

# Between Law and Customs: Normative Interconnections in Kabul's Tribunals

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The Afghan normative scenario is composed of customary practices, *shari'a* principles, laws promulgated by the state and international law. Studies on this arsenal tend to give special attention to the coexistence and/or clashing of different sources of law (for example Amin, 1993; Gang, 2011; Kamali, 1987; Wardak, 2011; Yassari and Saboory, 2010), but they usually overlook the interrelations that are created through the merging of values, norms and socially recognised customary practices. In particular, little attention has been given to the role that customs play within the judicial structure. A dichotomous perspective has thus prevailed in the history of law in Afghanistan, where 'formal justice' is opposed to 'informal justice', and where there have been few attempts to observe how the merging of different normative reference systems engenders normative syncretisms and forms of negotiated justice. In this article, after examining the key transition points in the legal history of Afghanistan, I will attempt to show that there is an important customary component in the justice's implementation of Kabul's tribunals, its principal aim being to legitimise the work of judges. An analysis of the current situation, informed by ethnographic research conducted in Kabul beginning in 2005, cannot be understood without a historical retrospective that takes account of the important politico-legal changes that have taken place over the past hundred and fifty years, which have been punctuated by multiple reforms and tumultuous regime changes.

## Laws and reforms

The politico-legal history of Afghanistan has been marked by important phases of law codification and by major redefinitions of the role and function of judges (*qazi* – Persian transcription of the Arabic term *qadi*).

In 1886, the sovereign Abdur Rahman (1880–1901) ordered the drafting of a code of conduct for judges (*asas-i quzat*) inspired by the legal tracts of the Hanafi school.<sup>1</sup> The code's essential result was that it forced judges to consult procedural guidelines defined by the central authority. Abdur Rahman's reforms were part of a broader state re-Islamisation process and represented a kind of reinstatement of *shari'a* to the detriment of customs. With a view to reinforcing the central authority, the sovereign tried to roll out an (Islamised) legal system throughout the country.

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Rahman implemented this centralisation plan mostly by force, but he also attempted to give his actions religious legitimacy; and it was no coincidence that he gave himself the title ‘protector and champion of Islamic faith’. He also formalised a tripartition of law sources: Islamic law, customary law and state law (civil and administrative). Furthermore, he established three types of court of justice: the Islamic court, which considered civil and religious disputes; the criminal court, which was administered by chiefs of police and religious judges and applied Islamic law; and the court for commercial disputes (Vafai, 1988).

Rahman can therefore be credited with the first real move to bring judicial power under state control. But it was under his son Habibullah (1901–1919), and later – even more so – under his nephew Amanullah (1919–1929), that the legal modernisation process accelerated considerably. Amanullah, the ‘hero of independence’ who came from the Young Afghans movement led by Mahmud Beg Tarzi (whose pan-Islamic ideas considerably influenced the sovereign’s work), is historically considered the ‘great moderniser’ of Afghanistan for his efforts to generate social change throughout the country by means of a comprehensive reform of the legal system. Compared to his predecessors, he enacted a larger corpus of laws that represented a desire for change, even if this had to be done in conformance with the jurisprudence and political doctrine of the Muslim world of the time (Kamali, 1987; Poullada, 1973; Schinasi, 1979). In fact, though they manifested a Western influence, Amanullah’s reforms sought a necessary source of legitimacy in Islam. Based on the principle of Hanafi law, the laws promulgated during his reign were presented as having the goal of preserving the values of Islamic doctrine. Despite this, the sovereign was not on very good terms with the principal religious figures.

The series of so-called *nizamnama* laws that marked the beginning of Amanullah’s modernisation programme included the promulgation of the first constitution (1923), the Supreme Law of Afghanistan approved by a *loya jirga* (the ‘great assembly’ of leaders). Through the constitution, the judiciary became independent. The creation of judicial structures became an indispensable step to giving the law the necessary strength and substance. The resolution of disputes through extrajudicial channels was prohibited (Yassari and Saboory, 2010). Yet, it should be noted that this legal provision was largely ignored by the population.

In practical terms, the constitution did not limit judicial activity to one legal system: judges could base their decisions on both *shari’a* principles and the new penal and civil legislation (art. 21). For the first time in the country’s legal history, there was official recognition and equal consideration of Muslim law and the positive laws of the state (De Lauri, 2012; Gregorian, 1969; Kamali, 1987). Furthermore, Amanullah transferred domestic issues from the jurisdiction of the religious court to that of the civil court (Vafai, 1988).

