

# **Legal Pluralism in Afghanistan: Historical Context and Future Prospects**

## **Abstract:**

This article explores the coexistence of multiple legal systems within Afghanistan, including formal state laws, Islamic law, and customary practices. This pluralistic legal framework, deeply rooted in the country's history and cultural diversity, poses significant challenges and opportunities. The study highlights the historical evolution of legal pluralism in Afghanistan, the impact of recent political changes post-August 2021, and the necessity of harmonizing these systems to ensure justice and human rights. It emphasizes the importance of a context-driven approach that respects local customs while aligning with international legal standards to foster stability and inclusivity in Afghanistan's legal landscape. The article also examines the role of traditional dispute resolution mechanisms, the influence of Hanafi jurisprudence, and the implications of the De Facto Authorities' (DFA) interpretation of Sharia law on the legal system.

## **Key Words:**

Legal Pluralism, Afghanistan, Shura, Jirga, Islamic Law, Customary Law, Constitution, Human Rights, Rule of Law

**June 2024**

## I. Introduction

Legal pluralism denotes the coexistence of multiple legal systems within a society, encompassing formal legal systems based on state laws and institutions and informal legal systems rooted in traditional or religious practices. These systems may sometimes conflict, leading individuals to choose one over the other based on their specific circumstances.

Legal pluralism is prevalent in many societies globally, often emerging when different legal systems coexist within a single society, such as traditional or customary laws alongside formal legal systems.

In [Afghanistan](#), historically, legal pluralism involved the coexistence of the formal legal system—grounded in the Afghan Constitutions, civil, commercial, and criminal laws—alongside informal legal systems based on traditional and religious practices, and Islamic Law. Legal pluralism in Afghanistan is intricate, providing some with access to justice while potentially causing confusion, inconsistency, and human rights violations. Afghanistan's decentralized location and culturally diverse population render legal pluralism particularly significant.

## II. Historical background of legal pluralism in Afghanistan:

Understanding the status quo and discussing the future of legal pluralism in Afghanistan requires an appreciation of the historical context. Customary law and Islamic law have deep roots in Afghanistan's history and way of living, predating the emergence of modern Afghanistan.

Afghanistan's legal history demonstrates a recognition of legal pluralism. Afghan constitutions have [acknowledged Islam's significant role](#), with the 1964 constitution being [the first to prioritize statutory](#) law over Islamic law. Despite this, Islamic law remained influential in practice, and the education system for legal experts continued to be dominated by the dichotomy of statutory and Islamic law. The 1964 Afghan constitution aimed to [unify the judiciary](#) and introduce a new national court structure. The term "sharia courts" was removed from the constitution, and the Law of Judicial Authority and Organization (1967) divided the court system into "general" and "special" courts. Despite the apparent decline of Islamic law's influence on paper, its impact in practice remained significant. Some Afghan legal codes, such as The Guiding Rules on Criminal Affairs (1971) and the [Civil Code \(1977\)](#), are believed to be codifications of Islamic law.

The diagram below illustrates the lifespan of each constitution along with the prescribed approach for judges in balancing the application of state law and Islamic law.

