

**Defending the Principle of Legality in
Afghanistan: Toward a Unified Interpretation
of Article 130 to the Afghan Constitution**

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ABSTRACT

The 2004 Constitution of Afghanistan is one of the main sources of criminal law in the country, not because it defines crimes and punishments, but because it establishes the fundamental, individual rights and liberties that impact criminal law and procedure. Among these is the principle of legality, as expressed in Article 27 of the Afghan Constitution. The principle of legality is the doctrine that no person shall be held criminally liable for any conduct unless a statute criminalizing that conduct precedes it. This doctrine is based on the idea that it would be unjust to announce that an act is illegal, or increase the degree of punishment for a crime, after that act has been committed. This doctrine however is complicated by Article 130 of the Afghan Constitution, in which courts are directed to use Hanafi Fiqh (jurisprudence) to fill in the statutory gaps when no provision in the Constitution or other Afghan statutes offers a path to justice. This Article explains that, based on Article 130, many criminal courts have used Hanafi jurisprudence to justify convicting individuals for crimes or subjecting individuals to punishments that exist under certain interpretations of Hanafi jurisprudence, but the crimes and punishments are not codified in the Afghan Criminal Code. This Article argues that these interpretations of Article 130 not only violate the principle of legality set forth in Article 27 of the Afghan Constitution, but also contradict international criminal law including the principles of the Rome Statute of International Criminal Court. In addition, this Article asserts that differences in judicial training are at the root of why some jurists interpret Article 130 to allow for this level of discretion and some do not. Finally, this Article suggests that the problem of inconsistent interpretation of Article 130 might be

helped by (1) using a similar approach as was used in Iran and Egypt, amending the Penal Code to include all legally recognized Tazir crimes (action or omission that is criminalized by an Islamic state or ruler) and (2) developing a system of secondary sources, like annotated codes, legal encyclopedias, and treatises, to help to shape future practice and bring more stability and consistency to judicial interpretation and rule of law.

INTRODUCTION

The internationally recognized doctrine of the “principle of legality” requires the existence of enforceable law before a person can be held criminally liable for their conduct.¹ The doctrine is prescribed in Article 27 of the Afghan Constitution, which states the following:

No deed shall be considered a crime unless ruled by a law² promulgated prior to commitment of the offense. No one shall be pursued, arrested, or detained without due process of law. No one shall be punished without the decision of an authoritative court taken in accordance with the provisions of the law, promulgated prior to commitment of the offense.³

Despite this provision, there continues to be instances in which this principle is flouted, primarily through the discretion perceived by some in Article 130 of Constitution of Afghanistan. Article 130 appears to grant judges the ability to punish an act that is not defined as a crime by codified Afghan statutes, if an act is deemed punishable

¹ The International Convention on Civil and Political Rights, art. 15, Dec. 16, 1966, 999 U.N.T.S. 171; 1057 U.N.T.S. 407. *See* Rome Statute of International Criminal Court, art 22, July 17, 1998, 2187 U.N.T.S. 90/37 ILM 1002 (1998)/(2002) ATS 15; *see* Universal Declaration of Human Rights, art. 11, para. 2, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); *see* European Convention on Human Rights art. 7, Nov. 4, 1950, 213 U.N.T.S. 222; *see also* American Convention on Human Rights art. 9, Nov. 22, 1969, 1144 U.N.T.S. 123.

² The above text is taken from an unofficial translation of the official Pashto and Dari version. The translation of Pashto term “Qanun” to “law” is not entirely accurate. To the best of my knowledge the term “Qanun” should be translated to “statute.” Notably, the Rome Statute of International Criminal Court defines principle of legality in its Article 22, where it uses the term “statute” instead of law. This distinction makes a difference because the term “law” has broad meaning and incorporates doctrine from a wide range of sources, including statutes, judicial precedents, and customary law, to name a few.

³ QANUNI ASSASSI JUMHURI ISLAMI AFGHANISTAN [CONSTITUTION OF ISLAMIC REPUBLIC OF AFGHANISTAN] Official Gazette No. 818 1382 (2004).

by Hanafi Fiqh (interpretations of Islamic law according to the Hanafi school of thought).

Article 130 states the following:

When there is no provision in the Constitution or other laws⁴ regarding ruling on an issue, the court's decisions shall be within the limits of this Constitution in compliance with *Hanafi* jurisprudence and, within the limits set by this Constitution, rule in a way that attains justice in the best manner.⁵

Thus, Article 130 grants the judiciary the right to turn to Hanafi jurisprudence for guidance in cases when the court finds an injustice or inequity, but there is no applicable, relevant provision of statute in the Afghan Constitution or statutes.⁶ The need for action under Tazir arises when the social norm opposes conduct where there is no established legal norm.

In over a thousand cases since 2004, judges have used this provision to justify holding defendants criminally liable where no crime has been defined by an enacted statute.⁷ For example, in the western Herat province of Afghanistan, a primary criminal court convicted and sentenced three men for selling dog meat.⁸ The court sentenced two of them to 15 years imprisonment and another, an accomplice, was sentenced to three years in prison.⁹ In other reports, 80 out of 100 women who were incarcerated in the Kabul Pul-Charkhi Prison had been convicted of having run away from home.¹⁰ However, selling dog meat and running away from home are not crimes under the Afghan Penal Code. Despite the fact that Article 130

⁴ As discussed above, the term “laws” is not an accurate translation of the Pashto/Dari version of the official Constitution of Afghanistan: the exact word is “statutes.”

⁵ QANUNI ASSASSI JUMHURI ISLAMI AFGHANISTAN [CONSTITUTION OF ISLAMIC REPUBLIC OF AFGHANISTAN] Official Gazette No. 818 1382 (2004).

⁶ *Id.*; see also Meininghaus Esther, Bonn: Zentrum für Entwicklungsforschung Center for Development Research (ZEF) Report 2007: Legal Pluralism in Afghanistan, 10 (2007).

⁷ From different reports, it appears that more than 1000 criminal cases have been decided based on Article 130 of the Constitution of Afghanistan. See Farzana Wahidy, *I Had to Run Away: The imprisonment of Women and Girls for “Moral Crimes” in Afghanistan*, HUMAN RIGHTS WATCH, (2011), <https://www.hrw.org/report/2012/03/28/i-had-run-away/imprisonment-women-and-girls-moral-crimes-afghanistan>.

⁸ *Selling dog meat perpetrators should be punished*, AFGHANISTAN MEDIA NETWORK (Nov. 19, 2014), <http://www.afghanpaper.com/nbody.php?id=84737>.

⁹ *Sellers of dog meat jailed for 13 Years in Herat Province*, KHAAMA PRESS (Jan. 15 2015), <http://www.khaama.com/sellers-of-dog-meat-jailed-for-13-years-in-herat-province-8950>.

¹⁰ MOHAMMAD HASHIM KAMALI, TEN YEARS OF THE AFGHAN CONSTITUTION: WHAT ARE THE ISSUES? 25 (AREU eds., 2014).

allows some judicial discretion, this practice of disregarding the principle of legality and holding individuals criminally liable for crimes and punishments that exist only in Islamic law violates Article 27 of the Afghan Constitution and contravenes constitutional provisions that protect individual rights and liberties.

This Article argues that for Afghanistan's Constitution to be internally consistent and to preserve the rights guaranteed by Article 27, Article 130 should be interpreted to apply only to civil cases—not criminal cases. In particular, this Article maintains that the practice of invoking Article 130 in criminal cases stems from a misunderstanding of the language within the provision itself, language that states, “[I]f there is no provision in the Constitution or other laws about a case . . . within the limits set by this Constitution.”¹¹ Article 130 of the Constitution states that the Hanafi Fiqh should be applied within the limits of the Constitution; Article 27, which states that no act shall be considered crime without determined by statute, is in itself a limit. Hence, a case does not necessarily include all civil, criminal, and commercial cases. Criminal cases could and must be excluded from the interpretation of Article 130.

As a solution to this problem, this Article recommends initiating supplemental training for judges on how to interpret Articles 27 and 130. In addition, it recommends that the Supreme Court of Afghanistan issue a decree clarifying that Article 130 applies only to civil and commercial cases.

Part I of this Article focuses on the internationally recognized meaning of the principle of legality and related doctrines, such as the rule of lenity, narrow interpretation of criminal statutes, and non-retroactivity. Part II aims to provide the necessary background for understanding how and why upholding the principle of legality proves so difficult in Afghanistan. Part III explains how the principle of legality appears in the different sources of law that govern Afghanistan, including Islam, the Afghan Constitution, Afghan Codes, and treaties. Finally, Part IV illustrates possible steps to be taken in order to strengthen the principle of legality in Afghanistan, providing some recommendations that might solve the problems of the inconsistency in the application and interpretations of Article 130,

¹¹ QANUNI ASSASI JUMHURI ISLMAI AFGHANISTAN [CONSTITUTION OF ISLAMIC REPUBLIC OF AFGHANISTAN] Official Gazette No. 818 1382 (2004).

including creating a committee charged with developing secondary sources to model educated and reasonable interpretations of statutes and constitutional provisions.

I

UNDERSTANDING THE PRINCIPLE OF LEGALITY

The principle of legality originates from the belief that all people deserve to know what conduct constitutes a crime and what punishment flows from a conviction for that crime.¹² The typical Latin phrase associated with this principle is “*nullum crimen, nulla poena sine lege*,” meaning that there is no crime or punishment without a statute.¹³ Under this principle, holding an individual liable for committing an act that was not expressly prohibited when the act was committed is neither fair nor just.¹⁴ However, after a law is enacted, all individuals are obliged to obey the law whether they are aware of the law or not. This means that no person or entity is superior to the law, and ignorance of a law is not a defense, except in the very rare case of misinterpretation of law.¹⁵

The principle of legality primarily concerns *notice*: an actor should have the reasonable ability to know whether his or her behavior is criminal.¹⁶ It is a foundational concept that underlies fair trial standards and is intended to assure the rule of law in criminal proceedings.¹⁷ The principle keeps the authority of defining crimes with the legislature, prevents judges and law enforcement agencies from misusing their power, and distinguishes criminal actions from lawful actions.¹⁸ The principle also prevents arbitrary prosecution.¹⁹

Germany provides an instructive example of the principle of legality in national law. In German, the term *Rechtsstaat* means “rule

¹² DANIEL E. HALL, CRIMINAL LAW AND PROCEDURE 36–37 (6th ed. 2011).

¹³ MOHAMMAD ASHRAF RASOLI, MAHAKIMA-YE ADILANA [FAIR TRIAL] 143, 1393 (2014).

¹⁴ HALL, *supra* note 12, at 36–37.

¹⁵ QANUNI JAZAI JUMHURI AFGHANISTAN [PENAL CODE OF REPUBLIC OF AFGHANISTAN] Official Gazette No. 347 1355 (1976); *see generally* RASOLI, *supra* note 13.

¹⁶ UNA AU ET AL., AN INTRODUCTION TO THE CRIMINAL LAW OF AFGHANISTAN 25 (ALEP eds., 2009).

¹⁷ RASOLI, *supra* note 13, at 13.

¹⁸ KAMALI, *supra* note 10, at 149.