If Amanullah’s political downfall highlighted the difficulty of establishing a central organ able to extend its (modernising) influence over the whole country, the 1931 constitution promulgated under the reign of Nadir Shah showed how the constitution could be used as a tool to support the central government’s attempts to orchestrate fragile, unstable relations with local authorities and religious figures. Whereas the 1923 constitution opened with a declaration of Afghan independence and national unity, the 1931 constitution tried to reestablish *shari’a* supremacy by declaring that Islam was Afghanistan’s religion (art. 1) and recognising the Hanafi school as the official rite. Following the promulgation of this constitution, several *nizamnama* measures were revoked, and the expression *nizamnama* itself was replaced by *usulnama*<sup>2</sup> (Kamali, 1987).

The early 1960s saw a resurgence in legislative activity. In March 1964, King Zahir Shah (1933–1973) set up a 77-member commission to draft a new constitution. The declared objectives included the abolition of discriminatory regulations, the centralisation of government authority, the reform of the legal system and the promotion of education (Amin, 1993). Assisted by a French adviser named Louis Fougère, the commission presented the first draft of the text to the

*loya jirga* (which, for the first time, had four women among its 455 members) at its meeting in Kabul in September 1964. On the 20th of the same month, the constitution was ratified, and then on 1 October 1964 it was promulgated by the king. The new constitution formally established the supremacy of state law, and stipulated that when a specific situation was not covered by the laws enacted by Parliament, judges were to refer to Hanafi *fiqh* (law) provisions (art. 69), which they in fact applied until the enactment of the civil and penal codes in the second half of the 1970s. In any case, no law could enter into contradiction with Islamic law (art. 64).

The 1964 constitution occupies an important place in Afghanistan's legal history (Dupree, 1965; Kamali, 1987; Wilber, 1965). Not only was it used as a reference during the drafting of the 2004 constitution currently in force, but above all it played a role in what some have interpreted as a victory for positive law (Etling, 2003). As far as judicial activity was concerned, the reference to principles of Hanafi *fiqh* as subsidiary decision-making criteria should have enabled judges to more flexibly apply Muslim law in order to resolve cases in such a way that – in the judges' view – justice would be best served (art. 102). According to the doctrine of the time, appealing to the judge's personal opinion was the constitutional foundation of the exercise of *ijtihad* (the interpretation effort or the 'independent reasoning'), in the Hanafi sense of the word. However, at the same time, by imposing the observation of Hanafi *fiqh*, the constitution encouraged a minor *taqlid*,<sup>3</sup> since it prevented judges from applying other versions of Muslim law and made it impossible to use the various solutions drawn up by the different legal schools. Proponents of the Hanafi school stressed the need for uniformity within the legal system and in judicial practice, and this is what the reference to a single school provided (Kamali, 1987). With the aim of giving jurisprudential solutions a certain homogeneity, works of the Hanafi school were translated into *dari* so that judges who did not speak Arabic could use them as a reference. Beyond formal provisions, judges were careful not to upset balances established with religious leaders and local chiefs. They often appealed to elders or local assemblies to back their decisions or provide information. Judges therefore integrated the decisions of customary assemblies into the formulation of their formal verdicts, generating a mixture between customary practices and positive law.

In the wake of constitutional legislation, Law 15 of 1967 defined judicial authority, organised the courts of justice and established their jurisdictions, dividing them into two types: special courts with jurisdiction over either fiscal law, commercial/industrial lawsuits, expropriation, juvenile justice, lawsuits between citizens, or public administration; and *shari'a* courts with a general jurisdiction over areas not covered by the state courts. Although the constitution was designed to bring uniformity to the legal system, this did not translate into consistent procedural models, much less a unified legal system. What prevailed instead was a dichotomous judicial model characterised by a lack of clarity with regard to the distribution of jurisdictions, and by a substantial difference between the legal procedures of the state courts and those rooted in *shari'a* law (Jones-Pauly and Nojumi, 2004; Kamali, 1987).

When the first republic was proclaimed in 1973, Daoud,<sup>4</sup> a brother-in-law and cousin of King Zahir Shah, initiated a series of reforms inspired by socialism. In an attempt to give a juridical identity to the central government, Daoud established a twenty-member commission (eighteen men and two women), tasked with drafting a new constitution. The draft was published and debated in January 1977. In February it was approved by the *loya jirga* and signed by the president. It led to a hybrid constitution that attempted to reconcile Islamic tradition with socialism. There was no substantial change in the area of judicial practice beyond the fact that, in conformance with socialist doctrine, judicial power was no longer independent but was subject to central authority's control.

