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The Legal Systems of Afghanistan: A Geographic Distribution

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Introduction

In November of 2008 the central Afghan government sanctioned the execution of four prisoners found guilty of organized crime.² These executions were condemned by both the United Nations (UN) and the Taliban; both groups contended that the men had not received a fair trial.³ This incident illustrates the tension between the three different legal traditions in Afghanistan; each one has a different idea of what a fair trial entails. The Afghan government sanctions the use of Islamic law, the Taliban represents tribal law and the UN, has a secular bent. As the UN and International forces become more and more isolated in Kabul the pressure is on to reconcile regional discrepancies in order to maintain the uniform rule of law throughout the country.

Afghan law is generally classified into three different legal traditions. The first is secular law, a product of Western positivist thought, upholding the principles of scientific objectivity. This type of thought generally results in a list of codified laws distributed to the nation's people. This legal system is common in Western countries where it is regarded as scientific or objective. The second type of law is shari'a, or Islamic law. Using the Qur'an as its primary source, and this law is important for Muslims because it is thought of as God's way. There is a reluctance to codify this system although general norms and schools of thought do exist. The third type is folk shari'a or customary law. These are not laws per se but rather unwritten social and moral codes which guide the informal justice system. This type of law holds historical legitimacy for many in Afghanistan. Most Afghan legal scholars have privileged one of

² "UN rights chief condemns Afghan executions," *Associated Foreign Press*, November 11, 2008. http://afp.google.com/article/ALeqM5iDIZyO7REok7zr7S3f3TgCeP_ZA

³ "Taliban condemn Afghan executions," *BBC News*, November 13, 2008, South Asia Section. http://news.bbc.co.uk/2/hi/south_asia/7728277.stm

these three legal traditions, diminishing the other two. However, depending on their regional provenance, the level of education and their tribal allegiance, an Afghan may use any of these three systems. It is important to maintain a balance between these three traditions, as privileging one system only succeeds in ostracizing a large part of the population or the international community. A person will find secular, shari'a or tribal law systems depending on where in the country they are.

In Kabul, the international presence has helped to create a more secularized legal practice due in part to the international human rights organizations that reside there and provide much needed financial support. This type of law is fairly new, remaining foreign to many Afghans and there has been a lot of difficulty in creating a group of codified laws. Recent scholars attribute this difficulty to an education deficiency; a lack of educational resources and historical record makes it difficult to establish necessary legal precedent.⁴ The low literacy rates in Afghanistan are a huge impediment for the propagation of positivist law. If judges cannot read the constitution or the statutes approved by parliament, it is impossible to maintain this sort of legal system. Nevertheless, support for this type of law remains the focus for many Western scholars, and it receives most of the international money from human rights organizations and other international donors.

In the northern, Persianate regions the legal system is shari'a. This region is influenced by the geographic corridor of Persian language and culture, a region bounded by mountains. This corridor extends beyond the boundaries of modern day Iran (Persia) through northern Afghanistan and into Uzbekistan and Tajikistan. In these

⁴ Weinbaum, M. G. (1980). Legal Elites in Afghan Society. *International Journal of Middle East Studies*, 12(1), 39-57.

places the Iranian Hanafi *mazhab*, school of law, is used to try cases. This type of law is sanctioned by the Afghan Constitution of 2004. In these areas, the legal impediment is not literacy per se, but rather literacy in Arabic. Many Islamic scholars believe that to read and understand the Qur'an, one must speak Arabic. Translations of the Qur'an are considered interpretations, with words divorced from their true meaning in the original Arabic. Using this logic the rulings of the Afghan courts that do not use Arabic are rendered invalid by scholars who believe that an opinion of the Qur'an cannot be correct unless it is read in its original language. The Persian lands are likely to use the Hanafi school of shari'a.

The southern, Pashtun areas are characterized by their use of Pashtunwali and tribal laws. Pashtuns are the largest ethnic group in Afghanistan, so many regard this region as the nation's heartland. The Pashtun tribal area extends over the border into Pakistan and has given rise to the recent Taliban influence.⁵ Many scholars ignore their tribal law system, viewing it as biased and medieval. Other scholars see Pashtunwali as a temporary solution, a way to administer justice until a codified legal system can be established.⁶ However, this system is extremely important to the people of Afghanistan and should not be dismissed so easily. Many Afghans believe that this tribal law system is intrinsically related to the practice of Islam, and thus their religious identity. Others see it as an important facet of their ethnic identity. The Pashtunwali system works well in this largely illiterate area precisely because it delivers quick informal justice. The

⁵ Rashid, Ahmed (2000). *Taliban : Militant islam, oil, and fundamentalism in central asia*. New Haven: Yale University Press.

⁶ Thier, Alexander. "Reestablishing the Judicial System in Afghanistan." Center on Democracy, Development, and the Rule of Law, Working Paper (2004): 1-17

advantage of Pashtunwali is that it can be much more efficient than the bureaucratic court system. Since everything is tried on a case by case basis by the community elders based on the memorized moral code, literacy is unnecessary. The southern Pashtun areas are thus more likely to use Pashtunwali for conflict resolution than shari'a or secular law.

Variations in the three legal systems in Afghanistan are reflected in their respective use of witnesses. Theoretically each region abides by the witness regulations codified in the Interim Code for Courts. Despite attempts by the central government to propagate these regulations, however, these codes are only administrated in Kabul. Many Afghans do not recognize this type of law as legitimate and use instead their own proprietary witness practices for their own community. The northern regions focus more on the religious aspect, assigning a higher value to pious men than to the impious. In the south witnesses are regarded as almost irrelevant and often the role of *jirgas*, informal courts of elders, reconciliation and not deducing the truth. In this system, it does not always matter whether a witness is accurate or not, but rather that the families will get along afterwards. The values of each community are reflected in the witness practices of that place. Each of these witness practices represents not only a legal system but likely betrays the region where this practices is used.

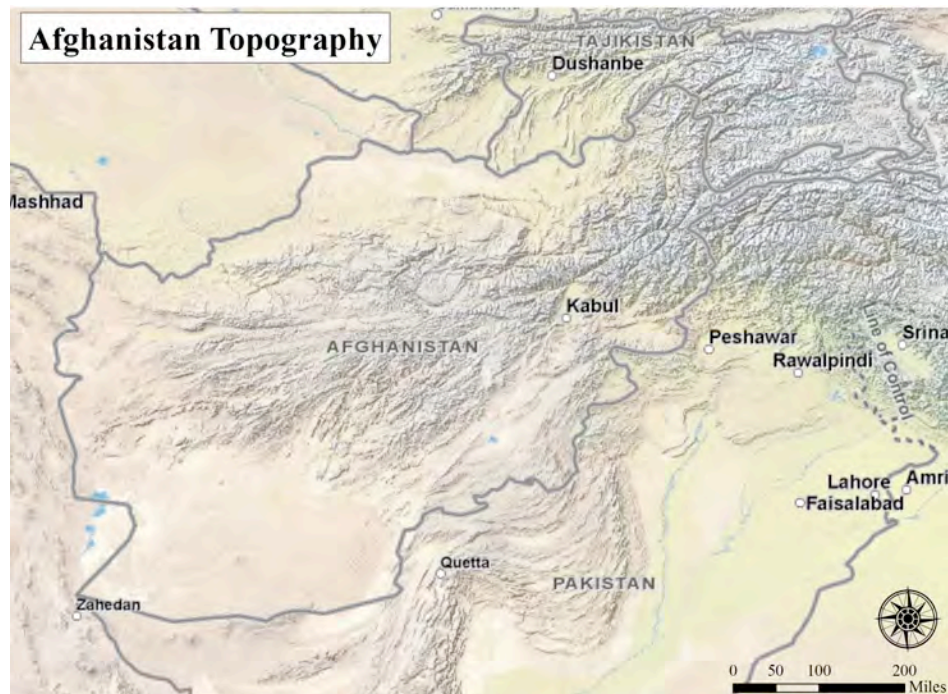
Understanding how and why these legal systems function the way they do in Afghanistan will dispel the myth of Afghanistan as a chaotic free-for-all. Many scholars mistakenly view the varied system as illegitimate. The multifaceted system is blamed on the recent Wars, discounting the historical and geographic basis for this legal diversity. Western scholars tend to see any religious law as biased and unscientific, while Arab Muslim scholars see illiterate Afghans as corrupting the Word of God. The Afghans, however, find legitimacy in all three types of law for different reasons.

In Afghanistan, the legal systems are distributed geographically depending on the people who live in the region and what their particular history is. The secular bias of the United States and other foreign interveners comes from a belief in rational science. These Western court systems seek to find an objective truth about alleged events. The urban regions of Afghanistan come from a religious background where courts seek to find the truth according to a Higher Power rather than the truth according to man. In tribal system of justice in the rural areas the truth is only somewhat unimportant; this pragmatic system is simple conflict resolution. The geographic distribution of legal systems in Afghanistan reflects regional differences in literacy, urbanity, and ethnicity.

History

The land of Afghanistan is extremely mountainous [Figure 1]. The Hindu Kush range runs from the northeastern Wakhan corridor which borders, China down through the central Hazara areas and along the south-eastern border with Pakistan. The area has always been associated with chaos; in fact before it was Afghanistan, the land was referred to as Yagistan, or the land of lawlessness.⁷ Governments have always struggled with the reach and uniformity of law in Afghanistan. In addition to rugged mountains, the country also has isolated fertile valleys, Ferghana in the North and Kandahar in the south. The Tajiks, or settled people, live in these valleys. The dichotomy of sedentary versus nomadic people is pervasive throughout Afghan as well as Middle Eastern and Asian history.

Figure 1



⁷ This word has also been translated as rebelliousness or insolence. Vafai, G. H., & Library of Congress. Law Library. (1988). *Afghanistan : A country law study*. Washington, D.C.: Law Library, Library of Congress.

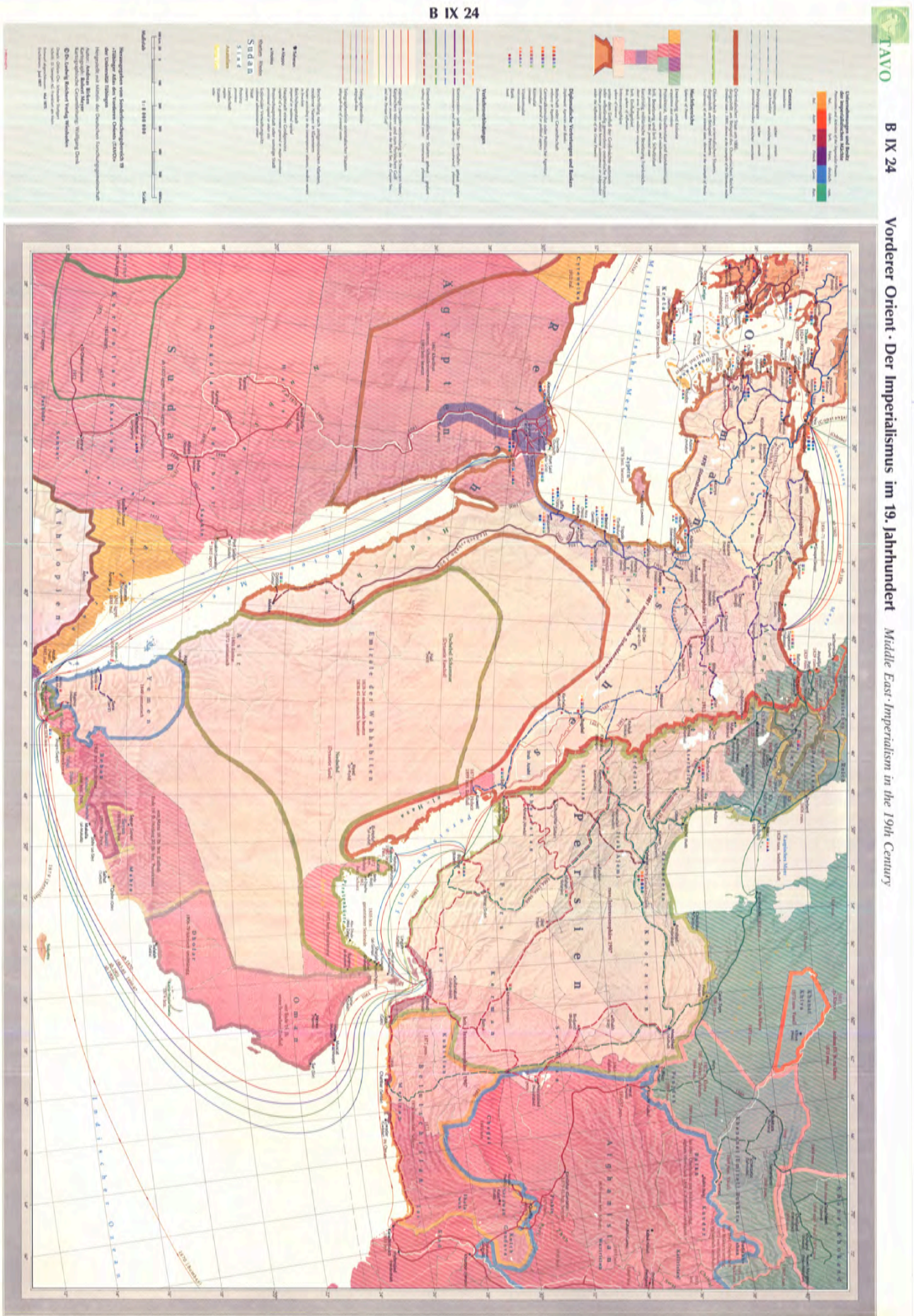
The historical and geo-political context of Afghanistan and Central Asia entered the Western consciousness with the rediscovery of the Silk Road by German geographer Ferdinand von Richthofen in the late 19th century. In the nineteenth century Afghanistan was caught in the Great Game, the competition between Britain and Soviet Russia to maintain and expand their powers into Central Asia. With Russian influence expanding southward and British influence spreading northward from India, buffer states like Persia, Afghanistan and Tibet became extremely important to securing geo-political dominance [Figure 2⁸]. In the region, geographers have historically depicted the Central Asian sedentary peoples as urbane and sophisticated and the nomads as rugged and uncontrollable. The Silk Road scholars Ferdinand von Richthofen and Sven Hedin ignored the culture and history of the nomads of Central Asia as they carved out a space for Western powers to play out the Great Game. Von Richthofen and Hedin attacked the character of nomadic people, and portrayed them essentially as brigands with a warlike temperament who were unfit to rule the country they resided in.⁹ The authors argued that Central Asian nomads never really possessed their land because they were uncivilized nomads. This characterization of Pashtuns and other nomads as beyond the reach of the government comes up again and again in Middle Eastern, especially within Afghan geo-politics.¹⁰