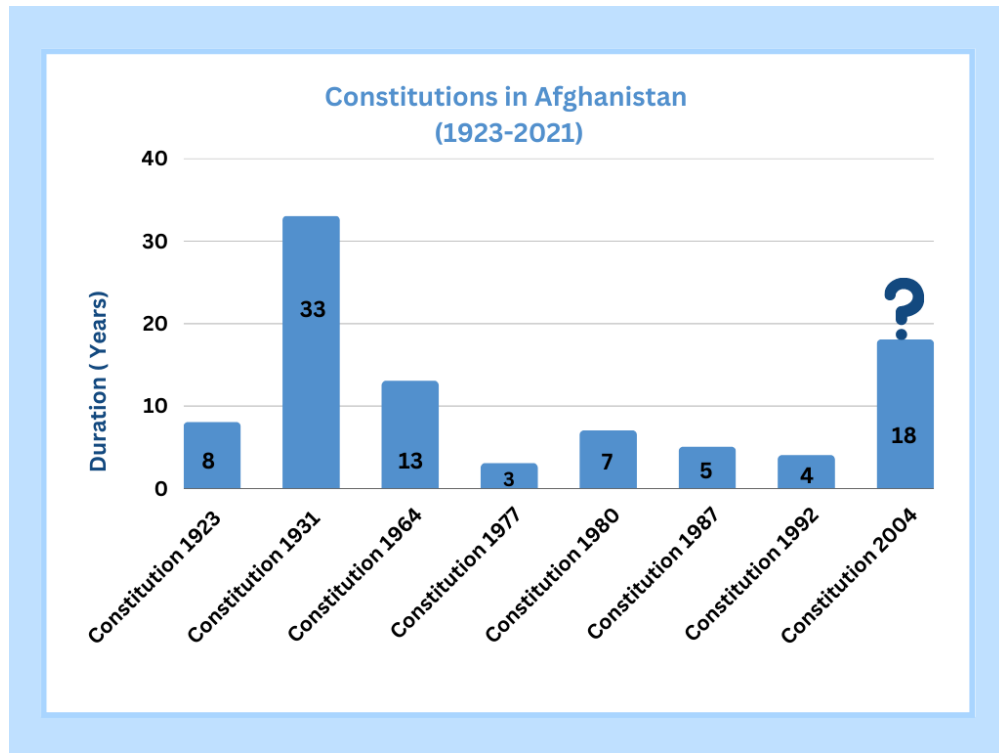


Figure 1 Legal History of Constitutionalism in Afghanistan

Constitution	Sharia & State Law
<b>1923 Constitution</b>	No mention of Sharia or Islamic law
<b>1931 Constitution</b>	Islam as the state religion; laws aligned with Islam
<b>1964 Constitution</b>	Islam as the state religion; laws aligned with Islam; Sharia as the primary law source
<b>1977 Constitution</b>	Islam is the state religion; Sharia is the highest law
<b>1987 Constitution</b>	Islam as the state religion; laws aligned with Islam; Sharia as law source
<b>2004 Constitution</b>	Islam as the state religion; laws aligned with Islam; Sharia as law source

Throughout history, the management of legal pluralism in state law has been a complex and dynamic process, influenced by the ever-changing balance of power and the specific area of law in question. For instance, the [2004 Constitution](#) mandates that courts apply both constitutional and other legal provisions, and then Hanafi Fiqh. The 1977 Civil Code instructs courts to consider common custom when neither law nor Hanafi jurisprudence

provides guidance. Similarly, the 1955 Commercial Code advises resolving commercial disputes through legally binding agreements or commercial customs and practices. These laws highlight the importance of legal pluralism in effectively achieving justice.

The laws exemplify two approaches to legal pluralism and the hierarchy of sources. The vertical hierarchy, evident in the 2004 Constitution, 1977 Civil Code, and 1955 Commercial Code, successively refers to each system when previous sources are unavailable. In contrast, the Penal Code adopts a horizontal approach, where certain crimes are governed by state law and others by Islamic law, indicating a concurrent application of state law or Islamic law depending on the type of crime rather than a sequential hierarchy.

**Article 130 of the 2004 Constitution:**

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 limits set by this Constitution, rule in a way that attains justice in the best manner.

**Article 2 of Civil Code 1977:**

Where neither do provisions of law exist, nor any ruling is found among principles of Hanafi Jurisprudence of Islamic Sharia, courts shall decide according to common custom, provided that the custom does not contradict provisions of law or principles of justice.

**Article 2 of the Commercial Code of 1955:**

Commercial disputes shall be settled in accordance with legally binding agreements and, in their absence, by reference to the explicit or implicit meaning of commercial laws. If the dispute is not settled in the said way, commercial customs and practices shall apply. Local and special customs and practices shall be preferred to general customs and practices. In the absence of customs and practices, provisions of other laws to which attribution is made shall apply.

**Article 2 of the Penal Code of 2017:**

- (1) This law regulates the Taziri crimes and penalties.
- (2) Perpetrators of Hudud, Qisas, and Diat shall be punished in accordance with the provisions of Hanafi jurisprudence of Islamic Sharia.

