

19TH CENTURY
FUSHTUN TRIBAL
STRUCTURE AND
LEGAL CUSTOMS

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INTRODUCTION

This paper concerns the Pushtun tribes of southern Afghanistan and north western West Pakistan. They are one ethnic group bridging these two modern nations. They speak basically the same language, have the same ethics and follow the same honor code. They share many customs and the same religion, Islam. Only 19th century power politics separated them into two nations.

In this paper I discuss their religion as it was seen practised. In studying Pushtun tribal law it is important to realize that the Pushtuns are and were Muslim and were therefore at least somewhat bound by the Islamic legal traditions. But, Islamic jurisprudence was inextricably bound into the web of government rule, a history of which I outline briefly, and appeal to the Shariyat was seen as an appeal to the centralized powers and as a threat to tribal cohesion and tribal traditions. However, as Muslims, the Pushtuns had to obey the Shariyat when it was directly appealed to. This conflict between their own tribal legal customs and the Islamic legal traditions was only a part of the conflict between the tribes and the central governments that tried to rule them. This conflict is central to an understanding of the Pushtuns and their tribal way of life, so I have included a brief history of the centralization process in Afghanistan. In my chapter on Islam I am indebted to Donald

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Wilbur, and in the chapter on government, I am indebted to Hasan Kakar and Vartan Gregorian.

Pushtun tribal customs and laws deeply affected the tribal power structure. The traditions outlined the paths to power and honor within the tribal communities. An understanding of both the power structure and the customs and the institutions of tribal government is necessary to understand both the ethics of Pushtun justice and the administration of that justice. In the third section of this paper I discuss the sources of power within the Pushtun communities, the actual power structure and the exercise of power by the various institutions, and, finally, the administration of justice. In the final chapter I discuss in detail some of the Pushtun customs and customary laws that guided their behavior within their own society.

It is important to emphasize that this paper concerns the British view of the Pushtuns. It was researched almost entirely from 19th century British sources and may have nothing to do with the reality of Pushtun tribal customs and law either in the 19th century or today. It stands simply as a discussion of the British view of Pushtun tribal life and administration of justice in the 19th century.

It is also important to clarify the difference between the hill tribes and the feudal tribes that I discuss in the paper. The hill tribes existed mostly in the frontier area, between the controlled areas of the British North West Frontier Province and the controlled areas of Afghanistan or the Kingdom of Kabul. These tribes were beyond the reach of the central government. They were raiders and marauders, highly democratic and violent.

The feudal tribes existed mostly in the Kandahar region of Afghanistan. They were settled, agricultural and usually ruled by powerful hereditary leaders. In Afghanistan democratic tribes also existed, such as the Ghilzai, and in discussions of the hill tribes, I usually include any of the uncontrolled, democratic tribes of Afghanistan as well as the people of the frontier area. The difference was not geographic but socio-economic and political. It was a difference between the controlled and the uncontrolled elements of the areas discussed. In West Pakistan, the Pushtuns of the Peshawar Valley region were feudal, settled and controlled while the people of the upper valleys, such as Swat and Dir, were, in the 19th century mostly uncontrolled, and mainly democratic.

It is also important to define an urban or town area as opposed to a rural area. I have defined as urban or town any area in which there was a bazaar, a fact which changed the socio-economic structure of the area. Bazaars introduced vocational and merchant elements into the population, who were usually not Pushtun, and usually followed changes in land holding patterns from equal to feudal. Urban areas were usually controlled and settled.

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I

Muslim law is an explicitly theological law derived from the will of Allah transmitted through His prophet, Mohammad. A Muslim is bound to accept it without criticism. One area of the Shariyat¹ comprises the Muslim religious law which attempts to regulate two basic areas of life: the worship and the religious duties of the believer², and the political, social and judicial administration of a Muslim community. It is based on the four major sources: the Koran, the words of the Prophet; the Sunna or the Hadiths³, the traditions; Qiyas⁴, application by analogy of the law; and, Idjma⁵, consensus. Fiqh⁶ is the general term for the science of Islamic jurisprudence.

The Sunni Muslims basically see Koranic law as reforming customary law; a customary law is considered lawful and operative unless it is specifically contradicted by a law in the Shariyat. Shi'ism, on the other hand, sees Koranic law as an entirely new system, and unless Koranic law specifically ratifies a customary law, the adat, custom, is rejected. The Sunni belief prevails among the Pushtuns and did in the 19th century, giving adat precedence. However, in practice, many of the Shi'a groups in Afghanistan, the Hazara for instance, altered Koranic law in favor of their customary law, and the purity of Shi'a Islamic law in Afghanistan was largely theoretical.⁷

In Afghanistan the Shariyat was only administered in the

- 4.) Haji: pilgrimage
- 5.) saum: fasting during the month of Ramazan

3. The Hadiths are the collected traditions of the Prophet's decisions and of his model behavior. The four basic schools of Islamic jurisprudence, the Hanefi, the Shafi, the Maliki and the Hanbali, accept varying amounts of the Hadiths according to how closely the Hadiths can be traced to the Prophet.
5. The Idjma were the unanimous decisions of the legal scholars before the 10th century. Their decisions were based on their interpretations of the Koran and the Hadiths.
4. Qiyas were the juristic reasonings by analogy of the early legal scholars of the Muslim community. The anaological arguments gave the scholars means to interpret the Koran and the Hadiths and to adapt the law to adat.
6. Fiqh covers all aspects of religious, political and civil life in a Muslim community. It was a system of laws regulating ritual and religious observances, family laws, laws of inheritance, property and contracts, criminal law and laws for the administration of a state and laws covering the conduct of war. In older theological language, fiqh applied to the independent exercise of the intelligence, the decisions of legal points by the judge's own opinion in the absense or ignorance of a tradition (qiyas).

1.)

1. Shushtery, p.340 "The Shariyat, or the science of religion, consists of the study of tradition, jurisprudence, scholasticism and Sufism."

2. Maraini, p.39 "It covers all aspects of prayers and fasting, the law of purchase and sale, contracts and transfers, marriage and family law, the criminal code; war together with the moral-cum judicial regulations designed to make it more humane; the sharing of booty, the calculation of taxes and excise, sumptuary legislation, the proper procedure to be observed during sacrifices and the ritual slaughter of animals; rules for voting and oath taking, regulations covering court hearings and the rule of evidence, slavery and the manumission of slaves."
(as quoted from Bausani, p.329 in "Religioni Islamica" in Civilla dell Oriente, Vol.III

2. Maraini, p.39 There are five required ways to approach Allah in Islam. All should be observed the minimum number of times by all Muslims.

- 1.) shahada: the profession of faith
- 2.) salat: prayers to be performed five times daily
- 3.) zakat: almsgiving

6. cont.

"We have thus... a kind of popular element among the sources for the education of laws: the concept of Idjma (consensus) i.e. the general usage of the community, which has been established by agreement in the larger circles of believers independent of the written tradition or inferred laws."

The Shorter Encyclopedia of Islam

7. Elphinstone, p.483 "One of the laws of the Yasa forbids adultery. The inhabitants of Calader applied for and received an exemption on account of their old usage of lending their wives to their guests."

2.

urban areas that were directly under the control of the Amir of Kabul, and only in urban center and in the towns did the religion have a formal structure. The Imam served as the leader of the congregation of the Friday Mosque, the largest and most important mosque in urban areas. The title and position were hereditary. The Imam led the Friday prayers, gave the Friday sermon, expounded on the Koran and presided over marriage and burial rites. He received gifts of hereditary lands, waqfs, and sometimes was given fixed amounts of grain¹ by his community.

At the grass roots level the mullahs were the most common and influential members of the religious order, but in the urban areas the mullahs either served under an Imam helping with the various duties, or as a student of the Imam, learning the religion. They were for the most part, full time functionaries. Urban mullahs and Imams tended to be more highly educated than the country mullahs who often inherited only the position and a vague knowledge of the theology and the doctrines of Islam from their fathers.

The Talib-ul-ilm, a seeker of wisdom, was a student of Islam. They flocked to famous, leading mullahs and Imams as disciples. They were also wanderers of a religious nature, and the British found them to be "very ignorant and remarkably² bigoted."

The mohtesib was the religious policeman usually found in the urban centers and towns. According to Islamic law the mohtesib was an attendant at the law court, empowered to check

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1. Elphinstone, p.540

2. Raverty, p.304

3.

up on the observances of the religious precepts and duties of the court. He had only nominal authority. In Afghanistan he was a specialized mullah who had the duty of checking the morals of the public. The mohtesib visited the bazaars to find individuals who had forgotten their prayers and to beat them with sticks, or individuals who had never learned their prayers. Those individuals had their faces blackened, were placed sitting backwards on a donkey and paraded around the bazaars. The mohtesib was obviously one of the great bazaar entertainers and always had a large and enthusiastic following during his forays into the bazaar areas.¹ The mohtesib watched for the slightest breaches of religion, punished or fined the culprits² and sometimes took the opportunities given for extortion.³ He inflicted punishments with an upper limit of forty blows with a leather strap as prescribed by Islamic law.⁴ The mohtesib of the city was sometimes paid by the municipality and was entitled to a small tax on shops.

There was also a country mohtesib in Afghanistan who went on circuits around the countryside twice a year to inspect the conduct of the inhabitants. He levied annual fees from his communities for his services.

In areas under central control, justice was administered by the royally appointed gazis, muftis and the Darogha of the Adawlat. The Darogha of the Adawlat supervised the whole of city justice, but he and the courts were generally considered corrupt; justice was frequently interfered with by the great.

3.)

1. Martin, p.p.275-276
2. The concept of buying off a punishment was acceptable in Afghanistan according to a local informant.
3. Elphinstone, p.158
4. This limit was the accepted limit in Afghanistan according to a local informant.

4.

The gazi was appointed by the Amir and served as the judge of the formal religious courts. Afghan gazis were trained in Islamic centers in India and in centers north of the Oxus River. The powers of the gazis extended only as far as the control of the Amir, and they had little or no control over the legal proceeding within the tribes. The tribes had their own judicial traditions and institutions to meet their problems, and they usually considered it shameful to appeal to the Amir's judge.

The gazi was required by Islamic legal procedure to treat all parties equally as long as both of them were believers. An in-court confession by the defendant was considered final requiring no further proof from the plaintiff. Otherwise, the plaintiff was placed on oath and required to prove his case.¹ The judgement of the gazi was final, but all citizens had the option of appealing a decision to the local governor or to their Amir in Kabul. To insure the independence of the gazi he was formally forbidden from accepting bribes and from engaging in any form of trade.²

Qazis held court in all the controlled major cities and towns in Afghanistan, but their powers depended on the support they received from the local government officials and from the tribal leaders as they were the persons who enforced the decisions of the gazi. Tribal people only appealed to the gazi for civil cases or for unacknowledged crimes which the accused denied.³

4.)

1. Elphinstone, p. 522
2. See Levy, p.p. 339-347 for details on the formal duties of the Qadi.
3. Thorburn, p. 187 "Two men had a dispute and agreed to refer it for the Shariyat or decision according to Muslim law, before the qazi. On the way the defendant met a neighbor and said to him, 'Tell my wife that I have won.' 'How do you know before the case is heard?' asked his friend with surprise. 'Well, I'll deny everything the plaintiff says.' said the other simply." The plaintiff would be required to swear by the Koran, and he was expected to decline to do so as the defendant was sure that the plaintiff was not telling the truth and would not want to swear on the Koran an untruth. If the plaintiff did refuse, the case would be dismissed.

5.

The gazi never interposed unless an application was directly made to him.

Qazis were seldom paid by the treasury; they were usually paid by a tax that was laid on every family within the gazi's district. They also charged fees for attending marriages, for affixing seals on documents and for judging cases.

As the legal specialist of the court, the mufti was the counselor to the judge and the prosecuting attorney. He gave the fatwa, the formal legal opinion on a case to the judge or to any private individual who paid him for it. Shariyat was a canon law, and the fatwa were the precedents used to decide cases or to determine acceptable behavior that were not explicitly covered by the Shariyat. The judge could base his decision on the fatwa, and the individual regulate his behavior in precise accordance with fixed precedent.

As has been stated before, this religious and judicial structure had little effect on either the religion or the justice administered among the tribal Pushtuns beyond the control of the Amir of Kabul. The Pushtuns were Sunni Muslims and accepted their rawaj, their customary law, as the regulations that guided their behavior, rather than the religious precepts that were enforced in the towns. Their religion was folk rather than theological and centered a great deal around the worship of saints and zierats, holy shrines. They believed in magical charms, evil spirits and the evil eye. They accepted the holy men as intermediaries between themselves and the evil surrounding them. The British found them to be basically ignorant of the basic tenets of Islam and the Muslim doctrines, and, although they were regular in saying their prayers and in

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observing the fast of Ramazan, they did not understand the prayers they recited in Arabic, nor could they read the Koran as it was also only written and read in Arabic. "...more civilized Muslims are hardly willing to admit their (the Afghans') right to a place in the congregation of the faithful."¹

However, there was an informal religious structure and hierarchy among the tribesmen, and religion was one of the binding forces in their society. Every village had a mosque which served many functions in Pushtun society. It was the religious and educational center of the community; tribal councils were sometimes held in the hujra of the mosque, a small room, literally a cell, that was attached to the side of the mosque. Village guests often slept in the hujra, and at times the hujra served as the community social center.

There was a variety of religious personnel to serve the Pushtun communities: mullahs, holy man and malangs. Holy men were often keepers of holy shrines, but they gained their positions as such only through reputations for sanctity and piety and for serving as intercessors between man and Allah. They were often descendants of saints whose graves they cared for. Like the mullahs, they supplied the local populace with charms against evil spirits. They often served as spiritual advisers and as mediators within their communities.² Malangs also were keepers of holy shrines, but many malangs wandered around the countryside collecting alms. Malangs³ usually dressed in bizarre costumes and often behaved in an insane manner and were thought to be inhabited by beneficial spirits by the local population. Holy men were usually propertied and very

6.)

1. Pennell, p.33
2. See Barth for details on saints, their religious and political functions within the Swat Pushtun society.
3. This information is local knowledge in present day Afghanistan.

7.

wealthy and in places wielded a great deal of political power¹, whereas malangs were poor, lived on charity and wielded no political power.

Mullahs were the most numerous and the most powerful religious functionaries in the countryside. They were the religious leaders and authorities of their communities. Most were only part-time functionaries; they owned land, tilled it and distinguished themselves from the rest of their communities only by their religious leadership role. They were the class with a claim to knowledge and learning and could threaten the population with fire and damnation for not following their interpretation of the doctrines of Islam. They also held out the promise of eternal bliss in paradise for all warriors who died for Islam in a holy war, a Jihad which they could declare at their pleasure. As a group they were said to have power "greater than the throne itself."²

Naming ceremonies, betrothal, marriage, sickness and death all required the presence of a mullah.³ In the absence of an Imam, the mullah led the prayers and gave the Friday sermon. He whispered the creed into the ear of a newborn thus making a new Muslim; he performed the nikka, the formal marriage pronouncement, at both the betrothal and the marriage; he read the talqin, the special prayers of a funeral, over the dead; he attended circumcision ceremonies; he announced the times of the feasts and the fasts; he performed holy cures over sickness, blindness, insanity, etc. and composed charms to be worn as amulets against the evil eye and other evil forces. Lastly, he served as a mediator within the community as well as a

7.)

1. Thorburn, p.34 as quoted from Edwards, Chapter II. The Ulema, the religious saints and their descendents, held control of over one sixth of the land in Bannu District, and 44 of the 278 forts in the area were under their direct control. They paid no taxes and were known to put their savings out to usury.
2. Pennell, p.114
3. Pennell, p.115

8.

spiritual adviser, and often represented the community in outside negotiations.

Mullahs were known to be fanatical and not entirely incorruptible; a proverb taught, "Obey the mullah's teachings but do not go by what he does."¹ They preached against entirely innocent pleasures such as non-martial music, but when they were so absurdly strict, the population paid them little attention.² Their fanaticism reached the British in a very painful way; many British officers and civilians died at the hands of a young Pushtun who had been encouraged by a mullah and promised entrance into Paradise for killing an infidel. A Muslim who killed an infidel became a Ghaza and was automatically guaranteed admittance into Paradise.

Mullahs were the ultimate interpreters of Islamic justice within the community. Any Pushtun could, as a Muslim, appeal to the mullah for a religious decision on his case, but the mullahs were usually illiterate and ignorant of much of the Shariyat. Their decisions were, nevertheless, definitive, and even the Amir of Kabul would hesitate to give an order at variance with the leading mullahs.³ In the village administration of justice, however, the mullahs usually served on the tribal council, and there their opinions were expressed before the final decision was taken. On such a case, a dissatisfied party could not make another appeal to the mullah alone, but had to take the case to the nearest qazi.

Few cases were appealed to the qazi from the tribes as the tribesmen considered it shameful to appeal to the Amir's

8.)

1. North West Frontier Province Peshawar Gazetteer, Vol. A, 1931, p.142
2. Elphinstone, p.215 The mullahs were "... fond of preaching up an austere life and discouraging the most innocent pleasures. In some parts of the country, the mullahs even break lutes and fiddles when ever they find them. Drums, trumpets, hautboys and flutes are exempted from this proscription as being manly and warlike, but all other music is reckoned effeminate and inconsistent with the character of a true Muslim. This austerity is little practised by the people, and mullahs are generally restrained to censuring more important breaches of religion and morality."
3. Pennell, p.114

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judge. Among the Pushtuns the Shariyat was a law seldom referred to, but when it was, it had a compelling force. An appeal to a qazi was normally only made when the defendant denied the charges made against him, and once such an appeal had been suggested for a case by one of the parties involved, it could not be turned down.¹ Nor could the decision of the qazi be disobeyed as it was "reckoned impious to refuse to conform to the Shariyat."² The case was usually decided by the number and the political status of the witnesses that each party was able to rally; the more important the witness, the weightier the evidence he gave. Lying to save a friend or to hurt an enemy was accepted by the Pushtuns and, to a certain extent, in Islam,³ so the evidence brought by witnesses was generally useless and, at best, had to be carefully considered. Witnesses really indicated the political and social support a party had in his community, and political clout usually decided a case. Nevertheless, the decision of the qazi was final, and if any tribesman refused to stand by the the verdict of the religious court, the Amir's sirdar⁴ was authorized to use force to execute the decision.

Shariyat law had little force among the Pushtuns partly because they lacked a qualified personnel to advise them as to the law, to administer it and to enforce it. Their rawaj provided them with sufficient regulations to guide their behavior; their tribal institutions, which were suited to their way of life and morality, enforced it. In rare cases when there was no adat covering a technical question as to the rights of in-

9.)

1. Elphinstone, p.440
2. Elphinstone, p.327
3. Levy, p.200 "...speech is a means towards a certain ends. When a lawful end may be achieved by truth as well as by falsehood, then lying is forbidden. If, however, that end can be achieved only by the telling of a lie, then that becomes lawful; it is even imperative if the end is imperative." e.g. "...when the life of a Muslim is at stake or a broken alliance cannot be otherwise cemented."
4. Sirdars were the heads of the Durrani clans. It was a military title meaning General or Prince, but today it is exclusively used by male members of the royal family of Afghanistan. Governors of provinces and of sub-provinces were also called sirdars, as in the text here, but I could not determine if this was a new meaning to the title, or if Durrani Sirdars exclusively were appointed to those positions.

heritance, adoption or the alienation of land, or a question about adat, the mullahs' interpretation of the Shariyat was generally accepted as the ultimate source of law, but for more normal cases and for day to day living, the rawaj was the law which governed the Pushtuns.

Many of the requirements for Muslims in the Shariyat were loosely interpreted by the Pushtuns, or even ignored although they were fully aware of them. They simply adapted the Shariyat to their own way of life. In the Koran itself Mohammad commanded all Muslims to pay the poor dues, the zakat.¹ In order to give the zakat one must have the intention, niyyat, of giving alms, one must be a Muslim, mentally fit, a mature adult, and have the means to meet one's minimum needs, i. e. food, clothing, the means to provide oneself with transportation, furniture, a house, weapons and books for study. The individual determines his minimum needs in each of these categories. Property and income² beyond these items are taxed with taxes specified in the law. However, the Pushtuns interpreted the law loosely, and even stipends given to mullahs who were supported by tax free lands dedicated to the mosque (wagfs) were counted as part of the zakat.³ Money spent on hospitality, and, in some parts, the⁴ tenth of the crop given to the headman as tribute were both counted as zakat. However, alms were also given regularly by all classes to widows, orphans, the maimed, the blind and the⁵ aged.

