to be relevant. Examples include previous legal decisions, law journals and other scholarly publications, law dictionaries, encyclopedias, textbooks, legal publications by various government bodies, policies & strategic plans, and commentaries on statutory laws and legislative history.

Petty offenses/obscenities: Carry a punishment of imprisonment from twenty-four hours to three months, and a fine of less than 3,000 Afghanis.

Plaintiff: A private party who initiates a civil lawsuit seeking restitution from a party who harmed him.

Pleading: The formal written document that states the party's basic position.

Pluralistic legal system: A legal system that includes many sources of laws, rather than simply one source of law.

Plurality: The biggest number of votes. Usually refers to a situation where no candidate has received a majority of votes (over 50%) but one candidate received more votes than the others. For example, if candidate A received 35% of votes, candidate B received 40% of votes and candidate C received 25% of votes, then candidate B would win by a plurality of votes.

Politburo: The principal policy-making group of a communist government.

Power vacuum: The situation left when a previous ruler withdraws from a state and leaves no one in control, resulting in a somewhat lawless state.

Precedent: Previous judicial decisions.

Preliminary objections: Challenges to the court's competence to hear the case or to the propriety of the claim in court.

Presidential cabinet: All ministers and possibly a few other officials (like chief of independent directorates and key agencies) who are together making the executive branch, having joint meeting, and making collective decisions including enacting regulations.

Presidential decree: Laws issued by the President, based on authority granted to him or her from the Constitution and statutory laws.

Presidential veto: The power of the President to prevent a bill from becoming law. In Afghanistan, this power is not absolute as the presidential veto can be invalidated by a two-thirds majority of the Wolesi Jirga (the Lower House of the Parliament); see “Overriding presidential veto”.

Presumption of innocence: The presumption that an accused person is innocent until proven guilty by the order of an authoritative court.

Primary sources: Binding sources of law that judges must apply when making legal decisions. The sources of law that are binding may depend on the circumstances surrounding the legal question. For example, international law may not be a primary source, if a domestic law says that it should prevail over international law.

Principle of legality: The requirement that all laws be clear, publicly accessible, and not impose retroactive increases in punishment.

Private international law (also known as “conflict of laws”): Governs interactions between 1) individuals from different states; 2) corporations from different states; 3) individuals and corporations from different states.

Private law: Recognizes and enforces private (non-governmental) parties’ rights.

Pro bono: Conducting legal services without charging clients fees.

Procedural law: Law that governs how people—often government officials—make the law, enforce the law, or adjudicate possible violations of the law. In other words, the set of laws that regulate the process by which a court hears and determines what happens in a civil lawsuit, criminal proceeding, or administrative proceeding.

Property: A physical object or right that has material value among people.

Proportionate: A number corresponding to the group’s share of the total. When used in elections of local representatives, proportionate means that districts with more people send more representatives.

Prosecutor: Lawyer that presents cases on behalf of the state against people who are accused of committing crimes.

Public international law: Collection of rules and customs that govern interactions between states.

Public law: Governs the relationship between a state and its citizens.

Question of fact: Question of fact is a question about what happened in a particular instance. This is distinguished from question of law below.

Question of law: Question of law encompasses two issues: what does a specific law mean and which law must be applied to the particular dispute. This is distinguished from question of fact above.

Ratification: Action taken by state or international organization indicating consent to be bound by a treaty. In the domestic context, meaning to sign and make officially valid. For example, when the President ratifies a bill, it becomes the official law.

Recusal: For a judge to recuse himself or herself from a case because of a possible conflict of interest or lack of impartiality.

Regulation: A legally binding rule that is enacted by the Council of Ministers or by one of the branches of the state (such as the Supreme Court).

Rehabilitate: To restore to a condition of useful and constructive activity.

Relevant fact: A fact that supports a conclusion.

Remand: To send a case back to the trial court for a retrial or more fact-gathering.

Repeal: A legislative enactment that cancels a law or a provision of the law.

Rescind: To revoke or cancel.

Res judicata: The principle that when a specific issue has been decided in court once, that same issue cannot be argued again.

Result: In rules-based reasoning, it is the legal consequence the statute specifies if the elements are present.

Reverse: To overthrow, invalidate, repeal, or revoke a lower court's decision.

Reverse causality: A fallacy where the argument calls the causal act the result and vice versa.

Right: Something that a person is legally entitled to have; for example, two of the most basic rights guaranteed by the Constitution are the right to life and the right to individual liberty.