With the fall of the monarchy, the number of primary courts of justice applying state law rose significantly in the country. This increase was largely linked to Daoud's attempt to extend central control as far as possible, even into rural areas. But the socialist model to which Daoud aspired

was difficult to apply, mainly due to the lack of adequately educated staff, the lack of financial resources and the shortage of logistical structures – not to mention the public's apprehension, which several times turned into political opposition.

Conciliation tribunals were established in 1974. They were made up of old men who met in village mosques, and their objective was the settlement (*sulh*) of civil disputes or non-serious offences (Jones-Pauly and Nojumi, 2004). The establishment of these tribunals revealed a certain focus on customary practices in the resolution of disputes, showing that the Daoud government's attitude was quite different from previous governments that had refused to formally recognise any judicial activity outside of state structures. In line with customary practices, decisions of these tribunals were only binding if the two parties concerned by the conflict accepted the judgement. However, the years that followed were turbulent and tragic, and these tribunals did not end up lasting long.

In addition to a new constitution, this period saw an important phase of codification with the promulgation of the penal code, the civil code and civil procedure code. The 1977 civil code<sup>5</sup> (*qanun-i madani*), still in force, was a product of the spread of the 1949 Egyptian legal model – more precisely its Iraqi variant. Though partly inspired by the socialist experience, the Afghan code remained faithful to the country's Islamic juridical heritage by incorporating solutions from the Hanafi *fiqh* and the Ottoman *Majallat al-ahkam al-adliyya*.<sup>6</sup>

It is interesting to note that the civil code begins with an article prohibiting the use of Muslim law where an explicit legal provision exists. The second paragraph of the first article provides for the possibility of resorting to Hanafi *fiqh* in cases that are not regulated by the constitution or by laws, in order to guarantee an effective form of justice. The second paragraph seems to confirm the attention given to justice typical of the Hanafi school and of Islam more generally, which places the dispensing of justice at the heart of its system of values and practices.

Nevertheless, beyond the provisions of the first article of the code, it is difficult to get a clear idea of how judges behaved while exercising their duties. The small amount of available data suggests that, yesterday like today, there was intense interaction between normative systems (customary practices, state law, Islamic principles), as well as between legal institutions and customary assemblies (Jones-Pauly and Nojumi, 2004).

Also inspired by the Egyptian model, the Afghan penal code (*qanun-i gaza'i*) came into force in October 1976, replacing the previous text promulgated in 1924. The code, which received new provisions in 1981 and still applies today, includes 523 articles divided into two volumes: the first contains general provisions, the second is dedicated to regulations concerning different crimes. Crimes not expressly addressed by the code are referred to Muslim law. Article 1 stipulates that only *ta'zir* crimes (considered less serious, and punished at the judge's discretion) are governed by law, whereas crimes subject to *hudud*<sup>7</sup> punishments, offences subject to 'blood money' (*diya* or *diat*) or *lex talionis* (*qisas*) fall under the provisions of Hanafi *fiqh*.

During the socialist regime, the constitutional instrument continued to play an important political and symbolic role. In April 1980, Babrak Karmal arranged the promulgation of a new provisional constitution. It stipulated that although Islamic religion must be observed and respected, it was not the official state religion and should not be considered a source of law. The constitution provided for the establishment of two new organs in the judicial system: the special revolutionary court, responsible for crimes against national security and integrity, and the Institute for Legal, Scientific and Legislative Research, which had a mandate to prepare and evaluate laws, decrees and regulations in accordance with the principles and requirements of the Republic. With regard to the application of laws in the courts of justice, the new constitution was not much different from the previous ones, stipulating that judges must primarily apply the laws of the Republic. It was only when the law was silent that they could refer to *shari'a* principles; of course this left the problem of establishing the

terms of this 'silence'. As for the judicial organisation, the new ideological position did not authorise the use of the conciliation tribunals that had been experimented with the Daoud government. They were replaced by a network of groups (each group made up of twenty families) spread throughout the districts, towns and cities, with the aim of creating a local substratum that could facilitate the reforms of the Revolutionary Council and manage conflicts between families. However, the main task of these groups consisted in collecting information and serving as local support institutions for the party. Problems arose primarily from two factors. On the one hand, long-standing antipathies and disputes turned into open conflicts between party members and their fellow citizens; on the other hand, party activists and members of local councils, representing the government's desire to extend a single control system to the whole country, intervened in family issues by interfering with customary practices of dispute and problem resolution (Jones-Pauly and Nojumi, 2004).