Bribery was strictly forbidden in the Koran,⁶ but it occurred

10.)

1. The Koran, Ch. IX. v.60 "The alms are only for the poor and the needy, and those who collect them, and those whose hearts are to be reconciled, and to free the captives and the debtors, and for the cause of God, and for the wayfarer; a duty imposed by God."
2. Shushtery, p.447 For instance, for every 5 camels, one gives a sheep or a goat; for every 10-14 camels, 2 sheep; for every 20-24 camels, 3 sheep or a one year old camel; for every 25-35 camels, a two year old camel; for every 46 camels, a three year old camel; etc.
3. Elphinstone, p,214
4. Dichter, p.59 "One tenth of the produce of the village is given to the wali as tribute and is considered fair and just and according to the tenets of Islamic law as the zakat."
5. MacGregor, p.313
Gazetteer of the Peshawar District, 1897-1898, p.111
6. The Koran, Ch.II v.188 "...nor seek by it (your property) to gain the hearing of the judges that ye may knowingly devour a portion of the property of others wrongfully."

11.

frequently. Abuse of office and the acceptance of bribes were seen as "the customary symbols of administrative power."¹

During his reign Abdur Rahman tried to stop the sale of public offices, but he was powerless to stop bribery and the acceptance of bribes. As long as officials continued a judicious flow of favors, their crimes were never caught. In addition to the corruption in the government, the courts and the religious structure, bribery also existed outside the cities in the tribal areas. Tribes that were responsible for the safety of certain passes often conveniently kept out of the way as mauraders raided passing merchants; the tribesmen, of course, received part of the booty. Sometimes merchants had not only to buy a safe conduct through tribal territory, but they had to bribe their way through the area as they met individual bands of the tribesmen.²

The injunctions against usury³, gambling⁴, and adultery⁵ and the prohibitions against intoxicants⁶ were not strictly obeyed by the Pushtuns. It was the mullahs and the Sayeds, descendents of the Prophet according to Afghan belief, who usually practised usury.⁷ Games of chance were frequently enjoyed,⁸ and the guest house was an institution set up in the villages for such amusements as well as for its other functions. Adultery was strictly forbidden both in the Koran and by the rawaj, and by tradition, it was punishable by death, but by all accounts it was commonly practised. In Ghazni area the seduction of a virgin was not considered a very serious crime, and monetary compensation was usually accepted, but the seduction of a married lady was more serious, and it was only forgiven if a

11.)

1. Hamilton, Agnus, p.271
2. Ferrier, p.91
3. The Koran, Ch.II v.275 "They said that trading is just like usury, while God allows trade and forbids usury."
4. Ch. CXI v.129 "Do not eat (take) usury in compound interest."
4. The Koran, Ch.V v.91 "Intoxicants and games of chance (before) idols and divining by arrows are uncleanness (and) the devil's work, therefore, abstain from them."
5. The Koran, Ch.XVII v.32 "And come not near into adultery. Lo! it is an abomination and an evil way."
6. see footnote #4
7. Elphinstone, p. 214, p.217
Edwards, p.70
8. North West Frontier Province Gazetteer Peshawar District, 1931
P.152 "The Pathan is a born gambler." The source cites quail fights upon which some Pushtuns were betting up to 300 rupees. Betting on dog fights was also common.

12.

men in the lover's family divorced a wife to be given in marriage to the jilted husband's family.¹ Women were more severely dealt with; they were usually killed by their husbands, and it was not uncommon among most Pushtuns, that the lover would also be straightway murdered if caught. Despite the severity of the rule and of the punishment, it seems that there was a great deal of illicit activity among the Pushtuns, and it was tolerated until it became the subject of common gossip. The extreme suspicions harbored by Pushtun men against their women indicated a certain amount of grounds for the suspicions, and proverbs also indicated that there was common adultery.²

Although Koranic law only mentions intoxicants as a whole, the Pushtuns, like most of the rest of the Muslim world, generally accepted drugs while they forbade the use of alcohol. However, in Afghanistan, although alcohol was taboo, the rich were able to line the pockets of doctors who were willing to prescribe it as a cure for their ills.³ Abdur Rahman took advantage of the lucrative aspects of alcohol and established government wine, whiskey and brandy factories for export into British India. Drugs were considered lawful but were not entirely socially acceptable.⁴ Chars, hashish, and opium were both smoked for medicinal purposes and were otherwise consumed "...only among the abandoned and debauched who are pointed out as disreputable characters and a disgrace to their names."⁵ Bang was another native intoxicant that was consumed by the Pushtuns. It was made of a mixture of chars, milk, almonds and sugar, and either eaten in a candy form, called mofara, or drunk as a liquid.

12.)

1. Information from the Malekiyar family of Ghazni area.
2. "A Kabul woman in Burka cover
Is never known to be without a lover."
"The farmer's wife is seen by everyone."
3. Ferrier, p.151
Bellew; Journal, p.31
4. North West Frontier Gazetteer Peshawar District, 1931
p. 146 "The consumption of opium And chars is regarded as
vicious. Bang, wine, spirits, etc. are hardly consumed at
all. The Pathan is, on the whole, very temperate in these
matters.
5. Gazetteer of the Peshawar District, 1897-1898, p.103

13.

Temperate use of drugs was apparently unknown, but, by all indications, use was widespread among the lower class in the bazaar areas. Only in Swat Valley did any Pushtun admit to the consumption of charrs by women.¹

It seems that prayers were socially important to the Pushtuns, and it was said that it was less dangerous to offend a Pushtun by annexing his property or by taking his life than to accuse him of omitting to bow to Allah the five appointed times a day.² Although this statement is exaggerated, prayers were important observation in Pushtun society, and Pushtuns generally prayed in places where their pious activities would be noticed by others. The Bannuchis were reputed to cease their prayers as soon as they were out of reach of their social environment.³ Furthermore, the observance of prayers was enforced by the mohtesib who was authorized to discipline any person who failed to pray at the appointed times.

Oaths were frequently taken and broken among the Pushtuns, and even oaths taken on the Koran had little binding power. Abdur Rahman observed that the Koran was used more for the taking of oaths, taken between friends and brothers, than it was for the purposes of religious instruction, and that these oaths were usually disregarded.⁴ Among the Pushtuns the most binding oath that could be taken was sworn on the individual's honor.⁵ Koranic law, however, holds Muslims responsible only for oaths sworn in earnest, with niyyat, and not for those sworn without the intent of fulfilling them.⁶ Pushtuns took oaths and lied freely in order to save a friend or to harm an enemy.⁷ Well told lies were not only acceptable but brought with them

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1. Information from George Getley from Swat Valley.
2. Grey, p.96
- 3.
4. Mir Munshi, p.262
5. From a local informant.
6. The Koran, Ch.V. v.89 "Allah will not take you to task for that which is unintentional in your oaths, but He will take you to task for the oaths which ye swear in earnest."
7. Gazetteer of the Peshawar District, 1897-1898, p.103
Census Report of the Tribal Areas, p.1-218

14.

social prestige to the liar, while a poor liar lost social status.¹ A Pushtun proverb said, "Either a strong man or a fool tells lies."

In Islamic law slavery was allowed but the manumission of slaves was greatly encouraged.² In Afghanistan slaving was justified on the basis of religious differences, and the Sunnis enslaved the Shi'as, and the Muslims enslaved the Kafirs. Slaves were common in the valley settlements, and they usually lived in a khan's house performing household, farm, agricultural or vocational labor. They were fed and clothed by the khan and were normally comfortable. Female slaves, windza, were used as concubines, but they often rose to favor, were freed and then legally married by their former owners.³ Khans in the Peshawar Valley area sometimes employed their windza "...to add spice to the life of distinguished visitors, though their sexual services are apparently monopolized by their owners."⁴ They were used as singers and dancers.

Slaves usually ate with their masters, did the same work as freemen and were allowed to own property. Their masters were expected to give them presents and to buy them wives. Slaves usually married the daughters of slaves, and the owner of the slave girl was entitled to the bride price, but he usually gave it to the girl's father, or even to the girl herself. Slave craftsmen were allowed to sell their goods to customers after they had supplied their owners with the requisite number of goods. Often masters agreed to free their slaves after a certain number of years, and the magistrates of the area enforced these contracts.⁵ Slavery was officially abolished in Afghanistan in 1895.

14.)

1. Thorburn, p.323 "A well told lie, when successful, that is, when believed, greatly supports a man's cause and is very creditable to the teller. As a rule no Bannuchi is ashamed of himself for telling a lie, but only when he tells it so clumsily that he is found out. In the latter case only public opinion will condemn him."
2. The Koran, Ch.XXIV. v.33 "And such of your slaves as are seeking a writing (of emancipation) write it for them if ye are aware of aught of good in them..."
3. MacGregor, p.301
4. Barth, p.p. 49-50
5. Elphinstone, p.p.243-245

Thievery is condemned in the Koran, but rapine was common enough in Afghanistan, and it was hardly looked upon as a crime by the tribesmen. It was, in fact, regulated by commonly recognized rules. During a robbery the victim was never killed once he had ceased defending his goods.¹ Killing intentionally was equally condemned in the Koran,² but any Pushtun who, in a matter of honor, refused to kill another man, was not considered a Pushtun.

The picture that emerges of the Pushtun religion is one of an animistic folk-tribal religion imbued with some of the Muslim tenets and rituals. Their practices were superstitious and dominated by the worship of saints and local shrines. They obeyed only those Islamic laws which fit into their tribal life. Islamic ritual rather than law was the Pushtun practice of Islam.

However, they accepted Islam as a social bond in their society, accepted the religious functionaries as leaders and obeyed them. The fact that they were Muslim was extremely important to them, even though the great majority, like the Afridi, "...knows little and cares less for the tenets and the doctrines of the faith he professes. It is probable that when the religion forms an excuse for plunder and a breach of faith ... that an Afridi considers himself in any way bound by the Koran."³ Islamic law was usually only evoked by an individual who would benefit from its application, and, even then, it was not considered an honorable action. Rawaj was the meaningful and honorable law for the Pushtuns.

In the first attempts to modernize the administration of justice, the attacks by the central government aimed at the

15.

1. Elphinstone, p.230

2. The Koran, Ch.IV v.93 "Whoso slayeth a believer of set purpose, his reward is Hell forever. Allah is wroth against him and He hath cursed him and prepared for him an awful doom."

3. Shadwell, p.6

powers of the religious establishment. Abdur Rahman first claimed the position of religious leader of the country for himself. As the definitive religious leader, he claimed the right to the final interpretation of Islam and the Islamic laws, stating that such a power was necessary if he was to preserve the purity and the orthodoxy of the religion. He attempted to deny the religious establishment at any level the right to call a jihad, asserting that he alone had the religious authority to do so. He denied the religious establishment the right to prescribe the duties of the monarch. As leader of the religion he wrote numerous pamphlets and tracts on theoretical questions.¹

Abdur Rahman substantiated his claims by attempting the nationalization of wagfs, an act designed to deny a large part of the religious structure its income. He legally placed all religious functionaries on government salaries, making the mullahs and the others little more than state employees dependent on the state treasury. It is important to note, however, that most mullahs were part-time farmers and, therefore, economically independent and unaffected by his legislation. He legally required all religious personnel to take and pass state examinations to prove their competence and to justify their employment by the state.² Abdur Rahman used his monetary control over the mullahs to help control the tribes. In the Ghilzai rebellion of 1888, the mullahs were deprived of their stipends for condoning the rebellion and for failing to preach obedience to the Amir.³

The Amir's actions were without precedent in Afghanistan, and were, for the most part, unsuccessful. The central government did not have the power to so severely disrupt the tribal

16.)

1. Gregorian, p.135
2. Mir Munshi, p.252 "...salaries would be paid to those only who performed services according to their merits, and they would have to pass certain examinations to prove their right to be paid."
3. Gregorian, p.136

way of life. Amir Abdur Rahman's steps against the power of the religious establishment were only a continuation in the century old struggle of the government of Kabul to assert its administrative control over the areas occupied by many of the Pushtuns and other ethnic groups as well.

II

As rulers of a Muslim state and of Muslim peoples, the functions and the powers of the Amirs of Kabul were theoretically rather confined. While Muslim rulers embody the police powers of the state and are responsible for the supervising of and the exercise of judicial functions, they are seen as administrators of the divine law which they have no authority to revise or to change.

However, in Afghanistan in the 18th and 19th centuries, the powers of the Amirs of Kabul were curtailed not so much by Muslim theory as by the independence of the various Pushtun tribes and ethnic groups of which they were the theoretical head. A major theme that can be seen throughout Durrani history is the continual struggle between the centralizing government and the independent tribes. The power of the government to tax the tribes was an indication of the strength or weakness of the central government. The Kabul government had no control over the hill tribesmen except an ability to incite them through the mullahs and rumored political agents to activity against the British. Even the British could not control or conquer these tribes and either left them completely alone or placed a political agent in their territory to act

17.)

1. See Gregorian for a detailed historical analysis of the modernization of Afghanistan as seen from mostly government levels.

18.

as a mediator between the British in the valley and the tribes in the hills. Before the British, the Sikhs also had had great difficulty in exercising any control over the tribesmen and never succeeded in taxing them.

In Afghanistan Ahmad Shah (1748-1773) was successful in his policy of diverting the energies of the tribesmen towards a policy of outward expansion. He first gained their loyalty when he liberated large areas from Persian rule. Using energies that would have otherwise been directed against a central government and in inter-tribal warfare, he organized a large and effective army and conquered an empire that stretched from the Oxus River to Delhi, from Little Tibet to the Arabian Sea, included Kashmir and held Persian Khurasan as a tributary state. However, Ahmad Shah did not succeed in creating a strong central government independent of the tribes and ethnic groups; his empire collapsed after the reign of his son Timur Shah (1773-1793). Ahmad Shah's government was basically a tribal confederation only loosely joined by a charismatic leader, and the real powers were the tribal chieftans who remained opposed to a strong central government.

Timur Shah was able to maintain his position as head of the empire his father had created by pursuing a system of alliances with various ethnic groups and successfully balancing inter-tribal rivalries. He married daughters of influential leaders around the empire and continued his father's policy of building a strong standing army loyal to the throne.

After Timur Shah Afghanistan was plunged into a period of civil war and anarchy. The attempts to create a unified

19.

empire from diverse and intensely independent people failed. Ruptures in tribal alliances destroyed the balance of power that had allowed the central government to develop in any form in Afghanistan. The instability of the government of that time and the growth in the strength of the tribes severely disrupted trade with the consequence that the strength of the central government was further decreased from the loss of revenues. The country lapsed into a period of regionalism in which tribal leaders became supreme powers.¹

Dost Mohammad was the next strong ruler of Afghanistan. He bridged the first Anglo-Afghan War, ruling from 1826-1838 and from 1842-1863, and had the task of pulling together an Afghanistan that was suffering from the consequences of years of regionalism, inter-tribal warfare and a lack of trade. He pursued tribal alliances through marriage, successfully played the tribes off one against the other to his own advantage, and sought and received British aid in his attempts to strengthen his army. But, he did not succeed in overcoming the independence of the tribes and failed to create a lasting government; at his death the kingdom again plunged into civil war.

After the Second Anglo-Afghan War (1879-1881) the British helped Abdur Rahman (1881-1901) to the throne. He used all the policies of his predecessors in attempting to form a powerful central government. He used the tribes' energies to conquer or re-establish Afghan sovereignty over various rebellious tribes such as the Hazara of the central mountainous region of Afghanistan; the Ghilzai, a major Pushtun tribe, partly nomadic and partly settled, of the Ghazni region; and the Kafirs,

19.)

1. Mir Munshi, p.217 "...every priest, mullah and chief of every tribe and village considered himself an independent king, and for about two hundred years past the freedom and independence of those priests were never broken by their sovereigns. The Mirs of Turkestan, the Mirs of Hazara, the chiefs of the Ghilzai were stronger than their Amirs, and as long as they were rulers the King could not do justice in the country. Every chief, official, prince and the King himself had parties of assassins and large numbers of hired robbers and thieves and as the robbers used to kill travellers, traders and other rich merchants of the country, and plunder their property and money, that stolen property was divided between employers and employed."

The two volume "autobiography" of Abdur Rahman was originally attributed to him, but today the authorship of the volumes is being questioned. It is generally agreed upon that the first volume was dictated by the Amir to his secretary, Mir Munshi and that the information contained in it is a reasonably reliable source of the Amir's public point of view and that some of the facts surrounding his life are reliably reported.

20.

the pagans of the area now called Nuristan, the land of light. In conquering the Shi'a Hazaras and the Kafirs he used his newly claimed powers of calling a jihad against the infidels; in conquering the Ghilzai he manipulated tribal rivalries and hatreds. He concentrated much energy on building a central army that would be loyal only to him, and he received some British advisers and weapons to help him.

The major problem of the Amir was making a nation out of tribes who by their very nature could never become part of a nation in the modern sense. The very existence of Afghanistan in the 19th century as a political state depended on two factors: the power and personality of its leader and his ability to unify centrifugal forces; and, the attitudes and politics of the two major powers outside of Afghanistan, Czarist Russia and British India. The 19th century's two strongest leader in Afghanistan, Dost Mohammad and Abdur Rahman, both followed a British invasion and retreat, which itself had been, in large part, a reaction to threatened invasion from the north on the part of the Russians.

The ability of the Amir to control the volatile energies of the tribes determined the amount of power he was actually able to wield, but there were many theoretical powers vested in the position of the Amir. The Amir, in theory, assumed the position of general superintendent of the nation with powers to coin money in his name, to wage war and to negotiate treaties with other tribes and nations. He assumed all rights over conquered lands, but he could not cede any territory occupied by Pushtuns. Appointments were granted by him as favors, but he was often limited by tradition and his needs

21.

for alliances with the powerful elements of the population, to the choice of members of one leading family. The Amir had ultimate control over the collection and the expenditure of revenues, but he was powerless to directly increase the land taxes, nor could he revoke the grants of his predecessors. However, he could increase revenues through fines, conscriptions for military service, and through the arbitrary evaluation of the produce of the land which was also taxed. Control of conscription and of the armies was vested in the Amir.¹

Each Amir differed in the actual amount of power he was able to wield over his nation. Originally, much of the power of the Amir lay in the support he received from the Durrani tribe of Kandahar, the conquering and ruling tribe of the empire. Ahmad Shah was the elected monarch of the Durrani tribesmen,² and as such, he was dependent on the goodwill of the Durrani Sirdars. In both his roles as military commander and as civil ruler he consulted his majlis, a council composed of nine important Durrani chieftans. Although the Amir formally appointed the members of his majlis, he was tied by the fact of his political dependence on the tribe, and his choices were automatic. In fact he never disagreed with a decision of the majlis.³ Ahmad Shah also granted hereditary offices to powerful Durrani families, losing both control over the families as they were assured of their positions in the government and of the positions they held.

The Durrani supported the crown because of the many privileges the tribe gained. The most important of these were the large tracts of land they were granted by the crown. These lands

21.)

1. Elphinstone, p.p. 512-514
2. The Barakzai and the Populzai were the two major subtribes of the Durrani Pushtuns, a group that had a reasonably developed feudal system. In a power struggle in the middle of the 18th century, Ahmad Shah of the Saddozai clan of the Populzai subtribe was elected ruler of the Durrani tribe. The Saddozai were a weak clan, and it was thought that Ahmad Shah could be controlled by both the elders of the Barakzai and the Populzai subtribes; he was their compromise candidate. His election was due to his personal and political acumen, to his repute for valour and, finally, to his position as leader of the Saddozai clan.

The Durrani aristocracy held lands from the crown, much of it given to them by Ahmad Shah during his age of conquest, in exchange for military levies. These lands were tax free. The military structure went along ~~with~~ the tribal divisions so that the head of each clan commanded the contingent that he had furnished. The tribal power structure was greatly enhanced with this system, leaving the Amir very much subject to the control of the tribal chieftans; the Amir was not allowed to punish any Saddozai, and in all probability, Ahmad Shah did very little harm to any of the other Durrani clans. Much of the history of civil war in Afghanistan during the 19th century centered around the rivalry between

21. cont.)

the Barakzai and the Populzai and the Seddozai.