⁸ Sonderforschungsbereich, *Tübinger Atlas des Vorderen Orients* (Wiesbaden : Reichert, 1994), B XI 24

⁹ Von Richtofen, Ferdinand, *Ancient Silk Traders Route Across Central Asia*, in the *Geographical Magazine* 1878, 12 and Chapter from Sven Hedin, *The Silk Road* (Eng. trans. of *Sidenvagen* 1936 in Swedish), 223

¹⁰ Faiz Ahmed, "Shari'a, Custom, and Statutory Law: Comparing State Approaches to Islamic Jurisprudence, Tribal Autonomy, and Legal Development in Afghanistan and Pakistan," *Global Jurist*: 7:1 (2007), 97

Figure 2



While modern geographers may dismiss this argument as deterministic, it has been such a part of the historical analysis of the region that it cannot be ignored. Geographic determinism, exemplified in the works of Ellen Semple and Ellsworth Huntington posits that human actions are a direct result of their environments.¹¹ This hypothesis has been largely discounted in geographic circles because it led to racist and ridiculous assertions. In the Afghan context, scholars argue that the harsh mountain terrain makes it difficult for civilization and governance to reach the mountains and the lawless nomads who live there. The settled areas are linked to the much-lauded Persian Civilization, while the Pashtuns by contrast are mentioned only in passing as warriors and brigands.¹²

The first person to observe this dynamic was the famous Muslim polymath Ibn Khaldun in the 15th Century. In his *Muqaddimah*, he put forth the idea that strong nomadic tribes rise to power after banding together around a charismatic leader and then establish or overtake an urban settlement. But settled life is inherently luxurious and corruptive and after three generations they lose their group feeling and thus become susceptible to occupation by stronger nomadic groups.¹³ Ibn Khaldun had many historical examples to use for his work, but the idea is epitomized by the prophet Mohammad and his tribe the Quraysh. These Arab nomads conquered many cities with

¹¹ Mikesell, Prof. Marvin, Classnotes. University of Chicago, Introduction to Geography. September 2007.

¹² In early British literature the Pashtuns are often referred to as Pathans.

¹³ Ibn Khaldûn, *The Muqaddimah: An Introduction to History*, ed. John Perry, (Princeton University Press: Bollingen Series, 1958), 1

the spread of Islam, eventually reaching Afghanistan in the 7th Century.¹⁴ The country is now 99% Muslim.

More recently, Professor Edmund Burke III has characterized Islamic states as tribal pastoral forces maintaining power against weak governments.¹⁵ In Afghanistan, the topography of tall rugged mountains in contrast with lush, rich flatlands, creates the perfect backdrop for this categorization. The dangerous, nomadic Pashtun tribesmen are portrayed as a destabilizing force against the solid, sedentary background of the Persian government.

Louis Dupree's seminal work on Afghanistan concludes with an almost eerie prediction of what is to come, asking "whether Afghanistan can peacefully continue to move forward toward some sort of democratic system consistent with its cultural and historical patterns or as have many developing nations, degenerate into a round robin of successive military coups and abortive leftist and rightist revolutions."¹⁶

Legal History

Afghanistan, as a country, was brought together in the mid 18th century by Ahmad Durrani, Afghanistan's first centralizing force. Ahmad Shah proclaimed his rule in the traditional way by minting coins and proclaiming the *khutba*, Friday prayer, in his

¹⁴ Since Afghan Islam was filtered through Persia, some Arab scholars see the Muslims there as corrupt. This center-periphery theory posits that the further you get from Mecca, the more corrupt your Islamic practices are.

¹⁵ Edmund Burke, *Struggle and Survival in the Middle East* (Edmund Burke: III ed. 1993), 336.

¹⁶ Dupree, Louis *Afghanistan* (Princeton, N.J. : Princeton University Press, 1980), 750

name.¹⁷ However, the loose confederation of tribal allegiances was precarious and the British attempted invasions twice during the next century. He also drafted a legal code which was never enacted.¹⁸ This pattern of a ruler establishing his own legal system is a current which runs through Afghan politics to this day.

After the instability of the subsequent Durrani rulers Amir Rahman Khan, nicknamed the Iron Amir, emerged as a leader during the late 19th century. He is famous for his subjugation of the Hazara tribes, and the re-unification of the country in the name of Islam.¹⁹ Rahman Khan brought the *ulama*, Muslim scholars, under his control by withholding their salaries and assassinating the clerics who opposed him.²⁰ He considered himself both the spiritual and temporal leader of Afghanistan.²¹ By citing submission as a tenet of Islam, he was able to appeal to the piety of the population. The Amir had his clerics declare that the most significant Islamic virtues were taxes, military service and obedience to the rulers.²² His legal reforms cemented the division between the legal systems by separating the existing laws into *shari'a*, *qanun* (secular codes), and *urf* or traditional laws.²³ In this period *shari'a* handled criminal, family and personal

¹⁷ Gailani, Fatima *Human Rights in Afghanistan: Law and Reality*, in THE RULE OF LAW IN THE MIDDLE EAST AND THE ISLAMIC WORLD: HUMAN RIGHTS AND THE JUDICIAL PROCESS 144-149 (Eugene Cotran & Mai Yamani eds., 2000), 144

¹⁸ *ibid.*

¹⁹ Ghani, Ashraf. (1978). Islam and State-Building in a Tribal Society Afghanistan: 1880-1901. *Modern Asian Studies*, 12(2), 275

²⁰ Ghani, 272

²¹ Gailani, 144

²² Ghani, 278

²³ Vafai, 4

issues while somewhat secularized government courts handled state issues and commerce.²⁴

Amanullah Khan, who ruled in the early 20th century, approved the first Constitution in 1923.²⁵ This constitution included a bill of rights for Afghan citizens and began to bring some transparency into the government and legislature. Amanulla also implemented a new administrative and penal code in 1925 and tried to codify the tribal laws.²⁶ The penal code, influenced by the French system forbid torture and forced labor, and brought punishments like rehab and prison sentences into the legal vocabulary.

For many, the reign of the last king of Afghanistan, Muhammad Zahir Shah, from 1933-1973 marked the end of a period of unity and dignity in Afghanistan. His recent death on July 23 2007, marked the end of three centuries of peace. Upon his recent death many people remembered his rule fondly, as the end of a golden era. Zahir Shah implemented the Fundamental Law, a variation on the bill of rights granting Afghan citizens free education, women's rights, freedom of speech, and freedom of peaceable assembly.²⁷ In the 1960s there were student demonstrations for and against the secularization of the legal system. His 1964 Constitution began the institution of the Supreme Court. The Constitution outlined that the courts would be based on Hanafi jurisprudence, and that the royal family and the government would be separate.

The gilded age reached an abrupt halt in 1973, when Zahir Shah's cousin and brother-in-law Mohammad Daoud Khan seized power while he was away. This

²⁴ Thier, 5

²⁵ Chishti, N. M. (1998). *Constitutional Development in Afghanistan*. Karachi, Pakistan: Royal Book Company.

²⁶ Vafai, 12

²⁷ Gailani, 147

bloodless coup was just the beginning of what would become 30 years of violence and unrest. In April 1978 Mohammad Daoud Khan and his family were assassinated in their palace. The perpetrators were members of Khalq, a communist party in Afghanistan. The Saur Revolution, as it is called, signaled the beginning of the Democratic Republic of Afghanistan. During this time the communists party attempted to make the official law more secular. The communist movement in Afghanistan was fueled by money from the Soviet Union, and soon enough there were thousands of Soviet soldiers in the country. The reinforcing troops were called in because the Kahlq movement was so unpopular in the majority of the country.

During this period there was a backlash against the secularization attempts of the Soviet backed communist government. The mobilization of Soviet troops brought U.S. presence in the country for a short period of time. They supported the *muajihideen*, jihad fighters, and supplied them with military aid.²⁸

This anti-secularist sentiment was one of the reasons why the Taliban was initially so readily accepted. Many Afghans looked forward to a government that would put religion first, as they did. The Taliban emerged from Pakistan refugee camps and religious schools sponsored by Saudi and other wealthy Gulf countries. The men sought to rid the country of the mujahideen and the lawless bandits who roamed the countryside. When they succeeded in eradicating the production of opium in the country, they even won respect from the international community. But what they became well known for was their inhumane treatment of women, and the instatement of outdated and abusive laws in the name of Islam. The Taliban ruled Afghanistan for

²⁸ Some trace the beginning of Al Qaeda to this period in Afghanistan. The jihad against the Soviets attracted Muslim fighters from all over the world. Rashid, 85

seven years, from 1996-2001. During their reign, the Taliban often cited the *shari'a* to rationalize their human rights abuses to the international community. But in truth, although these laws may have been similar to Islamic law, the law was really a mix of Pashtunwali and fundamentalist *shari'a*.

After the September 11th attacks the Taliban was linked to Osama bin Laden and al-Qaeda so the U.S. launched Operation Enduring Freedom, returning troops to Afghanistan. The U.S. worked with what was left of the mujahideen to help oust the enduring Taliban. Hamid Karzai became the interim President of the U.S.-backed government and was elected in the first democratic elections of 2004. That same year the new Constitution was ratified, the country's fifth. This one promised civil and human rights through a new bicameral legislation and a new judicial and court system. While the government is decidedly Islamic, it has promised to be more tolerant and liberal than the extremist Taliban.

Although the Taliban was thought to have been completely eradicated, they were never completely eliminated from the countryside, and since 2001 the Taliban's influence has been expanding. The Taliban has maintained control of some provinces along the Pakistani border. In some of these provinces, the people have no idea that elections were held, or who their new president is.²⁹ Kabul was said to be the only city completely impervious to further attacks, but recently the Taliban has vowed to take the Capital.³⁰

²⁹ Akbar, Said Hyder *Come Back to Afghanistan*. Bloomsbury USA

³⁰ Richard A. Oppel Jr., "20 Dead as Taliban Attackers Storm Kabul Offices," *New York Times*, February 11,, 2009, Asia Pacific Section.

The tumultuous recent history makes Afghan citizens reluctant to accept a new government every time power changes hands. Every change of government has had a subsequent change in legal system. The people have had to endure complete overhaul in political ideologies in the recent past. With the rapid fluctuations in government, and some people completely unaware of the current government, the rule of law seems impossible to uphold. But a consistent undercurrent flows under the jagged inconsistencies of rulers in flux. The tribal law system has been sustained throughout Afghanistan's tumultuous history, and for this reason it remains an important factor in Afghanistan's legal landscape.

Kabul

The city of Kabul is the largest, and one of the oldest cities in Afghanistan. The city was probably established between 2000 and 1500 BCE. Geographically it lies in a valley surrounded by steep, rugged mountains. This makes it prone to invasion from the mountain dwellers, and a large wall was built in the 5th century to protect it from attacks.³¹ It was an important stopping point on the Silk Road and other trade routes. The historic Khyber Pass leads to across the mountains from Islamabad in Pakistan to Kabul through Jalalabad and Peshawar [Figure 3]. Although it is on the southern part of Afghanistan, it is associated with the more sedentary Persian population in the north.³² The isolation of the city makes it difficult to disseminate important information to the rest of the country.

Figure 3



³¹ Afghanistan Information Management Service (AIMS). "Kabul's Historical Wall." Shapefile Metadata http://www.aims.org.af/services/mapping/metadata/kabul/line/historical_wall.html (accessed Jan 28, 2009).

³² The history is overpowered by the Islamic and Persian aspects, but Kabul has also been home to Buddhists, Hindus and Zoroastrians.

Kabul is the only place in Afghanistan where the secular legal system, familiar to Westerners, might be found. For a number of reasons, this is the only place where such a system can exist. The capital of Afghanistan has by far the largest urban population, with the highest formal education. In addition, there is a strong foreign troop presence in the city, making it safe for human rights organizations. Kabul is the only city in Afghanistan with the money and infrastructure to maintain this sort of system.

Kabul is the most urban Province in Afghanistan, where 78 percent of the population lives in the large cities of Kabul and Paa Maan [Figure 4].³³ It is easier to implement codes in urban areas than in rural ones, because of educational attainment, population density and the dissolution of family ties³⁴. The larger population allows for a sense of anonymity and objectivity. Within the larger population, there is less of a chance that a defendant will be related, or tribally linked, to the judge or arbiter, and this relative anonymity can diminish some of the tribal authority³⁵. In addition, the more rural areas lack the international oversight and facilities to detain criminals. For example, although there are thousands of registered detainees in the country, the only controlled jail is in Kabul City.³⁶

³³ LandScan™ Global Population Database. Oak Ridge, TN: Oak Ridge National Laboratory. Available at <http://www.ornl.gov/landscan/>.

³⁴ Faiz, 34

³⁵ *ibid.*

³⁶ SYMPOSIUM: RELUCTANT NATION BUILDING : SECURING THE RULE OF LAW IN POST - TALIBAN AFGHANISTAN : ESTABLISHING THE RULE OF LAW.(2002).