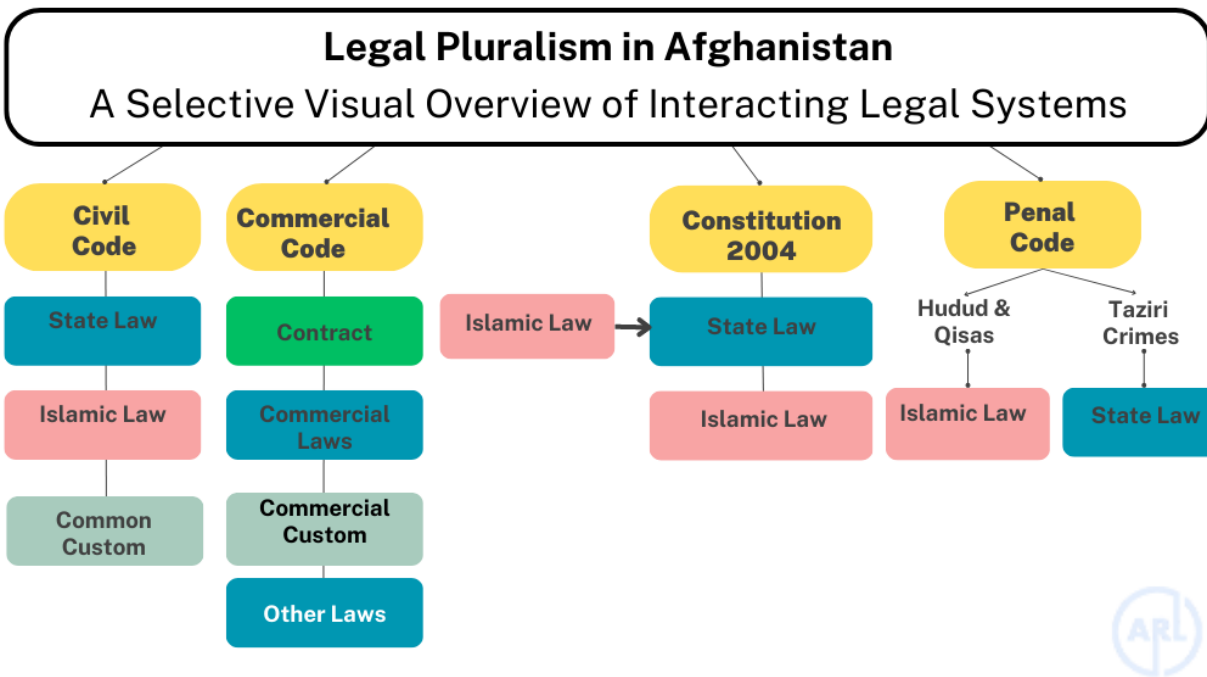


Figure 2 Different Models of Legal Pluralism Historically Recognized Under the Afghan Laws

While the status of these laws was not known at the time this article was drafted, these sources are important for various reasons, including historical reasons and also what lessons could be learned to help Afghanistan better manage legal pluralism so that it promotes justice and yet adheres to international human rights standards.

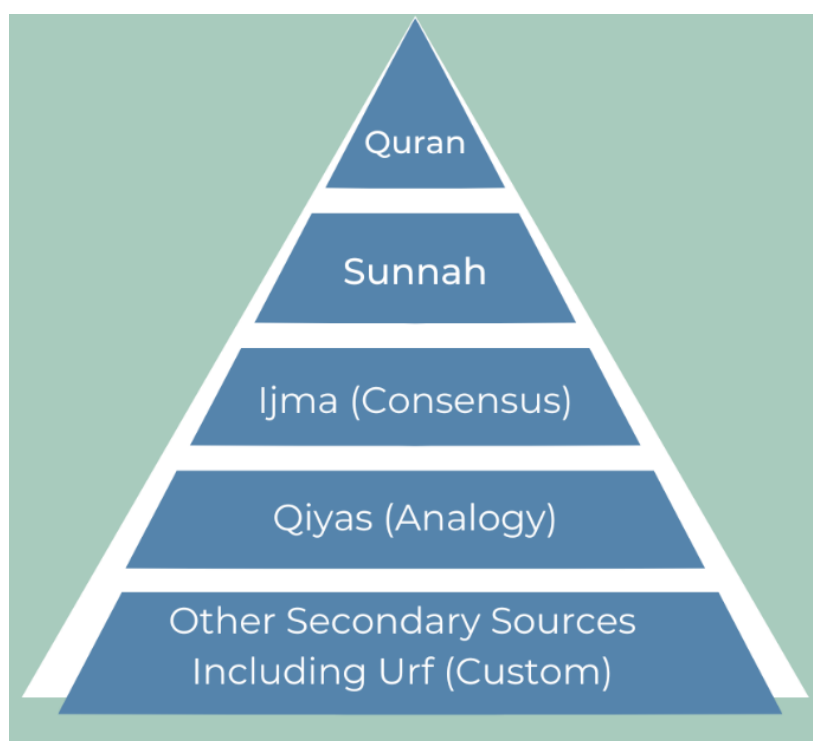
Despite being the most [widely applied](#) form of law in Afghanistan in practice, customary law has not been mentioned in any Afghan constitutions, including the 2004 constitution. This omission is concerning as official courts often refer cases to traditional dispute resolution forums like Shuras and Jirgas, which lack legal basis and risk human rights abuses.