3. Ganda Singh, p.348

were situated around Kandahar, the original capital of the Durrani empire, and were tax free. In return for the land, the Durrani supplied the Amir with contingents of soldiers. However, as another privilege, the soldiers they sent remained in their tribal groups that they had come from, so that a tribal leader commanded the troops he had sent; the loyalty of these soldiers never really turned towards the crown but remained towards their own tribal subdivisions. Non-Durrani subtribes were granted insignificant amounts of land, but, nevertheless, paid taxes on them and even had to furnish fifty to sixty per cent more troops than the Durrani.¹

Ahmad Shah attempted to tax other tribes in his kingdom, but he was strongly resisted by the tribes.² He sent government officials to collect taxes from the tribes, but the tribesmen insisted that collection should be through their own tribal institutions, and that the taxes should be paid to the government through their own tribal chieftans. The tribesmen strongly resented any government official and insisted that if they had to pay taxes to a government, they would do it their own way. Some tribes paid taxes on land; the taxes varied according to the quality of the land. Others paid taxes on produce, and still others paid fixed amounts as tokens of allegiance to the Durrani government.

Ahmad Shah was a powerful monarch in that he was an initially liberating and then a conquering monarch. His major policy and aim was to create a standing army "which would at the same time make the monarch largely independent of tribal support, bind his vassals and Afghan soldiers to him in personal loyalty and give the tribes a more suitable outlet for their energies

22.)

1. Gregorian, p.p.46-47

2. Ferrier, p.396 Fifty years later the situation was approximately the same; "Taxation in Afghanistan is regulated by a struggle between hand and power; it is always the result of a forced transaction and never, on the most moderate scale, is willingly paid."

23.

than inter-tribal feuds." He chose a policy of expansion, and with a "judicious distribution of the newly acquired lands" tried to cement firm relationships between the tribes and the monarchy.¹ But, his land distributions to the Durrani weakened the power of the central government, and the personal loyalty he sought could not be inherited, and his empire ultimately collapsed.

Timur Shah inherited the basic problems that plagued all the Amirs for the next several generations: the tax privileges and hereditary offices of the Durrani, and resistance of the tribesmen to any kind of government control especially in the form of government taxation. He attempted to change the system of hereditary offices in powerful Durrani families in order to gain back some control over those families. He minimized the importance and the responsibilities of those offices and established new non-hereditary positions for men who would owe their position and, therefore, their loyalty directly to him. He moved the capital of the empire from Kandahar, the seat of Durrani power, to Kabul. He made Peshawar the winter capital in an attempt to control the revenues of that rich trading city and, to a certain extent, in an attempt to gain some control over the hill tribesmen. Because of his need for tribal levies to resist the rising Sikh power in the south, Timur Shah was unable to revoke the tax privileges of the Durrani. The main burden of taxation was left on the non-Pushtun and urban groups whose very support he needed to undermine the power of the Durrani.² He remained, like his father, tied to the decisions of his

23.)

1. Gregorian, p.49

2. Gregorian, p.50

Durrani majlis.

Following the reign of Timur Shah, the central government was not able to control the tribes, let alone tax them; neither was it able to control its own tax and customs officials. By the 1820's the tribes were imposing customs duties independently of the central government. The Khyber pass was an area that the government not only could not control, but, in order to keep it open for travellers and merchants, the government had to pay the Afridi, the tribe in the pass.¹ The Ghilzai levied transit fees on all caravans on the Kabul-Kandahar route and collected high entertainment and hospitality fees as well.² The Mohmands, the Waziris, the Shinwaris, the Suleiman Khel, the Achikzai and the Nurzai all imposed head taxes and customs duties on all travellers and traders. Trade caravans from Bokhara to India were taxed on the average ten times in Afghanistan, and there were additional taxes to pay at Kabul and Ghazni. Even personal effects, such as caps, cloaks and teacups were taxed. Cash was taxed, but the percentages taken varied with the religion of the tax payer.³

Dost Mohammad inherited this regionalized, uncontrolled kingdom in 1826 when he emerged the strongest of a number of contenders for the throne. He established a new royal family, the Muhammadzai clan of the Barakzai subtribe of the Durrani, to a certain extent breaking the traditional alliances and power structure in the Durrani tribe. In 1826 he held only a small proportion of Afghanistan, and in his attempts to assert his authority over a greater area, he curtailed the power of the rival Durrani clans and concentrated political power and administrative control in the hands of the Barakzai.

24.)

1. Gregorian, p.55
2. Gregorian, p.54 The taxes paid were: 4 rupees per camel, 2 rupees per donkey, 40 rupees for entertainment and hospitality.
3. Gregorian, p.59 Armenians had to pay one tenth tax on their cash, Hindus one twentieth, and Moslems, one fortieth of the cash they carried.

25.

He used strategic intermarriage as a technique to cement tenuous alliances with potential rivals. His powers were limited, but he used them well in extending and consolidating Barakzai control over the kingdom.

He was somewhat successful in forcing some of the tribes to pay taxes to the central government. He did not, however, attack the Durrani tax privileges, although he did tax their humsauyehs.¹ He planned a tax reform that did not materialize. The income of the state at that time relied heavily on revenues from the urban areas, and only twenty percent came from land taxes,² an indication of both the strength of the Durrani and the freedom of the tribes.

Abdur Rahman has the reputation of being the most powerful of Afghan monarchs, a reputation he gained by his excessive and brutal use of force. Like his predecessors he used intermarriage,³ threats, bribes and force to gain the support of the tribes. He claimed and then used his religious influence as the formal religious leader of the country, his army and ruthless brutality to establish order in the country. He claimed divine sanction to his rule and the divine right of Kings. This was a radical departure from the traditional notion that the power of the monarch derived from the sanction of the tribes.⁴

He came to the throne heading a military alliance of northern, non-Pushtun elements and some Ghilzai, and he asserted that he was their leader only at their express wish. In establishing himself he consulted his tribal army on almost every important question. In his eyes, his method of consultation was designed to give the tribesmen the impression that either

25.)

1. A humsayeh was a client to the tribe, generally enjoying protection, but was allowed no part in decision making.
2. Gregorian, p.80
3. Mir Munshi, p.201 Abdur Rahman issued orders to all chiefs of all the tribes urging them to keep peace and to treat their subjects kindly; "If they did this they might expect in return kind treatment, rewards and royal favors from me..."
4. Gregorian, p.130

26.

they had made the decision or that they had voluntarily empowered him to make the decision. He, however, really held the power.¹

He was reasonably successful in centralizing taxation in the areas that he controlled. He stated that:

One quarter of the money which is rightfully mine, I get without trouble; one quarter I get by fighting for it; one quarter I do not get at all; and those who ought to pay the fourth quarter do not know into whose hands they should place it. (2)

He often used the issue of taxation as an excuse to invade and conquer independent tribes.³ Once conquered rebellious tribes were forced to pay taxes, and sometimes even back-taxes.

Abdur Rahman also legislated some tax laws, writing up traditional ones, changing some and creating new ones. The khanwari was a universal house tax, and even mullahs and Sayeds⁴ were subjected to it. Birth and marriage taxes were legislated with a tax of four rupees for the birth of a boy and two rupees for a girl, and a tax of ten rupees for a marriage with a virgin and five with a widow. The rahdari, the 'passport' required for all travellers within Afghanistan, was a method of taxing travellers as well as a way of limiting and controlling travel. The land tax was one third of the produce from stream irrigated land, one fifth from spring watered land and one tenth from land watered from subterranean sources.⁵ Polls were abolished, and standard import and export duties were established. These taxes were only applied to the controlled areas and did not affect the tribesmen very much, but they were effective in enough areas that the income of the government

26.)

1. Mir Munshi, p. 190-192 Abdur Rahman consulted his army about his relations with the British. One time he read them a letter that he had received from the British, and "...as it was the beginnings of my relations with the British I did not think it wise to reply to it before consulting with my army... I also considered that the opportunity had arisen which would prove to me how much authority they gave me in my foreign relations." He asked the chiefs to compose answers, and then he rejected their proud and defiant responses. He composed one himself "...before 700 Uzbeks and Afghans" and asked for their approval of his polite, evasive and legalistic letter. "They invested me with full authority to write what I thought fit."
2. Mir Munshi, p.88
3. The Amir's conquest of the Shinwari is a good example. In 1882 the Amir took control of the roads that were traditionally under Shinwari jurisdiction. The Shinwari sent a council to the Amir to negotiate the problem. The second council that the Shinwari sent, the Amir summarily executed. The Shinwari became truly incited and began attacking trade caravans. In 1883 the Amir introduced the sey-kob (one third) tax on land produce which the Shinwari refused to pay. They fought the Amir's invading troops, were defeated, and many

26. cont.)

Shinwari were jailed. Tribal councils were sent to the Amir, but he refused to negotiate. For the next few years there were constant skirmishes between the troops and the tribesmen, and the Amir stopped the allowances given by the government to the mullahs. In 1886 some of the Shinwari clans agreed to pay the sey-kot and to retain a gazi in their area, but others refused to give in. The Amir sent a council to negotiate, and the Shinwari executed it in revenge for their murdered council and in retaliation for the way that the Amir's troops had been treating the Shinwari women. After several more years of struggle, the Shinwari finally submitted. Taxes were levied, lands measured and a gazi installed. By 1892 the Amir claimed that the Shinwari were settled.

4. A sayed is technically a descendent of the Holy Prophet, but in Afghanistan it is and was common to call all people of Arab descent Sayeds. They usually held and still hold special rank in their communities even if they were poor. A Sayed must be respected.
5. Gregorian, p.122

27.

¹
increased.

Abdur Rahman created two councils, both without any real power, to placate the major elements opposed to his centralization. The Khilwat was a Royal Council composed of the most powerful tribal chiefs. Under the guise of giving the tribal leaders more power, he actually only kept them in Kabul under his watchful eye. The only function of the council was to execute the will of the Amir; it could only advise the Amir when requested, and even then, it never disagreed with him.² The Darbar Shahi was an assembly with three different types of representatives: the Sirdars were mainly members of the royal family or powerful Durrani aristocrats; the Khawanin Mulki, the "commoners" were landed proprietors and important khans; the mullahs were important religious dignitaries. The selection of the members of the Darbar Shahi was subject to the approval of the Amir, and the assembly had no legislative or executive power; it also could advise the Amir only when asked, and it too invariably agreed with him. Both assemblies had one major function: to keep all powerful persons dangerous to the Amir in Kabul, away from their power bases and under the control of the Amir's elaborate and effective spy network.³

During the 19th century the structure of the local government in the provinces changed little, although under Abdur Rahman a few more offices were added. The power of these royally appointed government officials waxed and waned with the power of the central government. 18th century local governments under Ahmad Shah and Timur Shah were different in the rather fundamental aspect that the local governor under Ahmad Shah appointed his own local officials, whereas under the Amirs of

27.)

1. Gregorian, p.142
2. Poullada, p.105
3. Mir Munshi, p.259 "There is no country in the world, perhaps not even in Russia, where there are so many spies and such a perfect Detective Department as in Afghanistan. Every house is believed to have a spy; a wife is afraid of her husband being sent as a spy on her; and the husband is afraid of his wife. There are not wanting many instances where children report against their parents... In fact, there are hundreds of cases of this kind in which sons, relatives and dearest friends betray a suspected person, who being proved guilty is punished, and the spies are rewarded by the Amir. This is a great cause of terror; everyone fears everyone else."

Abdur Rahman claimed that no person of importance could move about in Persia, Russia, India or Afghanistan without being noticed and brought to the attention of himself.

28.

the 19th century, the local governors did not have the powers of appointment for their major officials. For the most part in both centuries the central government only had the power of appointment over the local government officials, and because communications were so slow, local governments were quite independent. Their powers were restricted to the areas controlled by the Kabul government.

Ahmad Shah divided his territory into vilayats which were in turn divided into mahals. The Naib-ul Hakumat, the governor of the vilayat, was appointed by the Shah and served as the representative of the Shah. His duties were to maintain the peace, to pay regular amounts into the State treasury after deducting the expenses of the province. He could not give the death sentence, nor could he reduce the number of troops maintained in his territory. He appointed the subordinant officials, but a Sirdar, appointed by the Shah, commanded the troops. A gazi administered the justice; a kalantar commanded the forts and local garrisons; and, a bagir and a mudir-i gumarkat collected the revenues.¹ These officials exercised power only in the small areas surrounding the towns and urban centers that were under the Shah's control.

In the early 19th century the local government structure had changed somewhat. The kingdom was then divided into twenty-seven provinces, eighteen of which were considered important enough to have a hakim of royal appointment. The powers of the hakim included the authority to collect the revenues, a privilege they usually farmed out, and to command the local militia. The sirdar was either a subgovernor under the hakim serving as the commander of the regular troops, or he was the

28.)

1. Ganda Singh, p.354

governor of one of the other nine, remaining provinces. The sirdar was also a royal appointee. As governor of a lesser province, a sirdar never resided in his province, but only went there once or twice a year to collect what revenues he could from the tribes. At other times the countryside was left to the authority of the tribal leaders. In some areas the sirdar held enough power to make nominations for the leadership positions in the tribes, but his nominees had to come from the head family of the tribe. In provinces where the hakim was a Surrani, he served as the sirdar as well.¹

Both the Amir and the local governors served as courts of appeal in the administration of justice.² One of the most important functions of a Muslim ruler was keeping open court to which any and all could appeal for justice. Until the time of Abdur Rahman only tribal and religious institutions administered justice, and the only real control the government could exercise in legal matters was in the appointment of qazis and in their courts of appeal. Under Ahmad Shah and Timur Shah even the police were under the jurisdiction of the Ministry of Justice, which was a religious institution and under the control of religious leaders. Qazis were also under the jurisdiction of the Ministry of Justice, and control over them and the Ministry itself changed as the strength of the government changed.

The police were centralized only when the central government was strong enough to control them. Under Ahmad Shah police functions were either carried out by the mohtesibs or by his military which was directly under his control.³ Central control weakened in the following period of anarchy, and different

29. cont.)

the injured or to alleviate the suffering of the distressed."

3. Ganda Singh, p.353

29.)

1. Elphinstone, p.173, p.521
2. All Amirs kept open court, and it was said that any person simply by going through a prescribed ritual could command the attention of any ruler.

Mir Munshi, p.225 "The system of administering justice was such that the most humble were able to bring their claims before the sovereign by the simple process of getting hold of the sovereign's beard and turban, which meant to throw one's complaints on the shame of his beard, to which he was bound to listen."

Ferrier, p.158 "From the peasant to the highest functionary everyone has ready access to Yar Mohammad; he gives up six hours of every day to hear the complaints and to listen to the petitions of his subjects, and deals out prompt, equitable and severe justice to all."

Gregorian, p.78 of Dost Mohammad "...ever ready to listen to (the peoples') complaints and redress their grievances, he seldom rode abroad without being accosted by a citizen or by a peasant waiting to lay before the Sirdar a history of his grievances or his sufferings and to ask for assistance or redress... (The Amir) gives directions to his attendants to take the necessary steps to render justice to

segments of Afghan society developed their own policing systems. Each monarch had his own secret police and spies, but they only served political purposes.

Elphinstone found in 1809 that the police were corrupt and weakly controlled.¹ He claimed that they committed the greater part of the robberies in the towns, and that the position of policeman was so highly lucrative that the positions were farmed out to the highest bidders.² The police of the towns were managed by the sirdar and under him, by the mirshub. The mirshub headed the kishikchees, watchmen posted around the town. They did the rounds at night, taking up "...thieves, disturbers of the peace and offenders against morals."³ Another guard of the towns was the kilantar; every street had its kilantar whose duty was to report to the kotwal, the city magistrate, all births and deaths on his street, to keep order among the inhabitants, to keep the street clean, and generally to govern it. He was responsible for order on his street. The efforts of the guards to keep order in the streets were supplemented by the mohtesibs.⁴

The kotwal of Kabul served as the equivalent to the Head of the Police and the Judge of the Criminal Court in Kabul, and as the Chief of the Intelligence Department. It was, obviously, a very powerful position. Every town under the Amir's control also had a kotwal of the Amir's appointing. On the local level the kotwal was the city magistrate whose duty was to oversee all the affairs of the city including supervising the police, trying all civil and criminal cases that were brought to him, conducting tortures and extracting

30.)

1. Elphinstone, p.529 "The police is after all very bad. In many parts of the kingdom, travellers enjoy security by engaging an escort of the tribe, or by paying customs to its chief, but the King can do little to protect them. The police does not interfere in murders for retaliation except in towns and their vicinity.
2. Elphinstone, p.258
3. Elphinstone, p.520
4. Elphinstone, p.528 "Both the Mirshub and the mohtesib are odious and discreditable offices: they are probably the source of much oppression. In ~~the~~ Peshawar, at least, the mirshub paid an annual sum for his office, and extorted fees from gaming houses, wine shops, persons he took up on suspicion, and from the few houses of ill repute that are tolerated there."

31.

confessions, punishing offenders caught by the police, recording births and deaths, and a myriad of other duties associated with urban needs.

A police station usually consisted of six kotwali sepoys and a havildar who had the duty of writing reports and keeping records. Literacy was supposed to be a qualification necessary for the job, but most of the havildars were not literate and had to rely on friends and relatives. In the countryside the kotwal stations were placed at intervals along the main roads and at the borders, so there was a police check on all persons entering and leaving the country via the main routes. The kotwali sepoys collected customs on all goods entering and leaving the country and were supposed to stop all runaways. In the towns the kotwali sepoys were general policemen-guards who patrolled their assigned areas. They were supposed to change area every two weeks, but the knowledge they gained of the habits of the residents of their areas aided them greatly in their illicit activities, and they made every effort to circumvent this regulation.

All towns were subjected to a curfew, the wardi, that extended from about eight o'clock in the evening to sunrise. It sounded from every kotwali station, and between those hours no one was allowed in the streets unless they knew the special password selected for that night. If a person were caught outside without the requisite knowledge of the password, the kilantars or the kishikchees detained them in the guardhouse until morning. He was then taken to the kotwal who fined him unless he was satisfied with the excuse given.

31.)

1. Martin, p.47 of the kotwal: "...and each center an official of whose tyranny, oppression and cruelty stories and poems have been handed down from posterity."
2. Martin, p.49

The kotwal, although not formally a part of the administration of justice in Afghanistan, heard many cases; he had no court and merely the law of his own personal interpretation of how best to fulfill his duties and to enforce the rule of the Amir to whom he was responsible. However, both civil and criminal cases were brought to him. He punished criminals brought in by his police, but if the case were serious and involved the death sentence, or if there were no precedent for him to follow and he did not want to take on the responsibility of the case, sent it either to the local governor or to the qazi. In the court of the kotwal the defendant could not present his case, and almost invariably the plaintiff was the policeman, known to the kotwal, who had brought the man in. The position of kotwal was very lucrative, and it can be imagined that the defendant usually presented a defense in a monetary form. There was no appeal that could be made after the kotwal's decision unless it was made personally to the local ruler.

Under Abdur Rahman secular government officials such as the local governor and the kotwal, began participating in the judicial process in an institutionalized rather than in a merely personal form. He promulgated codes of law that were supposed to regulate their behavior as judges, and he kept personal control of all cases concerning capital punishment. He used his spy network to control his local officials, so that they were not entirely free to ignore his new regulations. His newly claimed control over the religious establishment also helped him secularize the dispensation of justice; powerful Muslim jurists "...held office only under his sufferance and, therefore, willing or unwilling, were bound to obey the crown."¹

32.)

1. Gregorian, p.137

His criminal code was extremely harsh and considered barbarous by the western residents in Kabul, and it did not even attempt to mitigate its severity in theory.¹ Abdur Rahman's reputation for cruel and unusual punishments still lives in Kabul today, although those punishments that are remembered were those that he dealt out personally and not those he codified. His was a reign of terror in which citizens were subject to his personal and terrible revenge and to his rigorous code of criminal law. His sadistic reign was perhaps a necessary step in Afghanistan's shift from a personal and corrupt justice of the towns to the impersonalized, codified and centralized justice that modern Afghanistan seeks today.

The Criminal Code had two important aspects to it; it was to a certain extent in keeping with parts of the tribal code, and, by giving urban, civil officials such as the kotwal greater but regulated powers, it began to deal with the phenomenon of urban crime. Murderers, once prosecuted and found guilty, were given to the victim's family for revenge or mercy, the tribal way. The government, however, retained the right to fine the criminal if he had been pardoned.² This usually meant that the man had to ransom his life twice; once to the victim's family with the payment of blood money, and once to the government with the payment of a substantial fine. Traditional tribal law did not seek to punish the offender, but merely to redress the wrong of the aggrieved; Abdur Rahman sought to punish the offender as well as retain the right of the aggrieved to revenge or compensation.

The authority of the kotwal was increased in his Criminal Code. The kotwal combined the duties of a chief of police

33.)