Population Density in Afghanistan with Major Cities

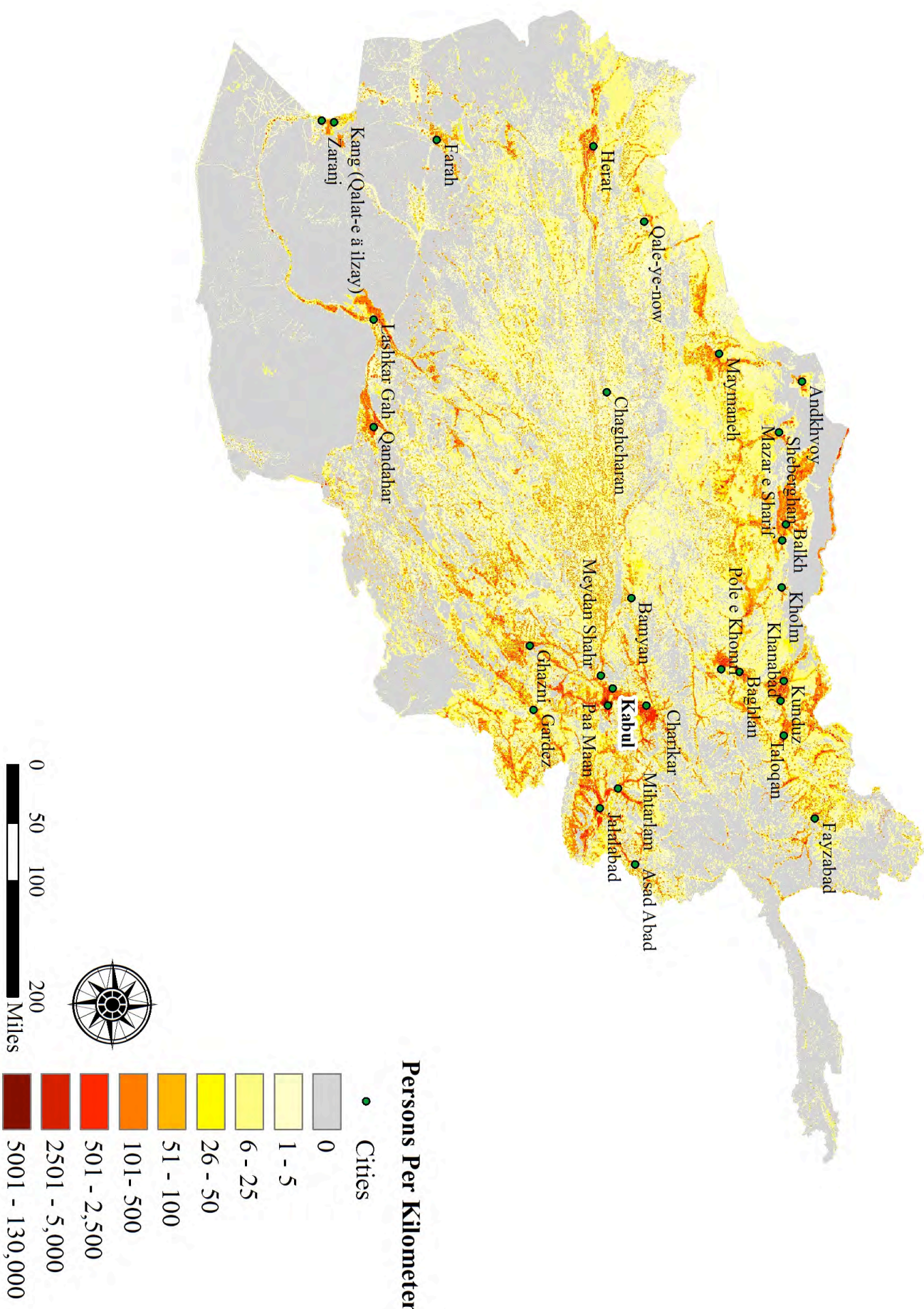


Figure 4

The state of education in Afghanistan remains of grave concern to the government, and the average literacy rate for the country hovers at less than thirty percent. In Kabul the literacy rate is significantly higher, almost 60% [Figure 5]. These statistics reflect the generally poor elementary school education in the country; higher education is equally weak. Given the current security crisis, Kabul University is one of the only functioning institutions for legal education. However the University, like the country, is severely debilitated. During Taliban rule, the Kabul Law Faculty Library was burned for heat.³⁷ The University lacks resources like teachers, functioning buildings, paper, files, and law textbooks.³⁸ The Ministry of Justice has the only collection of laws, and there are no copies available to distribute to the judges or the general public.³⁹ There are separate faculties for secular and *shar'ia* law, and there is little overlap in their teachings.⁴⁰ Because the educational system in the Afghanistan has been so poor for so long, the faculty is mainly foreign educated.⁴¹ They teach mainly lectures, and students are often taught rote memorization rather than critical thinking.⁴² Although there are problems with higher education in Kabul, it is still the only province in Afghanistan with a sufficiently educated population to promote secular law.

³⁷ Prosper, Pierre-Richard, Symposium: Reluctant Nation Building, 15

³⁸ Weinbaum, 44

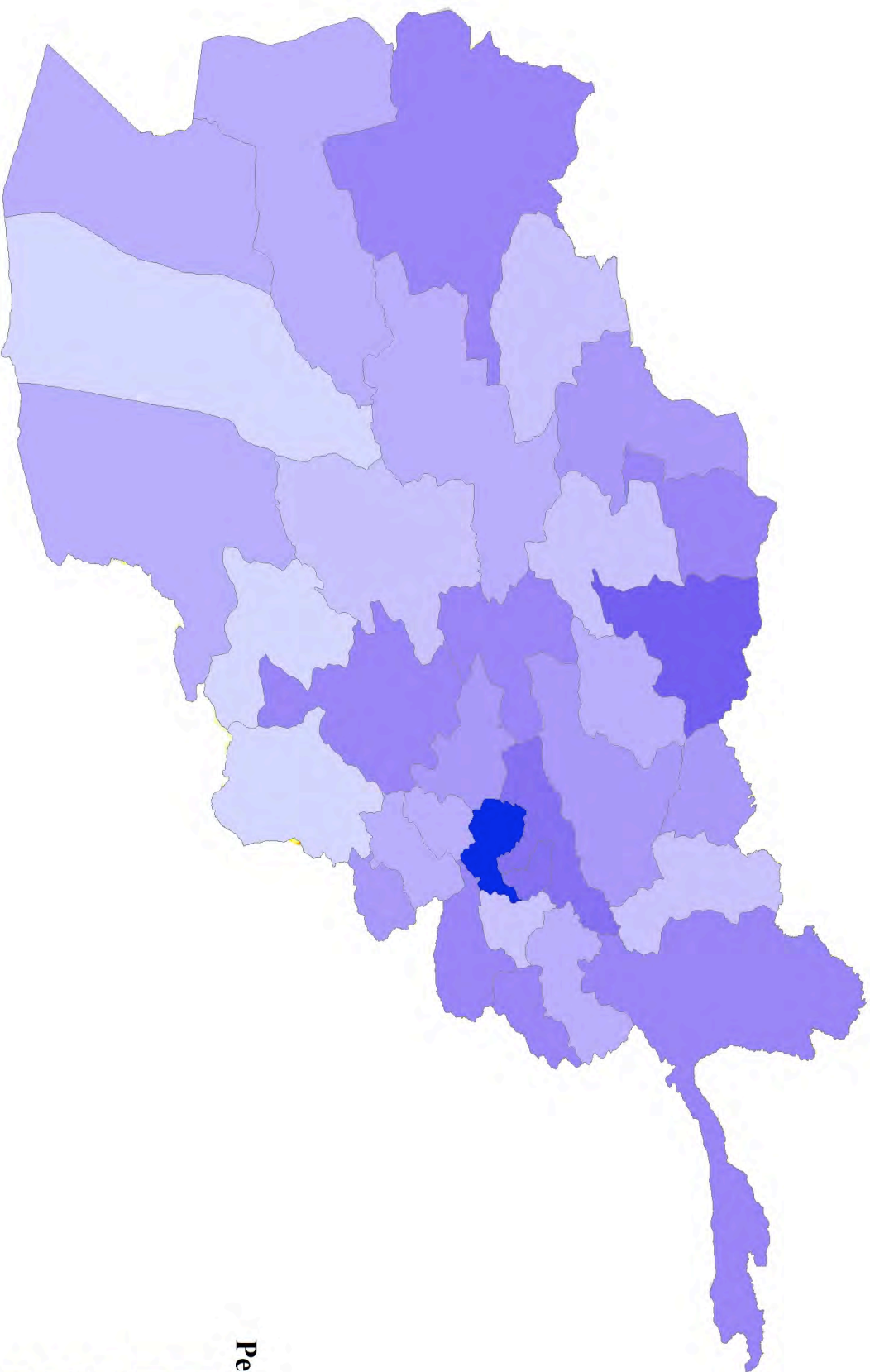
³⁹ *ibid.*

⁴⁰ Weinbaum, 43

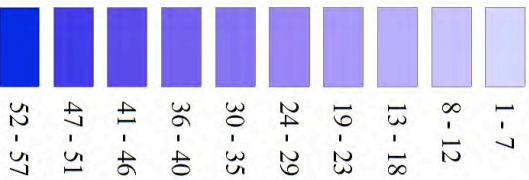
⁴¹ Weinbaum, 45

⁴² Weinbaum, 43

Afghan Literacy Rates by Province



Percent Literate



However, the biggest problem for the promotion of secular law is insecurity, and Kabul is no exception to the violence.⁴³ The past forty years have been particularly unstable. In the sixties political rallies slowed secular education.⁴⁴ After the Marxist coup of the seventies, the war against the Soviets and the war against the Taliban reached Kabul, destroying the lives and livelihoods of many. This was not a time of high legal order and functionality. Recently some legal codes have been re-established, and lawyers are being trained, however it is a slow process.⁴⁵ The Bonn Agreement, hurriedly approved in December 2001 after the attacks of September 11th, was to set up the provisional government and legislature for the country. The recent agreement proposed the use of judicial commissions, which took a long time to be established.⁴⁶ The agreement specifies legal statutes from the 1960s; however, it is unclear which laws are to be implemented, and how to make these texts available.⁴⁷ The institutions of the Bonn Agreement do not extend beyond Kabul.⁴⁸ In addition to re-establishing training for judges and lawyers, Afghan soldiers are also being trained to fight counter-insurgency in the south.⁴⁹ Judges and lawyers from the city are shifted from province to province, however there is extreme reluctance to go to rural posts because of a fear of

⁴³ Their, 2

⁴⁴ Weinbaum 43

⁴⁵ Prosper, 15

⁴⁶ *ibid.*

⁴⁷ Their, 9

⁴⁸ Prosper, 14

⁴⁹ Prosper, 14

the countryside.⁵⁰ The area is still plagued with a reputation for lawlessness and banditry.

The problem of insecurity is less severe in Kabul than in the rest of the country because the urban area has attracted a foreign presence. The United States army troops, as well as other forces, are concentrated in Kabul. The bulk of the insurgency is coming from the Pakistani border and the Pashtun areas. Even the armies fear the countryside, since they do not have the resources to fight the violent Pashtuns.

Secular Law

The impetus towards secular law is largely backed by foreign, Western, powers. The United States, Germany and Italy have offered the most funding for the codification and secularization of the legal code.⁵¹ Recently there has been some acknowledgement of the imperialist nature of these initiatives.⁵² However, it seems clear to many that the Afghan criminal justice system is incapable for the time being.⁵³ The foreign powers rely on the dilapidated secular system because they subscribe to the view that the Islamic and traditional legal systems seem to conflict with basic human rights.⁵⁴

The official secular witness system in Kabul succumbs to the Western norms. The prosecution and defense have their own sets of witnesses. Witnesses and experts are asked to appear in court under penalty of a fine. The witness must be sworn in, to tell

⁵⁰ Weinbaum, 50

⁵¹ Thier, 12

⁵² Dickinson, Laura: Symposium, 1

⁵³ Prosper, 19

⁵⁴ Wardak, 19

the truth in God's name. Afterwards the court can exclude witnesses it does not approve of. This is a very familiar system to a Western reader.

It must be understood, however, that in Afghanistan, there is no legal hierarchy, secular law is not seen as more correct or objective than the religious.⁵⁵ If anything, the Western hierarchy is reversed and secular law is seen as a negative imposition on the wishes of God.⁵⁶ The Constitution of Afghanistan clearly states that all legislation must be consistent with international standards as well as Islamic principles.⁵⁷ The backlash against the secularization, and perceived Westernization, of previous governments has been severe.⁵⁸ The issue of reestablishing justice in Afghanistan, is a loaded one, for it implies that Justice was somehow lost in the pages of historical disputes. Instead, some imply that justice was never lost, but it is lurking in the traditional and Islamic laws. The Afghan people are generally skeptical of the governmental bureaucracy and red tape and view the secular laws as an imposition. Until recently they have been called 'Bush's law.'⁵⁹ They trust their traditional system for its immediacy and longevity.

⁵⁵ Jones-Pauly, Christina and Nojumi, Neamat, "Balancing Relations Between Society and State: Legal Steps Toward National Reconciliation and Reconstruction of Afghanistan" *The American Journal of Comparative Law* (2004) 52:825

⁵⁶ Wardak

⁵⁷ *Constitution of the Islamic Republic of Afghanistan*. Chapter 2, Article 35, Section 2

⁵⁸ Thier, 11

⁵⁹ Center for Policy and Human Development. *Afghanistan Human Development Report 2007*,

Greater Persia

In the past, Persian Empires extended far beyond the reaches of modern day Iran. Ancient Persians ruled from Africa in the west to China in the east. We can see evidence of these civilizations in the many nations with strong Persian or Tajik minority populations.⁶⁰ Outside of Iran, there are substantial indigenous Tajik communities in the Middle East, (Syria and Iraq), the Caucasus (Georgia, Azerbaijan, Armenia, Eastern Turkey), Central Asia, (Turkmenistan, Uzbekistan, Kyrgystan, Tajikistan) as well as in northwestern parts of Pakistan and Afghanistan [Figure 6⁶¹]. Like many post-colonial nations, the political borders are determined not by a local map of the ethnolinguistic extent of the people, but by the political agendas of imperialistic powers during the Great Game.