¹⁹ RASOLI, *supra* note 13, at 143; *see also* KENNETHS S. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW 274 (Cambridge Univ. eds., 2009).

of law and the principle of legal state,” and this doctrine requires decisions—at least in serious cases—to be made according to law.²⁰ As part of this doctrine, *Rechtsstaat* limits the power of the state in order to protect citizens from the arbitrary exercise of law enforcement agencies. To ensure the uniform application of law, the German legal system limits the discretion of its prosecutors through the principle of legality. *Rechtsstaat* is practiced in conjunction with mandatory prosecution.²¹ Accordingly, a German prosecutor is obliged to prosecute a criminal case when sufficient factual evidence shows that a crime has been committed.²² Mandatory prosecution has been part of the criminal procedure code since its adoption in 1877.²³ While recent amendments give prosecutors more discretionary decision-making authority, there continues to be strict oversight of prosecutors to ensure that they follow *Rechtsstaat*.²⁴

As another example, the French civil law system reflects the principle of legality through its requirement that the legislative branch promulgate a statute prior to enforcement entities holding conduct criminally liable.²⁵ The French Declaration of the Rights of Man and of the Citizen enshrines the principle that everyone deserves to know which act constitutes a crime and which specific law applies to an alleged crime.²⁶ The French system emphasizes that any prohibition of an act must be announced and enacted in statutory form, *nullum crimen sine praevia lege scripta*.²⁷

Legal systems that follow this principle of legality agree that judges and law enforcement agencies should not punish a defendant arbitrarily or retroactively.²⁸ Most importantly, a person should not be convicted of a crime if that action was not a crime at the time it

²⁰ Dietmar von der Pfordten, *On the Foundations of the Rule of Law and the Principle of the Legal State/Rechtsstaat*, THE LEGAL DOCTRINES OF THE RULE OF LAW AND THE LEGAL STATE (Rechtsstaat), 15 (Silkenat James ed., 2013).

²¹ SHAWN MARIE BOYNE, PROSECUTORIAL DISCRETION IN GERMANY'S RECHTSSTAAT: VARIETIES OF PRACTICE AND THE PURSUIT OF TRUTH 4 (2007).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ GALLANT, *supra* note 19, at 48.

²⁶ *Id.* at 49.

²⁷ *Id.* at 48–49 (explaining that while historically in common law countries judges defined serious crimes, today most common law countries define crimes by statute).

²⁸ RASOLI, *supra* note 13, at 143–45.

occurred; so, criminalizing an act or omission prior to enactment of criminality through the legislative branch is strongly prohibited.²⁹

Judicial temperance is thus inherent in the principle of legality. While interpreting penal statutes, judges should give leniency to the defendant and must not convict a person without a clear and reasonable justification.³⁰ Further, no entity, including judges, can consider an act to be a crime based on opinion or public welfare arguments, nor can judges sentence a person to a punishment that is not mentioned in penal statutes based on the same reasons.³¹ The principle of legality helps to prevent both the initiation of a criminal case on one's own initiative or the seeking of retributive justice.³² Instead, it requires that prosecution of a criminal, from the allegation of criminal behavior to the execution of a final decision of the authorized court, shall be based on the enacted laws.³³

Implementation of the principle of legality has two important legal effects: a narrow interpretation of penal statutes and preventing retroactivity of criminal law.³⁴ Broad interpretations lead to the creation of new offenses after conduct has occurred: a retroactive criminalization of behavior.³⁵ In order to stifle broad interpretations of law, the principle of legality requires that a legislature pass penal statutes without ambiguities and vague rules.³⁶

Other judicial doctrines weigh in favor of a strict application of the principle of legality. The classic doctrine of lenity, expressly adopted into the Rome Statute,³⁷ requires that ambiguous criminal laws should be interpreted in favor of the defendant. Article 22 (2) of the Rome Statute clarifies that the definition of a crime shall be strictly construed and shall not be extended by analogy. In fact, the classic school of criminal law opposes the analogical interpretation of criminal law.³⁸ According to this school, analogical interpretation

²⁹ *Id.*

³⁰ *Id.* at 146.

³¹ *Id.* at 41–43.

³² GALLANT, *supra* note 19, at 53.

³³ *Id.*

³⁴ HAFIZULLAH DANISH, HUQOQ-YE ZAZAI HUMOMI [GENERAL CRIMINAL LAW] 50–51 1 (1st ed. 2014).

³⁵ GALLANT, *supra* note 19, at 257.

³⁶ *Id.*

³⁷ RSICC, *supra* note 1; *see also* Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 CRIM. L.F. 1, 4 (1999).

³⁸ DANISH, *supra* note 34, at 56.

creates a new crime and consequently contradicts the principle of legality.³⁹

U.S. courts follow the same rule of lenity⁴⁰ and also employ a related doctrine, “void for vagueness.” Both stem from the Sixth Amendment of the U.S. Constitution, which guarantees the right “to be informed of the nature and cause of the accusation.”⁴¹ If criminal statutes are drafted such that a reasonable person cannot understand them, the statute is constitutionally rendered void for vagueness.⁴² For example, in the case of *Franklin v. State*, the supreme court of Florida announced the state’s felony ban on sodomy was unconstitutionally vague.⁴³ The statute used the terms “abominable and detestable crime against nature,” which the court held that the language was not clear for an average person of common intelligence.⁴⁴ If the legislature intended to criminalize oral sex or only anal sex, then the statute should have included that specific language.⁴⁵

The void for vagueness doctrine is used as an instrument to support predictability and foreseeability in the interpretation of criminal law.⁴⁶ For example, in the case of *Papachristou et al. v. City of Jacksonville*, the Supreme Court stated that the Jacksonville vagrancy ordinance was unconstitutionally vague.⁴⁷ Based on that law, police had the arbitrary discretion to arrest individuals for “nightwalking” or “habitually living ‘without visible means of support.’”⁴⁸ Like in *Franklin*, the Court held that the language of the statute was vague and thus unconstitutional.⁴⁹

³⁹ *Id.*

⁴⁰ See also generally *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (the doctrine derived from the due process clauses of the Fifth and Fourteenth Amendments of U.S Constitution).

⁴¹ See generally *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921).

⁴² GABRIEL HALLEVY, *A MODERN TREATISE ON THE PRINCIPLE OF LEGALITY IN CRIMINAL LAW* 139 (1st ed. 2010).

⁴³ See, e.g., *Franklin v. State*, 257 So.2d 21, 23 (Fla. 1971).

⁴⁴ *Id.* at 24.

⁴⁵ *Id.*

⁴⁶ Michele Boggiani, *Principio di determinatezza and the Void-for-Vagueness Doctrine in Constitutional Litigation: The Italian Corte Costituzionale and the United States Supreme Court*, in *GENERAL PRINCIPLES OF LAW—THE ROLE OF THE JUDICIARY* 180 (Laura Pineschi ed., 2015).

⁴⁷ *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

⁴⁸ *Id.* at 164.

⁴⁹ *Id.* at 171.

Non-retroactivity of criminal law is also a worldwide standard. It is strictly prohibited to create a crime retroactively through national or international law (including treaty law, customary international law, and general principles of law recognized by the community of nations).⁵⁰ The overall concern is that retroactive application of criminal law may create a new crime and consequently deprive an individual of their liberty. This principle appears in the International Covenant on Civil and Political Rights (ICCPR)⁵¹ and the Rome Statute of International Criminal Court,⁵² both of which explicitly recognize the principle of non-retroactivity of criminal law and ensure legal predictability and certainty.⁵³ Notably, the ICCPR has 74 signatories and 168 parties, including Afghanistan.⁵⁴ This concept is also stipulated in Article 24 of the Rome Statute of International Criminal Court,⁵⁵ which has been ratified or acceded by 123 countries including Afghanistan.⁵⁶ Furthermore, most Islamic countries have also incorporated the principle of non-retroactivity of criminal law

⁵⁰ See *Muhammad Salim al' Awwa, The Basis of Islamic Penal Legislating*, in *ISLAMIC CRIMINAL JUSTICE SYSTEM* 133 (M. Cherif Bassiouni ed., 1st ed. 1982).

⁵¹ The International Convention on Civil and Political Rights, art. 15, Dec. 16, 1966, 999 U.N.T.S. 171; 1057 U.N.T.S. 407 (stating “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.”).

⁵² RSICC, *supra* note 1.

⁵³ ALEXANDRA GUHR ET AL., *MAX PLANCK MANUAL ON FAIR TRIAL STANDARDS* 13 (4th ed. 2009).

⁵⁴ *International Covenant on Civil and Political Right*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en (last visited Feb. 11, 2016).

⁵⁵ Rome Statute of International Criminal Court, art 22, 17 July 1998, 2187 U.N.T.S. 90/37 ILM 1002 (1998)/[2002] ATS 15 (stating “no person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute. In the event of a change in the law applicable to a given case prior to a final judgment, the law more favorable to the person being investigated, prosecuted or convicted shall apply”).

⁵⁶ UNITED NATIONS TREATY COLLECTION, *supra* note 54.

into their constitutions or penal codes.⁵⁷ This principle is specifically stipulated in Article 21 of the Penal Code of 1976 of Afghanistan.⁵⁸

In the sections that follow, this Article explains how the principle of legality and its related doctrines are expressed and interpreted in the Afghan legal context.

II

LEGAL LANDSCAPE OF AFGHANISTAN

The complexities of Afghanistan's geography and religious, cultural, and political history have led to an equally complex legal landscape that incorporates various cultural traditions and religious perspectives.⁵⁹ As part of this complexity, the Afghan legal system reflects three different components: Sharia Law, Civil Law, and Customary Law.⁶⁰ Sometimes these components complement one another or overlap, and sometimes they contradict one another.⁶¹ This section gives background needed to understand the complexities underlying the principle of legality in Afghanistan.

Throughout its history, the legal system of Afghanistan has been based on Islamic law and customary law.⁶² In the late nineteenth century during the reign of King Abdurahman Khan, the codification process began, and state legal codes became the exclusive source of legal authority; nevertheless, these laws were still firmly based on Islamic Law.⁶³

⁵⁷ GALLANT, *supra* note 19, at 54. (Gallant identifies laws from many Islamic countries including the Afghanistan Const. art. 27; Azerbaijan Const. art. 71(VIII); Bangladesh Const. art. 35(1); Bangladesh Const. art. 35(1); Egypt Const. arts. 66, 187; Indonesia Const. art. 28I(1); Iran Const. art. 169; Iraq Const. art. 19(2, 10); Kuwait Const. art. 32; Kyrgyzstan Const. art. 85(10); Malaysia Const. art. 7(1); Pakistan Const. art. 12(1); Romania Const. art. 15(2); and so on.).

⁵⁸ QANUNI JAZAI JUMHURI AFGHANISTAN [PENAL CODE OF REPUBLIC OF AFGHANISTAN] Official Gazette No. 347 1355 (1976).

⁵⁹ Adam Ritscher, *A Brief History of Afghanistan*, <http://www.afghangovernment.com/briefhistory.htm> (last visited Feb 20, 2016).

⁶⁰ Meininghaus Esther, Bonn: Zentrum für Entwicklungsforschung Center for Development Research (ZEF) Report 2007: Legal Pluralism in Afghanistan, 2 (2007).

⁶¹ *Id.* at 3.

⁶² *See generally id.*

⁶³ Katherine McCullough, *Out with the Old and in with the New: The Long Struggle for Judicial Reform in Afghanistan*, 19 GEO. J. LEGAL ETHICS 821, 825 (2006).