1. Hamilton, Agnus, p.277-280

2. Hamilton, Agnus, p.54

34.

and the Judge of Petty Sessions and heard cases concerning offensive speech, dishonest trading, gambling, purveying of charms, indecorous fathers, the vituperation of Sayeds, men of learning or civic elders, misconduct in mosques, failures to pray or fast at the required times, and more normal criminal cases such as robberies, forgeries, murders, etc.¹ The code granted to the kotwal much of the authority that had traditionally rested with the mochtesib. Abdur Rahman was attempting again to wrest power from the religious establishment and to place it into the hands of the civil authorities. The increase in the authority of the kotwal also represented an effort to deal with urban crime without relying on the traditional religious law courts.

According to most sources "robbery and murder were every night occurrences" in Kabul at the end of the 19th century.² It seems that urban crime rates were on the increase, and Abdur Rahman's code of laws was an attempt to deal with the problem. The anonymity of the city and the increased temptations in the forms of extensive bazaars and unknown persons to rob were probable sources of crimes perpetrated by rural people as they moved into the urban areas. Assassins were easily hired in Kabul for the price of 6,000 rupees; a man would risk "being caught and executed himself if he was guaranteed that the money would reach his family."³ The loss of tribal social pressure and mores and poverty in the cities must have contributed to the amount of crime there.

The punishments outlined in the code were harsh. Fines

34.)

1. Gregorian, p.136

Hamilton, Agnus, p.280 If a Kabuli failed to pray at the proper time, the police were supposed to remonstrate gently. If they received no response, they were supposed to use harsh terms on the individual. If they still received no response, they were supposed to use their sticks on him. If the recalcitrant still refused to comply, the police informed the Amir- "He will do the rest."

2. Hamilton, Agnus, p.54

3. Hamilton, Agnus, p.54 It is interesting to note the difference in the responsibility placed on an assassin for the crime he committed between urban justice and tribal justice. Among the tribesmen only the person who hired the assassin could be held responsible for the murder; the only danger that the assassin ran was getting killed during his attempt to execute his deed. In the city, however, the assassin was held responsible for the deed and was prosecuted for it if he was caught.

35.

and lashes given by a whip made of three strips of camel, cow and sheep hide and an olive wood handle were normal ¹, but they were carefully delineated in the code, and the kotwal was legally bound by it.

Abdur Rahman also attempted to decrease the crime in the countryside by making all the villages within a ten mile radius of a reported crime, responsible for it. Once a crime had been committed and reported, a fine was imposed on all those village, and until they paid it, regiments of soldiers were quartered in the villages. The soldiers had to be fed and lodged at village expense, and they commanded special and costly maintenance. ² The British reported a considerable decrease in crime during the reign of Abdur Rahman, especially citing the decrease in rapine and the increased safety of the roads for travellers.

Prisons were mentioned only in the sources written in the time of Abdur Rahman, and they did not have much to recommend them. There were, of course, the especially gruesome prisons that were maintained for the enemies of the powerful, but the common prisons seem to be a relatively recent development in Afghanistan, and they were only an urban phenomenon. Prisons were made in any suitably situated government building, and space was always inadequate. There was no sanitation, and typhus epidemics were common; mortality rates often went up to eighty per cent. The prisoners were fed two breads and some water per day. ³ Only the condemned or special punishment cases wore hand chains, but all prisoners wore foot chains. The guards were known to treat prisoners very severely. ⁴

35.)

1. Hamilton, Agnus, p.280
2. Gregorian, p.138
3. Hamilton, Agnus, p.278 "Under the conditions which prevailed in the Kabul prisons, unless the inmates have money or friends who will interest themselves in their plight, they are thrown on the charity of the public for their means of subsistence. The government provided nothing but bread and prison quarters..."
4. Martin, p.p.146-147

35b)

Prisoners seemed to be mostly men waiting for their trials rather than men serving a jail sentence as punishment. Usually a case was not tried until the proper officials had been adequately paid by interested relatives and friends of the imprisoned man, and, then, there was no guarantee that the trial would take place. Many prisoners were simply dispatched inside the prison once the officials had received enough money to placate them, and the relatives were told that the man had died in prison of natural causes.¹ Prisoners were also required to pay rental fees before they were released.

35a)

1. Hamilton, Agnäs, p.278 "Expedition is impossible until the officers of the Court, whose duty it is to bring case-in-waiting to the notice of the judge have been bribed. Heavy tolls are levied by all officials for this service, and, if the payment is not forthcoming, the trial may never take place or it may be protracted through several years."

Grey, p.101 Strangling and poisoning were the favorite means for dispatching prisoners.

Abdur Rahman's reforms were inadequate; through force, brutality and political manoeuvring he was able to establish some degree of administrative unity and power in his kingdom, but his legal system remained anachronistic and extremely complicated, and his paper legal reforms could not change the administration of justice as easily as they could be promulgated. The religious establishment remained powerful although he had been able to control it in the urban and town areas. But the vast part of the country and the population was tribal and rural and remained basically untouched by his attempts to centralize and secularize the administration of justice and to legislate change that would have affected their tribal structures. Tribal law, tribal administration of tribal justice and internal tribal government remained essentially intact and in control of the behavior of the tribal people.

III

There were two basic sources of power in the Pushtun tribal community: Communal consent and wealth. Both were closely tied to hereditary positions of power. The Pushtuns were basically a democratic people except in areas where feudal development assured leader families feudal rights to power positions, such as among the Durrani. Usually, however, any man with leadership capabilities could rise to an influential position in a community through community recognition of his capacities.

Individuals born into a tribe were considered citizens of that tribe until they chose to leave it. A Pushtun's only duties as a citizen of his tribe were to join all expeditions,

37.

either offensive or defensive, and to obey community decisions made by the tribal council or the community leaders.¹ Community leader were chosen in a variety of ways. One of the binding forces in a Pushtun tribe was the common belief in their kinship bonds, and often men chosen as leaders were those of direct, male, lineal descent from the eponymous ancestor of the tribe. In this case, authority was derived from proximity to past leaders; the position was hereditary and carried with it the traditional respect and honor due to lineage.

Other men were recognized as leaders because they fit closely the ideal leadership personality. The Pushtuns recognized as a leader a man of a verile, impetuous nature, given to extremes rather than compromise, brave and not necessarily wise. He had to be a man who had proved himself capable of defending both his honor and his property.²

Jirga or tribal council members were acknowledged leaders in the Pushtun community; the jirga itself held authority because it was a representative group of all the leaders of the community. Membership in the jirga, the tribal council, in feudal, agricultural areas was confined to landowners who represented the interests of the people living on their lands.³ Among the hill tribes the jirga was more democratic, to the extent that in some of the tribes all adult males were members.⁴ In most tribes it was the mishran, the elders, and the maliks, elected leaders, who attended the jirga. The mishran were selected by age, character, experience and 'tradition' i. e. usually heredity. Finally, in some tribes members were selected for the occasion of a jirga, and no one person had a right to

32.)

1. Gazetteer of the Peshawar District, 1897-1898, p.153
2. Barth, p.81
3. Barth, p.115
4. Davies, p.52 "The more democratic the tribe, the larger the jirga. For this reason a full jirga means nothing less than a gathering of every adult male." A British official had a meeting with the Mohmands to discuss a certain treaty. "These Mohmands stated that there were no maliks in their country, and 900 of them came to discuss the new political situation."

38.

belong to any jirga.¹ Mullahs also attended,² and a woman, if she had no male relatives to represent her interests and if she fit the other qualifications for membership could also attend the jirga to protect her interests and to voice her opinions.

Formal leadership positions, the khan of the tribe and the malik of the village, derived their power from tradition, wealth and community consent. In some areas they were actually elected; khans were elected by the maliks and the maliks by their own constituencies in their villages. Usually, however, the elections were formal procedures of legitimizing power for a man who, by consensus, had already become a leader. The positions were usually hereditary with considerations of age, experience and character affecting the choice in the election as there usually were several candidates competing for the position.

Wealth had a great deal to do with the exercise of power in the tribes. The ability of a leader to extend hospitality to his constituency gathered him many followers, and his ability to gather guardsmen and to lead feuds increased his power and social standing in the community as he proved himself capable of defending both his honor and his property. The khans and maliks usually had a guest house and a burj, a defensive tower, as part of their residences, enabling them to entertain, to offer sanctuary and to conduct feuds themselves. The standard Pushtun residence was and is a gala, a walled compound of adobe or rough stone construction with all rooms and facilities on the inside courtyard and with a defensive exterior.

38.)

1. Lorimer, p.3
2. Elphinstone, p.219 "Mullahs of this sort were reckoned very pleasant companions; they were great frequenters of the jirga, where indeed, their knowledge gives the order much weight in civil matters."

The guest house or men's house was a public room with a courtyard and stables. The owner of the guest house was expected to feed and house all strangers, travellers, persons on pilgrimage or visitors to the village, and the expenses were shared by the entire village. In the case of a large party of visitors, all the villagers contributed what meat and clarified butter they could. The guest house also served as the meeting room for all the male residents of the village, for the settlement of public business and for political discussions, and as a room in which male residents could simply relax, smoke and gossip. Young bachelors of the village often slept there as it was considered indecent for young men to sleep in the presense of women, and because the village was thus supplied with a ready group of warriors in case of attack.

The burj, usually attached to a leader's house, served as a place of refuge and observation both for private feuds and for feuds that involved the entire village or clans within the village. The burj was important to a leader because it enabled him to conduct feuds which were essentially power struggles. It also enabled him to extend hospitality and protection to others who were feuding, thus increasing the debt in which he held his guests. Por, debt, was very important to Pushtuns; they felt an obligation to return any favor, and the returns for hospitality and protection were usually political support and armed support, thus giving the leader power.

The actual power structure in a Pushtun tribe was both formal with the formal positions of khan and malik, and informal

with a variety of influential persons in the community acting as leaders. Authority at the bottom was vested in the family patriarch who held all formal authority in the family. Upon marriage, a woman became part of her husband's natal group, and authority over her was transferred from her father or brothers to her husband; she retained no legal rights in her natal family but her father and brothers usually interested themselves in her welfare and honor. Usually they protected her if she was maltreated or punished her if she behaved dishonorably and her husband would or could not discipline her. The authority of the patriarch was so great that he could cut his women off from all contacts with their natal kin, but usually a woman's sentimental ties to her own family were recognized and she was permitted to visit her natal home.¹ A husband was allowed to use physical force against his wife, although force was not considered an honorable method of control. The husband alone had the right to dissolve the domestic unit through divorce, but divorce was considered extremely shameful and was, in fact,² rare.

The Pushtun family was, besides basically patriarchal, patrilineal, patrilocal, endogamous, sometimes polygamous and often extended. The wealthy usually lived in large, fortified galas with extended families, while in some areas, the poor lived as nuclear families in small houses within the village; in others, the poor also lived in galas as large extended families. The nuclear families consisted of a man and his wife (wives), their unmarried children and sometimes their unmarried siblings, widowed parents or other relatives who

40.)

1. Islamic law authorizes a woman to visit her natal family once a year.
2. Divorce was usually only resorted to when the wife had committed adultery with a man politically more powerful than her husband. The husband through divorce only acknowledged a defeat and the slight to his honor, and he gained nothing except that he no longer had to support his wife; but he also lost her labor in the household. Unhappy husbands always had the option of taking another wife.

41.

would otherwise be alone.

The patriarch of every family was its oldest living capable male. In the tribal structure every ten or twelve related patriarchs convened under a speen zhera, a white beard, who served as the representative of the common ancestor of the group. Every ten or twelve speen zheras made a mehel or a quarter, headed by a kundidaur. The kundidaur was the representative of the common ancestor of all the speen zheras of the mehel; he was their elected representative, and, in his election, character and experience counted as well as proximity to the eponymous ancestor.

About four mehels convened under a malik (derived from the Arabic for King); sometimes the position was titles mushir (derived from the Arabic for counsellor). The malik was the elected representative of the four mehels. The constituencies of several maliks made up a khel, a clan, a division that western writers often referred to. (Khel is derived from the Arabic for band or assemblage.) A khel formed part of larger divisions, the subtribe and finally the tribe (which could number more than a million persons). The leader of the khel and all the greater divisions were titled khan.

To summarize, the structure was as follows: ¹



41.)

1. Elphinstone, p.161

Malik was a vague title: among the hill tribes every patriarch was often called a malik; sometimes the elders who attended the tribal council of the village were titled malik. However, usually the title referred to the head of a village or the head of a kundi, a tribal clan section within a village. As the head of a village or a kundi, the malik usually had limited perogatives. The malik's duties were to maintain the public peace, to collect revenues¹, to settle disputes which disturbed the peace and to see to the fair distribution of crops.² The position was often hereditary leaving room for selection through an election by the community, selection according to character and experience.³ Over policy questions concerning the community, the malik had no real authority; that authority rested with the entire body of tribesmen, and decisions⁴ reached by maliks were often repudiated by junior tribesmen. Where maliks were influential and powerful in village politics, their power derived from their wealth and their ability to gather armed guardsmen and followers rather than from their formal position. Maliks were subordinate to khans and communicated to khans the desires and complaints of the groups which they represented. They had no independent powers of action when they were serving as representatives to the khan of their khel or tribe and had to give the opinion of their constituency.

The actual exercise of power by the malik differed among the tribes and in time and place. In the early 19th century among the Yusufzai the malik was weak. Authority rested with the patriarchs of the community and with the head of the clan.

42.)

- 1.) Thorburn, p.32 The malik was authorized in some areas to collect a tax, the malikai which "formed a fund whence all public charges were defrayed; and out of it high mud walls around the fortified villages were repaired, the canals and water courses kept open, arms and ammunition purchased, the pilgrim feasted on his holy progress, the neighbor hospitably entertained, the begger relieved, the song of the wandering minstrel rewarded." At the end of the year if there was a surplus, the malik kept it; if there was a deficit, he was expected to meet it.
2. MacGregor, p.309
3. MacGregor, p.310 The position of the malik was hereditary "except in cases of manifest incapacity from mental imbecility or physical deformity, or from some objectionable quality of temper or general conduct, but there is nothing to prevent a man of courage and ability from raising himself to the position of either (khan or malik)."
4. Barton, p.18

The khan listened to and took the advice of his council of maliks only in times of war. The malik's success in the mediation of disputes and in administration depended more on the caprices of the individuals in the community than on either his authority or his arguments. He interfered in disputes only if individuals from different clans were involved, or from different villages.¹ Among the Ghilzai the maliks were very weak, and disputants did not acknowledge as legitimate any effort made on the part of the malik to settle a quarrel. Among the Western Kakars the malik held power as long as he had the support of the tribal council; he settled all village disputes that were brought to him, and he had the power to impose any penalty except death on the culprits. Among the Eastern Kakars the malik held less power and the jirga more² in the settlement of disputes. Among the nomads the malik of the Nausers held a great deal of authority. He settled all disputed within the camp without the help of a jirga, and he made all the decisions as to the movements and the stations of the camp. He usually had four or five advisers, but he himself was the final authority.³

Villages were often occupied by several clans of one tribe or sometimes by clans of several different tribes. Each clan had its own government headed by a mushir or a malik who was subordinate to the head-malik of the village and was, as well, subordinate to the khan of the tribal subdivision to which the clan belonged. The area of the village occupied by the clan was termed a kundi, a collection of residences of the individual families forming the clan. The malik was the general admin-

43.]

1. Elphinstone, p.p.337-338
2. Elphinstone, p.p.454-456
3. Elphinstone, p.457

administrative officer of the kundi.

The choice of the formal khan as leader of the tribe, the subtribe or the clan lay with the maliks although in the feudal ¹ Pushtun tribes the position was hereditary. In the democratic tribes the maliks elected the khan, and primogeniture, age, experience and character all figured in their choice. In areas with no feudal relationships, khan meant a variety of things. Many individuals simply added the title to their names to show ² that they belonged to established, land-owning families, and not necessarily to connote a leadership position. Informal leaders, also called khans were men who, more closely than others, fit the ideal leader personality, owned land and usually had lineal blood connections with the common ancestor of the group.

Among the feudal Durrani, the successful election of a formal khan had to include the approval of the Amir of Kabul. The Amir could make and break khans, but the Amir himself was dependent on the support of these khans in his own election to the Amirship and in his own exercise of power. The Amir had to strike a successful balance between placating the Durrani and their khans and preserving his own power. Alienated khans and unsuccessful but powerful candidates often broke away from their clans or subtribes with their followers and supported rivals for the throne in Kabul, adding greatly to the long history of civil wars in Afghanistan.

The formal khan was an elected magistrate set up for the public good, but among the non-feudal tribes he held little power except for an ability to manipulate his followers. Khans could not act against the interests or the wishes of the commu-

lit.)

1. Stacy, p.17 In Qalat, a town near Kandahar, the chief or khan was a nine year old child who had succeeded his father who had been killed in battle.
2. North West Frontier Gazetteer of Peshawar District, Vol.A
1931, p.154

nity which were ascertained through the maliks and the tribal councils of the descending order of communities that they led.¹ The Pushtuns generally felt loyalties towards their community and operated as clans rather than for the personal aggrandizement of the khan.²

The power of the khans varied greatly between the feudal Durrani and the democratic hill tribes, and between the hill tribes themselves. Durrani khans maintained the power to tax, maintain troops, administer justice and punish crimes, including political crimes. Among the tribal Ghilzai the khans were very weak, as they were among most of the hill and nomadic tribesmen. The khans rarely interfered in disputes, leaving their people to "...accomodate their differences as best they can."³ The Ghilzai submitted their problems to a jirga when they were forced to do so by pressure from the khan or by social pressure. In time of war, however, the Ghilzai submitted themselves to an authority, the Mir, the commander of the chelwashti, the tribal police force used both in defense and to enforce the decisions of the tribal council.⁴ The Mir was formally invested in his office by the malik who ceremoniously bound a turban around the Mir's head in the presense of the group over which he was taking control. The Mir then held all authority over the fighting men and the sentries and had the power to command them and to impose fines for broken peace and discipline within the community. The khan and the malik lost importance with the investment of the Mir and were liable for punishment like all ordinary citizens.⁵ When the chelwashti were serving as a police force in times of peace, any death arising from an action done in pursuit of their duties could

45.

1. MacGregor, p.310
2. Elphinstone, p.163, p.542
3. Elphinstone, p.439
4. Davies, p.53
5. Elphinstone, p.442

not begin a blood feud nor did it call for revenge.

Khans and maliks usually had the power to tax the community if taxes were necessary. If the central government was taxing the tribes, the khan himself collected them through the village maliks and paid them to the government tax agent. In the tribal areas customs duties were usually received by the khan although in some instances they were collected by representatives of the tribe. Usually the amount of the tax was determined in a bargaining session, but in some cases, a fixed rate was applied. A humsauyeh tax was levied on infidels by the community khan or malik.

The arrival of the British in the Peshawar Valley in 1848 spelled the beginning of the corruption of the democratic tribal system there. The khans, by cooperating with the British, gained greater powers, privileges and rights. With the introduction of land deeds and the consequent disputes over rights overland, the khans were able to amass great amounts of land by taking cases to court and winning the cases through political clout. They began collecting taxes previously unheard of (marriage and birth taxes which later, Abdur Rahman institutionalised in Afghanistan), and collected fees of various sorts from non-¹proprietors. The British conferred new titles on tribal leaders allied to them, such a Nawab, a title which was originally designed to be non-hereditary and to be conferred on 'influential persons'², but which developed into a hereditary, feudal-type title connected with wealth and land.

In Afghanistan itself in some areas the system was also corrupted, and some khans were able to accrue great wealth and to command absolute power. This happened especially among

46.)

1. Gazetteer of the Peshawar District, 1897-1898, p.153
2. North West Frontier Province Gazetteer, Peshawar District, Vol. A, 1931, p.154

47.

the feudal Durrani and in the north among the Uzbek and the Turkoman cultures. Khans appeared to be particularly strong in these areas when the central government was weak. In the 1850's while Dost Mohammad was trying to assert centralized power after years of civil war and a war with the British, many khans held tyrannical power. The tyrant khan "...knew no power but his own, governing by fear only; his rule is heavy indeed to bear, for he tyrannizes and tortures with or without reason."¹ In Kandahar, a Durrani khan, Kohendil Khan, ruled entirely for his own benefit so that his rule had "...driven away the principle merchants or obliged them to realize their property and to bury it in the earth, awaiting the return of security."²

Along with the tribal leaders, the khans and the maliks, the tribal council, the jirga, governed tribal society. The jirga was an assembly of selected members primarily convened for the two purposes of policy decision making and of negotiating solutions to various problems and disputes within the tribal community. The jirga was based on the concepts of communal authority and communal justice and reflected the basic loyalties of the tribesmen: loyalty towards the community rather than loyalty towards the chief, and loyalty to the family and the individual. Khans and maliks usually governed with the jirga, but often the jirga overrode the decisions made by the formal leaders of the tribe; frequently the jirga was all powerful in internal affairs and inter-tribal alliances. The jirga was the tribal body that made all the important economic, political and social decisions for the community. It was usually made up of the respected elders of the community it

47.)