### III. Navigating Legal Pluralism Amidst Afghanistan's Post-August 2021 Transitions

Significant change and uncertainty have characterized Afghanistan since August 2021, with the status of pre-existing laws and the 2004 constitution becoming uncertain. Reportedly, the de facto authorities (DFA) are reviewing some of these laws while also utilizing customary law and informal dispute resolution mechanisms, such as jirgas, to resolve conflicts and disputes. The DFA currently regards Sharia law as the only [legitimate source](#) of legislation, aiming to enforce its strictest interpretation. The DFA believes implementing Sharia law is vital for creating an Islamic government and maintaining stability in Afghanistan.

The DFA [envisions](#) a government led by a supreme religious authority, the "Amir al-Mu'minin" or "Commander of the Faithful," who is knowledgeable in Islamic law. The Taliban believes in the importance of consultation (shura) involving religious scholars and stakeholders in decision-making processes and advocates for an Islamic judicial system to ensure legal decisions are based on their understanding of Sharia.

It is worth mentioning that Legal pluralism is not exclusive to Afghanistan's formal legal system. Some [experts argue](#) that certain Islamic schools of thought accept legal pluralism by recognizing sources such as custom. Hanafi Fiqh's hierarchy of sources exemplifies this integration. With Sharia's increasing role in Afghanistan's legal and governance systems, determining the prevailing system in specific cases becomes more complex, potentially leading to confusion and inconsistency in the application of the law.



*Figure 3 - One way to illustrate various sources and systems in Islamic Law according to Hanafi Fiqh*

The IDLO-conducted justice sector survey involved 203 primarily male lawyers from various Afghan provinces, boasting experience ranging from 1 to 22 years. The survey aimed to gather perspectives on the legal system, legal practice and challenges lawyers are facing, court processes, prisoner situations, recent legal and institutional changes, and training needs. The survey revealed that 76% of participating lawyers do not rely on pre-August 2021 laws, while 24% still do, indicating uncertainty and confusion. Regional variations in legal practices contribute to this ambiguity.

Defense lawyers cited reliance on diverse law sources, including codified laws enacted during previous administrations, laws, and regulations from 1996-2001 when the Taliban

were in power, and various Islamic law sources unfamiliar to most lawyers. These sources, primarily commentaries and treatises authored by Muslim scholars on Hanafi jurisprudence, span different time periods and civilizations.

Another survey conducted by IDLO provides insight into the functioning, training, inclusivity, and referral sources of traditional dispute resolution mechanisms (jirgas/shuras) in Afghanistan. The data highlights key trends and challenges faced by these traditional mechanisms, with a focus on the participants' training, dispute referrals, and women's participation.

The survey found that training and knowledge among jirga members are limited, with only 17.5% of respondents receiving institutional training in dispute resolution. Furthermore, the participants were almost evenly divided in their perception of their legal knowledge, with 50.2% feeling confident in their ability to settle disputes and 49.8% feeling otherwise.

Referrals of disputes to jirgas come from various sources, with 61.3% of respondents stating that formal judicial institutions refer legal or criminal disputes to their jirga. Self-referral by disputing parties was the most common source (290 cases), followed by the Ministry of Justice (143 cases), police (122 cases), courts (99 cases), governors (23 cases), and defense lawyers (19 cases).

The survey also revealed concerns about women's participation in jirgas. A significant majority (76.3%) indicated that women are not allowed to participate as jirga/shura members. Moreover, 60% of respondents believed that the absence of women negatively affects the handling of cases involving women, while 40% did not perceive this as an issue. This underscores the need to address gender inclusivity in traditional dispute resolution mechanisms within Afghanistan.

#### [IV. Examining Legal Pluralism's Future in Afghanistan:](#)

The future of legal pluralism in Afghanistan is a topic of great significance, particularly in light of the country's diverse culture and history of conflict and instability. Harmonizing different legal systems is essential for promoting the rule of law while respecting human rights and adhering to international standards. The pluralistic nature of Afghanistan's legal framework requires policymakers to facilitate their coexistence and interaction to foster inclusivity and social cohesion.