Islam has also traditionally held a prominent place in the constitutions of Afghanistan.⁶⁴ It has been considered the religion of the state not only in the 2004 Constitution, but also in the 1964 and 1977 Constitutions.⁶⁵ In accordance with the 1964 Constitution, the King was required to be a Muslim and the State was required to practice religious rites in accordance with Hanafi Fiqh (jurisprudence).⁶⁶ This constitution also required that no law should be passed in contradiction to the principles of Islam.⁶⁷

Similar provisions were included in the 2004 Constitution of Afghanistan. Moreover, Article 130 of the Constitution refers judges to Hanafi jurisprudence for guidance when there is no provision regarding the enacted laws.⁶⁸ However, similar to other countries such as Egypt, Turkey, and Libya, Afghanistan also employs the structure of the civil law system.

A. The Relationship Between Islam and the Afghan Constitution and Codes

Islam has an important place in the laws of Afghanistan. It has played a central role in the country's history and in the formation of its national identity. Hence, all laws including criminal law are supposed to be passed in compliance with Sharia Law.

Indeed, the concept of "beliefs and provisions" opens the door to broad interpretations.⁶⁹ Under a broad interpretation, beliefs and provisions could refer not only to Sharia Law but also to the Hanafi Fiqh, and perhaps even to other Islamic law doctrine. With this language, the 2004 Constitution designed a legal system intertwined with Islam, incorporating the *Hanafi* school of jurisprudence by reference.⁷⁰

⁶⁴ Esther, *supra* note 60, at 11.

⁶⁵ QANUNI ASSASSI JUMHURI ISLAMI AFGHANISTAN [CONSTITUTION OF ISLAMIC REPUBLIC OF AFGHANISTAN] Official Gazette No. 818 1382 (2004).

⁶⁶ QANUNI ASSASSI AFGHANISTAN [CONSTITUTION OF AFGHANISTAN] Official Gazette No. 12 1343 (1964); *see also* Esther, *supra* note 60, at 8.

⁶⁷ Thier J. Alexander, *The Making of a Constitution in Afghanistan*, 51 N.Y.U. L. REV. 557, 565 (2007).

⁶⁸ QANUNI ASSASSI JUMHURI ISLAMI AFGHANISTAN [CONSTITUTION OF ISLAMIC REPUBLIC OF AFGHANISTAN] Official Gazette No. 818 1382 (2004).

⁶⁹ Said Mahmoudi, *The Shari'a in the New Afghan Constitution: Contradiction or Compliment?*, in ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (HEIDELBERG JOURNAL OF INTERNATIONAL LAW) 870–71 (2004).

⁷⁰ *Id.*

The language of Article 3 and Article 130 have complex implications for separation of powers or checks and balances in Afghanistan. For example, the 2004 Constitution gives the legislative branch the authority to define criminal or civil offenses. And while executive decrees are considered lawful under the Constitution, they may be accepted or rejected or amended by the legislative branch.⁷¹ Nevertheless, Article 130 limits this legislative power by directing the judiciary to Islamic sources outside of the control of the legislative branch; the legislative branch has no authority to change or amend Sharia Law, which independently criminalizes some acts and devises certain punishments.⁷²

There are other provisions of the Constitution that add to this complex relationship between Islam and the State. For example, Article 7 of the 2004 Constitution requires the Afghan State to uphold international treaties, international agreements, the United Nations Charter, and the Universal Declaration of Human Rights. In addition, Article 121 of the Afghan Constitution explains that the Supreme Court can review statutes and international treaties for their compliance with the Constitution and interpret them in accordance with provisions of law.⁷³ Juxtaposed with the requirements of Articles 3 and 130, Articles 7 and 121 require the judicial branch to reconcile the sometimes-differing demands of Islam and international human rights law.⁷⁴ For example, in accordance with Article 2 of the Constitution, followers of other faiths are free within the bounds of law in the exercise and performance of their religious rituals. Islam allows for Islamic da'wah (inviting to Islam), or conversion to Islam.⁷⁵ However, Sharia Law prohibits apostasy, or the abandonment or renunciation of one's religion.⁷⁶ In contrast, Article 18 of the Universal Declaration of Human Rights states that all people should

⁷¹ HOSSEIN GHOLAMI, *BASICS OF AFGHAN LAW AND CRIMINAL JUSTICE* 74–75 (Bashir Tanin & Valey Arya trans., 2008).

⁷² See generally RASOLI, *supra* note 13.

⁷³ QANUNI ASSASSI JUMHURI ISLAMI AFGHANISTAN [CONSTITUTION OF ISLAMIC REPUBLIC OF AFGHANISTAN] Official Gazette No. 818 1382 (2004).

⁷⁴ Martin Lau, *The Independence of Judges Under Islamic Law, International Law and the New Afghan Constitution*, 64 HEIDELBERG J. INT'L L. 918 (2004).

⁷⁵ A. Rashied Omar, *The Right to Religious Conversion: Between Apostasy and Proselytization* 2 (Aug. 1, 2006), <https://www.ciaonet.org/attachments/10903/uploads>.

⁷⁶ *Id.*

be free to change their religion.⁷⁷ In the Afghan context, these two provisions contradict each other.

B. Court Structure and Judicial Training

To understand the complexities involved in varied interpretations of Article 130, one must understand the court structure in Afghanistan and how judges are trained. The Constitution of Afghanistan is the sole source of required qualifications for the judges on the Afghan Supreme Court.⁷⁸ Under Article 116 of the Constitution, the judiciary is an independent entity that consists of the Supreme Court, courts of appeals, and preliminary or trial courts.⁷⁹ The Supreme Court is responsible for the administration of a court system consisting of 34 provincial courts and 408 primary courts throughout Afghanistan.⁸⁰ The court with the second-highest authority is the appellate court. The lowest court in the hierarchical structure of the Afghan court system is the primary court.⁸¹

The Supreme Court is composed of nine judges including a Chief Justice, all of whom are required to have higher education in the laws or in Islamic jurisprudence, as well as demonstrate expertise in the judicial system of Afghanistan.⁸² Thus, Supreme Court judges should have knowledge in both religious and statutory laws because the Afghan legal system is based on both Islamic law and statutory law; judges that lack training in either may not qualify as Supreme Court judges.⁸³

The criteria for appellate court and primary court judges are set forth in Article 81 of the Law on Organization and Structure of Judiciary Branch of the Republic of Afghanistan.⁸⁴ In accordance with Article 81, judges can come from one of three different educational backgrounds: “sharia school, religious school (Madrasa),

⁷⁷ UNUDHR, *supra* note 1.

⁷⁸ QANUNI ASSASSI JUMHURI ISLAMI AFGHANISTAN [CONSTITUTION OF ISLAMIC REPUBLIC OF AFGHANISTAN] Official Gazette No. 818 1382 (2004).

⁷⁹ *Id.*

⁸⁰ *Id.*; *see also* AFGHANISTAN RESEARCH AND EVALUATION UNIT, THE A TO Z GUIDE TO AFGHANISTAN ASSISTANCE 77–78 (7th ed. 2009).

⁸¹ *Id.* at 78.

⁸² DIEHL, KATHARINA ET AL., MAX PLANCK MANUALS ON CONSTITUTION BUILDING: STRUCTURES AND PRINCIPLES 28 (2nd ed. 2009).

⁸³ *Id.*

⁸⁴ QANUNI TASHKIL OA SALAIT MAHAKIM JAMHURI ISLAMI AFGHANISTAN [LAW ON THE ORGANIZATION AND STRUCTURE OF JUDICIARY BRANCH OF ISLAMIC REPUBLIC OF AFGHANISTAN] Official Gazette No. 1109 (2013).

and law school.”⁸⁵ The Sharia school curriculum consists of Islamic law and jurisprudence; however, Sharia students also receive introduction to some subjects in national and international law.⁸⁶ In contrast, in “law schools,” the curriculum focuses on statutory and international law, with some introduction to Sharia law and jurisprudence.⁸⁷ Students in religious schools, or Madrasas, study generally the religion of Islam.⁸⁸ Despite these discrepancies in educational background, each of these judges perform the same role in the judiciary, working in the same courts, as well as interpreting and applying the same laws.

As a way to supplement their legal education and prepare them for service in the judiciary, Afghanistan requires future judges to attend a judicial Stazh (practical course), a course that runs for two years.⁸⁹ While attending this course, all students are trained in the same classes and same subjects: civil code, penal code, criminal and civil procedure, fair trial standards, criminalistics, among other topics.⁹⁰ Later, while serving on the court, the judges also receive instruction through additional trainings and workshops.⁹¹ These trainings attempt to equip the judges with both Sharia law and positive laws of the state.

III THE PRINCIPLE OF LEGALITY UNDER AFGHAN LAW

This section explains how the principle of legality appears in the different sources of law that govern Afghanistan, including Islam, the Afghan Constitution, Afghan Codes, and treaties.

⁸⁵ *Id.*

⁸⁶ Interview with Abdurahim Akimi, Professor of Sharia, School of Herat University, in Seattle, Wash. (Feb. 10, 2016).

⁸⁷ Interview with Professor Fazel Rahman Ayoubi, Dean of Law School, Khost University, in Seattle, Wash. (Jan. 31, 2016).

⁸⁸ Akimi, *supra* note 86.

⁸⁹ Surat Bani Is- rail XVII, 15 (explaining the law on the organization and jurisdiction of judiciary branch of Islamic republic of Afghanistan).

⁹⁰ *A Quick Overview of the Judicial Stazh of Islamic Republic of Afghanistan*, <http://hoqoqwaras.blogspot.com/2011/02/blog-post.html> (Feb. 13, 2016).

⁹¹ *Id.*

A. “We never punish until we have sent a messenger”⁹²

There are many verses of the Quran that appear to reflect the principle of legality and non-retroactivity of criminal law. For instance, the Quran states that “[w]e never punish until we have sent a messenger.”⁹³ It also states “[n]ever did the lord destroy the townships. He had raised up in their mother (town) a messenger reciting unto them our revelations.”⁹⁴ The Quran goes on to state that, “Allah has forgiven what is past, but whosoever commits it again, Allah will take retribution from him.”⁹⁵ In addition, it emphasizes, “[l]et there be from you a nation who invite to goodness, and enjoin right conduct and forbid indecency.”⁹⁶

Fundamentally, Sharia requires there should be no crime or punishment unless stated by a law prior to commitment of such forbidden conducts.⁹⁷ God does not impose punishment upon individuals until they are informed about the prohibited action through his messenger.⁹⁸ Indeed, Islamic, national, and international sources of law each individually exhibit this clear commitment to the principle of legality; however, this commitment is sometimes lost in the complex reality of a mixed legal system, where these legal systems sometimes conflict or are susceptible to conflicting interpretations.

B. Distinguishing Between Hudod, Qissas, Diat, and Tazir Crimes

In Islamic criminal justice system, all offenses are divided into three categories according to the severity of penalty and nature of the offense.⁹⁹ Hudod (specified crimes in Islam) are those crimes that specified by Quran and Sunnah (the actions of the Prophet of Islam) and have specific punishments.¹⁰⁰ Qissas and Diat (just retaliation) are

⁹² Surat Bani Is- rail XVII, 15.