1. Ferrier, p.296

2. Ferrier, p.321

48.

represented. It derived its powers from the respect and honor in which its members were held.

There were several levels of jirgas, each dealing with different groups of people of communities. The Qaumi Jirga, the jirga of relatives, was an assembly representing two or more groups which debated their economic and social problems, provisions for engagements and marriages between the two groups and other alliances made between members of the two communities. It also met to settle disputes and feuds that the two groups might have. The Gundi Jirga was a joint tribal alliance jirga which functioned in times of war. The Gundi Jirga also met to solve the differences between members of the gundi, an alliance group, or it met to debate with another Gundi Jirga the problems between the two gundis. The Kili Jirga was the village assembly, and the Duokulo Jirga was an assembly of the representatives of two or more villages.¹ The Loya Jirga was the great national assembly which was convened by the King only for extraordinary and important occasions such as the declaration of war or negotiations of peace. It was composed of the most influential representative of the people, usually the khans and the maliks of the tribes and villages. Ahmad Shah was elected King in the Loya Jirga of 1748 in Kandahar.

A major function of the jirga was to facilitate the flow of information within the tribe and to maintain its basic democracy. The assembly existed at all levels in tribal organization. At the lowest level in the village or the kundi, the patriarchs debated and expressed their opinions. Some of the hill tribe jirgas were attended by every adult male Pushtun

48.)

1. Professor Habibi, Head of the Afghan Historical Society,
Kabul, Afghanistan.

in the tribe, so that every opinion was heard and debated.¹
At each level, the jirga elected one or more representatives to attend the jirga at the next level, up to the khan's jirga in which the maliks and the khel khans informed the chief of the tribe the opinions of the tribesmen below. These representatives had no freedom in the opinions they expressed but were tied to the decision of the jirga they represented.²

In theory at least, every tribal members was supposed to be represented in the consensus of opinion that travelled up to the khan. Every level of authority also received questions and commands from the level above it, and in turn, consulted the level below it.³ The flow of information was supposed to be in both directions.

The power of the jirga and the effects of its decrees and sentences depended entirely on the amount of support it had from the community. When the jirga did not have the necessary support to make effective community decisions or to negotiate peace settlements for feuds, local governors or sirdars of the area were supposed to enforce the decisions of the jirga.⁴ Some of the tribes had a conscripted force, the lashkar or the chelwashtis, which were used to physically enforce the decisions and the decrees of the jirga. But observers found that jirgas generally operated smoothly with a sense of their own importance and the gravity of their decisions. They were said to be, for the most part, impartial, and the chelwashti were little used.⁵

Theoretically, community leaders, the khans and the maliks, ruled with the jirga; they took part in the jirga's decision making, and their votes counted no more than any other. But, khans and maliks as rulers, also acted independently of the

49.)

1. See page 37, footnote 4.
2. Spain; The Way of the Pathans, p.51
3. Elphinstone, p.p.341-342 "Their khan sent a drummer to summon the maliks of the six clans and consulted with them on the propriety of a war. The maliks returned to their clans and conversed with the heads of the kundis, who took of the people at meetings in the hujra; all were eager for revenge."
4. Elphinstone, p.444 "When the settlement cannot be made by the mediation of the elders, they are brought before the jirga by the malik, and its decrees are, if necessary, supported by the sirdar."
5. Elphinstone, p.169 "In most cases they conduct themselves with tolerable impartiality... One naturally imagines their debates to be tumultuous and disorderly, but I understand this is not often the case; in some tribes, the jirgas are remarkable for order and gravity, and for a rude kind of eloquence much admired by their countrymen."

jirga in small matters. Jirgas were convened to solve important questions and problems,¹ and the jirga's decision was usually binding on the formal leaders of the community. Khans and maliks consulted the jirgas below them, just as jirgas informed the higher tribal authorities of their decisions. Although the power relationships between the formal leaders and the jirgas varied between tribes in the making of major economic, political or judicial decisions, a malik or khan always needed the support of his jirgas if he was to stay in power. The malik of the Western Kakars never took an important decision without first consulting his jirga,² and among the Yusufzai in the early 19th century the commander in times of war was still subject to the decisions of his jirga of maliks.³ The khan of the Yusufzai could act without the advice of the jirga only in times of great emergency.⁴

Within a tribal community there were usually humsauyehs, tribal clients who had no rights in decision making in the tribe. Tribe members were free to change tribes or clans, but if they entered a new tribe without owning land, they entered as humsauyehs. Most humsauyehs were Sikhs or Hindus, but the Pushtun humsauyehs were without question given much higher status than the infidels. Humsauyehs did not have the right to take part in the jirga, but their interests were watched over by the tribal division to which they belonged or by the family to whom they had attached themselves. It was considered a point of honor to protect one's humsauyehs, so their conditions were generally quite comfortable.

If, however, tribal emigrants owned land when they changed tribes, they were welcomed as equals to the original members

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1. For instance, in Kamdesh, Nuristan in 1971, the jirga decided to build a boys school for the community. They taxed the community in order to finance the construction, the supplies and the teachers.
2. Elphinstone, p.457
3. Elphinstone, p.337
4. Elphinstone, p.162

51.

of the host tribe. They gained all the duties and privileges of the original members, except that most tribes did not require new members to take part in a war against their former tribe.¹

Although khans and maliks exercised some judicial functions, the jirga was the main administrator of justice. Among some tribes, the Nausser for instance, the malik administered justice without consultation with a jirga, and in the Durrani tribe, the khan was strong enough to settle disputes. The khan and the malik had the duty of maintaining peace in the community and usually referred disputants to the jirga, or even forced them by use of the tribal lashkar to submit to the mediation of the jirga.

The function of the jirga in the administration of justice was not one of a police force. It never interfered in a case until a complaint had been made either by an individual involved or by a member of the community who usually complained first to the malik who then referred the case to the jirga. In some tribes the jirga would not hear a case until both parties had agreed to submit to the jirga. If the individuals involved were unwilling to submit to the jirga, there was very little that could be done in the immediate situation unless the entire community was willing to organize its own opposition to the activity in question.²

Most often the community allowed individuals and families to feud until the peace of the community was sufficiently disturbed that, through the malik, the community forced the individuals to either submit to the negotiation of the jirga or to leave the community as banished citizens.³ It was not considered honorable for individuals involved in a feud to

51.)

1. Elphinstone, p.172
2. Elphinstone, p.168
3. Elphinstone, p.444 "The interposition of the village in checking disturbances is more worked out in many divisions and in some they even (my italics) compel the parties to submit to a jirga, or to quit the village."

submit a complaint to the jirga in an appeal, as that was considered an admission of defeat. It was only under great pressure, or when the deaths or injuries on both sides were equal, that individuals or families would bring their cases before the jirga.

In negotiating the settlement of a dispute the jirga exacted fines or imposed blood money, but it did so only to equalize the damage sustained by both parties so that they would agree to end the feud. Fines paid to the jirga were not penalties and were only imposed to equalize the burdens of both parties. Blood money served the same purpose. The penalties were fixed by tradition, and they were harsh. A large part of the mediation done by the jirga was reducing the amount of compensation demanded by the victorious party. A public and humble apology and submission by the defendant were always part of the agreement. If the jirga could not get the parties to accept a settlement, all it could do was to define the traditional rights of each party in their feud.¹ It could not force a truce; it could only persuade the parties to agree to one.

Once the parties had agreed to a settlement, had feasted together and the defeated had apologized to the victorious, the fines and compensations had to be paid. If one of the parties then refused to comply with the terms of their agreement, he was guilty of contempt of jirga. Contempt of jirga also occurred if the defendant, having once agreed to a settlement, refused to apologize and to submit ~~to submit~~ himself to the victorious party. Contempt of jirga only occurred when a party, having accepted a settlement, refused to abide by it. The other

52.)

1. Spain; The Way of the Pathans, p. v. 50-51

was free then to retaliate in any way he wished, but normally the community itself punished the individual for the contempt. He was banished from the community, his house was burned and his possession put out for looting. Banishment was also, very rarely, the action taken by the community as a whole when feuding individuals refused, under great pressure, to come to a peace settlement. The community then banished them in order to preserve the peace and the safety of its members.

The community usually did not maintain the right to restrain an individual in the pursuit of his revenge, nor did the community maintain the right to punish transgressors for the sake of punishment. Justice within the Pushtun society sought redress for the aggrieved rather than punishment for the aggressor, and redress was achieved through a show of force which restored the individual's damaged honor. Wrongful aggression was seen not only in terms of the material damage done but also in terms of damage done to the honor of the aggrieved. Revenge restored the social belief that the individual was capable of defending himself, his honor and his property. If, however, an individual's behavior severely upset the peace of the community, he might be penalized by the jirga; the jirga's act was never one of moral example but merely an act of self-preservation for the community.¹

The administration of justice among the Pushtuns was mainly concerned with feuds which started over a myriad of problems and petty quarrels.² A Pushtun's honor was easily insulted, and the only way to restore honor was to revenge the insult. The law of revenge, badal, was the dominant law of Pushtun life, and the feuds resulting from badal were

1. Baily, p.p.84-87 Party A in a feud wished to surrender and began negotiations with his enemy, party B. Party A stated that he was willing to pay blood money. They had a tea for the negotiations, and there was a fight in which all the members of party B who were present were killed. There was a general reaction of horror in the community, and a terrible revenge exacted by the remaining members of party B; they dynamited the village of party A, and all men, women, and children were either killed in the fires or were shot down as they fled the village. There were no survivors. Had a jirga held the negotiations, this tragedy might never have happened.
2. Goodwin, p.p.10-11 Two neighbors were each in his own courtyard, one smoking a water pipe while sitting on his bed, and the other sweeping his yard. The sweeper found a beetle and without thinking threw it over the wall. It happened to hit the foot of the man smoking. He picked it up and threw it back. They threw it back and forth a few times, getting more and more angry, until the smoker went back into his house, took his gun, stood on his bed and shot his neighbor.

extremely costly to Pushtun society in terms of time, energy and man power.¹ The right to personally revenge any kind of insult to one's person, honor or property (including women and family) was very important to every Pushtun, and the use of force was central to Pushtun justice in both civil and criminal matters. Unless a man exacted badal, he was subjected to social scorn and ridicule. Badal was a debt in which a man had lost honor, and he had to regain it in order to maintain his social standing in the community. In the same sense a Pushtun would never forget a favor done and would always try to repay it. A murderer was in por to the victim's family; the guest was in por to the host. A Pushtun never forgets his por; hospitality was repaid often by political or armed support; a criminal por was repaid by an insult or equal or greater magnitude.²

Badal operated on the principle of strict retaliation, under which the injured party was under a social obligation to restore his lost honor. If the injured party himself could not revenge himself, it was the duty of his family and even his tribe to assist him or even to retaliate for him. Feuds were passed from generation to generation and were inherited as "the family's most sacred obligation and incumbent duty."³ A Pushtun proverb claimed that "A Pushtun took his revenge after one hundred years and said that he had not hurried." Revenge could be wrought on the offender or on any of his relatives and sometimes on any member of his tribe.

The state of feuding was called pakhto. It implied the deepest form of enmity between the parties involved, but it did not necessarily imply active feuding. Pakhto meant complete

24.)

1. North West Frontier Province Gazetteer, Peshawar District, Vol. A, 1931 "Figures recently appearing in the Press show that the number of murders in the Peshawar District is approximately equal to the number in New York City with a population seven times that of Peshawar. New York is understood to be one of the most criminal cities in the world." This statistic does not even come from the tribal areas where feuds were more common.

Dichter, p.60 One half the men in the village have to go about armed all the time because of the blood feuds that they are involved in. This was in a village of about 120 families situated in Swat.

Goodwin, p.12 "There are few Khattaks without a blood feud on their hands which is prosecuted from generation to generation."

2. Pennell, p.83 A father brought his wounded son to Dr. Pennell, a missionary doctor on the frontier. The doctor said that the boy would not live unless the leg were amputated, but that he could not guarantee that the boy would survive the operation. The father said, "Then let it be as God wills: let him die, for by our tribal custom, if he dies as he is, I can go and shoot my enemy; but, if he dies from your operation, then I could not, and I want

54. cont.)

my revenge."

3. Barth, p.84 Revenge was the responsibility of those who inherited the deceased's property, if it was a case of murder. If the heir failed, action could be taken by any male agnate related as first paternal cousin or closer. Maternal relatives have no shame involved in a feud, or in the murder, nor any of the honor from the revenge. If a man was not murdered but injured or shamed, his close agnates shared the shame and the honor of the revenge equally with the injured man himself.

social avoidance. Usually pakhto was a luxury afforded only by the middle and upper classes. In order to feud one had to be armed and usually to have an armed guard, a fortress like residence and time to spare from agricultural labor.

Badal was exacted for any insult, and insults usually occurred in quarrels about zar, zan and zamin- gold, women and land. Disputes about water right, land inheritance rights and tribal land rights all frequently resulted in violence and death. A failure to reciprocate in gift giving in birth, circumcision and marriage ceremonies and failure to return the jewelry borrowed for the wedding dowry were frequent sources for feuds. Quarrels surrounding the reallocation of land in vesh started many feuds, and insults to the dead, such as the supreme insult of cutting off the genitals and placing them in the mouth of the deceased, began some feuds. Insults to guests, carrying off a guest or failing to observe a host's badragga, a safe conduct, were all sources. To undo the trousers of a man was a grave insult and one that had to be revenged. To fail to observe the tribal territories often ended in injury or death and sometimes in inter-tribal feuds.

Many feuds started over arguments about land. Encroachment on land was accomplished subtly by plowing up the border path between fields, a political manoeuvre that only a powerful neighbor could carry off. Powerful chiefs tried to threaten or force people into selling their lands or abandoning their claim to their land, but usually Pushtuns preferred to fight for their land rather than give it up. In the British territory the khans gained land by manipulating land claims, taking them to court and, of course, winning the claims. One Khan of Hund

56.

won too many land suits and was killed while he was praying in the mosque by an assassin hired by his own people. Not even his sons nor his munshi, his secretary, pursued revenge even though it was common knowledge who the assassin had been.¹ The sons were due to inherit the land, and the rest had been so alienated by the khan's manipulation of power that revenge was not sought for the death of a dishonorable man.

Many feuds revolved around women. Seclusion of women was an important part of Pushtun society. The women were considered the property of their men and were watched and guarded accordingly. The Pushtuns were extremely suspicious and jealous; a woman seen talking with a strange man was immediately suspected of infidelity and either maltreated or murdered as a result.² Pushtun women did not associate with men outside their family circle except under unusual circumstances.³ The women were unveiled and were not confined completely within their homes, but their contacts with the opposite sex were very limited.⁴ When the women went out to collect wood or water, they always went as a group, and a casual guard of their male relatives watched from nearby. Any passerby had to carefully attend to his deportment, for to walk past the women bareheaded, singing, whistling or combing the hair was considered a slight to the women and strongly resented by the men. Such actions invariably led to quarrels and often to death.⁵

Slander was a frequent source of retaliation and feuds. A man was obliged to protect the reputation of his female relatives, and slander against one of them often resulted in the death of the slanderer, and, not infrequently, in the death of the slandered girl as well.⁶

56.)

1. Warburton, p.p.25-26
2. Gazetteer of the Peshawar District, 1897-1898, p.104
3. Goodwin, p.83 A British officer, well known among the Khattaks, went to visit the widow of a recently deceased friend, a malik of the Khattaks. The widow came out to greet him; "... for her to discard her purdah to meet her husband's friend was honor indeed."
4. Enriquez, p.p.98-99 The Yusufzai women, like other Pushtun women, led secluded lives and visited each other for amusements. "They strongly resent intrusion. She remembered that on one occasion a party of girls stoned a lad to death for interfering with them."
5. Goodwin, p.11, p.58
Sabir, p.83
The proverb, "He died at the godar, the watering hole." indicated that a man had insulted a woman's male relatives with his imprudent and public behavior with the woman.
6. Bellew as quoted by Darmesetter, p.121

Matiza, elopement, usually led to a family feud unless the couple were found in which case they were both murdered. Kidnapping usually took place with the girl's consent and was really another form of elopement. Once a couple had eloped, they could not return to their village for the boy would be straightway murdered by the girl's relatives. Sometimes a jirga was able to negotiate a bride price and a large amount of shame money, aharamanah, to be paid by the man to the family of the girl; but even then, the relatives of the girl often sought revenge. Their revenge usually took the shape of a retaliatory elopement with a girl of the boy's family. ¹ Among the Ahmadzai tribe the money paid for kidnapping a girl was equivalent to one and a half times the money paid for a murder. If the girl escaped and went of her own free will, the man had to pay double the normal brideprice. ² Zhagh, announcement, was also a fruitful source of feuds when it concerned a claim on a girl. With zhagh a man could claim a girl for himself even if he had been refused by the father of the girl as a suitor; any man who then became interested in the girl had to fight with the first suitor.

Women were rarely involved in feuds except as the occasions for them. It was considered a great shame to kill a woman or a child in a feud. However, sometimes they themselves entered a feud to exact the revenge that no male relative could or would obtain. ³ At other times, because of their immunity, the women brought supplies, water and food to their men during a war or a prolonged feud and to the besieged.

Feuds were often about money and inheritance; these feuds usually existed between paternal cousins for the obvious reason

57.)

1. Goodwin, p.58
2. Paxtoonwali, p.46
3. Pennell, p.18 A murdered B, and everyone knew that A was the murderer, but A was from a powerful family. No one would witness in court against him nor exact revenge. B's sister took it upon herself to revenge the death of her brother, killed A, was arrested, convicted and condemned to a life of penal servitude. "I have avenged my brother: for the rest, it is God's will: I am content."

North West Frontier Province Gazetteer Bannu District, 1907
p.113 "A case occurred but recently in Bannu where a Waziri woman in the absence of any surviving male relation to carry on the vendetta, dressed herself as a man and murdered one of the opposing faction at the very gates of the city."

58.

that paternal cousins were heirs to landed property. Enmity between cousins was proverbial; the Pushto word for enmity, turbanai, is derived from the Pushto word for a paternal cousin, turboor.¹ Among the Pushtuns generally "a house not divided against itself is a thing unknown."² Proverbs abound concerning cousin rivalries: "...as great an enemy as a cousin."; "For a cousin's tooth breaks on a cousin's tooth."

Feuding was guided by a few rules. There were areas in which feuding was forbidden. It was understood that Pushtuns would cease their feuds while guests in a foreigner's camp. Most British agents reported that the Pushtuns, although armed to the teeth, never pursued their feuds in the British camps. In missionary hospitals, enemies lay in the same room, both having understood that their feud had ceased while they were there. In the British army also, enemies never carried on their feuds. Usually major roads and caravan routes were forbidden territory for feuds; the tribes lived on the taxes they collected from the merchants and on the raids they conducted against the towns where the merchants delivered their goods, so it was essential to them to keep their life line open and relatively safe for the traders.³

Killing was usually limited to adult males, and only in cases when one party had been badly deceived and unjustly attacked would women and children become the subjects of revenge. Blunduraa, the slaughter of all the inhabitants of an enemy's house or village was an extreme action taken only under extreme provocation.⁴

Revenge, however, did not always mean murder; there were many petty ways of harrassing one's enemy, and usually there

58.)

1. Goodwin, p.71
2. Thorburn, p.264
3. Warburton, p.p.126-129
Pennell, p.78
Baily, p.94
4. See page 53, footnote 1.

was a long history of incidents before there was an actual death. Cattle poisoning was a common technique of petty revenge. The Pushtuns mixed arsenic and flour, wrapped it in hay and distributed bunches of these poisoned packages in their enemy's pasture. Shepherd boys were constantly on the alert for such parcels but often missed them, and many cattle were poisoned and died.¹ Burning of crops was also a favorite activity in feuds. An enemy took a cake of cow dung, placed gun powder in the middle of it, placed the cake in the middle of a pile of the crop that had been harvested, lit it and escaped long before the cake exploded. All this was done under the cover of dark, and the dung cake acted as a long burning match. Detection in both these crimes was extremely difficult. House breaking and theft were apparently frequent, and stealing of animals was common. Baangoh (see p. 79) was a custom adopted to deal with the problem. House burning was also a frequent occurrence in serious feuds.