In 1987, a new constitution was promulgated and the country was renamed the Republic of Afghanistan. The constitution repositioned Islam as a point of reference and reinstated it as the official state religion. There were plenty of nationalistic references, but what stood out most was the abandonment of communist terminology in favour of the symbolic reinstatement of the primacy of Islamic doctrine. The constitution provided for the creation of a council of *ulama* and *mullahs* endowed with legislative power; a constitutional council was also instituted, responsible for verifying the compatibility of laws with the constitution and with *shari'a* principles. Title 8, dedicated to justice, conferred judicial power upon the Supreme Court and created a system of military and civil courts (art. 108). The constitution also provided for the possible creation of special courts, but did not specify their jurisdictions. Members of the Supreme Court were named by the President of the Republic. The Supreme Court was given a nomophylactic role, ensuring correct and uniform interpretation of the laws. Articles 111 (paragraph 2) and 112 (paragraphs 1 and 2) stipulated that judges, in carrying out their functions, should respect the laws, the constitution and the principles of equality. As in previous constitutions, in the absence of applicable laws, judges could apply *shari'a* to best ensure justice.

In 1990, under the *mudjahiddin* government, Najibullah called a *loya jirga* meeting to revise the constitution. The impact of this revision should have been more political and symbolic than technical and judicial. In fact, as far as contents are concerned, there was not much new, even though symbolically all references to the People's Democratic Party of Afghanistan disappeared, the Special Revolutionary Court was abolished and all judicial power was given back to the courts. More broadly, by appealing to Islam, the constitution permanently broke with the socialist attitude that had characterised earlier constitutional phases.

A few years later, when the country fell into the hands of the Taliban regime, legislative and judicial activity was subjugated to its fundamentalist ideology. The government established by the Taliban, obsessed with the 'promotion of virtue and the prohibition of vice', was inspired by a Deobandi fundamentalism.<sup>8</sup> In the context of an imposition rationale that re-established the primacy of *shari'a* order in public and private spheres, the regime made ample use of *fatawa* (plural of *fatwa*, legal opinion). However, the normative activity during the Taliban period was in fact subject to interventions by Mullah Omar (whose authority lay in military force), who presented himself as a kind of *mufiti* (interpreter of the law) able to handle any issue of community interest.<sup>9</sup>

Although in 1996 the Taliban announced that all laws in force had been amended to conform to *shari'a* principles, it appears that these amendments were never made official. However, at the local level, the Taliban several times interfered with judicial practice, either by forcing courts of justice to ratify their authority, or by attempting to symbolically tailor customary institutions to the fundamentalist ideology. Under the Taliban regime, jurisdictional organs including customary assemblies like the *jirga*<sup>10</sup> were named *shura*, in accordance with Koranic terminology that non-Pashtun groups were already using. But the change was not limited to the name given to these

assemblies. The customary assemblies were forced to accept the participation of religious figures, so that they could condition local decision structures (Jones-Pauly and Nojumi, 2004). Although these assemblies remained a reference point for dispute resolution and community decisions, they had to yield to the demands of the Taliban authorities.

## The current context

During an interview in April 2008, a judge of Kabul's second district court said to me:

When I speak of justice, I'm not at all referring to the justice that law experts have in mind.<sup>11</sup> What justice do I speak of? The one I have to confront every day in court. I have to take into consideration laws, our values, respect for human rights, *shari'a* and customs. I have to take into account people who want Afghanistan to apply a system of justice that is indifferent to our tradition. Foreign governments and international organisations think their idea of justice must necessarily be ours. And I also have to take into consideration those who think that courts have nothing to do with justice.

The research I conducted in Afghanistan beginning in 2005 led me into the courts, the offices of the Ministry of Justice, as well as the headquarters of NGOs and various international agencies. Today, observing the Afghan normative scenario is above all a matter of taking account of the reconstruction process that began after the fall of the Taliban regime and the beginning of Operation Enduring Freedom in 2001. As the interview extract quoted above shows, it is by referring to a historical conjuncture characterised by a massive intervention by powerful countries (primarily the United States) and international agencies into the sphere of justice that one can provide a key to understanding changes in the contemporary legal and political spheres.

The Bonn Agreement of 2001 presented the reconstruction of the legal and judicial system as the most sensitive snag for the future of Afghanistan. Under the headline 'rule of law', the international community sought to begin a process likely to give rise to an equitable justice system, active throughout the country and able to get the upper hand over customary structures and also uproot deep-seated forms of marginalisation and discrimination, thus guaranteeing equal rights for all citizens. At the International Conference on Afghanistan in London in 2006, presided by Tony Blair, Hamid Karzai and Kofi Annan, the document Afghanistan Compact was made official, defining Afghanistan's relationship with the powers concerned. It stated the wish to 'respect the pluralistic culture, values and history of Afghanistan, based on Islam'. Its declared aim was to combine the rule of law model from the Western legal tradition with a constitutional state conceived according to the principles of the Islamic tradition. The legal and judicial reconstruction was seen as strictly linked to economic development and 'the creation of a stable context' (UNAMA, 2006). However, to this day, the theoretical convergence between the rule of law and Muslim law has not been translated into well-defined judicial practice, and the gaps between the 2004 constitution and the laws in force have not been bridged.