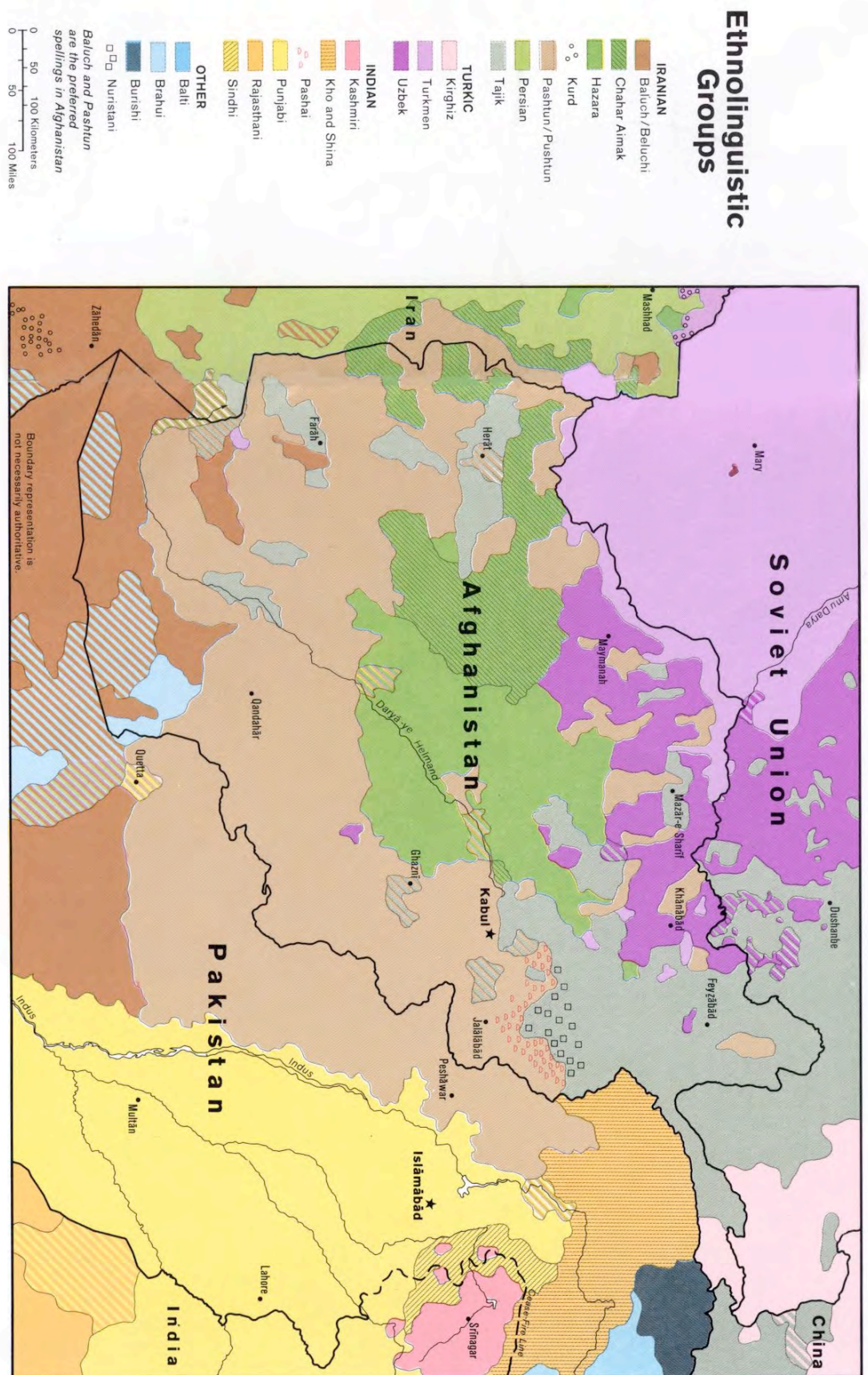
Although the word Tajik now refers to ethnic and linguistic Persians, the word originally referred to sedentary people. In this region the term served to differentiate Persians from the surrounding nomads: Turkic nomads to the north, Arabs to the east and Pashtuns to the south. The Tajik cities of the Ferghana valley became cultural the centers of Central Asia. The Ferghana Valley is one of the only fertile areas in the region, and most of the cities are located in or near it. Tashkent, Samarkand, Osh, Bukhara, Dushanbe, Balkh and Mazar-e-Sharif are distributed among four different countries, Uzbekistan, Tajikistan, Kyrgyzstan and Afghanistan, but until recently they were linguistically as well as culturally Persian and unified under a single ruler.⁶²

⁶⁰ Although Tajik is now associated with the country of Tajikistan, it is also a term for ethno-linguistic Persians outside of Iran.

⁶¹ Global Security, <http://www.globalsecurity.org/military/world/afghanistan/region-maps.htm> (accessed April 10, 2009).

⁶² Khanate of Bukhara, 18th Century

Figure 6



Like much of Asia, the history of northern Afghanistan can be explained using Ibn Khaldun's theory of nomadic *asabiyya*, tribal spirit, followed by sedentary corruption. The original settlers of Afghanistan may have been sedentary Bactrians, followed by Achaemenid Persians. The Persians were overtaken in the third century B.C. by Alexander the Great, a personage who although not nomadic, could easily have been seen as such. In the next period, northern Afghanistan was ruled by Indians and Chinese, but it was the next group of nomads who would leave their permanent religious mark. In 642 the Arabs, having conquered Persia, invaded Afghanistan, converting the people to Islam and bringing the region under the Caliphate [Figure 7⁶³]. This gave way to the Ghaznavids, Ghurids, Safavids and Seljuks who, although initially Turkic, were quickly integrated and offered much in the way of Persian civilization. Much of this was destroyed when Genghis Khan and the Mongols tore through in the 13th Century. The area was broken up among his sons and was last together under the Khanate of Bukhara in the 18th Century. This was broken up by the most recent nomadic invasion, this time of Pashtuns from the south creating the current Afghanistan. In the 19th century the Persian region was influenced by the Great Game [Figure 8⁶⁴].⁶⁵

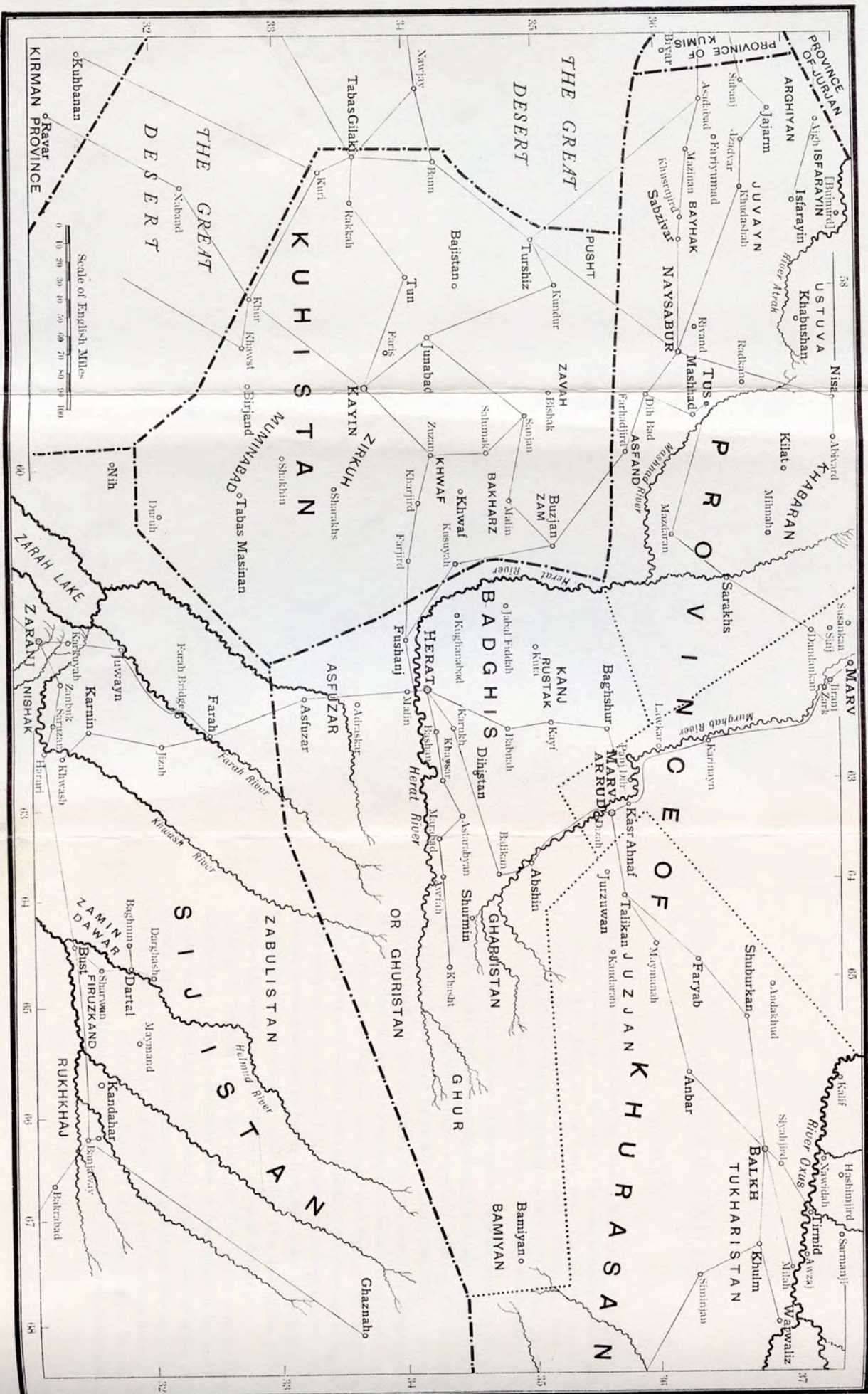
⁶³ G. Le Strange, *The Lands of the Eastern Caliphate*, (Cambridge: Cambridge University Press: 1905), 334

⁶⁴ Sonderforschungsbereich, *Tübinger Atlas des Vorderen Orients* (Wiesbaden : Reichert,1994), B X 1

⁶⁵ Northern Afghanistan was also influenced by the Soviets who settled in the cities of Uzbekistan and Tajikistan. The climate there is milder than the harsh steppe and the people were already sedentary. Under Stalin and Khrushchev, the Central Asians were forced to grow cotton and wheat, neither of which was particularly suited to the, still harsh, environment. The failure of wheat caused widespread starvation in Kazakhstan. The cotton was ineffective in most states, except in Uzbekistan where it became a cash crop.

Figure 3

PROVINCES OF KUHISTAN, KHURASAN, AND PART OF SIJISTAN



MAP VIII

Vorderer Orient · Der Imperialismus in der ersten Hälfte des 20. Jh. *Middle East · Imperialism in the First Half of the 20th Century*



Although the Great Game brought some Soviet influences to northern Afghanistan the lasting cultural climate is shaped by Persianate Islam. According to recent estimates the Tajiks form about one third of the Afghan population.⁶⁶ They reside mostly in the north-east and western districts of the country, near the borders of Iran and Tajikistan, however, they are also the predominant ethnicity in the capital city of Kabul as well as most other urban areas [Figure 9].⁶⁷ With fertile plains, the northern terrain is historically more amenable to sedentary life, and there are a number of large cities in this part of the country.⁶⁸ The Tajiks hold a considerable amount of wealth and prestige in Afghanistan and are likely overrepresented in the government. Almost half the population speaks Persian, (although Pashto shares official languages status, only 35% of the country speaks it).⁶⁹ Due to ethno-linguistic similarity as well as historic unity Tajiks have always been linked to their Iranian neighbors to the west. There exists a socio-cultural as well as ethnolinguistic homogeneity across these two regions.

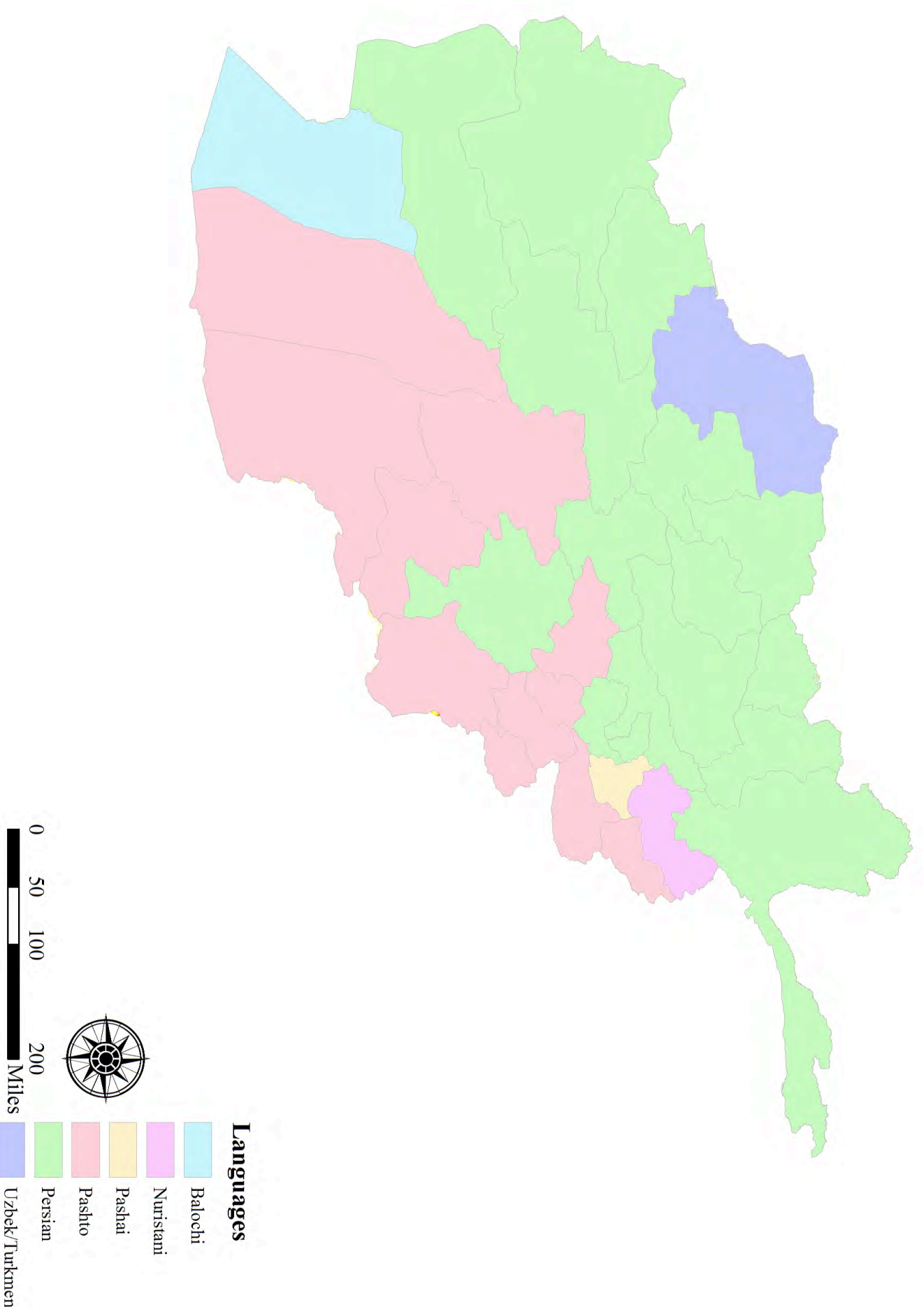
⁶⁶ Central Intelligence Agency, “The World Factbook: Afghanistan,” <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html>.