Feuds were power struggles in which the stronger finally defeated the weaker party or drove it from the village. At times the weaker party, having fled, managed to rally discontented elements within the tribe and return to his community to win over his rival. The point in the revenge was not to return insult for insult in a tit-for-tat situation but to show or at least imply superior force to that which the enemy was able to rally. Badal was concerned with the social status of the individuals involved and not in the talion revenge commanded by the Prophet.²

It was not considered honorable to submit a problem to the jirga, and before parties would allow the jirga to negotiate

59.)

1. Warburton, p.21
2. The Koran, Ch.V v.45 "And We prescribed for them therein: the life for the life and the eye for the eye and the nose for the nose, and the ear for the ear, and the tooth for the tooth, and for wounds retaliation."

60.

a settlement, usually the damage done to both sides had to be considered by both parties as equal; a sort of natural justice had been reached and peace could then be negotiated. Honor would not be sacrificed as they both recognized a stalemate, and each could count itself victorious in that they had not been defeated. In such a case, the jirga would offer its services to mediate between the enemies, a feast of reconciliation would be held and perhaps women exchanged in marriage to seal the end to their enmity.¹ In some tribes, however, the second murderer was banished from the community in an effort to break the chain of revenge, which, at times, not even a formal reconciliation and marriage exchanges could break. The banishment was not a moralizing act but merely an act of communal self-preservation.²

Basically, the only other way to end a feud by negotiation was if one of the parties admitted defeat. There were a variety of acceptable ways for the defeated to ask for a cease fire and a settlement. In such a case the jirga mediated between the parties and tried to arrive at a settlement to which both would agree. The jirga normally took the side of the defeated party in the negotiations in an attempt to reduce the compensations demanded by the victorious party. Both the demands and the traditional penalties were extremely severe.

One common way of admitting defeat was to place a tiga stone at the door of the victorious party's house. The defeated could not do this himself as he would be shot on sight, and he usually appealed to elders in the village to place the tiga stone for him. The tiga stone was the Pushtun stone of peace. It served both as a sign of a desire for a truce on the part

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1. Pennell, p.29 Pennell attended a feast in a village in Bannu and sat next to a man who stated, "That is the man who shot my brother." Pennell remarked on the goodwill and peace in which they appeared to be living, and the man said, "Yes, we are good friends now because the debt is even on both sides. I have killed the same number in his family."
2. Elphinstone, p.404

61.

of one of the feuding parties and as a pledge to honor the truce. The party who desired the truce pleaded under the law of suppliants, nanawati, to gain the help of some of the elders and the mullahs of the village. They proceeded as a group to the house of the man's enemy and laid the tiga stone on the threshold. It was considered very wrong to refuse the truce that it implied. Once it was accepted, negotiations started through the elders and usually through a formal jirga. At times the jirga imposed the tiga stone and the truce on the feuding families when both were unwilling to cease fighting, but the imposition could only be temporary. In negotiations the parties either arrived at a peaceful solution to the feud, or they agreed to a truce for a given period of time, called the tiga period. They pledged over the tiga stone to maintain the truce and to pay a stated amount of money to the other side if they violated the tiga cease fire. The amount of money was normally very large. If a solution were found, the parties feasted together and declared rogha, a time of conflict solution in which hostile attitudes were forgotten. In the tiga cease fire, the two parties still observed complete social avoidance, but in the rogha the parties were able to meet each other socially. ¹

The tiga stone was used in family feuds, gundi feuds and tribal feuds. A tiga-ekhdil symbolized a truce between all factions in favor of an alliance against an outside threat. The truce remained as long as the outside threat remained; afterwards it was lifted and factional enmity was resumed. It was a pledge between allying tribes not to interfere with each other's life and property. The tiga stone was witness to that pledge, and a price was placed on it, a price to be paid by the first

61.)

1. Paxtoonwali, p16

Paxto Dodana, p.26

62.

¹
violator.

Violation of any tiga was punished; either the party which had broken it paid the sum that had been placed upon it, or he was banished from the community, his house burned and all his possession looted. The present day price on a tiga stone is 100,000 rupees in West Pakistan.

Swarah was also a method of obtaining peace. It was also a way of admitting defeat. The defeated party declared, through elders, that he was ready to give swarah to his enemy. Swarah meant that the defeated party was prepared to give in marriage a sister or a daughter to the victorious party in order to end the enmity.² Ne:dae, also an admission of defeat, was an announcement made by the defeated that he was ready to give money in compensation. Ne:dae was the least sure solution because a Pushtun family never accepted money as an honorable compensation for the death of one of its members, and it was common that, having received the money, they would still pursue revenge. If they managed to kill one of their enemy, they were required by custom to return the ne:dae money plus an equivalent amount to the injured party.³

Monetary compensation was not an honorable solution to a feud; money did little to restore the social prestige of the receiver. There were apparently many families which preferred extinction before settling on a peaceful solution. A more honorable solution was the exchange of women between the families. The number of women to be given as compensation for every unrevenged male death varied between tribe, areas and in time, as it seems the value of women appreciated during the 19th

62.)

1. Sabir, p.82
2. From S. Tahir Bukhari, Peshawar Records office, Peshawar, West Pakistan.

Paxto Dodana, p.27

century. Hamilton found that in 1820 in the western part of Afghanistan twelve young women, six with dowries and six without, were given in marriage to the injured party in compensation for the unrevenged murder of one man. Six women were given in compensation for a severed hand, ear or nose; three women were given for a broken tooth; one woman was given for a wound in the forehead. In the eastern parts of Afghanistan, fewer women and more money were the normal compensations. There were monetary equivalents to women, but the choice was on the receiver. In the Ahmadzai tribe in the late 19th century there was a specific monetary value to a man's life, and all the compensations were dealt with according to that sum (which was not cited in my source). The loss of both eyes, ears or hands was equal to a whole murder. The loss of a lip or the tongue was equivalent to a whole murder, and the loss of a tooth to one tenth of a murder. Fingers were classified according to location and to whether the loss was sustained on the right or the left hand; on the right the loss was equivalent to one fourth of a murder. If the sexual organs were cut while the man was alive, it was a crime equivalent to two murders, and if cut while the victim was dead, the crime was equal to three murders. Broken bones were equivalent to one half a murder, and if a man had been attacked with a wooden club he had the privilege of hitting his enemy with a similar weapon in front of the jirga. If a man's moustache had been cut off by his enemy, the enemy was fined; if the enemy had cut a beard off he was fined a larger sum. For the destruction of property, the culprit was fined both for the property damage and the transgression on the owner's dignity. The replacement value of

63.)

1. Hamilton, Walter, p.542

stolen animals was from four to none times the value of the original animal, and the purposeful murder of a dog was considered equivalent to the murder of a man.¹ The high price of compensation surely accounted for much of the reluctance shown to negotiate peace.

Elphinstone related a story of one feud which ended when the offender gave his niece and his sister to the injured party as compensation for a murder. The injured party considered himself ^{honorable} and returned the sister to her family, but "... he kept the other without marrying her for the Naikpeekhil never marry a woman given in the price of blood."² Blood money was still a viable solution to a murder in the 1920's. If the victims family could be persuaded to accept blood money, the murderer could escape execution by the civil authorities.³

Yirgal was a kind of bail used to end feuds. The defeated side gave yirgal, some of their own people to the other side as a demonstration of their loyalty to the peace that they desired. Later a jirga was held to solve the differences between the two parties according to the customary compensations. "They never break their word of peace when they have their man on bail."⁴

Usually a jirga only negotiated feud settlements, but sometimes it was asked to settle problems that had not yet developed into feuds. Usually the malik referred these cases to the jirga, but the power of the jirga was limited. It had no say over family affairs so long as the patriarch of the family was in control. It only intervened in family disputes which disturbed the peace. The jirga heard cases of breach of contract, disputes over land boundaries, over water rights,

64.)

1. Paxtoonwali, p.p. 44-45
2. Elphinstone, p. 340
3. Gregorian, p. 272, footnote
4. Paxtoonwali, p. 38

claims to land or pasture, infringements of customs and grants of inheritance. The jirga investigated the causes of the dispute and then negotiated a solution to the problem. It had no powers but the power of persuasion.

In cases of negotiating ends to feuds, the jirga did not judge innocence or guilt. Most often both parties openly and proudly spoke of their activities against the other. Because of the absolute duty of revenge, few deeds were concealed; rather they were boasted of as they proved the honor and the bravery of the perpetrator. The jirga therefore, rarely had to judge guilt or innocence; instead, it had to judge the extenuating circumstances and the justifications given for the deeds done.

In a jirga-trial the procedure was somewhat formalized. All members sat in a circle, usually out in the open air, on public property. No individual sat higher than any other as such a seating arrangement connoted a status hierarchy: all members of the jirga were equals. The circular arrangement also prevented a status hierarchy seating arrangement. Meetings opened with a prayer importing that 'events are with God, but deliberation is allowed men.' Any individual had the right to speak, but he was not guaranteed an audience. When one wished to speak, he simply stood and spoke; sometimes there were several members speaking at once. Those sitting either listened or quietly conversed with their neighbors. There was no chairman of the meeting, and a vote was never taken. Simply, the 'sense of the meeting', consensus, decided an issue. There was usually much coming and going, lobbying and bargaining, and the ultimate absence of opposition decided an issue.¹

In the jirga-trial, after the opening prayers and poems,

65.)

1. Spain; The Way of the Pathan, p. 50

the plaintiff's story was heard. If the defendant's story was at variance he was heard. Witnesses were called, and the jirga attempted some resolution of the facts. To lie to defeat an enemy or to help a friend was not considered an evil among the Pushtuns and "unblushing lies are uttered by witnesses..."¹ Witnessing for an individual was a political act of support, and if cases came to call on witnesses, the politically more powerful usually won his case.

In the jirga-trial one of the major functions of the jirga was to help the defeated by convincing the victorious party to decrease the compensations he demanded, or to convince the plaintiff to accept less than the customary penalties. One of the convincing factors was the willingness of the defeated to make a formal and public apology and declaration of submission to the victorious party. The victorious party was thus compensated by an increase in his honor and social standing.

Customarily, a show was made of taking the criminal to the offended party and of giving the plaintiff the option of retaliation, but it was well understood that the plaintiff had to comply with the decision of the jirga and to accept the compensations agreed upon. Afterwards the two parties were made to salute each other with 'salam alaikum' (peace be with you)² and to partake of one another's hospitality.

If the accused refused to appear before the jirga once a negotiation had been agreed upon, some tribes proceeded with the trial ex parte; others physically forced the refractory person into the presense of the jirga; still others sent the mullahs out to curse him. His property was then given to plunder and he was expelled from the tribe. The ultimate

66.)

1. Census Report of the Tribal Agencies, p.I-218

Also see page 9, footnote 3; page 14, footnote 1.

2. Elphinstone, p.168

67.

punishment the jirga could give was kussundae, and it was only given for contempt of jirga or for a refusal to comply with the community desire for a feud to end. In this case, the first man to kill was considered the guilty party, and under kussundae a murderer was made to leave his home and village. The jirga decided where the individual could and could not go. He usually sought refuge in the home of a rich man so that he would not be sold to his enemies. If a member of the opposing faction broke the peace agreement, the banished man was allowed to return, and if he died in exile, his body was returned to be buried in the family graveyard. Sharuni, the expelled, lost all their civil rights, had no claim to their wives or children, their dwellings or animals. They lived on the hospitality of another, and finally became humsauyehs to their hosts.¹

Only in the feudal areas, such as among the Durrani where the khans held virtually despotic powers, was there anything like an executive function in tribal society. In these areas the khans held ultimate power and were the policy makers. Maliks served as executors of their decisions. The administration of justice was still dispersed in the lower elements of Durrani society, but the khan was the court of appeal and could overrule jirga decisions. The difference between the feudal tribes and the democratic tribes lay in the placement of political power; with a democratic distribution of power, there was no place for an executive branch of government.

Legislation barely existed in the tribal societies. Law was customary or religious and was considered complete. The attempts of the central government to legislate new laws and

67.)

1. Ravery, p.211

Paxto Dodana, p.28

to change the society through legislation were, as has been discussed, mostly unsuccessful. Tribal society had no precedent nor place for new legislation, and it could not accept the way of life it implied. The only legislation that existed in the tribes was in the form of taxation and even that was either customary, as paid to the maliks and the khans, or it was communally legislated for the common good.

The lack of any legislation in Pushtun society greatly increased the stability of the tribal organization and life. Both the God given Islamic law and the rawaj could only be interpreted, and both were accepted as sufficient to regulate behavior, so there was no need of other legislation. If a problem arose, the respected elders, the jirga or the mullahs interpreted the law, both the Islamic law and the rawaj, to meet the need, but the interpretations had to have community acceptance before they could become effective.

The Pushtunwali, the Pushtun honor code, with its law of revenge, placed both interpretation and execution of the law in the hands of the individual. The basis of the individual's interpretation was his own traditional sense of honor, and he executed the law on the basis of his personal definition of an infringement upon it. There were no institutions in Pushtun tribal society that defined an infringement of honor, and the only restrictive force on an individual's actions was the need for communal support in his execution of the law of revenge. The jirga represented the community, but it did not have the power to define the limits of the law until after the fact of its execution, nor did it have the power to punish transgressors of the law; it could only use the pressures of

communal non-support to bear against transgressors to make them agree to stop endangering lives and property and to cease infringing upon others' rights.

The traditional, communally accepted power elite, khans and maliks, also exercised little power either as administrators of justice, policy makers or law enforcers. Except among the feudal tribes, they depended upon community support and on an ability to mobilize physical, armed support and to manipulate and bargain with the forces within their tribal group in order to administer justice, execute policy or enforce peace. Their honor and social status were closely connected with any ability to govern the tribesmen; if powerful, it was often because the khan or malik was an honorable, strong, charismatic man.

Communal consent was necessary among most Pushtun tribes for any political, legal or judicial action, and the community had only its traditions, the rawaj, the Pushtunwali, their interpretation of the Shariyat and a developed sense of Pushtun honor on which to base any decision of support or non-support of an action. With traditions as the basis for community decisions, and communal consent the major basis for political power, the stability of the customary law and the tribal way of life were guaranteed.

IV.

Although the formal law of the Pushtuns was the written Shariyat, the laws that affected the lives of the tribesmen were the rawaj,¹ the customary, unwritten law, and the Pushtun-

69.)

1. Levy, p.177 "... (Hanefi) was the first to present a clear idea of what the system of Muslim jurisprudence and its "roots" ought to be. He appreciated and acknowledged for the first time the fact that custom and long established usage had to be taken into consideration in any code of law, and he therefore placed them definitely amongst the roots."

wali, the Pushtun code of honor. The rawaj varied regionally and tribally among the Pushtuns, and "It often not only circumvented the laws of the Kingdom, but also modified certain tenets of Islamic law, especially in matters of marriage, inheritance and women's rights."¹ The Pushtunwali was the code of honor of all Pashto speaking people,² and it varied much less than the rawaj. There were three basic elements to the Pushtunwali: badal, the law of revenge, melmastia, the law of hospitality, and nanawati, the law of suppliants and deputation. The code required the satisfaction of the aggrieved rather than the punishment of the aggressor, and the satisfaction of the aggrieved was achieved through a restoration of his honor attained by a show of superior force over the aggressor. Non-observance of badal, melmastia and nanawati was regarded as the worst of all actions and brought lasting dishonor and virtual banishment from the Pushtun society, if not death.

The Pushtunwali was based on the Pushtun sense of honor, ghaeerat, which was an essential ingredient in family and tribal life. Badal was pursued in order to maintain ghaeerat. Pride in being a Pushtun was part of the Pushtun life and attitude towards their world. Pashto, the language, was also the symbol of keeping one's word, being loyal to decisions, purposes and undertakings. "If a person speaks contrary to his inner feelings, against his beliefs and cultural values, the Pushtuns will never call him a Pushtun."³ Equality among the Pushtuns was an important value and part of their enormous pride in being Pushtun; "...every man considers himself as good as his neighbor, and a step better if he has a more modern gun."⁴ Strength in character and physical strength were much admired by the

70.)

1. Gregorian, p.41
2. Hamilton, Walter, p.524 The Pushtunwali was generally seen by the British as a "rude and primitive system, from which the opinion that it is every man's duty to revenge his own injuries is by no means excluded."
3. Paxtoonwali, p.18
4. Pennell, p.49

Pushtuns and were the basic sources of a man's honor. Although the Pushtun society was one in which there was a virtually hereditary hierarchy of power, a man of honor and strength could move into leadership positions.¹

Honor was derived from public adherence to the Pushtun ideals of character and behavior. One of the most admired traits of an honorable Pushtun was his bravery.² Thora or turah literally means sword, but to the Pushtuns it had a much deeper cultural meaning. It meant manifesting bravery, courage and selfless fighting in battle; beghayrat, meaning coward, was a very derogatory term applied to those who did not manifest turah.³ A particularly honorable burial was provided for those who died in battle, and they were buried in their blood stained clothes so that they would be recognized as warriors of the true faith on the Day of Judgment. A man who refused to go to battle was fined, his property confiscated and his house burned.⁴

Another basic character trait much admired by the Pushtuns was liberality and hospitality. "The easiest way to get a good name is by hospitality." A Pushtun proverb claimed that "What you give away becomes a rose; what you eat becomes excrement."⁵ Hospitality, melmastia, was one of the three elements of the Pushtunwali, and it was supposed to take precedence over badal. There are many stories among the Pushtuns of a mother who sheltered the murderers of her son because they had gained entrance into her house and were, therefore, her guests, or stories of a father who killed his own son because the son had exacted revenge of a guest who was a traditional enemy.

71.)

1. Barth, p;82 "Honor as a source of authority is certainly conceptually distinct, in the eyes of a Pathan, from other sources of authority as landowning and wealth."
2. Thorburn, p.241 "In a Pathan's eyes a brave man must possess every virtue, but a coward can possess none."
3. One word in Pashto for coward is literally translated as 'unmanly' or 'impotent'.
4. Field, p.18
5. Thorburn, p.324

Part of the tradition of hospitality among the Pushtuns was the equality assumed between the host and his guests. A Pushtun host, no matter how distinguished, always sat with his guests, served them with his own hands, but his generosity and the width of his floor cloth always indicated to the guests the host's importance.¹ The honor an important man did his guests through his entertaining them gained him their support and respect.

Hospitality was a route to power and success in Pushtun villages.² The mark of a true malik was an unlimited supply of blankets, beds and food for travellers and for the villagers themselves. Usually in the village organization, melmastia was extended to strangers and travellers by the malik in his guest house built for that purpose. The malik was also responsible for the safety of his guests, not only in his guest house and within the village, but also within the entire village territory. For the safety of travellers, he extended a bedragga, the safe conduct, to the edge of his territory. An attack on a traveller with a bedragga was considered an attack on the person who had extended the bedragga and was consequently revenged. A tribal member always accompanied the traveller who had been issued the safe conduct to insure his safety, but the duty of these escorts were limited in time and place, and many travellers fell victims to them once they were out of the protected area.³

A kind of safe conduct was issued to merchants and caravans when the caravan paid a tax to the tribesmen responsible for the area. If the caravan was then raided, the tribal chief was responsible and sometimes even paid compensations to the

72.)

1. Spain; The Way of the Pathans, p.47
2. Gazetteer of the Peshawar District, 1897-1898, p.102
"To a great extent it is true that a malik's influence largely depends on the hospitality he exercises."
3. Pennell had an escort of two evil looking Afghans on one of his trips to Bannu. They protected him and delivered him safely and refused money for their services because he had been their guest. He, as way of thanks, sent them to the home of one of his assistants at the missionary hospital. The assistant fed them and gave them a place to saty for the night and awoke in the morning only to find that the two Afghans had absconded with all of his clothes. These Afghans had violated melmastia in that they had behaved dishonorably as guests, but they had not violated the bedragga in that they had safely delivered Pennell. They were, therefore, answerable to no person and did not risk punishment either from the malik who had sent them nor from the assistant as he was not a native Afghan and without real rights to badal.

merchants.¹ It was generally understood that caravans were not to be plundered except in times of emergency, but plunder was what some of the tribes, such as the Afridi in the Khyber Pass, lived on. It was a custom among the tribes guarding major caravan routes that feuds could not take place on or near the roads precisely to keep the caravans coming.