The concept of the rule of law is used as a miraculous remedy to resolve the problems of the Global South, to accelerate economic growth and to foster human rights. The problem is that the administrators, operators and political leaders still have not found an effective non-hegemonic *modus operandi* for propagating the principles of the rule of law. Plans that have attempted to export it, implemented in various regions of the globe, have often had disastrous effects (Erbezniak, 2011).

As has rightly been observed, there is a substantial difference between the academic conception of the rule of law and the intentions and effects of actions undertaken in its name. Generally, in more and more places, promoting the rule of law has become a fundamentally imperialist activity, in which foreign administrators backed by powerful armies govern societies they consider incapable

of governing themselves (Ehrenreich Brooks, 2003: 2280). According to Danilo Zolo (1998), the Western legal globalisation doctrine depends on Western economic and military hegemony, as well as on the influence of globalisation processes that would seem to require the worldwide unification of normative and jurisdictional systems. It also depends on the fact that it is a legal philosophy that serves to legitimise existing international institutions.

Today Afghanistan is heavily influenced by the United States, the United Nations, the European Union and a dozen NGOs. Encouraging the rule of law has become a tired refrain (Ehrenreich Brooks, 2003: 2283) of international politics, through which legal and political models are supposed to be assimilated. It is no longer possible to get to the end of a discussion on international politics without someone suggesting 'the rule of law' as a solution to the world's problems (Carothers, 1998; Erbeznic, 2011). This becomes particularly significant if one considers, along with Ehrenreich Brooks (2003), that the rule of law is not something that exists independent of cultures and can be imposed by simply creating formal structures and rewriting constitutions and statutes. In its true meaning, this term concerns a culture, in spite of the fact that promoters of human rights and defenders of the foreign policy of powerful countries pay little attention to the complex processes by which cultures come into being and change (Ehrenreich Brooks, 2003: 2285). It is also this 'self-interested disinterest' in the cultural and political importance of rule of law plans that generates forms of resistance in areas affected by post-conflict reconstruction and international interventions.

In several post-war contexts (even if the 'post-war' notion is entirely ambiguous in the case of Afghanistan), the imposition of codes and laws does not simply translate into technical and administrative procedures. Rather it is a political and normative action liable to reinvigorate political antagonism. Through the Italian Justice Project Office, Italy played a leading role in preparing and drafting the new Afghan penal procedure code adopted in February 2004. Faiz Ahmed (2007) recalls that during a conference held in Qatar, Italian government representatives characterised the code as a simplified text designed to make the work of police and prosecutors simpler and more respectful of human rights. However, these government representatives failed to mention that not a single Afghani or Islamic jurist had been consulted in the process of drafting the code, and that neither Afghan customary law nor Islamic law had been taken into consideration as essential sources for this important legal text.

On the subject of the penal procedure code, Saber Marzai, prosecutor of Kabul's 11th district, said to me (12 March 2008): 'Collaboration between prosecutors and police is very difficult. We often have tough confrontations. The work hasn't been made any easier by the 2004 code, which isn't adapted to our system. In most cases we have to work around it.'

In fact, the 2004 constitution – which can be considered the judicial and ideological reference text that should underpin the authority and legitimacy of the courts of justice – is itself also detached from the actual judicial routine taking shape in courtrooms. Another consequence of these problems is that in the courts, although the pre-eminence of the laws of the state should be recognized, what takes place in reality is a socio-normative negotiation between customs, religious principles and legal codes. One should certainly take into consideration that many judges are lacking knowledge of state law and that bribery is rife, since these issues undermine the principles of justice that the magistrature should theoretically represent. But the social and judicial importance of this socio-normative negotiation must be recognised. It has the effect of creating a practical and symbolic substratum in which apparently irreconcilable systems of reference seem to work together.