⁶⁷ Jawad, Nassim, *Afghanistan, a Nation of Minorities*, (London, UK : Minority Rights Group, 1992.), 5

⁶⁸ Jawad, 11

⁶⁹ *ibid*

Languages of Afghanistan by Province



During the Great Game of the 19th Century, Iran and Afghanistan emerged as buffer states dividing the zones of British and Soviet influence. During the strategic maneuverings of this politically tense time, Iran lost control of the city of Herat.⁷⁰ This city on the western tip of Afghanistan, is particularly associated with Iranian identity and even has a significant Shi'ite population, (unlike the majority of the country, which is Sunni). This annexation was the most recent adjustment to the Afghanistan-Iran border, so Herat is one of the most Iranian metropolitan areas, however, most of the predominantly Tajik provinces are associated with Iran as well.

Persian Islam is distinguished from Arab Islam, first and foremost, by their use of the Persian language. For those who subscribe to the center-periphery view of Islamic civilization, Persian Islam is less concentrated and pure. This idea is centered around Mecca and Medina in the Arabian Peninsula and the further you get from there the more prone to corruption the Islamic practices are. Because the region is so far from the Hejaz, there are few hajjis, people who have performed the pilgrimage to Mecca, and *sajids*, people who claim to be descendents of the Prophet, which some say makes the religious less legitimate. In addition, historians say that un-Islamic practices such as smoking, drinking and fraternizing between the sexes are more common in Central Asia than in the Middle East.⁷¹ It is this pervasive perspective that attaches a hierarchy to Islam. Somehow between Arabia and Persia, the prophet's message became corrupt, and Islam was lessened.⁷²

⁷⁰ This was agreed upon in the 1857 Anglo-Iranian Treaty of Paris.

⁷¹ Hambly, Gavin, *Central Asia*, (London : Weidenfeld & Nicolson, 1969.), 14

⁷² This perspective is even more extreme with respect to Turkic Muslims.

The Islam practiced in northern Afghanistan is also affected by the Persian pre-Islamic practices of the area. *Nowrooz*, a Persian new-year celebration is practiced throughout southern Central Asia. Some claim that Nowrooz is a Zoroastrian ceremony, since Zoroastrianism was an important pre-Islamic influence in the Persia. But, despite reports of the contrary, this ceremony has remained secular.⁷³ The national legend, including cosmic myths, the Zoroastrian Avesta, and the *Shah Name*, a Persian epic, are seen as conflicting to Islam.⁷⁴ Due to these influences, many regard Central Asian and Persianate Islam as corrupt. Other scholars claim that low scholarship has had a corrupting influence on Islam in the region.⁷⁵

Islamic education in Afghanistan is filtered through Persia as well. Islamic education is often derided in popular media, however, in an Islamic republic, knowledge of Islam is integral to understanding society. The madrassas, Islamic schools, are famous for teaching rote memorization of the *Qur'an* and not critical thinking. However, Islamic law programs require a twelfth grade madrassa education as well as an Arabic prerequisite.⁷⁶ The largest and most famous Islamic law program is al-Azhar in Egypt, and half of the professors teaching in Afghanistan were trained there.⁷⁷

⁷³ Perry, Prof. John, Classnotes. University of Chicago, Contemporary Central Asia. February 2008

⁷⁴ Ibid.

⁷⁵ Bacon, 78

⁷⁶ Weinbaum, 44

⁷⁷ Weinbaum, 45

Shari'a

There are four main Sunni mazhabs, schools of shari'a, law: Maliki, Hanafi, Shafii, Hanbali. Most non-Arabic speaking Muslim populations use the Hanafi school, because abu-Hanifa, the founder of the school, was a Persian speaker, who wrote out special provisions for foreign language speakers. Using more *hadith* (Muhammad's teachings) and less Qur'an for its source, the school appealed to the ordinary populations throughout the Muslim Community. Although not a liberal philosophy, the Hanafi school employed the more liberal doctrine of letting those who could not speak Arabic study the Qur'an in their own language.⁷⁸ This became a general rule for this school, and is still practiced today. This is the mazhab used in Afghanistan. Because of the translation, it is often considered the most liberal of the school. The Afghan people are stubborn and loyal to the Hanafi school.⁷⁹ The 2004 Constitution stipulates that Hanafi jurisprudence should be used when there is no previous court record. Hanafi jurisprudence should be used on almost all decisions. In addition, the Afghan Consitution specifies the use of Shiite mazhabs, (Jafari) in the majority Shiite areas, which constitute about 15% of the country's courts.⁸⁰

The mainstays of sharia are agreed upon by all the mazhabs. The primary source of shari'a is the Qur'an.⁸¹ In addition to the Qur'an, however, judges who use

⁷⁸ Welch, A.T.; Paret, R.; Pearson, J.D. " al-Kur;ān." Encyclopaedia of Islam. Edited by: P. Bearman, Th. Bianquis, C.E.

Bosworth, E. van Donzel and W.P. Heinrichs. Brill, 2006. Brill Online. UNIVERSITY OF CHICAGO LIBRARIES. 29November 2006 <http://www.brillonline.nl/subscriber/entry?entry=islam_COM-0543>

⁷⁹ KAMALI,M.H. PRINCIPLES OF ISLAMIC JURISPRUDENCE (3d ed., 2003), at 450

⁸⁰ Wardak, 6

⁸¹ Many see shari'a as limiting because the Qur'an cannot be changed, they see the main source of law is stagnant.

shari'a are permitted to look to three other sources. The second source, if a law isn't outlined in the Qur'an itself, is the *sunnah* or *hadith*. These are traditions based on the life of the prophet Muhammad, not just what he wrote, but what he did, said, and gestured. The third source of shari'a is through analogical reasoning, or *qiyas*. If, for example, there is a similar law which is present in the Qur'an or the hadith, you can use an analogy to apply it to your current case. The final way to interpret the shari'a is to have a consensus, *ijma*, among all the legal scholars in the community.

The punishments based on the text of the Qur'an are called *hudud* and are fixed for certain types of crimes. Adultery, for example is always punishable by death. Since these punishments are particularly harsh their use is contentious. Some scholars think that the complex process of shari'a has been oversimplified into just chopping off hands and stoning people to death.⁸² Other legal scholars however consider these practices the most important aspects of Islamic faith.⁸³

In the Hanafi school, the official system of witness is called *shuhud*. In order to testify the witness must have all of ten qualifications. The witness must not be insane, blind, or have poor memory; they cannot be a slave or a child; they must be Muslims of good character with no bias and an understanding of justice. It is preferred that these witnesses be men, but if there are no men, it is permitted that 2 women or a number of children can fill their place. Adultery, since it is such a heinous crime, requires 4 male witnesses. A false witness is punishable by public shaming, whereby the person must

⁸² Faiz, 119

⁸³ **William H. Spencer** *Symposium: Reluctant Nation Building Minister of Justice* said: listen, we're going to adhere to international legal obligations and international standards, we're going to continue to create a proper system here. We're not going to be chopping anybody's hands off, or doing any of those sorts of things here. " And the Chief Justice retorted and said, "Clearly the minister hasn't read the Bonn Agreement, because this is an Islamic state. And you'd better believe we're going to chop people's hands off, and we're going to do all the things that are required by our tradition and our system."

leave the city where the new townspeople will be told to beware of them, for they have given false testimony. There is no written procedure for protecting witnesses or victims.⁸⁴ In practice, witnesses rarely conform to all these qualifications, and are rarely used.⁸⁵

Unlike codified legal systems, shari'a works on a case by case basis. Afghans are extremely reluctant to write down rulings; since the Qur'an is the word of God, this is thought of as interfering with God's path. It is regarded as a doctrine rather than a code, since codification would subtly distort it.⁸⁶ The Official Gazette of court ruling is published only sporadically and has a limited distribution. This can result in gross abuses of power by judges. The victims are, however, often free to seek a retrial from any of the other schools or even legal systems if they so wish.

The Hanafi school is officially sanctioned by the government in the Afghan Constitution. Although it is not secular, and most of it is unwritten, shari'a it is a formal system of law. The Hanafi school is found in the historically Persian areas of Afghanistan, because of the pervasive tradition. Also because of the educational prerequisites and formality of the system, these are more likely to be found in urbane rather than rural areas.

⁸⁴ Afghanistan Justice Sector Support Program. Assessment of the Justice Sector in Kunduz Province. http://www.jssp-afghanistan.com/Reports%20and%20Publications/Assessment_of_the_Justice_Sector_in_Kunduz_Province_Oct_2007.pdf

⁸⁵ Kunduz, 7

⁸⁶ SHERMAN A. JACKSON, ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHAB AL-DIN AL-QARAFI (1996), at xvii.

Pashtunistan

The Pashtun tribal areas are in the Hindu Kush mountains and straddle the border between Afghanistan and Pakistan [Figure 10]. The terrain there is difficult, so the Pashtuns are renowned for their nomadic spirit and general hardiness⁸⁷. The Pashtun tribes have always been associated with violence and militarism. Positioned on the southern border, they strategically located to protect the rest of the country from invaders to the south. Pashtuns are associated with the warlordism and insurgency as well as the unification and centralization of Afghanistan.

The first indigenous ruler to emerge in the area was Ahmad Durrani in the 18th century. His empire was created through strategic alliances between isolated tribes. These tribes were isolated by ideological and ethnic differences, but these differences were exacerbated by the geographical barriers separating these people from each other. By allying these tribes Durrani was able to create the core area of Afghanistan. Since then, the Durrani tribe has been like a royal family, and all the subsequent Afghan leaders have traced their lineage to them including the current President Karzai. By allying disparate tribes Durrani was able to create the core area of what is now Afghanistan.

As the Durrani are famous as Afghan leaders, another large Pashtun tribe, the Ghilzai are famous for their guerrilla warfare tactics and were integral in the Anglo-Afghan wars. In an astounding feat the Afghans were able to defeat the British army at the height of British imperialism.

⁸⁷ The difficulty of the terrain has resulted in a lower population density [Figure 7].

Majority Ethnicity by Province

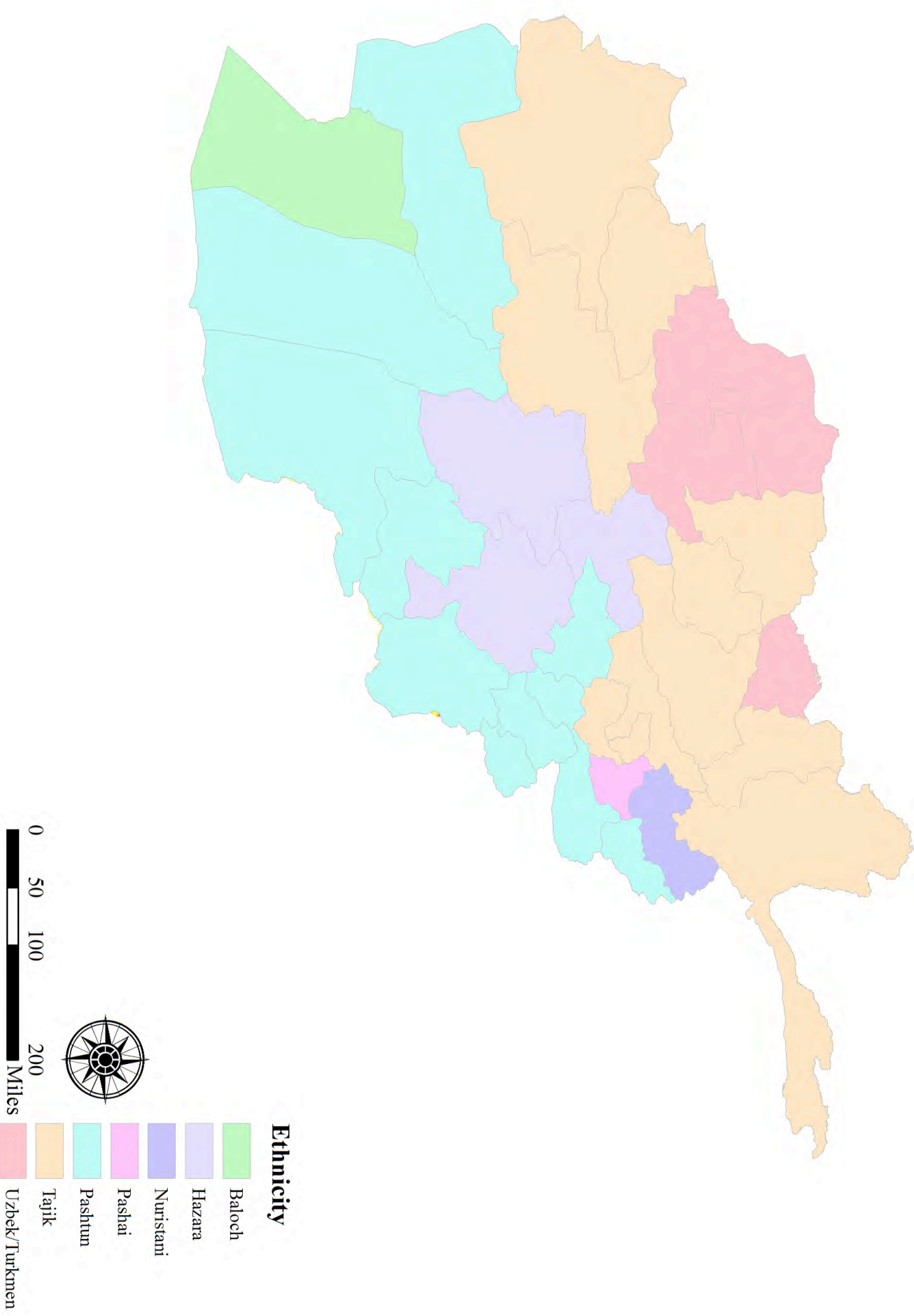


Figure 10

During the Great Game of the nineteenth century when Afghanistan became a buffer state between Britain and Soviet Russia, Pashtunistan marked the extent of British Influence [Figure 11⁸⁸]. Since there are Pashtun tribesmen on both sides, the Afghan-Pakistani border has always been extremely permeable. The Durand line between Pakistan and Afghanistan was established in 1893. The line is so called because of Mortimer Durand, the British dignitary who designed the treaty.⁸⁹ Afghanistan was defined between the northern border of Pakistan, where British rule ends and the southern borders of Tajikistan, Uzbekistan and Turkmenistan, where the rule of the Soviet Union stopped [Figure 2⁹⁰].