⁹³ Surat Bani Is- rail XVII, 15.

⁹⁴ Surat Al- Qasas XXVIII, 59.

⁹⁵ Surat al-Ma’ida V, 95

⁹⁶ Surat al-Imran V, 104.

⁹⁷ Silvia Tellenbach, *Fair trial guarantees in criminal proceedings under Islamic, Afghan Constitutional and International Law*, 64 HEIDELBERG J. INT’L L. 929, 931 (2004); see also KAMALI, *supra* note 9, at 150; see also Salim al’ Awwa, *supra* note 49, at 133.

⁹⁸ KAMALI, *supra* note 10, at 158.

⁹⁹ *Id.* at 161.

¹⁰⁰ *Id.* at 157; see also ANWARULLAH, *CRIMINAL LAW OF ISLAM* 34 (1st ed. 1995).

crimes that deal with homicide and the infliction of bodily harm.¹⁰¹ In these, the discretion of punishment is left to the victim or his or her family.¹⁰² Tazir literally means to prevent, to honor, to moderate, to avoid, and to assist.¹⁰³ Tazir are those crimes that are criminalized by the rulers.¹⁰⁴ The privilege of law making power given to Muslims is complementary, not absolute. Thus, the legislation should be in compliance with Sharia.¹⁰⁵ In Islam, Tazir crimes are crimes referenced generally in the Quran or the Hadiths, but for which neither source identifies or defines a punishment.¹⁰⁶ Under Islamic law, punishments for Tazir crimes are, therefore, determined at the discretion of the judge or ruler of the state.¹⁰⁷ Notably, there is no separate criminal court for hearing Hudod, Qissas, Diat or Tazir crimes in Afghanistan, and all courts and judges are qualified to hear all cases.

In contrast to Tazir offences, Hudod crimes encompass specific crimes against God, and these crimes have fixed punishments articulated in the Quran and the Sunnah.¹⁰⁸ Hudod crimes include adultery or fornication, theft, and apostasy, among some others.¹⁰⁹ The set punishments for these crimes include death by stoning, lashes, and amputations, depending on the crime.¹¹⁰ In Hudod cases, because both the crimes and the respective punishments are considered in primary Islamic sources, judges exercise limited discretion, primarily limited to the intent of the defendant and the credibility of the evidence.¹¹¹

Qissas means “equality” or “equivalence”.¹¹² Crimes governed by Qissas allow for certain punishments, for example in assault or

¹⁰¹ KAMALI, *supra* note 10, at 157.

¹⁰² ANWARULLAH, *supra* note 100, at 88.

¹⁰³ *Id.* at 225.

¹⁰⁴ *Id.* at 35.

¹⁰⁵ M. Cherif Bassiouni, *Sources of Islamic Law, and The Protection of Human rights in the Islamic criminal Justice System*, in *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 11 (Cherif Bassiouni eds., 1982).

¹⁰⁶ ANWARULLAH, *supra* note 100, at 35.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 125; *see also* KAMALI, *supra* note 10, at 157.

¹⁰⁹ ANWARULLAH, *supra* note 100, at 125.

¹¹⁰ *See generally* ANWARULLAH, *supra* note 100.

¹¹¹ KAMALI, *supra* note 10, at 161.

¹¹² Bassiouni, *supra* note 105, at 203.

murder charges. For example, under this doctrine, a murder victim's closest relative has a right to kill the murderer, if the court deems it appropriate. Again, because this doctrine is defined and described in Islamic sources of law, judges have little discretion. Judges hear the case and are responsible to ensure the proper implementation of retaliation through convicting the defendant based on evidence.¹¹³

The Islamic criminal justice system has clear rules and principles regarding Hudod, Qissas, and Diat crimes. For Hudod crimes, there are specified punishments; however, the punishments for Qissas and Diat crimes are left to the discretion of the victim and the victim's family. Families have the discretion to request punishment or to negotiate for compensation.¹¹⁴ Notably, it is debated whether retaliation still occurs in modern Islamic countries.¹¹⁵ For example, in Egypt, retaliation was practiced until the French Model Penal Code was adopted in 1883.¹¹⁶ Both Hudod and Qissas crimes are sanctioned through specified rules and regulations of Sharia. In other words, the crimes and the punishment of these crimes are identified. Because Hudod crimes are severe, the procedural rules regarding the crimes are characterized by their stringent requirements of proof. Most of the time it is nearly impossible to prove the crime.¹¹⁷

With Hudod crimes, punishments cannot be altered; thus, there is no minimum or maximum punishments attached to them. If someone commits a Hudod crime, he knows what the punishment will be. No one, including heads of state, legislature, or judges, can reduce or change the punishment for Hudod crimes. However, with Tazir crimes, there are grounds for general and specific pardon and such pardons can take place through the president or parliament.

In Afghanistan, inconsistencies and disagreements about the principle of legality are most evident in cases of Tazir crimes, primarily because of the relationship between Article 130 and Article 27 of the Constitution, as well as differing opinions about how those provisions should be interpreted.¹¹⁸ Regarding Hudod, Qissas, and

¹¹³ Mark Cammack, *Islamic Law and Crime in Contemporary Courts*, 4 BERKELEY J. MIDDLE EASTERN & ISLAMIC L. 5 (2012).

¹¹⁴ Tellenbach, *supra* note 97, at 931; *see also* GALLANT, *supra* note 19, at 52.

¹¹⁵ KAMALI, *supra* note 10, at 163.

¹¹⁶ *Id.*

¹¹⁷ Mandana Knust & Rassekh Afshar, *The Case of an Afghan Apostate*, 10 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 596 (2006).

¹¹⁸ KAMALI, *supra* note 10, at 25.

Diat crimes, Article 1 of the Penal Code of Afghanistan has clear provisions that state the following:

This penal code regulates *Tazir* crimes and penalties. Those committing crimes of “Hudod”, “Qissas and Diat” shall be punished according the provisions of Islamic religious law (Hana jurisprudence).¹¹⁹

With the language of Article 1 of the Penal Code, the Code specifically states that determinations of Tazir crimes are governed by the Code itself,¹²⁰ in effect, announcing that judges do not have absolute discretion to criminalize an act of Tazir. Instead, Tazir type crimes must be defined and adopted by the legislature.

1. A Historical View of Tazir Crimes

At the beginning of Islam, a state leader, the Caliph himself, would decide cases, without the assistance of courts.¹²¹ It was during the caliphate of Umar (Radiya Allahu Anhu),¹²² the second Caliph, that judges were appointed and justice before the law was considered an Islamic duty of judges.¹²³ These judges were considered delegates of the Caliph or governor of a province. At that time, judges were resolving many different kinds of disputes, “civil or criminal,” according to the Quran and Sunnah.¹²⁴ Specific instructions were given to judges, including many principles of Fiqh, describing crimes and punishments. For example, there was a Fiqh instruction to judges that extrapolation may be used from similar cases when there is no concrete rule in the Qur’an and the Sunnah of the Prophet on a matter.¹²⁵

Later during the Abbasids dynasty, additional schools of Islamic thought were established and gradually developed.¹²⁶ The Quran and Sunnah give discretion to the Caliph to make new laws in compliance

¹¹⁹ QANUNI JAZAI JUMHURI AFGHANISTAN [PENAL CODE OF REPUBLIC OF AFGHANISTAN] Official Gazette No. 347 1355 (1976).

¹²⁰ *Id.* at 594.

¹²¹ Lau, *supra* note 74, at 920.

¹²² Is the Arabic word for “may God be pleased from him.”

¹²³ Lau, *supra* note 74, at 920.

¹²⁴ *Id.*

¹²⁵ Nazeer Ahmed, *the Development of Fiqh*, HISTORY OF ISLAM, <http://historyofislam.com/fiqh-the-development-of/> (last visited Jan. 8, 2016).

¹²⁶ Lau, *supra* note 74, at 920.

with Quran and the Sunnah; in this way, Islamic scholars are permitted to find different solutions when new challenges or situations arise.¹²⁷

Different Islamic scholars have different solutions for the issues that were not specified in the Quran and Sunnah.¹²⁸ Hence, five major schools of Fiqh were developed. They are the following: Hanafi, Maliki, Shafi'i, Hanbali and Ja'afariya.¹²⁹ *Fiqh* established a doctrinal response to new challenges of the Islamic civilization.¹³⁰ Under Fiqh, judges solved cases as part of a religious duty, and the judge was obliged to solve cases in compliance with Islamic principles such as equality before the law and impartiality.¹³¹

According to Islamic jurisprudence, judges have broad discretion in Tazir crimes.¹³² Depending on the severity of crimes, they are authorized to impose imprisonment or the death penalty, or they can simply issue a warning. Different Islamic schools have different opinions regarding Tazir crimes. The Maliki, Hanbali, and Fiqh state that in certain cases, Tazir may involve the death penalty; the Hanafi advises a restrictive method to Tazir and determines that Tazir punishment must not reach the severity of the *hudod* or *qissas* punishments. Hudod or qissas maximums are forty lashes of the belt, and according to other sources, only ten lashes.¹³³ Imprisonment was sanctioned as well, but later in the historical timeline.¹³⁴ However, there remains an essential quandary: is there an "official" list of Tazir crimes in accordance with the Fiqh or is it always the judge who decides what is wrong and punishable?

Numerous authoritative Islamic sources maintain that individuals deserve to know what a crime is and its possible punishment.¹³⁵ In fact, Abdul-Qadir Awdah, the famous Egyptian jurist and author of an important textbook on Islamic Criminal Law, maintains that Sharia

¹²⁷ Ahmed, *supra* note 125.

¹²⁸ Esther, *supra* note 60, at 11.

¹²⁹ Ahmed, *supra* note 125 (However, there are some other schools of Fiqh, followed by a small number of Muslims.).

¹³⁰ *Id.*

¹³¹ Lau, *supra* note 74, at 921.

¹³² MOHAMMAD HASHIM KAMALI, LAW IN AFGHANISTAN: A STUDY OF THE CONSTITUTIONS, MATRIMONIAL LAW AND THE JUDICIARY 46–47 (1985).

¹³³ KAMALI, *supra* note 10, at 25–26.

¹³⁴ *Id.*

¹³⁵ HALL, *supra* note 12, at 36–37.

imposes certain restrictions on the powers of judges.¹³⁶ According to Awdah, Tazir offences are regulated by the text of Sharia alone, and it is a mistake to suggest that a judge has discretion or liberty to determine an action or omission as a crime and provide punishment for it.¹³⁷ Awdah explains that a judge is obligated to decide first whether the conduct constitutes a wrongdoing according to the language of the text of Sharia.¹³⁸ The judge should first look to a corresponding Tazir crime that is expressly prohibited in the Sharia law or jurisprudence, without specifying the exact punishment.