## Customs and judicial practice

Judicial modernisation processes, characterised by a constant reformulation of the relationship between state law and *shari'a*, have been aimed at law practices to gradually move away from the

customary sphere. With a few exceptions (like conciliation tribunals under the Daoud government), state apparatuses have attempted to eradicate customs from the normative sphere. Nevertheless, today Islamic law and state law still intermingle with practices and values linked to the customary sphere. Customary institutions and conflict resolution practices have themselves undergone significant redefinition, particularly since the 1960s (Barfield, 2003). This is why in examining this normative interweaving, special attention should be paid to the situational and processual characteristics of the laws and customs.

The civil code itself keeps customs alive by stating that, in the absence of an applicable provision, the court should apply Hanafi jurisprudence; when *shari'a* references are not exhaustive, the court can pass judgement on the basis of customs, as long as these do not contradict principles of Islam or articles of law. However, when one observes judicial practices in Kabul, one sees that this hierarchisation does not really occur. In most cases, judges do not respect this normative path, seeking instead to develop judicial solutions that are the product of normative negotiation.

Below I will present two judicial cases (a civil dispute and a criminal trial) with the aim of highlighting what can be considered as a characteristic trait of judicial practice in Afghanistan: interconnection and negotiation between normative systems. A 2005 report by USAID based on research throughout the country also recognised this entanglement between courts of first appeal and customary assemblies in the resolution of disputes and problems. The continuity between different forms of legal authority leads one to see tribunals as customary institutions, not only because of the explicit collaborations between courts of first appeal and social institutions like the *jirga* or *shura*, but mainly because of the implicit normative interconnections that structure the conduct of trials and converge upon particular verdicts.

In civil trials handled by Kabul's courts of justice, the search for agreement between the parties concerned prevails. Judges authority relies directly upon their ability to connect different requirements, without disrupting the social balances that existed prior to the judicial proceedings. However, the phenomenon of widespread bribery (De Lauri, 2012), even if it is not the only factor that comes into play (power dynamics sometimes operate beyond economic possibilities), undermines the principle of equitable legal mediation. More generally, it is possible to assert that mediation is only equitable and negotiated when no bribery is involved, and only in cases where there is no social asymmetry between the parties concerned. This was the case in a dispute between two families over ownership of a piece of land.

The hearing I observed took place in March 2008 at Kabul's Second District Court. It was presided by judge Sayed.<sup>12</sup> Also participating were judges Fatime and Farid, the two members of the court who had studied the case. The lawsuit concerned two families (X and Y), one represented by three men, the other by five.

The dispute had started a few years earlier when the land in question had been acquired by the two families, who had decided to share it. The bill of sale they had drafted with the previous owner – a man who had emigrated to Iran – had not been registered at any of the provincial registry offices. The only document that existed was a 'customary document', a private contract between the parties that stated the selling price and bore the fingerprints of the 'signatories'. Immediately after this acquisition, families X and Y decided to divide the land in half. However, according to Family X's complaint, Family Y monopolised three-quarters of the parcel, rejecting all of Family X's attempts to reclaim land and repeatedly threatening members of Family X. Violent incidents had in fact taken place, as attested by the complaints that judge Farid had retrieved.

Therefore the court had to determine if the land had been shared unequally, as Family X was claiming. In the absence of cadastral data and official register information, the court could only refer to the customary document, which contained no information about how the land was to be divided. After having heard the two parties, the court decided to adjourn the hearing for a month,

asking the two families to supply witness statements and/or other items if need be. During the second hearing, the families were accompanied by a few elders who declared that, between the first and second hearings, a *shura* had been held and that they had taken part in it. The hearing proceeded like a kind of negotiation between the parties, in which the presiding judge took on a 'ceremonial'<sup>13</sup> role, while the members of the *shura* aggregated the requests (of Family X) and concessions (of Family Y). After a two-hour hearing, the families declared that they had come to an agreement thanks to the help of the *shura*. Family Y had agreed to relinquish part of the land to Family X; through the *shura* they would determine the size of the piece of land in question. Judge Sayed approved the parties' choice by saying: 'I think this is the most reasonable way to resolve the problem. For this I thank everyone present today.'

If civil courts of first appeal appear to be places where an acceptable solution is negotiated in order to resolve a dispute, in criminal proceedings it seems that a precise hierarchical order is established between judges and defendants: the mediation process yields to the authority of the judge, who attempts to legitimise himself through the *force of law*. This authority is not solely manifested at the moment of the verdict, but is evident in how the protagonists occupy the court space (criminal trial defendants sit at the back of the room, often with their hands and feet in chains), in behavioural rules (in criminal cases the defendant has to remain standing while speaking), in language (the judge is addressed in reverential terms, whereas judges speak to defendants in a severe tone). However, whereas in civil lawsuits, negotiation is an evident part of the dispute resolution process, in criminal trials it has to be found in the implicit criteria used by judges to reach the verdict. I will describe what I observed in another trial (on 25 March 2008) that suggests interesting avenues for reflection on this subject.