Royal edicts: An official order by a king or ruler, sometimes known as civil codes.

Rule: The type of law that draws a clear distinction between conduct that is prohibited and conduct that is not prohibited.

Rule-based reasoning: Applying facts to the components of a statute to see if the statute's required result occurs.

Rule of law: A state of governance in which (1) the laws are clear, publicly accessible, and prospective; (2) all people and institutions, including ruling officials, are accountable to the law; and (3) the laws are applied by impartial, independent judges.

Rule of precedent: In the common law tradition, a requirement that when a judge encounters a legal question that has already been resolved by the same court or a higher ranking court, she must follow that earlier ruling.

Run-off election: The second round of elections, where people vote for the two candidates who won most votes in the first round. In Afghanistan, a run-off election is used if no candidate won more than 50% of votes.

Search warrant: A court order that a judge issues to authorize law enforcement officers to conduct a search of a person, location, or vehicle for evidence of a crime and to confiscate any evidence they find.

Secondary legal sources: Sources of law that help explain primary sources and persuade judges, without being binding.

Secular law: Law not based on religious beliefs.

Sentence: Punishment for a crime.

Separation of powers: It is the idea that the power of government as a whole can be limited by distributing power throughout the three branches of government (the executive, legislative, and judicial branches).

Settlement: An official agreement intended to resolve a dispute or conflict outside of court.

Share: A division of a corporation's capital which indicates a percent ownership of the company.

Shareholder: A part owner of a company.

Shari'a: God's law (in the Islamic legal tradition), as revealed through the text of the Qur'an and the Sunna of the Prophet Muhammad (PBUH).

Shura: Local councils, either religious or secular, that are typically convened on an as-needed basis to resolve disputes or decide issues of community governance or resource management. They may apply customary law.

Signing a treaty without ratifying it: Demonstrating a desire to continue participating in the treaty-making process without formally consenting to be bound by the treaty.

Single party state: Meaning only one party, that most Communist countries have, including Afghanistan at the time.

Social norm: A type of behavior that is seen as usual and appropriate within a particular society.

Sole proprietorship: A form of business where a single person owns a business.

Specialized jurisdiction: The power of the court to hear only those cases that fall under its specific subject. In Afghanistan, there are four Primary Courts with specialized jurisdiction: (1) District Primary Court; (2) Juvenile Primary Court (3) Commercial Primary Court, and (4) Family Primary Court. For example, the Family Primary Court is only allowed to decide cases that have to do with family issues, such as marriage, divorce and familial property.

Standard: The type of law that expresses a general principle, leaving room for debate about whether or not a certain type of conduct is prohibited.

Standard of proof: The degree or level of proof required for the party to prevail.

State: Nation or territory that is considered an organized political community under one government.

Statute: Laws that are approved by both houses of Afghanistan's National Assembly and endorsed by the President.

Statute of limitations: The limited time period in which a person can be convicted of a crime.

Subject: Thing of value exchanged in a contract.

Subpoena: A written document that orders a person to give testimony.

Substantive law: The set of laws that create, define, and regulate the rights, duties, and powers of individuals and collective bodies.

Summon: To command someone to appear in court through the delivery of a summons form.

Sunna: The life, deeds, and sayings of the Prophet Muhammad (PBUH); considered an authoritative source in the Islamic legal tradition.

Supersede: To replace a law with a new law.

Syllogistic reasoning: Using a major premise and a minor premise to reach a conclusion.

Taqnin: General Department for Law Making and Academic Legal Research Affairs of the Ministry of Justice. The Taqnin ensures the proposed legislation does not conflict with the Constitution, international treaties, sharia, or existing legislation. All proposed bills must go through Taqnin before the National Assembly can vote on them.

Tariff: Taxes on imports or exports.

Testimony: An oral or written statement presented to the court as evidence.

The Bonn Agreement: A roadmap to try and rebuild the government of Afghanistan following the U.S. invasion and removal of the Taliban from power in 2001.

Treaty (also called an "international convention"): Formal agreements between states or international organizations that impose special legal obligations upon them.

Undefined term: A term lacking a definition.

Verdict: A judge's decision in a criminal trial that the defendant is either guilty or not guilty.

Voluntary assent: An agreement made by choice, characterized by the absence of coercion. To voluntarily assent to an agreement, one must also have the option of rejecting the offer.

Warrant: A document that authorizes the police to search a particular individual's place of residence. For example, a court might issue a search warrant if there is evidence that items related to a crime are hidden in a certain person's home.