During the Great Game period there were three wars between the British and Afghans. In the Pashtun dominated regions of Afghanistan and Pakistan, the British secured more influence than the Russians during the Great Game. In large part due to the guerilla tactics employed by the Pashtun tribesmen, however, the British were never able to colonize Afghanistan. The British struggled through all three of the wars and ended up granting independence to the Afghans in 1919.⁹¹

⁸⁸ Tavo

⁸⁹ Louis Dupree, *Pashtunistan*, ed. Shah Muhammad Rais, (Kabul: Shah M Book Co, 2003) 123.

⁹⁰ http://www.icosmaps.net/pashtunistan/014_map/iframe_3#top

⁹¹ There was a famous incident in the late 19th century involving the retreat of British troops from Kabul. Although the trip was only 90 Miles, the resulting massacre of over 15,000 British is often blamed on poor planning by General William George Keith Elphinstone. Some Afghan troops were sent to help secure their trip, but most Afghans resented the foreign presence in their country and offered no help. The ill-fated retreat began in January, the narrow passes were covered with two feet of snow, the troops had little food, and there was general antagonism from the entire country. Given this situation, the narrow passes of the Hindu Kush in the dead of winter, no food and few supplies, much of the garrison probably would have died along the way even had they not been attacked. The Ghilzais attacked them two days after they left, using their knowledge of the terrain, the Pashtun tribesmen were able to maximize on a bathtub effect; trapping the British in a narrow pass with no way out. By the end of the week thousand had died, killed by the Afghans or frozen in the winter tundra. A week later William Brydon was the only soldier to reach Jalalabad.

Figure 11

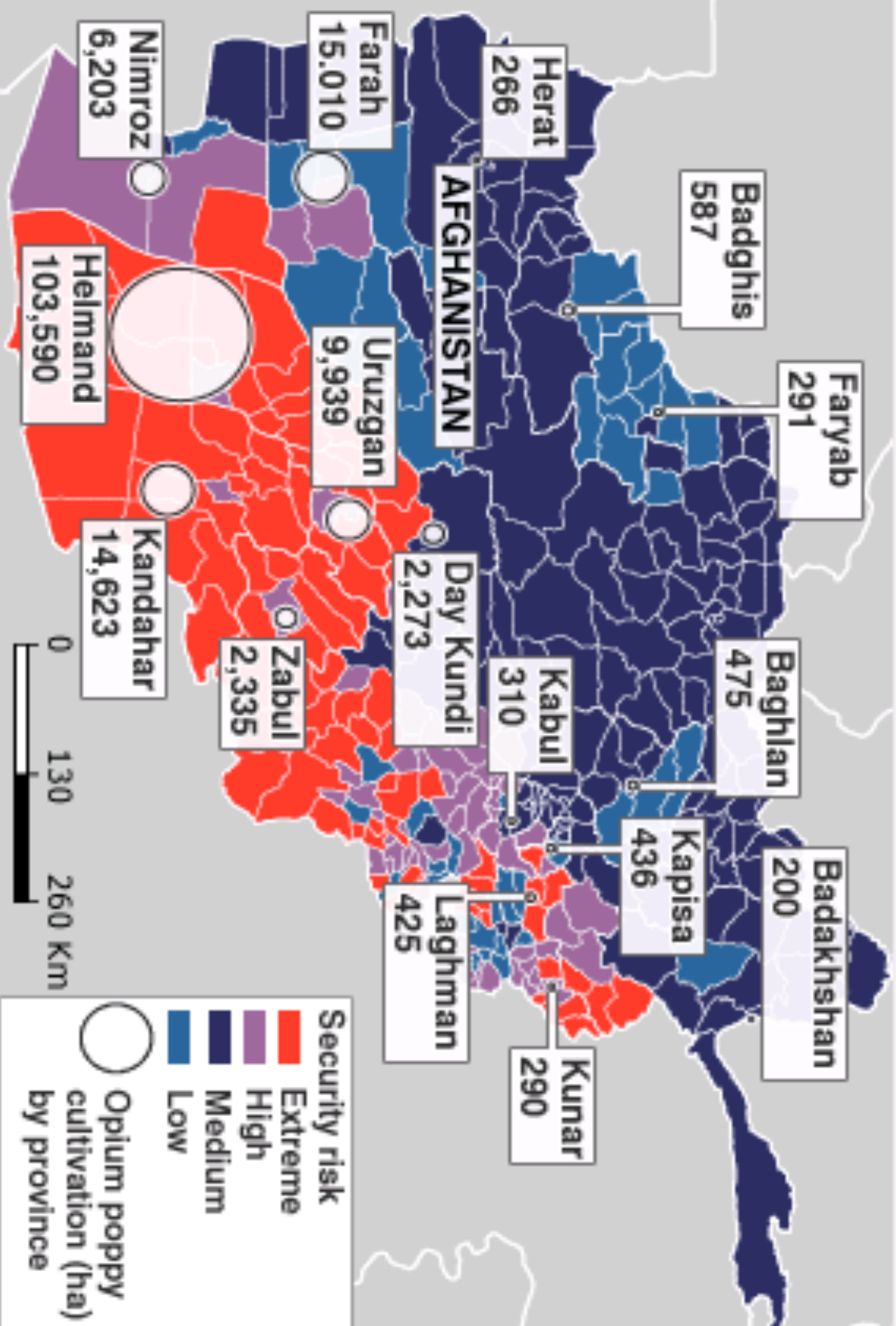


Although Afghan independence was probably a result of World War I territorial consolidation, it was also an admission of defeat by the British. They realized finally that this country would be very difficult to colonize, and in counting their losses they also may have foreseen that it would be just as difficult for their former rivals in the Soviet Union and later, the United States [Figure 12⁹²]⁹³.

⁹² Wikimedia, “UN Security map”,
[http://wpcontent.answers.com/wikipedia/commons/b/ba/Afghanistan_map - security by district and opium poppy cultivation by province 2007 - 2008.gif](http://wpcontent.answers.com/wikipedia/commons/b/ba/Afghanistan_map_-_security_by_district_and_opium_poppy_cultivation_by_province_2007_-_2008.gif) (Accessed April 10, 2009)

⁹³ The communist government sought help from the Soviets, who had been looking for just such an excuse to enter the country. The Soviet Union sent tanks from Tajikistan and Uzbekistan as well as a substantial air force into Kabul to secure the area. This invasion triggered a response from the mujahideen, but also from the United States. At the time, U.S. President Jimmy Carter was caught up in the Cold War conflict and, fearing Soviet influence, decided to supply the mujahideen fighters with U.S. weapons. The Soviet-Afghan war became a proxy war for the United States and the Soviet Union. Ahmad Shah Massoud emerged as a leader in the Panjshir valley, and an ally for the U.S. As an ethnic Tajik he was able to secure much of the northern countryside. The Soviets had not been particularly effective fighting on the ground, the harsh terrain proved difficult for even soviet tanks to maneuver as many armed civilians who were much more familiar with the geography were united against the invaders. However the Soviets dominated in the air, the Afghans had basically no air force were being defeated from above. The CIA and U.S. advisors, after much deliberation decided to arm the Afghans with FIM-92 Stinger anti-aircraft missiles. With these light, over the shoulder stingers the Afghans were able to counter the Soviet air-raids, leading to a quick withdrawal of Soviet forces.

SECURITY MAP AND OPIUM POPPY CULTIVATION IN AFGHANISTAN BY PROVINCE, 2007-2008



SOURCE: UN

Pastoral nomadism, the livelihood historically practiced by the Pashtuns, has recently experienced marked decline. Although, pastoral nomads claim to be fiercely independent, they often have a symbiotic relationship with the sedentary population. The nomads offer this population military protection in return for agricultural products which nomads cannot produce. In Afghanistan, nomads often offer protection to those trying to traverse the treacherous passes of the Hindu Kush. The decline of pastoral nomadism is due to a myriad of factors including the rise of capitalism, loss of grazing areas and governmental suppression.⁹⁴ The rise of capitalism has led to increased competition for pastoral animal products, like milk and wool, which are no longer unique products of nomadic activity. Nationalization and the shifting of boundaries has caused the loss of grazing areas, as well as trade route shifts and mechanization. Governments have historically suppressed nomadic groups because they cause instability. The governmental suppression has resulted in a loss of privileged socio-economic distinction, important for the nomadic-sedentary relationship. Pashtuns and other nomadic tribes throughout the world have experienced marked decline, and nomadism is rarely practiced in its true form anymore.

The Pashtun were an even larger percentage of the population before the Soviet invasion of the 1970s. During the invasion, many crossed the Durand line to their tribal counterparts in western Pakistan. The line was declared invalid in 1949 after the dissolution of British India, a moot decision, since the border had never really been enforced. Many Pashtuns, as well as, occasionally, the governments of Afghanistan and Pakistan regard the mountains of the border as Pashtunistan a place far from the reach

⁹⁴ Mikesell, Prof. Marvin, Classnotes. University of Chicago, Cultural Geography. 27, 2009

of the law.

While the Pashtuns are no longer nomadic, they maintain a fierce political independence and a strong sense of honor. Their honor code is referred to as *Pashtunwali* and also serves as a legal system in the Pashtun provinces. Adherence to *Pashtunwali* requires hospitality, the *jirga* system of legal arbitration, a separation of the public from the family sphere, and a call for revenge and blood money. This is a controversial policy whereby, if a family member is murdered, they can ask that the murderer be killed, or ask for any amount of blood money. This honor code is associated, in the Pashtun ethos, with their nomadic spirit.

Ethnic Pashtuns comprise the largest percentage of Afghanistan, and represent a core Afghan identity.⁹⁵ In fact, for many years the terms Pashtun and Afghan were synonymous. The foundation of Afghanistan as a state as well as the subjugation, integration and in part the forced Islamicization of alien ethnic groups was brought about by Pashtun tribes. The Pashtun consider themselves the “real” Afghans.⁹⁶

The Pashtuns, 40% of the population, live in the east and south of the country, adjacent to Pakistan.⁹⁷ The Pashtun tribesmen are characterized by their hardiness, for few people dare live in the rugged mountains they call home. They are also distinguished by their strict adherence to the tribal code.

⁹⁵ I draw a strained parallel here between the Afghan and American socio-political landscapes. In the recent election the media was inundated with maps of voter distribution by state, with the urbane, intellectual democrats in the coastal cities and the center of the country populated by proud, patriotic and religious republicans. Republicans, like Pashtuns tend to think of themselves as ‘true Americans’ and are more likely to fight in wars and remain skeptical of the urban elite.

⁹⁶ Orywal, Erwin, “Ethnicity – Conceptual and methodological considerations” p. 39

⁹⁷ Mikesell and Murphy, “Minority-Group Aspirations,” *Annals of the Association of American Geographers*, Vol. 81, No. 4 (Dec., 1991), 10

Pashtunwali

Pashtunwali is sometimes described as folk shar'ia, and is an example of informal local justice. Some of the written traditions of Islamic jurisprudence are synthesized with the indigenous, and primarily oral indigenous Afghan customary law.⁹⁸ Since there is a language barrier, and the majority of the judges cannot read the texts in Arabic, the Islamic law can be convoluted.⁹⁹ The system is complex and often customary to a small area. This level of specialization, as well as the long history, gives the system particular legitimacy in the eyes of the local people. The emphasis is on immediate and familial solutions rather than official government bureaucracy.