Hospitality was a route power because it gathered around the host many individuals who were in debt to him. The host therefore gained many men who were willing to repay their host with political or armed support if he proved himself a brave, capable and honorable leader. But it was also a route to poverty and indebtedness as hospitality was often carried to such extremes that it ultimately ruined the host. The law, melmastia, was a major factor contributing to both upward and downward social mobility in Pushtun society, and it was a social equalizer in that it placed great social obligations on the wealthy to entertain and feed the less wealthy of the community. A host had no protection and was obliged to take all guests, and Ferrier noted that among the nomads, there were individuals who perpetually lived off the hospitality of others.²

Melmastia extended in form to whole divisions of tribes; a division of one tribe could quit its tribe and join another. They were granted lands, their chief and elders were given places in the jirga, and they retained their own internal government. They entered the tribe with full rights and obligations; they were subject to the same laws, had the same privileges, entered wars and alliances with their hosts and kept their own name. Such complete acceptance was a form of

73.)

1. Kakar, p.130

2. Ferrier, p.225 "The hospitality in the tents of those wanderers is often badly taken advantage of by the idlers of the tribe, who avail themselves of every opportunity of living entirely on the bounty of other. They go from camp to camp... They continually eat the bread of those who have gleaned it by the sweat of their brow."

Pushtun hospitality.

Ⓧ Closely connected with melmastia in the Pushtunwali was nanawati, the law of suppliants and deputation. Nanawati means literally 'entering in', and the law bound all Pushtuns to accept and aid all persons who required shelter and assistance. By meranah, gallantry, a Pushtun was bound by his honor to aid any person who needed his help, and to attack the guest of a Pushtun was a serious insult to the host and one that had to be revenged. Often individuals came to a host asking for protection, and the host was put under an obligation to defend his guest even to the point of death.¹ If the guest posed a defense problem a jirga was convened to attempt a solution to the problem. However, many of the tribes there was a limit to how long a guest could legitimately demand protection, and among the hill tribes, after four days, a guest was given a bedragga and an escort to the end of the village's territory.

A suppliant entered a house and refused to take any tea or food, refused to sit on his host's carpets until the aid that he sought had been promised. The suppliant's refusal to accept his host's hospitality placed the host under an absolute obligation to comply with his guest's desires.

Usually a suppliant went to the home of a respected and powerful man seeking his aid in mediating a feud or a quarrel which the suppliant wished to end. In this case the suppliant brought his nang, shame, and placed it on the host. The shame became the host's and to lift it from his own house, the host had to comply with the suppliant's desires and act as a mediator in search of a solution to the problem.²

74.)

1. Nash, p.p.9-10 Khan A was defeated by Timur Shah in the late 18th century and sought refuge with Khan B. He was met by Khan B outside of B's territory, and B explained that if he accepted Khan A as a guest that he would bring down upon his own people the wrath of the Shah. "Arsilla strove to excite their compassion and while thus engrossing their attention, he contrived to send a portion of his baggage into the village by a circuitous route; when the chiefs discovered that Arsilla's people had gained admittance into their village, they immediately acknowledged that he was now under their protection, received him hospitably and summoned their tribes to protect him."

2. Information from the Malekiyar family of Ghazni, Afghanistan.

A suppliant seeking protection was received under both the law of melmastia and the law of nanawati. In the tribal areas many men sought sanctuary from the British. The tribesmen would seek protection and hospitality from a tribal chieftan and would be accepted for three days only, after which he became a humsauyeh in the household which had granted him protection. The three day limit was probably a fairly recent development among the tribal Pushtuns just outside the British territory; it served to protect the tribes from a great deal of exploitation from individuals who were escaping the newly imposed British form of law and justice in the settled areas. As a humsauyeh, the refugee was fed, clothed and sheltered by his protector, and in return he was required to work tilling fields, cutting wood and as a bodyguard.¹ But, he was never given over to the British authorities.²

The usual meaning of nanawati was deputation in which the elderly and respected host of the suppliant acted as a mediator between the suppliant and his enemy. Making nanawati was acknowledging a defeat, and not to accept it was never forgiven. It was believed that to not accept nanawati was to be cursed by God as the victor showed no thankfulness for his victory. Making nanawati was the ultimate humiliation in Pushtun society. Under nanawati the suppliant placed his shame on another man, meaning that he was not strong enough to wipe it out himself. Nang was placed on respected members of the community who then asked the enemy of the suppliant to cease the hostilities and to settle for a peace. Often old women were sent to first negotiate a cease fire with the enemy. They were sent bareheaded and carrying the Koran to offer a few

75.)

1. Goodwin, p.43

2. Ali, Mohammad; And The the Pathan Murders, p.48
"But he refused to deliver them on the grounds that they had taken refuge under his roof and he would not under any circumstances betray the trust."

sheep to the victor and to plead for forgiveness. Once the defeated party had been granted amnesty the elders mediated a settlement of blood money or marriage exchanges between the enemies.

If the victorious side refused the apologies of the elders or the old women, the leader of the defeated party went himself, accompanied by the elders so that he would not be shot on sight, with grass on his head, smearing mud on his neck, again with a few sheep as a peace offering. He knelt before his enemy, unsheathed his sword and gave it to his enemy, putting his life into the hands of his mortal enemy. In some places it was customary to carry a few yards of the cloth used to wrap bodies in.

Generally nanawati was accepted because it meant victory for the one side and because of the long tradition of respect for elders and old women. It was in the interests of all parties to accept nanawati as imbalances in the death scores between the two sides were evened out with the payment of blood money or exchanges of women according to the settlement agreed upon in the jirga that met to solve the feud. But, it was rarely used to end feuds, and many Pushtun families preferred extinction to the humiliation of nanawati.

Chadaur nanawati was an equally binding custom on the Pushtuns. A woman in distress sent her veil to any Pushtun in an appeal for aid, and under the law, the man was then under an obligation to help her. Once such a relationship had been established, the woman called the man her brother, and as such he was obliged to assume a protective role towards her.

Once assistance had been promised, the host was under an obligation to act accordingly. A promise, ahd, once given with the intent of carrying it out, was binding. "Even if his head is cut off his body, Khushhal will never act contrary to the promise he had given to his friend." ¹ However, ahd given to enemies with no intent to fulfill them were considered false promises and were not binding, and there was social stigma attached to such promises.

Although falsehood was accepted among the Pushtuns, self-aggrandizing tall tales were not, and boasting was seldom indulged in. "The frog mounted a clod and said that he had seen Kashmir." Informing on one another was also considered disgraceful, and an informer was considered as wicked as an assassin and "if found would certainly share a like fate at the hands of some relatives of the homicide." ² British accounts of the North West Frontier Province are full of stories of the gory ends of their informers.

Much of the Pushtun rawaj had to do with regulating the relationships between the sexes. Pakki Aw Ifft literally means purity and continence, and it meant that any illegal relationship with a woman was against both the religion and the traditions of the Pushtuns. If any Pushtun suspected his wife of having an illegal relationship with another man, he would not even look for evidence or proof, and, assuming that the lover was a man less powerful than himself, would usually kill both of them straight off. ³ Tor meant a state of infamy or guilt and was usually applied to individuals who had illegal relationships with the opposite sex. However to become tor, an individual had to be blatant and open about his defiance of

77.)

1. Wilbur; Afghanistan, p.116 as quoted from the poetry of Khushhal Khattak
2. Ferrier, p.189
3. Pennell, p.192 A tribal chieftan, upon coming home at an unexpected time one day, found his wife talking with a male neighbor over the compound wall. He was so furious that he drew his sword, struck off her head and threw it over the wall, saying, "There, you are so enamoured with her, you can have her." The neighbor quietly moved to the next village.

"The recognized punishment in such a case of undue familiarity, would have been to cut off the nose of the woman and, if possible, the man too. This chief, in his anger, exceeded his right, and if the woman had had powerful relations, he might have been brought to regret it. But, as a rule, a woman has no redress; she is a man's property, and a man can do what he likes with what he owns."

of the traditions. It appears that illegal relationships between the sexes were common, and, in actuality, it was only when the affaire became the subject of common gossip that the individuals were labeled tor and the husband's honor was damaged. He was then under an obligation to retaliate and to kill the lovers.

Tor applied to many offenses less serious than adultery. A boy simply seen talking with a girl to whom he was unrelated was tor and in the frontier tribes the father or the brother of the girl could legitimately kill him for the offense. However, if the girl's family failed to kill her for her tor, the boy's family could legitimately revenge the murder of the boy. A girl who openly declared that she wanted a certain boy was also tor and could be slain by her family for the shame. But, if the girl declared to the boy directly that she loved him, the boy was honor bound to consider himself engaged to her, and if he refused, her family had the right to redress the shame. This custom was called sadaa.

Tukre Austel was a custom that operated only among the Pushtuns north of the Peshawar Valley area. If a lover had been previously refused by the parents of a girl, he stole her veil and fled to another village, pleading nanawati. If he was caught by the male relatives of the girl he was slain for violating the honor of the girl involved. The elders of the sanctuary village conferred with the elders of the boy's village and were usually able to mediate a settlement by which the boy's family paid a great deal of money to the girl's family as a bride price, and the boy married the girl. The bride price was usually so inflated in tukre austel that the

boy's family was often bankrupted. If, however, the family of the girl refused the marriage, they could legitimately start a feud with the boy's family.

Ghagkawal was also a custom for frustrated lovers. A boy could publicly declare his attachment to a girl with a zhagh, an announcement, by firing into the air in front of her door. He fired three times, and his zhagh threw out a challenge to any other man who wished to marry the girl; another prospective lover would then have to fight the former.¹ The man who made the zhagh usually approached the father of the girl through the elders, asked for forgiveness and for the hand of the girl in marriage. Again, the price of the girl was automatically higher. If the father refused, a feud could start between the two families.

Zhagh also applied to murder cases. Among the Fushtuns the man who was responsible for the murder was considered the guilty one, not the executor, if they were different persons. The man responsible also received all the honor and the social prestige that went along with a revenge murder. If a man hired an assassin, after the murder, he made a public statement, a zhagh, that he was the man responsible for the death. His zhagh sanctioned the death if it was a revenge murder and placed him in a susceptible position as far as retaliation from the victim's family was concerned.²

Bramata was a custom that allowed a creditor, when faced with a debtor who was either unwilling or unable to pay off the debt, to seize either a member of the family of the debtor, or his tribe, or something of value belonging to the debtor and to keep it until the debt was paid. Bramata only sanctioned

79.)

1. Census Report of the Tribal Agencies, p.I-152 A and B were friends, but B was under an obligation to A. A wanted to marry B's daughter, but B refused because A was his benefactor. A made his zhagh by firing three shots into the air in front of B's house, thereby declaring his attachment to the girl and challenging all other persons who might have wished to marry her. The girl ultimately married F who knew of A's zhagh. F was A's paighair, disgrace, and according to the rawaj A would have been justified in starting a feud with F. But, F took nanawati of Sayeds and elders and a couple of sheep to A. A accepted the nanawati with the addition of a double bride price for compensation.
2. Census Report of the Tribal Agencies, p.I-152

30.)

1. Field, p.20

2. Wilber; Afghanistan, p.115

It was a common saying that "God created men and sheep
for sacrifice." (meaning death)

3. Faytoonwali, p.6

never left their dead or wounded on the battlefield in fear that the bodies would be mutilated by the enemy. Any booty that was taken in a raid or a battle was divided equally among those who had participated; it was a principle of honor and equity called dada¹ among the Pushtuns that all booty be presented and equally distributed.

Gundis were groups of people come together to support each other in rivalry and alliances.² A gundi was an alliance between individuals, clans, sub_tribes or even tribes and bound the individuals concerned with ties that were supposed to be stronger than blood. The individuals in a gundi were supposed to give all they had, including their lives, for each other. Such an alliance between two chiefs was^{not} dissolved even by a war between their respective tribes, although it was temporarily lifted during the war. Once the contest was over,³ the chiefs renewed their friendship alliance. If an individual in one gundi was maltreated by an individual in another, he complained to his chief who then presented the case to the chief of the other gundi. If the responsible chief did nothing, the drums were beaten and the first gundi was under an obligation to revenge the insult to one of its members. If an individual was maltreated within his own gundi, he defected to the rival gundi and was received with full citizen rights. Usually rival gundis⁴ within a given area allied in the case of an outside threat.

Tinga⁵ literally means a common effort towards a common good. Communal work in Pushtun villages was common although the authority for enforcing and directing such communal work varied with the economic structures of the different Pushtun

81.)

1. Jashne-e Khyber Souvenir, Vol. V, 1968, p.12
2. Faxtoonwali, p.43
3. Elphinstone, p.326
4. Thorburn, p.34 There were approximately eighteen chiefs in the Bannu District who were all allied into two major gundis. All internal politics of that area were accomplished through the gundis, with members easily defecting to the rival gundi if insulted by their own.
5. A Pushtun proverb asked, "What dust rises from a single horseman?"

areas. In areas with powerful khans the begeer, forced labor, was practised. The begeer custom allowed any khan or malik to requisition labor for almost any purpose.¹ Communal work in the frontier area was common and usually initiated by the jirga, although any man could call for help in harvesting or building a house. The community usually provided the labor, and he fed them in return.² The work decreed by the jirga usually consisted of labor on the irrigation system of the village, and landowners contributed labor in proportion to the amount of land they owned and to the amount of their usage of the irrigation works. When a tinga was declared, every household was required to support it, and a nagha, punishment, was set by the jirga for those who failed.

Charity was practised at all festivals and religious holidays when part of the food cooked for the occasion was set aside for the poor. At naming ceremonies, marriages, circumcisions and funerals, special food was served, and always some of it went to the poor. The zakat, the alms demanded by the Shariyat, was generally observed. Begging was seen as degrading by the Pushtuns and was rarely practised in the countryside without the guise of religious asceticism.

A belief in fate enable the Pushtuns to accept their feuds and the deaths involved, their poverty and their failures as well as their fortunes and good luck. Conflicting proverbs showed the paradoxical attitude the Pushtun had towards the future: "Destiny is a saddled ass; he goes wherever you lead him." and "The inevitable laughs at a man's schemes."³

Although Islamic law detailed specific inheritance patterns, in practice the Pushtun rawaj concerning inheritance rules

82.)

1. Mir Mushi, p.139
2. Information from the Malekiyar family of Ghazni, Afghanistan.
3. Thorburn, p.269

was applied. In theory, in the case of a dispute concerning the rights of succession which had no precedent in the rawaj, the Shariyat was taken as the ultimate source; but, in reality the Pushtuns employed inheritance rules which contradicted in details and in fundamental principles the laws of the Shariyat. In practice, the inheritance patterns varied among the different tribes, but they all followed basic principles that were contrary to Islamic law: women did not usually inherit; inheritance was patrilineal on the tanzimat principle; and, nearer relatives excluded the more remote. Inheritance was usually equally shared among all the sons regardless of the caste or the social status of the mother. If there were disputes, the question was usually decided in the jirga; rarely, a case was taken to a gazi for a decision by the Shariyat.

Among the Pushtuns male lineal descendants excluded all other heirs. If there were no male lineal heirs, the wife or wives and unmarried daughters received possession of the inheritance for life or until they were remarried or married. After the widow(s) and unmarried daughter(s), male collaterals were entitled to the inheritance. Brothers of the dead man excluded their sons, but the father of the deceased had first claim. In some tribes the mother of the deceased was entitled to possession for life before her other sons could inherit the land.

All sons shared the inheritance, a custom that fractured the land to such an extent that during the 19th century some tribes changed to nomadism and pasturage. Generally sons of all mothers shared alike no matter what the caste of the class of the mother, but among some tribes the son of a concubine

83.)

1. The tanzimat was a principle of inheritance in which the claiming group received the portion of the inheritance that the ancestor through whom the group that had the claim would have received.
2. Tucker, p.1iv "Neither custom nor the Shariyat profess to lay down any limit to the succession of collaterals. As long as a man can trace his direct descent from the same common ancestor, he is entitled to the reversion of the property, and exclude both daughters and widows from obtaining more than interest."
3. Lorimer, p.19
4. Elphinstone, p.447 For instance, the Kharotee of the Ghilzai tribe.

did not receive equal shares but usually inherited half the amount a legitimate son inherited or was granted sustenance for life. In some tribes he only received one quarter the share of a legitimate son, and in a few tribes, the son of a concubine was not entitled to inherit¹ at all. Step sons and illegitimate sons did not inherit at all; step sons had claims on their natural father's property, and illegitimate sons were granted maintenance until maturity.² A step son had no claim even for maintenance from his step father. Among some of the wealthy families in the Peshawar Valley area, sons of mothers of low caste inherited only one half the amount the sons of Pushtun mothers, but the general feeling among the people was strongly in favor of the equal division of property among all the sons.³

Inheritance patterns for brothers varied among the tribes; some felt that full brothers of the deceased should inherit to the exclusion of half brothers,⁴ while others held that all brothers should inherit equally. If the family property was held in common both the full and the half brothers shared equally the deceased's share of the estate.⁵

In the khan families, part of the estate usually belonged to the position of khan, and the son who inherited the position of khan received that part of the estate in its entirety as well as his equal share of the deceased khan's private estate. The khan's estate usually included a guest house and a burj. The khan inherited as well as the khan's estate, the khan's responsibilities, such as hospitality, that were incumbent on the khan.

84,)

1. Lorimer, p.23
2. Tucker, p.lv
3. Tucker, p.lv
4. Lorimer, p.20
5. Tucker, p.lv

85.)

1. Tucker, p.lvi
2. Lorimer, p.9
3. Tucker, p.lv

claims to the property. If she married a collateral heir, as was the general custom, she retained the interest of the property for life, and the property went to her husband upon her death in preference to closer collaterals of her former husband.¹ It was customary for a widow to select one of her deceased husband's collaterals to manage the property and to look after her. The man thus selected would, upon her death, succeed to the property to the exclusion of closer collaterals.² Unchaste widows³ forfeited their inheritance rights.

Daughters and their issue were excluded from inheritance by the presense of male lineal descendents, by male collaterals of their father and by their father's widow(s). Unmarried daughters were entitled to maintenance as long as they were unmarried, and were entitled to their dowry from their father's estate. Often the eldest son inherited a larger portion of the estate but also inherited the responsibility of paying ~~this~~ sisters' dowries. Upon receiving her dowry a girl was sometimes made to formally renounce all further claims to her father's estate on the grounds that she had received in advance⁴ the portion due to her by Islamic law in the form of her dowry. This was a formality observed only by strictly religious families who wished to conform to the Shariyat. After unmarried daughters,⁵ unmarried sisters of the deceased inherited the estate. Married daughters and sisters were completely excluded in the inheritance.

A woman was allowed to own and to acquire property independently of her husband, but pattern to the inheritance of that property are unknown. Most tribesmen cited no customs, and said that in a case where there were no sons to inherit

86.

1. It was the custom among the Pushtuns for a woman to marry her deceased husband's nearest collateral. Upon her husband's death, the nearest collateral became her guardian. She could not remarry without his permission, and he was responsible for her in every way. It is obvious that she lost no freedom and he gained no extra responsibilities with their marriage and inherited through her the estate of the dead man.
2. Tucker, p.1iv
3. Lorimer, p.17
4. Tucker, p.1iv
5. Lorimer, p.21

the property, the Shariyat would be referred to. Some said that after sons, the husband and then daughters would inherit. A dowry was usually inherited by the sons unless it was given to the daughters as their dowries, and in a case with no children, one half of the dowry was inherited by the deceased woman's husband and the other half reverted to her parents. Some tribes claimed that the entire dowry was inherited by the husband or his heirs; others claimed that it reverted¹ in its entirety to her father or his heirs.

There was only one type of guardian among the Pushtuns, and he served all purposes. He controlled the property of a minor and chose a marriage partner for his ward. The guardian was usually the nearest male kin, preferably in the descent line of the father of the minor. The guardian had the power to dispose of the property of his ward but only for the benefit of the ward. The property was regarded as an amanat, a deposit.² According to the Koran the wali, the guardian, could also alienate the property of his ward if he himself was in need, but it seems that the wali among the Pushtuns did not have that power except that he was usually next of kin and could arrange a family solution to the problem. He was not allowed, among some tribes, to lease his ward's property for an 'excessive amount'. A mother, when guardian, had full power to dispose of a minor's property for the minor's benefit. All contracts that were made by the wali on behalf of the minor were binding upon the minor when he reached³ maturity.

Guardianship of a married, minor female varied among the tribes. Some of the frontier tribes gave preference to

87.)

1. Lorimer, p.28
2. See Levy, p.143
3. Lorimer, p.12

her husband or his family, while others gave the guardianship to her father.¹ The Pushtuns of Nagahar gave responsibility of a married girl to the 'father of nikka', her representative during the nikka ceremony of both her betrothal and her marriage.² When a girl attained majority, her guardian was her husband. A widow forfeited her right to guardianship of her children when she remarried.