Some of these crimes include perjury, usury, obscenity, insult, bribery, unlawful entry into private dwellings, and espionage.¹³⁹ Because these acts are forbidden by Sharia, the authority is provided to an Islamic state's leader to deem the conduct criminal. Yet, Awdah maintains that a judge has the discretion to determine punishment for any of these wrongdoings, ranging from a warning to fines and imprisonment. In other words, the judge has substantial flexibility and authority regarding *Tazir* offences, which Awdah characterizes as *sultah al-ikhtiyar* (power to select) as opposed to *sultah al-tahakkum* (power to legislate at will).¹⁴⁰ An alternative view, championed by Mohammed Salam Madkoar, the former head of Islamic Law at the University of Cairo, argues that Sharia Law emphasizes the societal interest, so broad discretion should be given to judges to prevent evils in the future.¹⁴¹

Neither judges nor any other organ of government enjoys unlimited power under Islamic law. Thus, granting to the judiciary unlimited discretion of criminalization and punishment of an act is not allowed. Instead, there are two alternative solutions that adopt an expansionist view of *Tazir*. First, the head of the state determines the upper limit of Tazir punishment. A second view of Tazir includes capital punishment, citing the well-known hadith (a collection of the sayings and doing of the Prophet Mohammad) wherein the Prophet Mohammad, *peace be upon him*, addressed the believers, saying,

¹³⁶ See generally KAMALI, *supra* note 10.

¹³⁷ *Id.* at 25–26.

¹³⁸ RASOLI, *supra* note 13, at 143.

¹³⁹ KAMALI, *supra* note 10, at 25–26.

¹⁴⁰ *Id.*

¹⁴¹ *Islamic Law, Sharia and Fiqh*, SAINT GROUP 6; <http://saint-claire.org/wp-content/uploads/2016/01/Islamic-Law-SHARIA-AND-FIQH.pdf> (last visited Feb. 24, 2016).

“[w]hen all of you have agreed on a leader and then someone tries to split you asunder and divide your community—kill him.”¹⁴² This hadith, however, deals with a specific and very serious political situation, and perhaps might not grant a general extension of the death penalty to Tazir.

As stated before, the Quran and Sunnah stipulate specific punishment for Hudod crimes only. Hence, other minor crimes are left to the discretion of Islamic jurisprudence to criminalize them according to circumstantial need.¹⁴³

2. *Tazir in Modern Islamic States*

In the era of applicable laws, the question arises whether criminal act or omission should be codified via parliament or whether it should be left to the discretion of judges to criminalize an act or omission. Various Muslim countries have different approaches to this matter. Saudi Arabia allows a judge to set Tazir crimes and punishments;¹⁴⁴ however, some restrict discretion to the punishment. In contrast, in 1983 Ayatollah Khomeiny ordered the Iranian Parliament to enact all Tazir for the purpose of the unification of the application of Tazir in courts.¹⁴⁵

Today, in almost all Islamic countries, judges do not hold discretion in Tazir crimes; the legislature has codified Tazir, in compliance with Sharia, in penal codes or statutes.¹⁴⁶ Moreover, as most Islamic countries have ratified a constitution, Tazir crimes would also be subject to any principle of legality articulated or adopted into those constitutions.¹⁴⁷

3. *Distinguishing Hudod Crimes from Tazir Crimes*

Some crimes are considered both Hudod and Tazir, and similarly some crimes are considered both Qissas and Tazir.¹⁴⁸ For instance, theft is a crime under both Tazir and Hudod. When the value of a

¹⁴² KAMALI, *supra* note 10, at 26.

¹⁴³ Etim E. Okon, *Hudud punishments in Islamic Criminal Law*, 10 E. S. J. 227, 228 (2014).

¹⁴⁴ *Islamic Law, Sharia and Fiqh*, *supra* note 141, at 6.

¹⁴⁵ Tellenbach, *supra* note 97, at 932.

¹⁴⁶ KAMALI, *supra* note 10, at 26.

¹⁴⁷ *Id.*

¹⁴⁸ Okon, *supra* note 143, at 228.

stolen item is below a certain threshold,¹⁴⁹ a thief may be punished with Tazir instead of under the Hudod punishment scheme. Stealing a bottle of water, for example, would not deserve Hadd punishment.

A sexual crime, which is essentially a Hudod crime, might be punished through Tazir when it doesn't rise to the level of intercourse. In addition, when the evidence in a case does not satisfy the strict requirements for Hudod proof, a person might be punished with Tazir.¹⁵⁰ For instance, the required evidence in fornication cases is confession from the defendant plus four credible eyewitnesses.¹⁵¹ If that specific level of evidence is not available, the crime can still be classified as Tazir. However, under Tazir the punishment would be less severe than under Hudod.

Article 1 of Penal Code of Afghanistan specifies that Hudod cases must be decided in accordance with Hanafi Jurisprudence; however, the code does not specify the number of Hudod crimes that exist. There are seven Hudod crimes, four of which are punishable by death in special circumstances: adultery, apostasy, armed robbery, and rebellion.¹⁵² Although these crimes have fixed punishment under Islamic law, various Islamic schools have differing points of view regarding available affirmative defenses and interpretations of the requirements for these crimes.¹⁵³

It is much more difficult to prove Hadd crimes because many Hadd crimes cannot be proven by circumstantial evidence. These high evidentiary safeguards and limitations on construction of the law decrease the chance of successful prosecution of Hadd punishments.¹⁵⁴ For instance, the required evidence to prove adultery is confession by the defendant plus four eyewitnesses.¹⁵⁵ The defendant can withdraw a confession any time before the execution of

¹⁴⁹ Threshold is 10 Sharia Dirham, which is equivalent to approximately 4.5 grams gold or 31.5 grams of silver.

¹⁵⁰ Okon, *supra* note 143, at 228.

¹⁵¹ IBN TAIMIYYA ON PUBLIC AND PRIVATE LAW IN ISLAM OR PUBLIC POLICY IN ISLAMIC JURISPRUDENCE 117 (Omar A. Farrukh trans., Khayat 1st ed. 1966).

¹⁵² Elizabeth Peiffer, *The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria*, 11 WM. & MARY J. WOMEN & L. 507, 509 (2005); *also see generally* Una Au et al., *supra* note 16, at 89.

¹⁵³ Peiffer, *supra* note 152, at 509.

¹⁵⁴ *Id.* at 515.

¹⁵⁵ IBN TAIMIYYA, *supra* note 151, at 117.

the punishment.¹⁵⁶ The witnesses must have good character and should have seen the crime as it happened. Providing false testimony regarding crime is punishable by eighty lashes.¹⁵⁷ In addition, Islamic schools do not accept the testimony of women in cases of adultery tried under Hadd.¹⁵⁸ Notably, unlike other Hudod crimes, apostasy can be proven by circumstantial evidence.¹⁵⁹

Although often harsh, the use of Hudod punishment does not violate the principle of legality because clear notice has been given to the people of society. Citizens already know the list of Hudod crimes and the punishments assigned to each crime.¹⁶⁰ The burden of proof is common knowledge as well. Hadd crimes, their punishments, and the burdens of proof are immutable, even to the judiciary.

a. Relevant Constitutional Provisions and Codes

The principle of legality is expressed through Article 27 of the Afghan Constitution, and Articles 2 and 3 of the 1976 Penal Code. As explained in the introduction to this Article, Article 27(2) of the Afghan Constitution states, “no person can be pursued, arrested or detained save in accordance with the provisions of law. In addition, no person can be punished except in accordance with the decision of a competent court and in conformity with the law adopted before the date of offence.”¹⁶¹

Articles 2 and 3 of the Penal Code echo the Afghan Constitution. Articles 2 and 3 state generally that no act shall be considered a crime, unless it is in accordance with statute.¹⁶² No one can be punished but in accordance with the provisions of a statute that has been enacted before commitment of the act under reference.¹⁶³

Under Article 21 of the 2014 Criminal Procedure Code, evidence deemed inadmissible due to violating the provisions of this law or other enforced laws shall be taken out of the file and stamped. This

¹⁵⁶ Peiffer, *supra* note 152, at 510.

¹⁵⁷ *Id.*

¹⁵⁸ IBN TAIMIYYA ON PUBLIC AND PRIVATE LAW IN ISLAM OR PUBLIC POLICY IN ISLAMIC JURISPRUDENCE 117 (Omar A. Farrukh trans., Khayat 1st ed. 1966).

¹⁵⁹ Peiffer, *supra* note 152, at 512.

¹⁶⁰ *See generally* KAMALI, *supra* note 10.

¹⁶¹ GHOLAMI, *supra* note 71, at 155.

¹⁶² QANUNI JAZAI JUMHURI AFGHANISTAN [PENAL CODE OF REPUBLIC OF AFGHANISTAN] Official Gazette No. 347 1355 (1976).

¹⁶³ QANUNI ASSASI JUMHURI ISLMAI AFGHANISTAN [CONSTITUTION OF ISLAMIC REPUBLIC OF AFGHANISTAN] Official Gazette No. 818 1382 (2004).

evidence and all related documents shall be maintained separately from other evidence and documents.¹⁶⁴ In light of these provisions, law enforcement and prosecutorial authorities may not conduct any arrests, detention, or searches unless in accordance with specific, existing rules of criminal procedure.¹⁶⁵

In the following sections, this Article explains how the principle of legality and its related doctrine have been articulated in the various constitutions of Afghanistan.

(i) Before the 2004 Constitution

Article 64 of the 1964 Constitution of Afghanistan required parliament to enact law in compliance with the principles of Islam.¹⁶⁶ Accordingly, judges had to base their decisions on the laws that were passed by parliament.¹⁶⁷ Hence, the Constitution required judges to decide only based on the enacted laws; however, in accordance with Article 102, the judges had discretion to refer to Hanafi jurisprudence when there were no statutes to cover the case before the judge.¹⁶⁸ The unconsolidated state of manuals of Fiqh and the diversity of opinions within Hanafi jurisprudence have created problems of inconsistency and unpredictability in court practices—courts rely on the views of different scholars within the Hanafi School of Jurisprudence. This also leads to problems of the consistency of the Hanafi jurisprudence with the Constitution, which creates serious obstacles for judges to decide which one to prioritize.

The principle of legality was also expressly incorporated into the Constitution of 1964; in accordance with Article 26 of this Constitution, no action is considered a crime unless defined as a crime by an enacted law prior to the commission of the act.¹⁶⁹ Accordingly, no one shall be punished without the decision of an authoritative court

¹⁶⁴ QANUNI IJRAHATI JAZA-E-JUMHURI ISLAMI AFGHANISTAN [CRIMINAL PROCEDURE CODE OF REPUBLIC OF AFGHANISTAN] Official Gazette No. 1132 1393 (2014).

¹⁶⁵ QANUNI IJRAHATI JAZA-E- JUMHURI ISLAMI AFGHANISTAN [CRIMINAL PROCEDURE CODE] Official Gazette No. 1132. 1393 (2014).

¹⁶⁶ QANUNI ASSASSI AFGHANISTAN [CONSTITUTION OF AFGHANISTAN] Official Gazette No. 12 1343 (1964).

¹⁶⁷ KAMALI, *supra* note 10, at 6.

¹⁶⁸ QANUNI ASSASSI AFGHANISTAN [CONSTITUTION OF AFGHANISTAN] Official Gazette No. 12 1343 (1964).