In many of the rural Pashtun parts of Afghanistan there is skepticism towards government authority and bureaucracy.¹⁰⁰ The tribesmen perceive the formal law system as elitist, corrupt and convoluted, resulting in long delays.¹⁰¹ At the end, many of the punishments involve jail time, an inadequate solution in a culture that says that, "if you killed my relatives, you owe me a blood debt... and this is not a blood debt that can be paid in the Hague."¹⁰²

The major principles of Pashtunwali are; to avenge blood, fight to the death for defense of property or persons under your protection, refrain from killing women, children, and non-Muslims, to be hospitable, and offer forgiveness and sanctuary to

⁹⁸ Faiz, 14

⁹⁹ Thier, 51

¹⁰⁰ Barfield, Thomas: Symposium, 8

¹⁰¹ Their, 2

¹⁰² Barfield, Thomas: Symposium, 9

those who ask for it.¹⁰³ All of these stem from the ideas of honor and honesty¹⁰⁴. Different tribes have different specifics but all agree on these principles of hospitality and the protection of those seeking asylum.¹⁰⁵ Pashtun norms are based on restorative rather than retributive justice, the wrongdoer asks for forgiveness from the one wronged, using the special custom of nanawati or apology.¹⁰⁶

The principles of justice are resolved by the jirga, a council of elders. The jirga works on many different levels, from the Loya Jirga, the large parliament style council that approved the Afghan Constitution, to the most informal conflict resolutions.¹⁰⁷ The jirga is appointed from well known elders appointed from both sides of the conflict. Both sides pledge to abide by the decision of the court with a security deposit, usually money, livestock, goods or arms. The principle of badal, or compensation, states that the price to be exacted should be equal to the insult or injury. The principle of nerks, or price, sets a value for each injury, from the loss of a finger to death.¹⁰⁸ Specific nerks include khunbaha/poar, or blood money.¹⁰⁹

According to the Pashtun tradition, because of the importance of women, most the severe conflicts are regarding women's issues and special regulations. The bad, or fine, for acts against women is often very severe to discourage others from following

¹⁰³ Vafai, 23

¹⁰⁴ Inomkhojaye, Prof. Rahmon. University of Indiana, Bloomington, "Pashtunwali" July 2008

¹⁰⁵ Gailani, 147

¹⁰⁶ International Legal Foundation, The Customary Laws of Afghanistan. September, 2004

¹⁰⁷ Inomkhojaye, July 2008

¹⁰⁸ The Nerks of the Ahmad Zai are used because this is the largest Pashtun tribe and deemed to have the wisest men. International Legal Foundation, 9

¹⁰⁹ Gailani, 147

suit. The punishment for kidnapping a married woman is equal to seven murders, if a woman and man are caught committing adultery they are both killed. Generally women are not a part of the justice process. Women are not permitted to attend the jirgas, as they are considered disruptive elements.¹¹⁰ If a husband beats his wife or injures her, the woman's father is entitled to restitution.¹¹¹ If a woman commits murder, she cannot be killed, the jirga instead chooses a male member of her family to be executed. Women are considered a good choice for khunbaha or poar because when the girls are married to the victim's family the people become kin, presumably erasing any animosity.¹¹² This is the nature of such a restorative justice system; the stress lies ultimately in familial reconciliation.

In Pakistan, the Pashtun provinces have recently been treated with a degree of legal autonomy. Pashtunwali is used in many of the Pashtun provinces for illicit conflict resolution, however in Pakistan, the North West Frontier Province is free to use this legal practice without any attempt at government control.¹¹³ It was in this climate of government independence that the Taliban emerged. The current Taliban movement is predominately Pashtun, heralding both their tribal code and Sunni Islam as their platform. Although the Taliban have been portrayed as Islamic fundamentalists, they could also be viewed as nationalists. Pashtuns believe that they 'more Pashtun than Muslim.'¹¹⁴ The provinces have their own local governors, with Gul Agha in Kandahar.

¹¹⁰ International Legal Foundation, 10

¹¹¹ Ibid.

¹¹² International Legal Foundation, 11

¹¹³ Faiz, 119

¹¹⁴ Nassim, 10

The personages are larger than life warlords, but may be integral to the government centralization.

Perhaps Afghanistan would benefit most from a law that is never written down. In a country with such low literacy, it is not of the utmost importance to record rulings and pass laws, it is only important that people know and follow them. The most efficient way of transmitting this information is yet to be determined.

Findings:

Although there is not enough data to get concrete results about the geographic distributions of legal systems in Afghanistan, some preliminary conclusions can be drawn. Statistics showing which legal system is used in which area are impossible to gather because there has never been a census in Afghanistan, and much of the conflict resolution is informal. In lieu of these variables two sets of statistics were used: literacy rates and the number of judges per province.

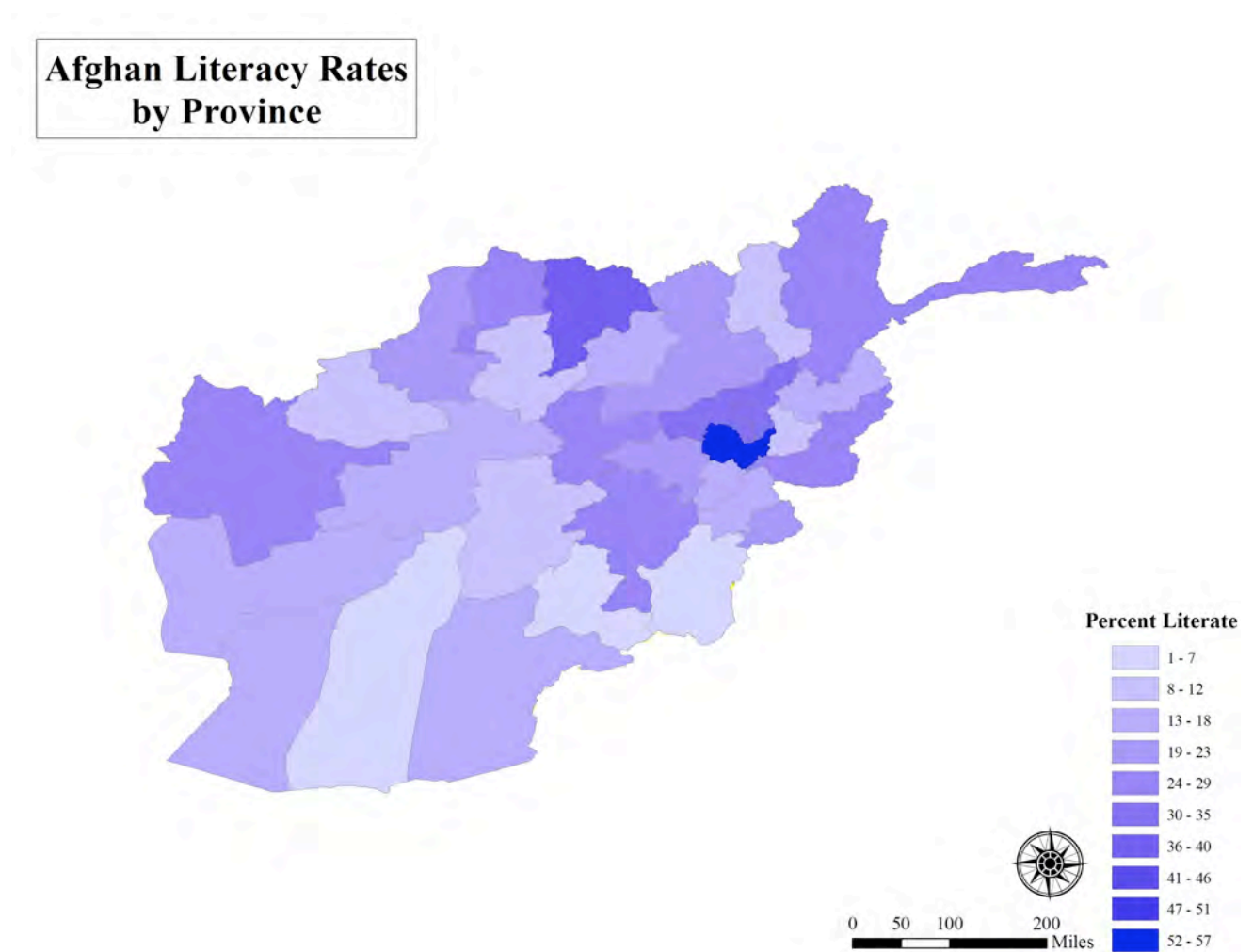
The distinctions of Kabul, Greater Persia, and Pashtunistan are based on population density and ethnicity so it made sense to look at what effects these two variables had on the literacy and judge statistics [See Figure 13 and Figure 9]. Ethnic Persians and urban areas have a higher literacy rate and number of trained judges [Table 1].¹¹⁵

¹¹⁵ These results are compelling though not statistically significant, see Appendix for more information

Table 1

	Ethnic Pashtun	Ethnic Persian	Rural	Urban
Average Literacy Rate	15	25.36363636	14.625	24.3125
Standard Deviation	9.391485505	13.96619295	2.71E-05	11.28255
Average Judges/Prov	5.48785E-05	6.09182E-05	5.18E-05	5.72E-05
Standard Deviation	1.8907E-05	1.8907E-05	3.27E-05	2.7E-05

Figure 5



Judges per Person by Province

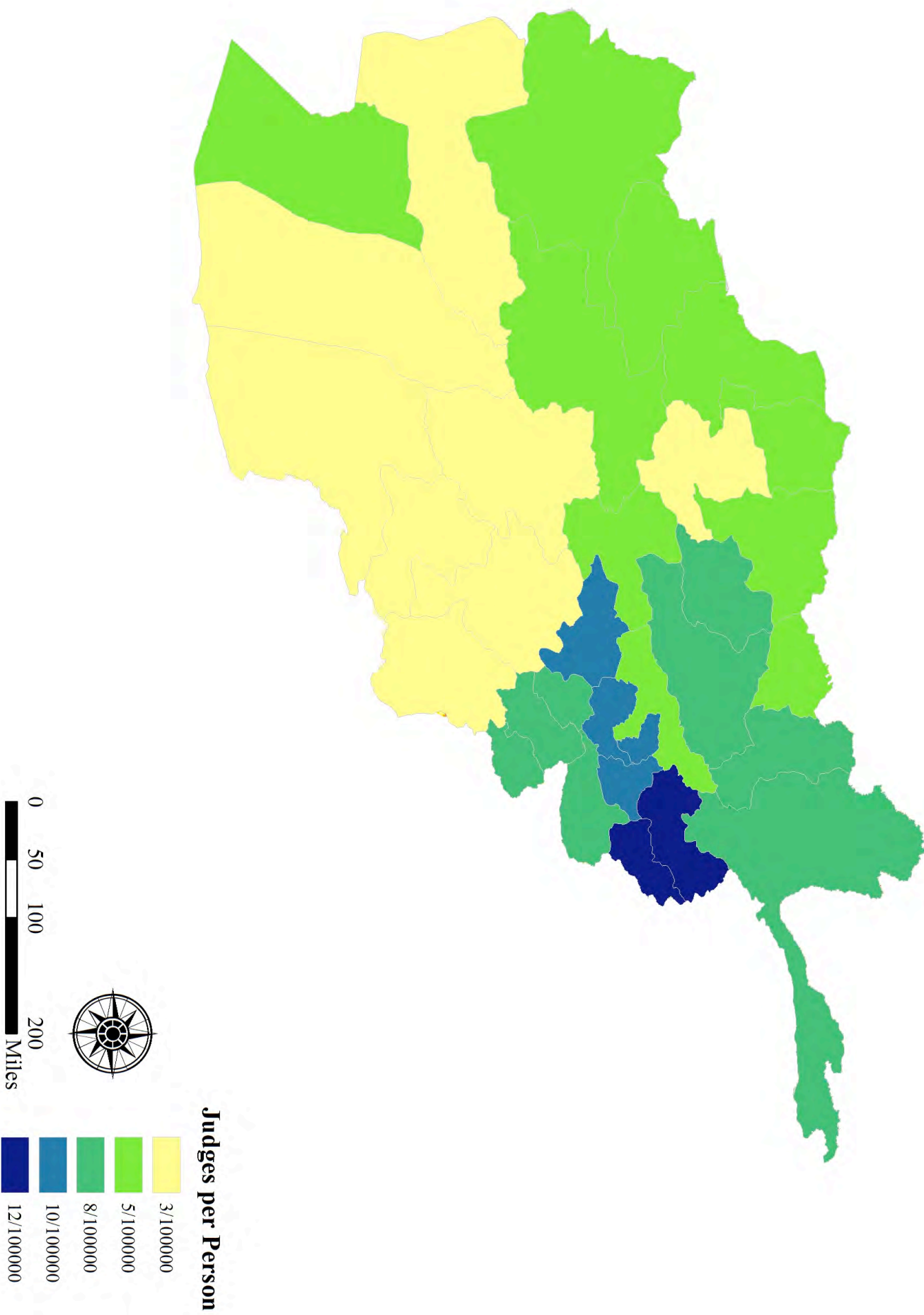


Figure 13

Conclusions

The distribution of legal systems in Afghanistan reflects three geographically isolated populations. The Afghan people identify themselves as ethnically and culturally distinct and have always been loath to succumb to centralized legal systems. The geographic and historical realities of the country have yet to be acknowledged by the international community. Unless the United States recognizes this phenomenon the current intervention is doomed.

Disregarding the separate histories of the different people of Afghanistan has led to much confusion, however establishing a pattern of legal system distribution proved remarkably simple after taking geography into account. The highly populated capital uses secular law, the urban, ethnically Persian areas in the north use recognizable shari'a, and the Pashtun areas in the south use tribal law. This simplistic geographic and ethnic characterization of legal systems will hopefully help to illuminate some of the important differences between the Afghan legal systems.

These differences are indicated by the regional practice of witnesses, but are also reflected in statistics of literacy rates, and number of judges per province. The witnesses in Kabul are treated in a western secular fashion, while the Persian cities in the North use the shuhud practice. In the Pashtun areas witnesses are often irrelevant as reconciliation is paramount, rather than objective fact-finding. These indications of regional differences in the Afghan legal systems shed light on the cultural history of the region.

This study and its results are preliminary and in no way exhaustive. Since Afghan legal practices have not yet been systematically recorded, much more needs to be done. Many valuable resources which would have been available for similar studies on other countries have gone missing in the war-torn country. There are, however,

certain steps that can be taken. Afghanistan has never had a census, although this will be difficult, it seems absolutely necessary.¹¹⁶ The borders need to be established between Afghanistan and its neighbors.¹¹⁷ More generally, those who undertake work in Afghanistan need to acknowledge the geographic and cultural history of the country.

¹¹⁶ See Appendix for details on data collection methods.

¹¹⁷ See Appendix for details on data collection methods.

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Appendix

Data

The Afghan Shapefiles and the data about ethnicity come from the Afghanistan Information Management Services website.¹¹⁸ This website was extremely helpful, and had a number of useful shapefiles, and a good deal of metadata. Some shapefiles were unusable however, including the Settlements file, which is erroneous due to ‘cartographic inexperience’.¹¹⁹

The initial literacy data came from the 2007 United Nations Human Development Report (UNHDR) on Afghanistan. This gave percentage of literacy by province. I was hoping individual reports would give this information by district. The district reports, however, are incomplete, with fewer than half of the districts represented, so systematic data on the district level cannot be obtained.