The court included judge Aimal (who presided) and judges Ahmed and Fatime. It was a case of alleged fraud committed against the Ministry of Education. In addition to the judges, the first hearing was attended by the three defendants accompanied by two elders. The prosecutor who had conducted the investigation and drafted the indictment was absent, but judge Fatime had the report he had written. The three defendants were employed by the Ministry of Education, and were responsible (among other things) for purchasing fuel for *bukhari* (heaters). According to the complaint lodged by a ministry official, for several years they had been falsifying the buying price of fuel, keeping for themselves the difference between the real price and the alleged price. The prosecutor's report included a table comparing the fuel prices offered by certain dealers: they were all less than those indicated by the defendants. The accusation was also based on the fact that the three men had not presented all the documents justifying the amounts they had been granted. The only available police statement concerned receipt of the complaint (though this can at times be enough for a conviction of guilt in Afghanistan); no investigation had been conducted. The defendants declared themselves innocent and even complained that they had been unfairly dismissed from the ministry without their guilt being proven. All three of them were from the Paghman district, near Kabul. After a few questions from the judge, they asked permission to read a letter. This reiterated their declaration of innocence, and added an interesting piece of information: the defendants maintained that they were 'respectable people from good families'. The two elders accompanying them were in a position to substantiate this assertion, and the letter presented them as 'important, respectable, honest men'. After the letter had been read, judge Ajmal addressed the elders to ask if they had anything to say. They then spoke up to confirm that they knew the defendants and their families very well, and asserted that they were 'young men who had never had any problems', and that they had 'good relations with all of their neighbours'. After this chorus of praise, they concluded by inviting the court to 'conform to Allah's will'. The judge thanked them for expressing their opinion and added that the court would give their contribution serious consideration. Finally, he invited them to attend the second hearing if they so desired.

It is important to stress that these two elders had no useful information relating to the litigation itself. However, the court considered their contribution important for the purpose of determining the defendants' reputations. The respect that the judges showed towards the two 'witnesses' and the relevance they attributed to their depositions provided a clear illustration of the importance that customs and traditional authorities play in the structuring of legal and power relations. The distance between judges and defendants, which is particularly wide in criminal trials, was in this case partially rebalanced by the presence of two 'witnesses' considered 'worthy of respect'. This factor should not be confused with other aspects (for example bribery) that are likely to redefine the relationship between judges and defendants. Recognition of values such as respect, honour and wisdom is not placed in the shadow of the prohibited. On the contrary, these values are asserted under the light of custom, to the point of becoming key elements in a legal procedure. Recourse to the opinion of experienced men is an essential criterion in the mechanisms used to resolve disputes managed at the community level (Gang, 2011). In a court as well, the statements of two respectable people play an important role in defining the symbolic scenario within which a judge endeavours to make a decision. The legal authority of judge Ajmal was therefore asserted thanks to the substantial authority of the two elders, whose social position could influence the court's judgement independently of what actually occurred. After the hearing, judge Ajmal made the following comment:

Witnesses are an essential tool. The advice of a wise person can be more useful than a document. If a young person has always behaved well, if he has always been respected, if he has a job, why would he start stealing? If there's no proof [it is worth emphasizing here that the judge forgot to consider that, according to Afghan law, 'if there's no proof' there cannot be conviction of guilt], the court has to find out the defendants' whole history, and then we'll be able to understand a few things. I try to base my decisions on the facts, but the facts aren't always clear.

The discretionary nature of the process of arriving at a judgement in the absence of eyewitnesses and concrete proof (there was the absence of some documents, but the fact that some dealers were selling less expensive fuel was not enough to prove the charge; moreover, the prosecutor may only have entered the lowest prices into his table, leaving out the others) forced the judge to try and get an overall idea of the defendants; this pre-judgement could be useful in the trial in progress, but it should be supported by the opinion of people considered both credible and honourable. This kind of pre-judgement can be a valuable asset for reconstructing the case and helping the judge take a position. The attention that the presiding judge gave to the two old people who had come to court to confirm the defendants' good reputations shows the importance that recognised community authorities can assume in state institutions, especially in court. The complex relationship between theory and practice in the judicial arena gives a discretionary power to judges, who are careful not to show a lack of consideration for forms of authority and respect that are recognised in the social context in which they are acting. If judges were to ignore these aspects and not give values and practices validated by custom the right to enter the court, their social legitimacy, already fragile and unstable, would no longer exist.