As noted by the [United Nations Development Programme \(UNDP\)](#), the justice sector in Afghanistan is essential for the nation's stability and security. Nevertheless, the sector confronts challenges arising from the limited capacity of justice institutions and restricted access to justice for Afghan citizens. The pluralistic nature of Afghanistan's legal framework, combined with the significant role of traditional justice, has led to polarization in policy debates among government, civil society organizations, and the international community. This polarization has further complicated access to justice, as

harmonization between formal and informal systems lacks definitive policy guidance. During this critical period in Afghanistan's history, it is imperative that donor organizations and justice stakeholders actively pursue harmonization efforts in support of the rule of law.

Afghanistan's evolving legal landscape, characterized by political changes and uncertainties, presents opportunities and challenges in managing legal pluralism.

## V. Opportunities and Challenges

Legal pluralism can contribute to sustainable peace and development by recognizing customary law, deeply rooted in local traditions, fostering inclusivity, and empowering marginalized communities. It can advance human rights and the rule of law by integrating diverse legal traditions and international norms. Trust and legitimacy in the justice system are built through the rule of law and human rights protection, while community involvement and input result in a more responsive justice system.

However, Afghanistan faces challenges in legal pluralism management. One challenge involves translating local conceptualizations of women's rights and universal human rights, affecting transitional justice efforts. Simplistic positivist notions may not adequately account for complexities, leading to chaos and injustice amid political instability and conflict.

The DFA's ambiguous position regarding the 2004 constitution and former laws adds complexity, as does the lack of guidelines for judges and legal practitioners on referring to specific systems within the Islamic law framework. International efforts to build judicial institutions have been limited due to political instability and conflict, increasing the potential for chaos and injustice if legal pluralism remains unaddressed.

Addressing these challenges demands innovative approaches accounting for legal pluralism complexities and Afghanistan's specific context. If not managed effectively, legal pluralism could result in parallel institutions, weakening the justice system and complicating human rights promotion. Failing to manage legal pluralism properly may lead to chaos, injustice, and conflict, hindering Afghanistan's pursuit of human rights and justice.

## VI. Harmonizing Formal and Informal Legal Systems in Afghanistan: A Context-Driven Approach

When exploring strategies for harmonizing legal systems in Afghanistan, it is crucial to understand the mixed results legal transplants have produced. Legal transplant attempts to accelerate legal development and modernize systems but may not succeed due to the



strong ties between a country's legal systems and its history, culture, and social norms. Transplanting foreign legal systems without considering the local context can lead to resistance and rejection, potentially reinforcing existing power structures and inequalities. To avoid this, legal development must consider the local context, values, and customs while engaging with communities to ensure that legal systems meet their needs and priorities. Understanding the local context and empowering local actors and institutions is crucial for successful legal development, particularly in Afghanistan, which has a rich legal history and diverse cultural heritage.

The establishment of an inclusive, internationally aligned legal system depends on key decisions from those in power. Afghanistan's legal history demonstrates that constitutions and administrations change, but deeply rooted legal systems, such as Islamic and customary law, cannot be disregarded or eliminated quickly. To prevent history from repeating itself, legal pluralism must be managed effectively by harmonizing these systems to ensure societal stability and justice.

Fostering inclusivity and social cohesion in Afghanistan requires recognizing and respecting the coexistence of formal and informal legal systems, including state, Islamic, and customary law. This involves acknowledging the local context and empowering local actors while adhering to international human rights standards. As the [UNDP](#) emphasizes, harmonizing these diverse systems is essential for creating a more effective and inclusive legal framework. Legal transplants should be approached with caution, considering potential resistance and risks of reinforcing existing power structures. Sustainable peace and development can only be achieved if legal systems reflect the communities they serve.

[Some studies suggest that](#) a balance between informal, traditional mechanisms and modern laws is essential to effectively manage Afghanistan's legal systems. Key recommendations include referring high-stakes disputes to state courts and less critical ones to Jirgas, providing training for individuals involved in informal dispute resolution, and recognizing that creating a hybrid system requires time and dedication. This approach acknowledges the benefits and challenges of legal pluralism, ultimately promoting an effective and inclusive legal framework.

[Other recommendations](#) include providing judicial training for formal and informal justice systems' actors, improving access to legal resources, and establishing qualification criteria for Shura members. Additionally, developing regulations to outline jurisdictional boundaries, ensuring criminal cases remain within the formal justice system, and avoiding the formalization of traditional justice is essential. Furthermore, efforts should be made to compile general customary law, create a monitoring system for settlements, and mainstream gender equality and sensitivity within the traditional justice system. Finally, increasing women's representation in both justice systems and related sectors is vital for fostering an inclusive environment.