After deciding to use the UNHDR data, it became clear that this source posed problems. The literacy was gathered using information from a National Risk and Vulnerability Assessment survey conducted in 2005. The survey asked the head of household how many members of the household could read, which in itself is not the most reliable method¹²⁰. In addition, the authors of the study recognize that the population estimate for the denominator is quite low. Population figures vary widely from year to year, and based on who is conducting the survey. Afghanistan has never held a complete population census¹²¹.

¹¹⁸ <http://www.aims.org.af/>

¹¹⁹ <http://www.aims.org.af/services/mapping/metadata/afghanistan/point/settlements.html>

¹²⁰ UNHDR 175

¹²¹ UNHDR 179

This study used two main sources for population Data in Afghanistan, Landscan and the Central Statistics Office (CSO) of the Afghan Government. The Landscan dataset is a raster GRID file for the entire world. The information is extremely fine, down to square kilometer accuracy. There is no metadata, however, as to how the data was gathered in each country. There are large swaths of land in Afghanistan, for example, with no population, which (I believe) should have a very low population. This became important for later calculations.

The CSO statistics seemed fairly straightforward, but upon further inspection had their own problems. There were two main datasets, one from 2002 and another from 2005. The statistics for 2002 were available by district, which would have come in handy, had I found any other information available by district. Instead I just aggregated it to the province level. The problem was that the Province names were different from those in the AIMS shapefile (presumably put out by the same Afghan government CSO). For the 2005 dataset I had to translate the names from Dari (Persian), and found that they had the same extra provinces.

The largest omission from all the population datasets are nomadic tribes (referred to as Kuchi). Because of their itinerant nature, they are difficult for any government to track. Some estimates were made for the entire population, but it is difficult to predict which province

For ethnicity data there were a few maps I worked off, a National Geographic map, and a CIA map¹²². I was, however unsure how to aggregate the data, by province, so I was thrilled to find a map showing just that, majority ethnicity by province and district. When looking for the provenance I found that it was from Wikipedia, and that the map was highly politicized (as all maps of ethnicity in this region are wont to be). The user who created the map was being

¹²² I found out later from Professor Marvin Mikesell that the CIA map is almost directly lifted from an old USSR ethnic map.

questioned by other members of the community for misrepresenting ethnic groups. The users methods seemed to be based on the maps I had already seen and the incomplete district reports.

Methods

The literacy and ethnicity statistics may not have been accurate, but once I had them, the numbers were fairly easy to work with. The population data, however, turned out to be more problematic. In order to find a statistic for urban population I had to create my own metropolitan areas. In order to do this fine tuned analysis, I chose the Landscan data.

When I first clipped the Landscan data for Afghanistan, I was eager to explain all the places of high population density. Kabul was obvious, but in order to explain the other red dots I found a list of the most populous cities in Afghanistan, and using their coordinates from Wikipedia, and a shapefile from the AIMS database, which I knew was skewed and problematic. I was also able to use the ESRI images and maps. These maps showed different provincial borders as well (though not coincident with the various permutations from the Afghan government). So after labeling 30 cities, I was able to explain all the areas of high population density¹²³.

In order to calculate an urban statistic I had to define the metropolitan area. I used the Landscan data, for population density, the ESRI satellite image and the ESRI topography layers to determine breadth, as well as the coordinates for the cities which I had previously found. Looking at all these factors, I was able to clip out 30 metropolitan areas. By querying the data, I was able to find which provinces had which cities. I then added the population of the cities in

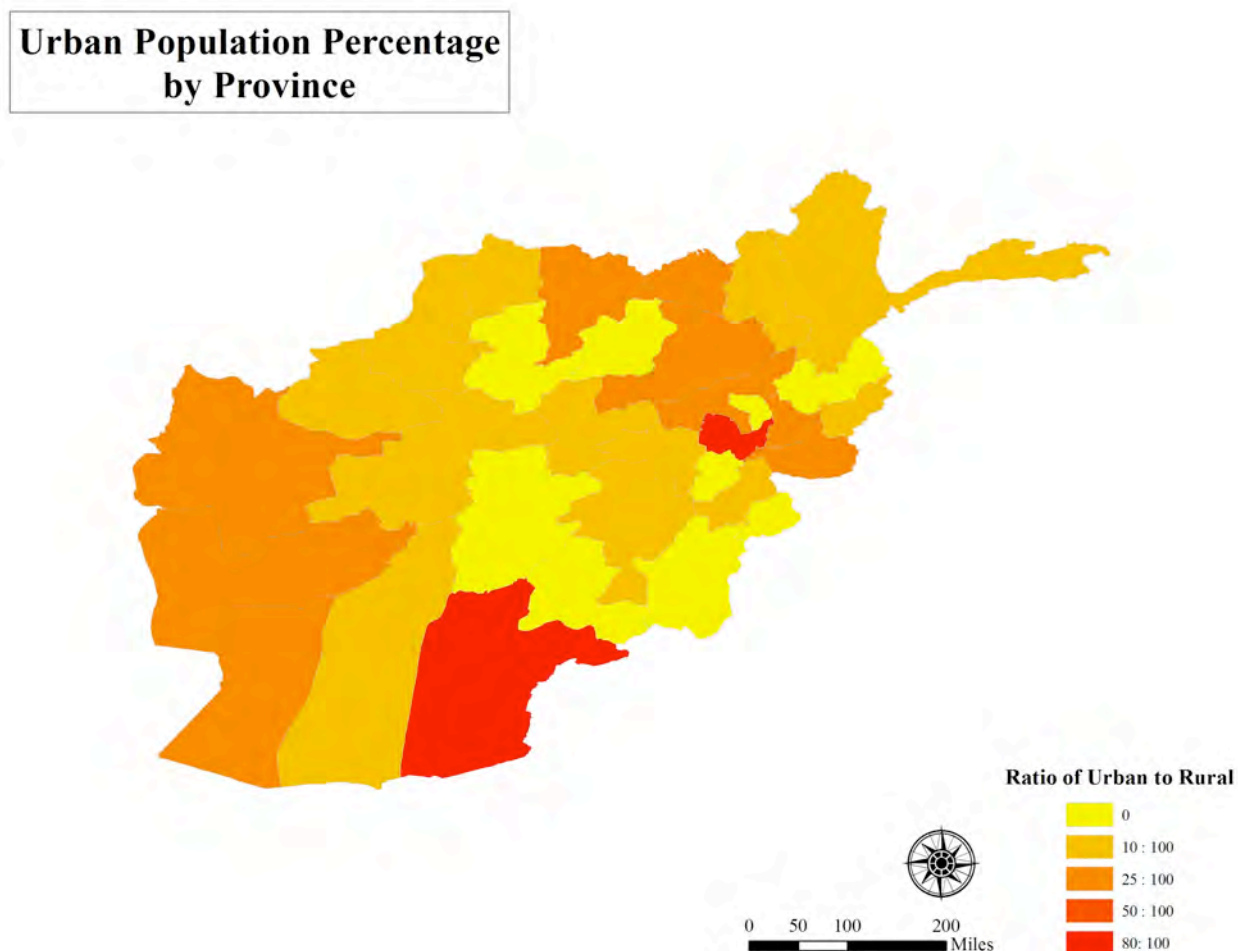
¹²³ The areas of low population density could probably be explained with a topographical map of Afghanistan showing deserts and mountains.

each province. By dividing this number by the total population of the province (found by clipping the Landsat data or each province), I hoped to find out the percent of the population that was urban in each province. However, since so much of the population was zero this data was quite inaccurate.

In this map of province urbanity some provinces in the south, especially. Kandahar, and Hilmand, seem more urban than expected. Perhaps the data may have been skewed since so many of the provinces had large zero populations. Quite possibly, these areas had very low, but not zero, population. After painstakingly recalibrating the data so that these zeros would be ones, I found that the map was very similar, and with the same legend, the map turned out to be exactly the same [Figure 15]. This seems to show that the ratio remains similar despite this adjustment. To get around this I listed the provinces in order by population in metropolitan area.

I then was able to find an average for the most and least urban areas.

Figure 5



Findings

In Kabul province, the literacy rates are 57 percent. Kabul has by far the largest urban population, a city of about 2.5 million residents. The province with the second highest literacy rate is Balkh, with merely 37 percent, which is substantially lower than Kabul. There are three cities in Balkh Province: Balkh, Mazar-e-Sharif and Kholm, with a combined population of about 300,000.

Lack of data precluded more complex geographic statistics. Instead a simple mean average literacy rate was calculated in Pashtun vs. Persian areas as well as for the urban vs. rural areas. As expected that Persian areas had a slightly higher literacy than Pashtun ones and urban areas had a slightly higher literacy rate than rural areas. However, the difference was not drastic in either case, nor was it significant. Although there does seem to be a relationship between ethnicity, urbanity and literacy, it is still unclear what the precise relationship is. It would be fallacious to assume a causal relationship based on this data.

Table 2

Province Name	Male Adult Literacy	Female Adult Literacy	Adult Literacy Combined	Ethnicity	Population 2004	Language	Judges	Judges/Population 2004	Population 2002	Judges/Population 2002	Land Scan Population Aggregation	Urban Ratio	Population in Cities	Corrected Urban Ratio	Corrected Rural Ratio
URUZGAN	14	0	7	Hazara	297	Pashto	5	0.016835017	639115	0.00000782	1035651	0	0	0	1
NURISTAN	22	5	14	Nuristani	130	Nuristani	13	0.1	111898	0.000116177	181342	0	0	0	1
KHOST	38	3	23	Pashtun	487	Pashto	23	0.047227926	300619	0.0000765	487922	0	0	0	1
LOGAR	27	5	17	Pashtun	332	Pashto	23	0.069277108	291880	0.0000788	473612	0	0	0	1
PAKTIKA	3	0	2	Pashtun	369	Pashto	7	0.01897019	352629	0.0000199	574876	0	0	0	1
ZABUL	2	0	1	Pashtun	258	Pashto	7	0.027131783	247425	0.0000283	939353	0	0	0	1
KAPISA	46	15	32	Tajik	374	Persian	30	0.080213904	360292	0.0000833	577258	0	0	0	1
SAMANGAN	21	4	13	Tajik	328	Persian	24	0.073170732	304073	0.0000789	492733	0	0	0	1
SARI PUL	17	4	11	Uzbek/Turkmen	473	Persian	11	0.023255814	467763	0.0000235	757986	0	0	0	1
GHOR	25	3	15	Tajik	586	Persian	20	0.034129693	486108	0.0000411	787712	0.003887208	3062	0.003829534	0.996170466
BAMYAN	37	5	24	Hazara	379	Persian	18	0.047493404	340005	0.0000529	550959	0.00424714	2340	0.004225627	0.995774373
WARDAK	33	5	21	Pashtun	506	Pashto	37	0.07312253	413596	0.0000895	672429	0.009861264	6631	0.009836951	0.990163049
TAKHAR	17	5	12	Tajik	828	Persian	45	0.054347826	697601	0.0000645	1130485	0.045297372	51208	0.045129109	0.954870891
HILMAND	6	1	4	Pashtun	782	Pashto	13	0.016624041	745616	0.0000174	1208430	0.054939053	66390	0.052222628	0.947777372
GHAZNI	45	11	29	Hazara	1040	Persian	31	0.029807692	1897493	0.0000163	1482211	0.059282383	87869	0.059003411	0.940996589
BADGHS	12	4	9	Tajik	420	Persian	10	0.023809524	301483	0.0000332	488534	0.060826882	29716	0.05985385	0.94014615
BADAKHSHAN	34	14	25	Tajik	806	Persian	41	0.050868486	593148	0.0000691	961130	0.071487728	68709	0.068480003	0.931519997
KUNAR	47	8	27	Pashtun	382	Pashto	41	0.107329843	321662	0.000127463	521267	0.082997773	43264	0.082784802	0.917215198
NIMROZ	25	4	15	Baloch	138	Balochi	7	0.050724638	149339	0.0000469	242349	0.104956076	25436	0.087813602	0.912186398
JAWZJAN	37	15	27	Uzbek/Turkmen	452	Uzbek/Turkmen	26	0.057522124	508660	0.0000511	825990	0.093473287	77208	0.092576428	0.907423572
FARYAB	23	10	18	Uzbek/Turkmen	840	Uzbek/Turkmen	24	0.028571429	698897	0.0000343	1132645	0.09487527	107460	0.094349811	0.905650189
PAKTYA	22	5	15	Pashtun	468	Pashto	24	0.051282051	415109	0.0000578	672954	0.094682549	63717	0.094583461	0.905416539
PARWAN	45	11	30	Tajik	561	Persian	36	0.064171123	726839	0.0000495	1184273	0.118149278	139921	0.117821464	0.882178536
KUNDUZ	29	12	22	Uzbek/Turkmen	833	Persian	32	0.038415366	815107	0.0000393	1321194	0.125002838	16513	0.124825501	0.875174499
FARAH	22	7	15	Pashtun	429	Persian	9	0.020979021	338276	0.0000266	548024	0.138773119	76051	0.128058288	0.871941712
NANGARHAR	41	10	27	Pashtun	1262	Pashto	72	0.057052298	1086593	0.0000663	1762038	0.1612207	284077	0.161074712	0.838925288
BAGHLAN	28	9	20	Tajik	762	Persian	50	0.065616798	758242	0.0000659	1228690	0.174175748	214008	0.172730435	0.827269565
HIRAT	37	18	29	Tajik	1545	Persian	46	0.029773463	1178096	0.000039	1909323	0.220144522	420327	0.216782856	0.783217144
BALKH	48	24	37	Tajik	1073	Persian	52	0.048462255	935742	0.0000556	1516205	0.218936094	331952	0.217755119	0.782244881
LAGHMAN	19	2	12	Pashai	378	Pashai	25	0.066137566	308260	0.0000811	604641	0.221079947	133674	0.220738967	0.779261033
KANDAHAR	22	3	13	Pashtun	990	Pashto	13	0.013131313	861615	0.0000151	1401328	0.646497465	905955	0.622155608	0.377844392
KABUL	68	45	57	Tajik	3072	Persian	265	0.086263021	2943084	0.0000984	4768584	0.784267405	3739845	0.784151474	0.215848526