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In the present historical conjuncture marked by large-scale reconstruction projects, the judicial sphere in Afghanistan is once again being subjected to a modernisation programme imposed from outside. But the attempt to bring justice under state control based on the Western model of the rule of law does not eliminate the normative interconnections that enter into the practice of law.

The current normative transformations lend themselves to several levels of reflection. On the level of prevailing humanitarian propaganda, customs and state justice would appear to be mutually exclusive systems of reference (informal justice vs formal justice). But in day-to-day practice, judges are ensuring the continuity between legal and customary practices and authorities. This continuity is the fruit of a social and normative interweaving whose epistemic foundation

is to be found in a judicial pluralism rooted in Islamic principles. However, beyond this key to understanding, the low level of confidence that Afghani citizens have in the courts is due to a range of factors, including bribery, the extreme bureaucratisation of the state apparatus and the interference of the dominant countries. This mistrust evokes the image of a magistrature that is incapable of acquiring legitimacy of action or grasping how citizens feel about justice. The customary function that certain courts of first appeal demand could find its place in the fragile balance determined by the contact between heterogeneous models of justice and the reconfiguration of the role of judges. It is on the axis of this normative interconnection that we see the development of possible scenarios in which the successes and failures of legal and judicial reconstruction plans play out.

Translated from the French by Matthew Cunningham

## Notes

1. The Hanafi school was developed in Iraq between the 8th and 10th centuries and played a major role in the creation and organisation of Muslim justice during the Abbasid caliphate. Between the 9th and 13th centuries, the Hanafi doctrine spread through Iran, Central Asia, India and among Turkish populations that had converted to Islam. Between the 13th and 16th centuries, the Hanafi school received support from Mamluk Turks and Circassians in Egypt and Syria; between the 16th and 20th centuries, it was the dominant school in the Ottoman empire (Coulson, 1964; Johansen, 1997). For further information on Hanafi *fiqh* in Afghanistan, see Kamali (1987).
2. The term *usul* in Muslim law means ‘roots’, the source of the law.
3. The term *taqlid*, which designates the acceptance of a legal authority, has a complex history. For more information see Hallaq (2001).
4. Daoud became Prime Minister in 1953. Forced to resign in 1963, he returned to power in 1973, supported by a group of young pro-Soviet officers, by various political and social groups, and by the People’s Democratic Party of Afghanistan (PDPA).
5. The civil code is composed of 2,416 articles and covers a variety of areas such as citizenship, marriage, the rights of minors, inheritance, and land and property rights.
6. See, in comparative terms, Aldeeb Abu-Sahlieh (2007) and Hasan (2004).
7. *Hadd*, the singular of *hudud*, literally means ‘limit’. The term is generally associated with the idea of ‘prohibition’ or ‘obligatory punishment’. With regard to these punishments, jurists agree that the judge has no discretionary power and must apply the immutable penalties provided by Islamic law. However, there is no doubt that judicial practice reveals nuances that contrast with the inflexibility of certain theoretical classifications. *Hudud* punishments correspond to crimes considered particularly serious such as theft (*sariqa*), extramarital sexual relations (*zina*), false accusations of illicit sexual relations (*qadf*), alcohol consumption (*surb al-hamr*) and robbery (*qat’ al-tariq*).
8. According to Rashid (2001), with their inflexibility, the Taliban clearly eroded the intellectual and reformist tradition represented by Deobandism, since they see doubt as nothing but a sin, and almost consider debate a kind of heresy.
9. According to Sami, a law graduate from the University of Kabul, Mullah Omar cannot be really considered as a historical figure, but rather as a ‘concept’ (Kabul, 25 May 2013).
10. The assembly is a social institution spread throughout the country. Despite slight differences in character and function, customary assemblies play a similar role among all of the people of Afghanistan. The Pashtun term *jirga* is common even among non-Pashtun groups. However, generally among non-Pashtuns the terms *shura* is used. This derives from the Arabic word *mashwara* (to consult, to question). Among the Hazara people, the word most commonly used to designate the assembly is *ulus* (literally ‘people’, or ‘soldiers’).
11. The judge was referring to a meeting that had taken place in Kabul a few days before our meeting, in which experts from international organisations had discussed justice in Afghanistan.
12. I use pseudonyms to protect anonymity.
13. The ceremonial role of judges in civil trials has been highlighted by Simon Roberts (2008). According to Roberts, with the transformation of courts of justice into arenas for bilateral negotiation, judges resemble ceremonial figures that preside over – or rather legitimise – proceedings in which the decision is taken by others.

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