¹⁶⁹ *Id.*

following the provisions of the enacted law, which had to have been promulgated prior to commitment of the offense.¹⁷⁰

The adoption of the principle of legality in the 1964 Constitution was ahead of its time; at that time, Afghanistan did not have any developed codified penal statutes.¹⁷¹ The first Penal Code was enacted in 1976, a year before the adoption of the 1977 Constitution of Afghanistan. And similar to Article 102 of the 1964 Constitution, Article 99 of the 1977 Constitution stated the following:

When there is no provision in the Constitution or other laws regarding ruling on an issue, the court's decisions shall be within the limits of this Constitution in compliance with basic principles of *Hanafi* jurisprudence and, within the limits set by this Constitution, rule in a way that attains justice in the best manner.¹⁷²

Under this Article, judges were allowed to apply the basic principles of Hanafi Fiqh to ensure justice; however, because the legislature had begun to enact statutes in the form of the Penal Code, there was a question of whether, because the legislature began to codify law, judges should not have the power to criminalize Tazir crimes.¹⁷³

(ii) 2004 Constitution and Current Penal Codes

The 2004 Constitution of Afghanistan provides individual rights of citizens in the second chapter. Included in these rights is the right to be informed of prohibited actions or omissions and their punishments. For example, Article 27 requires the government of Afghanistan to specify all crimes and the punishment of each crime in statutory laws; if there are no statutes regarding an action or omission, prosecution is considered illegal.¹⁷⁴ In short, there is no crime or punishment for conduct unless the law expressly forbids it.

Elsewhere in the Constitution, however, there is a significant retreat from the principles of Article 27. As explained above, Article 130 states that when there is no rule in the Constitution and statutory law regarding a specific case, Islamic law under the Hanafi School of

¹⁷⁰ *Id.*

¹⁷¹ KAMALI, *supra* note 132, at 45–46.

¹⁷² QANUNI ASSASSI JUMHURI ISLAMI AFGHANISTAN [CONSTITUTION OF ISLAMIC REPUBLIC OF AFGHANISTAN] Official Gazette No. 360 1356 (1977).

¹⁷³ Alexander, *supra* note 67, at 577.

¹⁷⁴ QANUNI ASSASSI JUMHURI ISLAMI AFGHANISTAN [CONSTITUTION OF ISLAMIC REPUBLIC OF AFGHANISTAN] Official Gazette No. 818 1382 (2004).

Jurisprudence may be invoked.¹⁷⁵ There is simply an unclear path to reconciling these two provisions, and one cannot help but notice that certain readings of them undermine the principle of legality.¹⁷⁶

A partial reconciliation can be read into Article 130. One scholar points out that Article 130's use of the phrase, "within the limits set by this Constitution,"¹⁷⁷ can be read in conjunction with Article 27 to bar the application of Article 130 to criminal cases and exclude punishment for behaviors not set forth in the codified laws of Afghanistan. At an international workshop regarding gender and criminal justice in Afghanistan, held in 2006, Fazal Ahmad Manawa and Advisor Minister Ashraf Rasooli, two expert former Deputy Presidents of the Supreme Court of Afghanistan who have broad knowledge of Sharia law and statutory laws, stated that Article 130 of the 2004 constitution does not apply to criminal cases; instead, it should apply only in civil cases.¹⁷⁸

Nevertheless, as illustrated in the case discussions in the following section, criminal courts of Afghanistan frequently argue that this Article does in fact give them the discretion to convict and sentence defendants for Tazir crimes when there is no Penal Code provision.

C. How Judges Use Article 130 to Justify Punishments Under Tazir

The criminal courts of Afghanistan have used Article 130 of the Constitution to convict and punish defendants in more than a thousand criminal cases in which the judge relied on Hanafi jurisprudence. Examples of these cases include mundane activities like those involved in runaway cases, and the selling of Haram animals as meat. For each of these, there is no specific rule in the Penal Code that defines the act as a crime. Having not been formally recognized as a crime, there can be no attendant punishment assigned. Instead, the punishments handed out by judges are based on social norms and the demands of the people in the community. The following are some examples of Tazir cases in which the criminal courts justified their decisions on Article 130.

¹⁷⁵ *Id.*

¹⁷⁶ UNA AU ET AL., *supra* note 16, at 25.

¹⁷⁷ KAMALI, *supra* note 10, at 16.

¹⁷⁸ *Id.* at 25.

1. *Case of Sayed Perwiz Kambakhsh*

In October 2007, Sayed Perwiz Kambakhsh, a student at Balkh University and a journalist for Jahan-e Naw (New World), was arrested for downloading and publishing materials “offensive to Islam.” Kambakhsh had written criticism about certain Quranic verses about women.¹⁷⁹ He was accused of blasphemy.¹⁸⁰ The punishment for blasphemy varies among different schools of jurisprudence. Different schools take into consideration whether the perpetrator is Muslim or non-Muslim, or man or woman. Depending on the level of blasphemy, the punishment can be fines, imprisonment, flogging, amputation, hanging, or beheading.¹⁸¹ For example, injuring or defiling places of worship with the intent to insult the religion might deserve fine or imprisonment, while use of derogatory remarks in respect of the prophet Mohammad might deserve death.

In Kambakhsh’s case, local religious leaders demanded that he be executed. The prosecutor asked the primary criminal court of Balkh province to convict and sentence Kambakhsh under Article 130 of Constitution, arguing that the judge could decide the case under Hanafi Jurisprudence because it was Tazir.¹⁸² Initially, the primary criminal court sentenced Kambakhsh to death, reasoning that he had confessed to blasphemy.¹⁸³

However, Kambakhsh eventually denounced his confession, claiming his confession was a product of torture. Following an outcry from the international community, which deemed the conviction and sentence a human rights violation, his sentence was commuted to twenty years imprisonment, a sentence upheld by the Supreme Court

¹⁷⁹ John Witte, Jr. & M. Christian Green, *Religious Freedom, Democracy, and International Human Rights*, 23 EMORY INT’L L. REV. 583 (2009); see also *Afghan ‘Blasphemy’ Death Sentence*, BBC NEWS, http://news.bbc.co.uk/1/hi/world/south_asia/7204341.stm (last updated Jan. 23, 2008).

¹⁸⁰ *Id.* at 583.

¹⁸¹ See Robert Postawko, *Towards an Islamic Critique of Capital Punishment*, 1 UCLA J. ISLAMIC & NEAR E. L. 269, 314 (2002).

¹⁸² Notably, the prosecutor also asked that the court to convict Kambakhsh under Article 347 of the Penal Code. Article 347 of the Afghan Penal Code, however, defines certain crimes against religion and prescribes punishment of cash fines and midterm imprisonment for up five years. While Article 347 would appear to limit any sentence in Kambakhsh’s case, the court clearly disregarded this provision or determined that it did not apply.

¹⁸³ Witte & Green, *supra* note 179, at 583; see also *Afghan ‘Blasphemy’ Death Sentence*, *supra* note 179.

of Afghanistan.¹⁸⁴ Notably in September 2009, then President Karzai pardoned Kambakhsh, and he is since believed to have left the country.¹⁸⁵

The Court virtually made two rulings in Kambakhsh's case. First the Court had to deem his act blasphemy, which is an offense to Islam under Tazir. This decision by the Court allowed it to apply Article 130 of the Constitution to sentence Kambakhsh using a Tazir punishment.

2. *Dog Meat Case*

There are many verses in Quran regarding Halal (permitted food) and explaining what meat would be considered Haram (food that is not permitted). One of the Hadith explaining these verses states that "Allah's Messenger is prohibited to eat: every beast of prey that has a canine tooth and every bird that has a claw."¹⁸⁶ Given that dogs have canine teeth, they are considered Haram under Islamic law. Because Haram is a crime against Islam, the Court justified a conviction and sentence for a Tazir crime under Article 130 when defendants were accused of selling dog meat.

The case arose when, in Herat province, police arrested three individuals who were accused of selling dog meat to people under the guise of sheep meat. The butchers association of Herat province and members of the community suggested harsh punishment for the defendants. They believed this action went against Islamic principles, and anyone who misused Islamic principles should be sentenced to the strongest punishment. They warned that if the government showed mercy or gave a lesser punishment, they would take action themselves and punish the individuals on their own.¹⁸⁷

Although eating dog meat is prohibited in Islam, there is no specific article in the Penal Code of Afghanistan regarding eating or selling dog meat or other haram. Nevertheless, the primary criminal court of Herat province convicted two of the defendants of "selling dog meat" and sentencing them to 15 years imprisonment; the third

¹⁸⁴ Witte & Green, *supra* note 179, at 584.

¹⁸⁵ *Id.*

¹⁸⁶ Imam Muslim, HALAL AND HARAM MEAT OR FOOD, <http://www.islamweb.net/emainpage/index.php?page=showfatwa&Option=FatwaId&Id=84822> (last visited Feb. 26, 2016).

¹⁸⁷ AFGHANISTAN MEDIA NETWORK, *supra* note 8.

was found to have only assisted with the crime and was, therefore, sentenced to only three-years imprisonment.¹⁸⁸ The Court justified this ruling under Article 130 of the Constitution of Afghanistan, which ostensibly gives the court broad discretion in cases like this where the conduct is considered evil or against Islam.

3. *Runaway Cases*

Despite the fact that delegates of the Lawyers' Union of Afghanistan have criticized practice of sentencing women to imprisonment in runaway cases, further instances in which Afghan courts have relied on Article 130 of the Constitution to prosecute young women and girls for having run away persists.

There are many reasons why a young person might run away from home, including leaving the family to seek marriage on one's own terms or escaping from domestic violence. According to the 2012 Human Rights Watch report, up to 70 percent of the approximately 700 female prisoners in Afghanistan have been imprisoned for running away, most of who fled because of forced marriage or domestic violence.¹⁸⁹ In Pul-Charkhi prison, 20 out of 80 women in detention were convicted, with sentences of up to 14 years imprisonment, for running away from home.¹⁹⁰

While Islam may not expressly prohibit running away from home, it is considered to run counter to Islamic principles. This is so because, in Afghanistan, running away is presupposed to indicate crimes like adultery and prostitution. Neither is "running away" a crime under the Afghan Penal Code. Yet, law enforcement authorities often arrest, jail, and even prosecute girls for running away, usually qualifying the charge as "intention" to commit adultery (*zina*) which is a crime under the Penal Code as well.¹⁹¹

Afghan courts have justified conviction and punishment for running away based on a determination that runaway cases are classifiable as Tazir under Hanafi jurisprudence. In 2010 and 2011 the

¹⁸⁸ KHAAMA PRESS, *supra* note 9.

¹⁸⁹ *Free Women Jailed for "Running Away,"* HUMAN RIGHTS WATCH (Sept. 18, 2012), <http://www.refworld.org/docid/505c1c852.html>.

¹⁹⁰ KAMALI, *supra* note 10, at 25.

¹⁹¹ UNAMA, *Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan* 37 (Dec. 9, 2010); *see also* Isaac Kfir, *Feminist Legal Theory As A Way to Explain the Lack of Progress of Women's Rights in Afghanistan: The Need for A State Strength Approach*, 21 WM. & MARY J. WOMEN & L. 87, 136 (2014).

Supreme Court of Afghanistan issued guidance about runaway cases to the criminal courts.¹⁹² The Supreme Court confirmed that running away, even in cases of abuse, “could cause crimes like adultery and prostitution and is against Sharia principles.”¹⁹³ The Court determined that the act is “prohibited and prosecutable based on discretionary punishment” because the behavior could be classified as Tazir.¹⁹⁴ The following are examples of how the courts use the language of Article 130 to convict individuals of crimes that are not codified.