The article presents various approaches to address legal pluralism in Afghanistan, such as the 2017 Penal Code that integrates systems through clear role distribution, the 2004 constitution's hierarchical structure with one system dominating, and the development of a new framework for harmonious system collaboration. Current overlapping and conflicting systems risk causing turmoil. The upcoming illustrations will provide further insight into these options for addressing legal pluralism in Afghanistan.

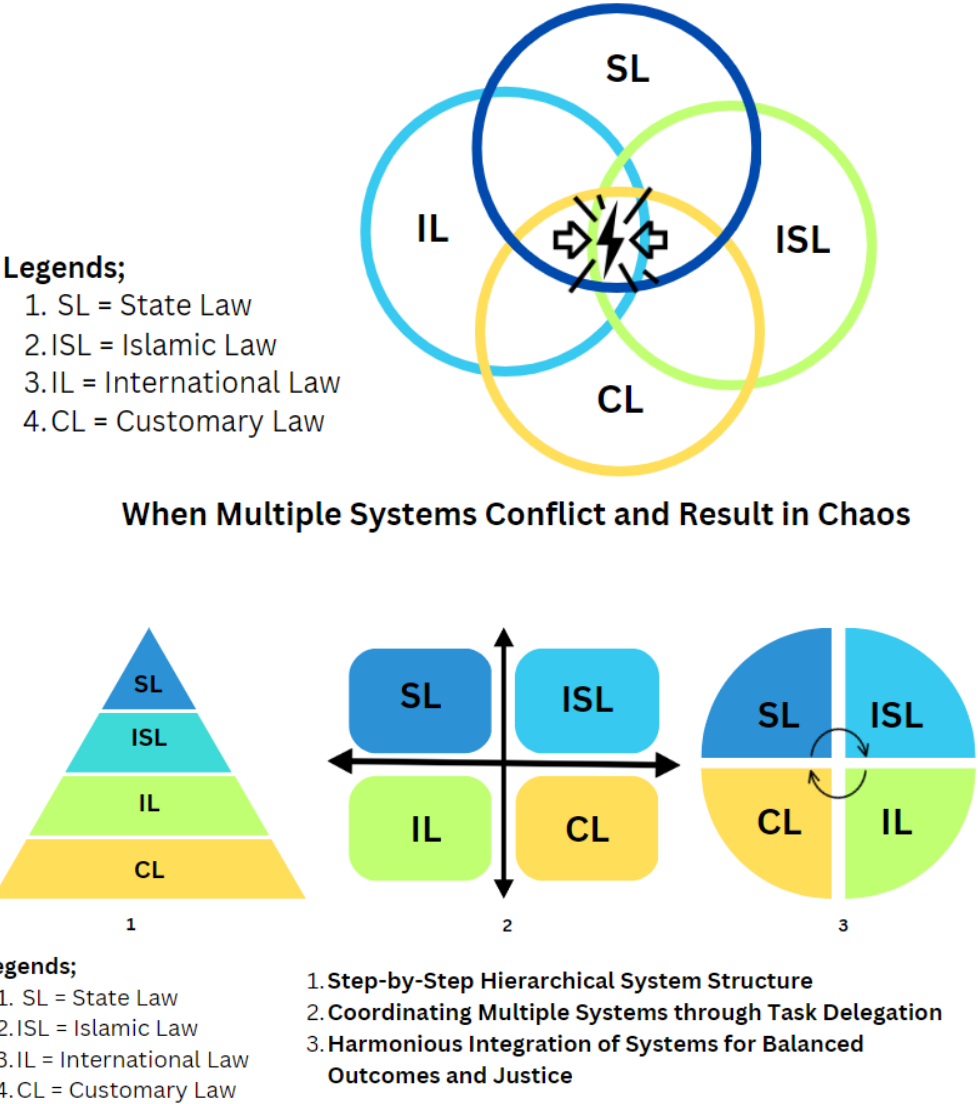


Figure 4 - Models of legal pluralism in Afghanistan

The future is uncertain, but the potential for a more inclusive, rights-based legal system in Afghanistan remains. Afghanistan can work towards a future where legal pluralism contributes to sustainable peace and development by engaging with communities, acknowledging local context, and respecting diverse legal sources.