In one case, a man from Logar province of Afghanistan married his 16-year-old daughter to an elderly man.¹⁹⁵ Because of this situation, the daughter ran away with a boy to another province of Afghanistan.¹⁹⁶ The primary court sentenced her to seven years imprisonment and transferred her to a juvenile correction center in Kabul.¹⁹⁷

In another case, as reported by Human Rights Watch, a 16-year-old girl fell in love with a school friend’s brother. The boy asked her family if they would allow him to marry their daughter; however, her family refused. The boy’s mother suggested that the girl run away with the boy, which would force her father to agree to the marriage. She did not agree to run away at the time, but later her father arranged to marry her with another boy. Because of her father’s decision, she decided to run away with her lover.¹⁹⁸

In 2011, they ran away to the boy’s cousin’s house in a different region. After fleeing, she called her brother to tell her father that she ran away. Her brother told her to return and said that her family would finally let her to marry the boy.¹⁹⁹ They decided to return, but at a checkpoint the police realized that they were not married and arrested them both. The girl was convicted for running away and sentenced to two years in a juvenile facility. The boy was released,

¹⁹² “I HAD TO RUN AWAY” *The Imprisonment of Women and Girls for “Moral Crimes” in Afghanistan*, HUMAN RIGHTS WATCH (2011), <https://www.hrw.org/report/2012/03/28/i-had-run-away/imprisonment-women-and-girls-moral-crimes-afghanistan>.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ UNAMA, *Harmful Traditional Practices*, *supra* note 191, at 37.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* After being arrested, she was detained in Logar Juvenile Correction Center where she was allegedly raped. *Id.*

¹⁹⁸ *I HAD TO RUN AWAY*, *supra* note 192.

¹⁹⁹ *Id.*

she said, because his family paid a bribe and “knew someone in the police.”²⁰⁰ She stayed in prison for the duration of her sentence.²⁰¹

Because of growing criticism regarding charging women and girls with running away, despite an abiding disdain in the culture for the conduct, the way of charging these women has shifted toward attempted *zina*.²⁰² The assumption and justification for this classification is that women who run away without their male relatives must have attempted to have sex.²⁰³ Accordingly, when a young woman has been arrested in a runaway case, the police sometimes order virginity tests to determine whether the girl was engaged in recent sexual intercourse.²⁰⁴ The court then relies on the results of those tests as evidence.²⁰⁵ These exams are ordered as a matter of course, without the consent of girls, and some girls are subjected to multiple gynecological exams.²⁰⁶

Prosecution of runaway cases has been criticized by local human rights activists and by international observers, including the UN mission to Afghanistan.²⁰⁷ UNAMA and the civil societies recommend that the president of Afghanistan and the Supreme Court issue a decree to stop prosecution of these cases.²⁰⁸ As a result, on April 11, 2012, the Attorney Generals’ Office issued a directive stating that “running away” is not a crime under penal statutes and should not be prosecuted.²⁰⁹ The directive states that:

A circulation must be prepared and shared with all relevant prosecution offices in the center and provinces and the prosecutors should be instructed not to prepare unjustifiable case files regarding running away cases that have not been criminalized under Afghanistan laws and cannot be heard by courts and refrain from conducting baseless investigations. Other circumstances where people run away to commit any other crime are not covered by this instruction. The issue is being communicated to you so that you can

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

take action in accordance with instruction of the High Council of Attorney General Office of the Islamic Republic of Afghanistan.²¹⁰

This text clarifies that running away must not be prosecuted, but still it leaves the gap for misuses with the inclusion of the exception: “Other circumstances where people runaway to commit any other crime are not covered.”²¹¹

In addition, the international interveners also asked the Supreme Court of Afghanistan to clarify whether running away because of domestic violence would constitute a crime. As a result, the high council of Supreme Court²¹² issued a decree that states:

There is a difference between being a runaway and committing a crime. The action of those who leave home because of family violation and go to judiciary, law enforcement organizations, legal aid organizations, or their relatives’ home does not constitute crime. A large number of girls because of family violation are living in shelters; therefore, running away in this situation must not be prosecuted. However, running away for the purposes of moral crimes or other purposes considered crime shall be prosecuted. In this case the law enforcement agencies must not use the term “runaway.” Rather, they must find the description for the committed act form in the statutory laws. Courts and the attorney general office shall use the specific term for the committed crime and avoid the term “runaway.”²¹³

This decree was sent to all lower level courts, which were directed to apply it by January 13, 2013.²¹⁴

Despite these decrees, individuals are still prosecuted for running away from home. Just recently in 2015, four girls--two sisters, their relative, and a friend, all decided to run away from home together because of domestic violence. They bought airline tickets and spent the night at their friend’s home. The next day, police arrested them at the Kabul National airport, where they were trying to fly to another province of Afghanistan.²¹⁵

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Date of issuance 1391/09/7 (Nov. 27, 2012).

²¹³ This is the author’s translation of the decree. The original decree is in Dari and is on file with the author.

²¹⁴ By the solar calendar on 1391/10/24.

²¹⁵ RUNNING AWAY CASE, PRIMARY CRIMINAL COURT OF KABUL CITY, 2 (2015).

The prosecutor accused two of the girls for “running away” and “zina.” In that case, virginity tests were done, and the prosecutor filed a separate case for one of the girls because she alleged zina by force.²¹⁶ However, for the others, the prosecutor recommended that the primary court punish the girls for “running away” based on Article 130 of the Constitution.²¹⁷

In the end, the primary courts did not charge them for attempted zina because of a lack of evidence for the elements of the crime; however, the courts convicted them of running away from home based on Article 130 and decided that the time they spent in the detention center was sufficient and they should be released. The prosecutor appealed against this decision, but the appellate court affirmed the decision of primary court.²¹⁸

IV WHAT AFGHANS CAN DO TO PROTECT THE PRINCIPLE OF LEGALITY

Many judges and scholars, including this author, agree that, when read together, Articles 130 and 27 of the 2004 Afghan Constitution do not permit judges to exercise discretion in convicting and punishing for Tazir crimes.²¹⁹ Rather, Tazir crimes should be the sole province of the legislature. Nevertheless, this issue continues to be controversial, and there remain proponents of allowing judicial discretion under Article 130. Those who favor permitting judges to decide criminal cases based on Article 130, in the absence of a statute or other law, claim that judges should have broad discretion to fill in the gaps left by the legislature.²²⁰ In their view, it is not possible to foresee all potential crimes, and the legislature may forget to include some serious crimes that deserve prosecution and punishment under principles of Islam.²²¹

²¹⁶ *Id.* at 3. See also *I HAD TO RUN AWAY*, *supra* note 192, at 44.

²¹⁷ The prosecutor also asked for prosecution under Article 427 (zina) and Article 29 (attempt to crime) of penal code.

²¹⁸ *RUNNING AWAY CASE*, *supra* note 215.

²¹⁹ See, e.g., Interview with Mohammad Ashraf Rasooli, Advisor to the Ministry of Justice, in Kabul, Afghanistan (Nov. 10, 2015); Interview with Mohammad Zaman Sangari, Judge Appellate Court for the Province of Kabul, in Kabul, Afghanistan (Nov. 12, 2015); Interview with Nasrullah Stanekzai, Professor of Law and Advisor for the President of the Islamic Republic of Afghanistan, in Kabul, Afghanistan (Nov. 2, 2015).

²²⁰ *RASOLI*, *supra* note 13, at 148–50.

²²¹ *Id.* at 150.

This Article maintains that the controversy persists primarily because of discrepancies in judicial education and societal attitudes, and that in order to increase accuracy, consistency, and reliability in criminal cases, the Afghan government must implement more judicial training on the relationship between Islam and the Afghan Penal Code. As part of this cause, the government must support an effort to develop a system of secondary sources, like annotated codes, legal encyclopedias, and treatises, to help shape future practice and bring more stability and consistency to judicial interpretation and rule of law. In addition, Afghan legislators should emulate the approaches of Egypt and Iran and amend the Penal Code to clarify that all potentially criminal actions associated with Tazir fall under the Penal Code, and that when there is no provision describing an offense, none is recognized or punishable through the legal system. If society deems certain behavior criminal, then the legislature must pass legislation to that effect before anyone can be convicted or punished for it.

A. Social Norms Affecting Interpretation and the Egyptian and Iran Model

Under Islamic law, social norms play an important role in a judge's determination of the need for criminal sanctions for Tazir. Mohammed Salam Madkoar makes the following observation:

Tazir punishments vary according to the circumstances. They change from time to time and from place to place. They vary according to the gravity of the crime and the extent of the criminal disposition of the criminal himself. Tazir crimes are acts that are punished because the offender disobeys God's law and word. **Tazir crimes can be punished if they harm the social interest.** Shar'iah Law places an emphasis on the social or public interest. The assumption of the punishment is that a greater "evil" will be prevented in the future if you punish this offender now.²²²

This relationship between legal norms and social norms is inherent in the concept of Tazir. In most Islamic law cases, legal norms are applied in compliance with social norms. For instance, punishing a thief involves applying an existing law that criminalizes the conduct, the legal norm, and the punishment comports with public scorn for the act, the social norm. However, the perceived need for action under Tazir arises when the social norm opposes conduct where there is no

²²² *Id.*

established legal norm. In runaway cases and dog meat cases, for example, the legal norm would have required the release of the offenders because their actions were not criminalized by state law; nevertheless, the social norm demanded punishment because the actions offended the sensibilities of society because the prosecution is usually prepared on the basis that running away is considered preparation for adultery.

Generally, the purpose of Hudud crimes and their punishments in Islamic society is the protection of public interest, property, security, and the moral value of Muslim society.²²³ In contemporary Islamic states, the legislative branch struggles to protect social interests by codifying Tazir offences with appropriate punishment.²²⁴ A legislature in an Islamic country may criminalize an act if the public interest demands it, and the level of public interest may also affect the limit of discretion of the judge when considering a Tazir crime.²²⁵

One problem with moving in the direction of codification of Tazir crimes and clarification about judicial discretion in criminal cases is the administrability. The Egyptian criminal justice system, for example, which integrated Islamic jurisprudence into its statutory law, could be a good model for Afghan reform on this issue. The Egyptian reform could be considered in line with both the international human rights conventions that Egypt has signed and Islam.²²⁶ Egypt was largely successful because of the training judges receive in Islamic law—it is a modernist version of Islam that attempts to reconcile Islam with liberal rights and values.²²⁷ Because most Afghan judges receive trainings like the Egyptian judges, the Egyptian model might be considerably useful in Afghanistan. In addition, as stated in previous sections, in Iran there were controversial perceptions between Islamic scholars regarding the codification of Tazir crime, a problem that was finally solved when the Iranian government codified Tazir crime.

²²³ Awwa, *supra* note 50, at 127–32.

²²⁴ *Id.* at 135.

²²⁵ KAMALI, *supra* note 10, at 160.

²²⁶ Maurits Berger & Nadia Sonneveld, *Sharia and national law in Egypt*, in SHARIA INCORPORATED: A COMPARATIVE OVERVIEW OF THE LEGAL SYSTEMS OF TWELVE MUSLIM COUNTRIES IN PAST AND PRESENT 51 (Jan Michiel Otto ed., 2010).

²²⁷ See generally Clark Lombardi & Nathan Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L. L. REV. 379 (2006).

The government of Afghanistan could invite Afghan's Islamic scholars along with Islamic scholars from other countries to draft statutes and include all, or reasonably all, actions or omissions that they think constitute a crime under Tazir jurisprudence. After the ratification of that law, it will be clear for everybody what act or omission is prohibited and what punishment is lawful. A concerted effort to employ the principle of legality would help Afghanistan's courts avoid inconsistency, a lack of foreseeability, and other injustices that arise when the principle is disregarded. Generally, the rule of law in Afghanistan would benefit from a move to eliminate gaps in the judicial system. A unification of the law and principles of justice, considering the diversity within the Hanafi jurisprudence, should be done with the consideration of all sources of reference in the Islamic nation.²²⁸

B. Addressing Differences in Judicial Education

As explained above, those who graduate from Sharia schools tend to believe that Article 130 gives them broad discretion to punish all actions considered evil under Sharia—even for conduct that has no specified punishment under the Sharia or criminal sanction under statutory law—what they would consider to be Tazir crimes.²²⁹ In fact, some Sharia graduates go so far as to argue that there is no need for statutory laws at all because there are solutions for all cases in Sharia.²³⁰ These judges try to solve all cases, including Tazir cases, in accordance with Islamic jurisprudence (the Fiqh). They maintain that Islamic jurisprudence provides them with broad discretion, discretion that can sometimes even result in a violation of a defendant's statutory or constitutional rights.²³¹

Judges trained in law schools, on the other hand, interpret these same provisions differently. In their view, by expressly distinguishing between Tazir crimes and Hudod, Qissas, and Diat crimes, Article 1 of the Penal Code announces that judges do not have absolute discretion to criminalize an act classified as Tazir if it does not appear

²²⁸ KAMALI, *supra* note 10, at 6.

²²⁹ QANUNI ASSASSI JUMHURI ISLAMI AFGHANISTAN [CONSTITUTION OF ISLAMIC REPUBLIC OF AFGHANISTAN] Official Gazette No. 818 1382 (2004).

²³⁰ Ayoubi, *supra* note 87.

²³¹ Akimi, *supra* note 86.

in the Penal Code.²³² They also emphasize the language of Article 2 of the Penal Code, which seems to take this rule even further, stating that “[n]o act is considered a crime unless specified by the provision of the law.”²³³ Article 3 of the Penal Code also lends support to this position by stating that “[n]o one may be punished except under the rulings of a law that have been put into force prior to perpetration of the alleged crime.”²³⁴ As a result, when judges, who graduate from law schools, hear cases that could otherwise be classified as Tazir, they consider the statutory law and observe the rights of defendant as described by statutory law, and they do not tend to refer to Hanafi jurisprudence to fill any perceived gap.

The root of this inconsistency between the perceptions of judges stems not just from differences in types of legal training, but also from a lack of professionalism and inadequate legal education, in general. In fact, some judges have obtained their positions in Afghan courts despite a lack of higher education of statutory law or Sharia law. Instead, they are graduates of Madrassas or high school. As a result, when they approach complex legal problems and laws, they are not able to do the analysis or find the relevant provisions.

The aforementioned Kambakhsh case provides a good example of this lack of professionalism. In the Kambakhsh case, the prosecutor demanded punishment in accordance with Article 347 of the Penal Code, a crime accompanied by a prison sentence of no more than five years or a fine. Despite this relatively moderate sentence, the criminal court sentenced Kambakhsh to the death penalty. This case illustrates that the judiciary and attorney general’s office need a way to integrate more effective educational programming into its legal training systems across the board.

One of the causes of this disparity in education is simply access to legal materials. In some rural areas of Afghanistan, there is even a shortage of copies of the enacted laws. In addition, there is little access to the Internet or any other means to find and consult legal sources. As such, this article recommends that the government of Afghanistan, with the help of NGOs, consider this problem and take steps to ensure that judges and law enforcement agencies have access to the materials they need to make correct decisions under the law.

²³² Knust & Afshar, *supra* note 117, at 594.

²³³ QANUNI JAZAI JUMHURI AFGHANISTAN [PENAL CODE OF REPUBLIC OF AFGHANISTAN] Official Gazette No. 347 1355 (1976).

²³⁴ *Id.*

Both judicial training and access to legal sources such as statutes, bylaws, the constitution, treaties, conventions, legal encyclopedias, annotated statutes, and so on, is necessary to improve the quality of trials in Afghanistan. Providing materials would not work without qualitative legal education because access to materials will not solve the problem if people do not have the education or ability to understand those materials. Similarly, legal education without access to the sources would be detrimental to the quality of the education.

The problem is exacerbated by the fact that many judges and prosecutors lack the skills and experience to analyze more complex law in the first place.²³⁵ This lack of skill can lead to unfair justice and harsh punishments.²³⁶ As such, this Article suggests that the Supreme Court of Afghanistan provide more educational programs to the judges and instruct them on how to interpret provisions of law that support justice in the best manner. Further, the courts should encourage religious leaders and jurists to campaign for empowering the principle of legality and the rule of law to ensure the liberty of Afghanistan's people.

However, while some legal educational training has been held by NGOs for Afghan judges and prosecutors, these programs were short and for limited number of judges. Mostly, in such programs, the NGOs give the judge and prosecutors legal manuals, which are beneficial, but only a few judges and prosecutors can take benefit of such programs.²³⁷ Hence, a large number of judges and prosecutors still need training and access to legal sources. For instance, the Max Planck Institute for Comparative Law and International Law developed many manuals on civil, criminal, procedural, and constitutional issues and held some training for the judges and prosecutors.²³⁸

Regardless of whether such programs are accessible to only a small number judges and prosecutors, one can argue that holding such a

²³⁵ *Reforming Afghanistan's Broken Judiciary*, INTERNATIONAL CRISIS GROUP (Nov. 17, 2010), <https://www.crisisgroup.org/asia/south-asia/afghanistan/reforming-afghanistan-s-broken-judiciary>.

²³⁶ *Id.*

²³⁷ See, e.g., *Justice Training Transition Program (JTTP)*, INTERNATIONAL DEVELOPMENT LAW ORGANIZATION, <http://www.idlo.int/what-we-do/initiatives/afghanistans-justice-training-transition-program-jttp> (last visited June 6, 2017).

²³⁸ MANDANA KNUST RASSEKH AFSHAR, *THE MAX PLANCK MANUAL ON CONSTITUTIONAL PRACTICE AND HUMAN RIGHTS* (Vol. 2, 2007).

short-term training program cannot solve the problem unless the program is extended to every province and district court and general attorney offices and provide them with sources that help to analyze the statute and find the appropriate provisions.²³⁹

Even if the government of Afghanistan provides collections of statutes to the prosecutors and judges, this alone would not solve the problem. Access to materials that assist with interpretation, such as annotated statutes, legal encyclopedias, and treatises on constitutional interpretation would be an essential step toward supporting consistency among the decisions of judges and courts. These sources could also help lawyers, and prosecutors in particular, to normalize which cases they bring and how they charge.

Secondary sources like annotated statutes, legal encyclopedias, and treatises on constitutional interpretation could provide important commentary on how a law evolved, what it means, and how it should be applied in future cases. In addition, it could be helpful to create an annotated statute with illustrations, similar to the format modeled by the Restatement series from the United States, where the committee could show how the law would apply to different hypothetical scenarios.

To begin the process of creating these sources, the Supreme Court could appoint a body of respected professionals, lawyers, judges, and academics from both law and Sharia schools. They should be tasked with coming to some consensus on interpretations of the individual provisions of the code, and when necessary, they should offer different, but well-reasoned interpretations reflective of different schools of thought. At the same, however, these groups of experts should follow a reasonable interpretation of the law. These resources would help prosecutors, judges, and even defense lawyers to understand the meaning of statutory and constitutional provisions.

To achieve this goal, a panel of respected professionals and lawyers as well as academics in law and Sharia schools should be established to supplement, by collaboration and cooperation, the modest materials that have previously been offered by NGOs and academics. In interpreting the Fiqh, judges should give priority to the statutes that have the most usage in the courts of Afghanistan, especially those that have created problems because of controversial interpretations and inferences that arise from confusion over the

²³⁹ Much of the information in this respect is based on the direct experience of the author.

relationship between the Constitutional provisions discussed here, as well as many other provisions of the Penal Code. Investing in legal resources would not only increase the knowledge of judges, prosecutors, and other practitioners, but also, the process of working together to interpret and comment on the Penal Code may reveal weaknesses and ambiguities in the statutory provisions themselves.

Developing these sources not only will require cooperation among the judiciary, academia, and the government, but also will necessitate time and expense, which may fall outside the capacity of the Afghan government on its own. Many international NGOs have previously assisted the judiciary and the Attorney General's Office in the legal capacity building arena. While on the financial end, this effort could be assisted by NGOs, strong leadership from the Supreme Court and knowledgeable and respected lawyers and academics would be needed for the sources to gain respect and prominence.

This would be an ambitious project, to say the least. And while finding the financial resources to make this project work may be challenging, finding consensus among the perceptions of Sharia experts with law professionals will likely prove to be even more difficult. Participants in the project would need strong encouragement, not only to work together, but also to find consensus for the benefit of the public interest and, ultimately, for compliance with Islamic principles and the development of rule of law in Afghanistan. It will require strong leadership and commitment from all participating constituents.

Using its power to interpret the Constitution, the Supreme Court should issue a decree that should clarify the meaning and scope of Article 130 of the Constitution. More specifically, it is important that the Court clarify that Article 130 only applies to civil and commercial cases. The application of Article 130 to criminal cases undermines rule of law and the principle of the legality of crimes and punishments.

CONCLUSION

The internationally recognized principle of legality leads to a proper balance between the rights of individuals and the needs of society. In Islam, the principle of legality requires that no action or omission shall be considered Hudod, Qissas, Diat, or Tazir unless clearly forbidden by law prior to the committed action in question.

This principle is also embedded in Article 27 of the Constitution of Afghanistan, which requires prosecution of criminal cases strictly in compliance with law. It also obliges judges and law enforcement agencies to avoid arbitrariness while prosecuting criminal cases.

In Afghanistan, too often judges disregard the principle of legality when it comes to Tazir cases, cases where there is no statutory provision that describes conduct society condemns. In such cases, Afghan courts have relied on the Hanafi jurisprudence as directed under Article 130 of the Constitution. Hanafi jurisprudence therefore serves to fill the gap when there is no statute or constitutional provision on point. Despite the language of Article 130 itself, this practice is questionable in criminal cases because of the presence of the principle of legality in the Afghan Constitution and in Islam. However, the criminal courts of Afghanistan have long been relying on Article 130 to prosecute criminal cases that the legislature has not described—cases of runaway, selling Haram meat, and blasphemy, among others.

This Article argues that this way of legislating, *ex post facto*, sits uncomfortably with a government that is supported by an international community that subscribes to the principle of legality. Prosecutions under Article 130 of the Constitution have at times caused the international community to threaten to stop their support.

The persistence of this inconsistency in the criminal justice system of Afghanistan stems from the lack of professionalism, access to quality legal education and materials, and different interpretations of law. Thus, this Article recommends initiating supplemental training for judges on the meaning of Articles 27 and 130. In addition, it recommends that the Supreme Court of Afghanistan issue a decree clarifying that Article 130 concerns only civil and commercial cases.