A minor was capable of acquiring property independently of his guardian, but among some tribes the guardian had the power to prevent his ward from making acquisitions or contracts that were, in the wali's opinion, disadvantageous. In some tribes the contracts made by minors were binding only if they were made out of necessity, and in others they were not binding at all. Contracts made by minors were not binding if they were made in direct defiance of the minor's wali. There was no custom for the guardianship of illegitimate children.

A minor upon attaining his majority gained his inheritance, and the wali lost all legal control over the property, although as he was usually a member of the family, he often retained real control over the estate. The heir, as legal possessor of the ancestral lands, gained citizen rights to the jirga and the tribal pasture land, the shamilat.

Generally ownership of ancestral tribal land gave the possessor privileges and, therefore, the ownership of land was an extremely important factor in the tribal social structure and in the distribution of rights. Within the Pushtun social structure of the Peshawar Valley region, other ethnic groups, as non-proprietors, served commercial and vocational functions; they did not have the privileges the Pushtuns

88.)

1. Lorimer, p.12

2. Faxtani Dodana, p.17

enjoyed. Pushtuns generally considered only agricultural work and fighting as honorable occupations, and in Peshawar Valley, as a landowning-warrior gentry, ruled over the rest of the population of the area.

The Pushtun's rights over his land were permanent. There was no claim of adverse possession if the owner were absent from the land for any number of years, and generations later the family could reclaim the land even if it had been tilled or improved by another.¹

Landownership, however, did not bring with it absolute rights over the land. A man could lease his land to whomsoever he wished, and there were no traditions governing the terms of lease. He could mortgage it or let it fallow, but rights to sell, give away or bequeath the land varied among the tribes. Many of the tribes on the frontier held that a man had no right either to alter the natural shares of the heirs or to alienate his land by gift. Others held the opposite, that a man was totally free to either alter the shares or to alienate his land. If the heirs agreed to an alteration of their natural shares, all tribes agreed that a man was then free to do so. But, if the tribe owned tribal pasture land, shamilat, a gift or sale of land to an outsider did not bring with it rights to the shamilat nor rights to the jirga. Customs varied as to whether a man could disinherit a natural heir, although according to the Koran the father has such a power.²

Giftes were held valid as long as the donor was considered sane, and it was not a death bed gift. A gift was revocable unless absolute, made with niyyat, and received. Some tribes acknowledged the validity of death bed gifts. Wills regarded

89.)

1. Gazetteer of the Peshawar District, 1897-1898, p.155
"...but under all circumstances and after any length of
absense, a Pathan could claim his rights, and he cared not who
had cultivated the land in the meantime, resting assured
that he would acquire possession when it suited his conven-
ience."
2. Levy, p.143

as equally valid in either an oral or a written form. A gift of a share of nasha, undivided joint property, was generally legitimate even when given without the consent of the co-sharers. ¹

Partition of family land among the sons could happen at any time but was entirely under the control of the patriarch of the estate. Sons had no rights to demand a partition unless their father had made them co-sharers in the property. If the partition was affected during the life of the patriarch, he held absolute power to divide the estate as he wished, and his distribution was held valid after his death and could not be changed. If the partition was affected during his lifetime, he could legitimately withhold a share for himself, and if a new son was born to him after the partition, he could call for a repartition of the land in order to give the new son his natural share. In large estates, the guest house was reserved from partition and was assigned to the fittest son as chosen by the father, or to the eldest son. ²

If a man died intestate and without traceable heirs, the tribesmen held that his property would be given to the mosque or to a charity, or it would be divided among the khel in which the deceased had lived. ³

Land belonging to the community was divided into three major categories: seri land, land dedicated to specific purposes; shamilat, common pasturage; and privately owned land. Pargai seri land was land given permanently to a position or an institution within the community. The khan or malik was often given land as a part of his private estate for use during his lifetime, but he did not have any powers of alienation over it. It belonged to the position rather than to

90.)

1. Lorimer, p.27
2. Lorimer, p.29
3. Lorimer, p.23

the person, and he was allowed enjoyment of it only as khan. Seri land was also dedicated to the support of the mosques (wagfs); da telo seri was land dedicated to the purchase of oil for the mosque, its upkeep and for the mosque functionaries. It was administered by the mullahs, but they had no rights over it except the enjoyment of it. Seri land was sometimes temporarily given to non-land owning community servants, such as blacksmiths and carpenters, in return for their services.¹

Common pasture land, shamilat was owned by the entire community of landowners and access to it was one of the rights of possessors of land. Sometimes, under population pressure, the community decided to take a portion of the shamilat, divide it among the community as private land, thus increasing the property of every landowner.

Bandas were communities set up in the shamilat by poor landowners or non-proprietors of the group that owned the shamilat. The land did not become the property of the founders, nor the future inhabitants of the bandas. Rights to till banda land were informally hereditary, but banda members never acquired ownership rights over it. The banda was tolerated by the owners of the shamilat on the conditions that the banda members join all expeditions of the main clan and that they ward off all aggressors.² The clan leader acted as the leader of the banda. If the banda founders were humsauyehs they usually rented the land from the clan on terms of their keeping three fourths to one half of the crop. Many banda communities were founded by Sayeds or holy men in which case, the land was given to them as a permanent gift by the shamilat's clan.³

91.)

1. Barth, p.66

2. Gazetteer of the Peshawar District, 1897-1898, p.153

3. MacGregor, p.309

Private land was usually called daftar. Land used for agriculture in a community was categorized and classified and graded by quality, and each daftar was made up of some of each grade of land, the total amount of each quality being proportional to the wealth and the power of the descent group which owned the daftar.¹ Daftar was hereditary, and a daftari was an owner of inherited, ancestral land.

Brakha was the family's land possession. Each brakha also contained a proportional amount of each quality of land distributed in the community. Ideally, all brakha in a community were equal, but, in fact, most communities had large and small landowners, but all owned both high and low grades of land. Brakha was hereditary, and the owner held rights to lease and mortgage it. Rights to alienate brakha varied among the tribes. Possession of brakha gave the owner full citizen rights.

The zamindari were owners of land holdings that had been either founded or acquired by a living individual, and villages in which rights of tenure were fixed through purchase of the land were increasingly common in the 19th century.²

Non-Pushtun, non-proprietors formed much of the population in areas which were dominated by a Pushtun land owning class. Fagirs, literally indigents, lived on land owned by the Pushtuns, rented houses from their landlords and had the duties of providing community guests with grass and grain for the animals and blankets and beds for the guest house. They were required to take part in the watchguards, to help at harvest time and to go on raids conducted by the Pushtuns.³ They were usually craftsmen.⁴ They were sometimes given non-hereditary, seri

92.)

1. North West Frontier Province Gazetteer, Peshawar District,
Vol. A, 1931, p.242
2. North West Frontier Province Gazetteer, Peshawar District,
Vol. A, 1931, p.240
3. Gazetteer of the Peshawar District, 1897-1898, p.153
4. MacGregor, p.301

land free of charge for their services.

One of the areas in which the Pushtuns were the land owning class and the fagirs the indigent, serving, non-proprietary class was the Peshawar Valley region. One of the customs of this area served to greatly emphasize the class difference between the Pushtuns and the fagirs: the vesh, a custom of periodic land reallocation within the community. The Pushtuns were a mobile element in the population, changing residence, village and even area every several years while the rest of the population remained stationary. It was a custom that also affected landownership rights and inheritance patterns as well as the social and political structure of the society.

According to all sources vesh had a definite historical origin; the Yusufzai tribe moved as conquerors from the Kabul region into the Peshawar Valley and into Swat Valley in the late 16th century. Having conquered the area, they appealed to a semi-legendary person, Shaikh Mali, to devise a system of distributing their newly conquered lands equally among all the tribe members. Shaikh Mali divided the lands into as many areas as there were major subdivisions in the tribe and gave to each subdivision permanent ownership of an area. In further subdivision Shaikh Mali divided each area into as many sections as there were basic divisions in the subtribe; if there were two branches in the subtribe, the area was divided into half; if there were three branches, the area was divided into thirds. These areas could never be equal in fertility; therefore, Shaikh Mali decreed that within the subtribes the land should be periodically redistributed so that in the course of time every man would have equal access

to the fertility of the land. The two main branches of a subtribe should alternate the use of the land; the three main branches should rotate, etc. Within the main branches the land was distributed to clans, down through the tribal divisions finally to the family unit. Within each of these divisions the land was periodically reallocated.¹

Under this system no individual owned land but owned a right to "a certain proportion of the total area...of the joint estate of a descent group of Pushtuns..."² Each individual had a right to a certain number of fields of various types and qualities, a brakha, a proportional share in every division of land (wand) within the village area. Along with the brakha the individual retained his rights to the tribe's shamilat, the commonly shared tribal land used mainly for pasture.

There were two basic kinds of vesh; the vesh, also called khasanne, which distributed land only to adult males, and the khula vesh, which distributed land "to every mouth", in other words, to every man, woman and child, so that the larger the family, the larger the brakha it received. In the khula vesh one family's brakha tended to vary much more in size than in the khasanne. If the clan grew larger so that there was not enough land to be distributed, either the lots were made smaller, or when, with the diminishing lots, no man received enough land to support his family, new land was chosen from the shamilat, divided into wands and then into lots and distributed in the new vesh.

Usually vesh was periodic, every five, ten or twenty years, but sometimes the jirga decided the time it was to be done, or it was done "when the majority desired it."³ If new

94.)

1. MacGregor, p.306 At the time of Shaikh Mali, Kalmazai was a division of the tribe with two main branches: the Mishranzai, the elder branch, and the kishranzai, the younger. The Mishranzai settled in Toru, the Kishrazai in Hoti. The land apportioned to the Kalmazai was divided into 400 shares, and each branch was allotted 200.

In the Kishranzai, 100 shares were given to the subdivision settled in Hoti, and the other 100 shares were given to the subdivision that settled in Mardan. In the Mardan subdivision, 12 shares were for seri- free gift land for the support for various priest orders, and 88 were divided among the Pushtun community. Of these 72 were divided equally among the three divisions of the Kishranzai family at Mardan: Khan Khel, Rustam Khel, and Bada Khel. Each 24 lot portion was divided equally among the families composing the khel: Khan Khel with one family did not divided, but Rustam Khel contained Bahadar Khel and Bamo Khel each of which were given 12 lots.

The remaining 16 lots of the subdivision was given to the Mandari tribe whose ancestors had been military mercenaries of the Yusufzai. The land of the Kalmazai which had not been divided into the 400 lots was left as common pasture land for the whole tribe to use.

2. Barth, p.51

94. cont.)

3. The Imperial Gazetteer of India, Vol. XIX, p.193

land was added, the elder decided what part of the shamilat was cultivable. They divided it into wands and classified it according to the quality of the soil. The division into wands was accomplished by the jirga under the direction of either the khan or the malik. The ground was measured by means of the purrai rope of between fifty to one hundred feet in length. The process of measuring was called the 'casting of the purrai', and the land was measured off into wands. Wands were generally rectangular in shape. They were subdivided into equal lots for distribution. The number of lots they were divided into was determined by a tribal census, the counting of the khulas, mouths, with a lot for every mouth. Each individual lot was rectangular and extremely narrow, running the length of the subdivision of the lot in which it was located.¹

The drawing took place in a border village between the lands of two tribal subdivisions who were having the vesh. Most of the tribesmen concerned attended the ceremony, and such a large number of people gave the meeting a high chance of trouble. The maliks usually prolonged the meeting until many of the people returned to their homes to await the outcome.² Finally, the chiefs of the groups drew lots by casting the pucha. The representative of each khel to share in the distribution selected a private marker such as a piece of wool, a sheep's pellet, a rag, a grain of maize or a stone, and in the presence of all, he gave it to the elder who had been appointed to cast the lots. The representative publically claimed his marker as his own. The elder gathered all the tokens in the skirt of his tunic and walked around the wand throwing them

95.)

1. MacGregor, p.307

Thorburn, p.p.128-129

2. Elphinstone, p.334

out onto the different lots as he passed them. A lot then became the possession of the khel whose token had fallen on it.¹ The khels which had won the most fertile land made public distributions of charity and entertained the people remaining in the village.² If the portion of land given to one khel was in excess of its needs and what it could legitimately claim, the excess was given to a khel which had received less than its allotted amount.³

Vesh occurred within the villages also, so that the lands of the village and even the houses were periodically exchanged. If the houses exchanged either in the village vesh or in a vesh between villages were approximately equal in size and value, the individuals involved would exchange on equal terms, but if one house was better than the other, the individual who received the better house paid some compensation to the other. Usually, however, they removed everything from the houses including doors, the grass thatch and the rafters from the roof, leaving only the bare mud walls standing. If an exchange were unequal even on those terms, and if the one refused to pay compensation to the other, there was sufficient reason for the loser to begin a feud.

Some of the land was not subjected to the vesh. Chiefs or khans in Swat Valley were exempt from both the land vesh and the vesh concerning houses. In Dir and Bajaur the chief khan was exempt, and the seri lands belonging to powerful mullahs were not subjected to reallocation.⁴

Under vesh the sale of land was impossible because the land was the property of the entire subdivision of the tribe and without tribal sanction, the land could not be alienated.

96.)

1. MacGregor, p.308
2. Elphinstone, p.335
3. Gazetteer of the Peshawar District, 1897-1898, p.144
4. Davies, p.54

An individual in some the tribes was allowed to alienate his brakha rights, but in doing so he lost his rights to the jirga and the shamilat, and the buyer gained neither with his purchase, but in most of the tribes, an individual could not sell his brakha rights without the sanction of at least his clan.

Mortgages were allowed, but the legal complications involved were one of the major reasons for the demise of the vesh custom. It was generally accepted that a mortgagee was entitled to some sort of compensation in either money or land if at a new vesh, the number of mortgaged strips had diminished by deaths in the family of the original mortgagor or his descendants.¹ If a mortgagor died without issue, his rights to a brakha were extinguished, and the mortgagee took his place at the next vesh. There was no information concerning the rights of collateral heirs in such a case available.²

Vesh was originally practised among all the frontier tribes except the Hazaras (not to be confused with the separate ethnic group called the Hazaras who lived in the central mountainous region of Afghanistan) and the Waziris. In the late 19th century most of the tribes had ceased the practise because of the complicated legal problems attached to it in selling, renting and mortgaging the land and because of the natural growth of population which led to intense competition within the tribes for land. Several British writers observed a growth of feelings for individual rights among the tribesmen, a development that to a certain extent eclipsed the communal interests of the tribesmen.³ Another basic objection to vesh was that the lack of prolonged possession of the property prevented

97.)

1. This is assuming a khula vesh in which shares were allotted every man, woman and child. The khula vesh seemed to be very common.
2. Thorburn, p.127
3. North West Frontier Province Gazetteer, Peshawar District, Vol. A, 1931, p.241

98.

the tribes men from desiring to improve their land, and it was a fruitful source of feuds and bloodshed when the British first saw it.

In the end of the 19th century tribal shares were usually only maintained for distribution of water rights for irrigation and in the shamilat. Vesh still existed, however, in parts of Buner and in parts of Swat, and in 1932 it was reported to exist in Dir, Buner, Bajaur, Utman Khael and Swat.¹ Vague information today reports yesh to be still practised in Yusufzai pockets in Batagram Tasil in Hazara District, near Machao in the plain of Ziarat and in the Talesh Valley of Dir,² all of West Pakistan.

CONCLUSION

A community may define wrong acts in a variety of ways. It may have codified, written laws, or it may have customs and traditions which guide behavior, or it may have both. The laws may have moral implications, or they may simply demand outward, public, social conformity to them. Every society differs in what it defines as wrong and as how wrong, and in how the society deals with transgressors. The definition of a transgression also lies with different bodies in various societies. In some the individual members of the community are allowed to apply their own definitions; in others, there are institutions that deal with definitions both before and after the fact of a transgression.

There are also many ways for a community to solve its problems. It has the choice of ignoring problems and disputes

98.)

1. Davies, p.54
2. Interview with Farid Khan of the Peshawar Museum, Peshawar, West Pakistan.

among its members, or it can choose to interfere. It can give one individual enough authority to deal with disputes and to make decisions; it can give a group of individuals that authority. It can permit the authority to use force, if necessary, to enforce its decisions, or it can limit the authority to mediation and persuasion. Or, the community can merely ostracise trouble makers.

The 19th century Pushtuns had both written laws and customary laws to guide their behavior. The written laws, the Shariyat, were, however, interpreted and adapted to their customs and were, practically, more like a customary law than written law. However, the Pushtuns considered the Shariyat the ultimate and indisputable source of law, and, in that sense, they had an unchanging, written law as a source of the ultimate definitions of right and wrong behavior. Because there is no legal definition of a wrong act in customary law, customary law and customary definitions of right and wrong behavior are defined through application of the law and through community sanction of the application after its fact. Among the Pushtuns community support behind an act of revenge was essential or the act of revenge itself would be defined as a wrong deed and would be liable to community disapproval.

Among the Pushtuns there were four sources for definitions of wrong behavior: the Shariyat, the rawaj and the Pushtunwali, the community and the individual. There were social structures within Pushtun communities that dealt with the Shariyat, the religious structure, and the rawaj and Pushtunwali, the jirga and the elders. The jirga and the elders also served the

community as its leaders in the interpretation of law and behavior, and in the enforcement of the rawaj, the Pushtunwali and community decisions. With the law of revenge the individual was the most potent force for the interpretation, application and enforcement of the law and custom within the Pushtun community. There were no institutions or rules that guided or lessened the power of the individual's application of the law, and the individual was guided only by the knowledge of his relative strength and social standing in the community, his sense of Pushtun honor and by his definitions of infringements upon that honor.

Among the Pushtuns an act against the traditions was not itself dishonorable, but the public knowledge of it was. A broken tradition was an insult only if one party's honor came into question. Honor among the Pushtuns depended upon the individual's ability to appear before his community as a conforming member of that community, loyal to his family and tribe, to his religion, customs and traditions. Honor also depended upon the individual's ability to defend himself, his property, dependents and those related to him. Any action interpreted by the individual as an insult to him, his honor, his family or his property had to be revenged with a show of equal or greater force to that which the enemy had shown. With physical and successful retaliation, honor was restored and social status secured.

In retaliation, the individual had to have the support of the community, but with the interpretation of the law, the decision of what was an insult subjective to the victim, the

community only rarely would actively challenge a man's right to revenge if the man felt himself to be insulted. The injury was personal and was to be personally interpreted and revenged, and the community was not often expected to interfere. Support usually was a political action and it had little to do with the actuality of a right or wrong act, in any case.

In most Pushtun communities a group of individuals was given the authority to make decisions for the community and to solve disputes among the members of the community. This group, the jirga, usually only had the powers of persuasion and mediation. The ultimate action that the jirga was authorized to take was banishment. The property destruction that usually accompanied banishment was a symbolic act by the community and the jirga that the individual so punished had lost all his ties with that community. Other than this measure, the jirga did not usually have the power to punish or fine any transgressor unless the transgressor agreed to abide by the rule of the jirga.

The concept of justice in the Pushtun society was based upon the Pushtun concept of honor. Justice was achieved by the retribution of the aggrieved rather than by the punishment of the aggressor, and the function of the jirga was to find a solution to a problem that insulted neither party and satisfied the aggrieved. The aggrieved was damaged both physically (or materially), and socially and morally in that every insult damaged the victim's honor and social standing. Revenge on the aggressor reestablished the actor's honor.

With law enforced through revenge by individuals who interpreted deviant action as a slight to their honor, the enforcement

of the law was placed in the hands of the individual members of the community. Any deviant behavior could, therefore, be punished, and the range of deviant behavior tolerated by the community was defined by the most conservative members of the community able to enforce their interpretations of the law. It seems, therefore, that one of the functions of the law of revenge was to narrow the range of deviant behavior tolerated by a Pushtun community. The Pushtuns lived in an inhospitable environment where survival was a struggle, and the traditions outlined a way of life that had proven at least somewhat conducive to the survival of the community. In such an environment, there was no room for the luxury of experimentation, and badal enforced the tried and proven ways.

The written, unchangeable Shariyat was also conducive to conservative delineations of acceptable behavior. The law itself could not be changed; it could only be interpreted. Interpretation of both the rawaj and the Shariyat lay in the most conservative members of the community, the elders and the mullahs. They, as members of the power elite, had the most to lose with new interpretations of the law. They gained their power from the community's respect for their wisdom; the mullahs were the only sources of knowledge concerning religious obligations and doctrines, and the elders gained their knowledge from long experience in the traditional ways of life. Changes would have challenged their sources of respect and power. The community was liable to follow the interpretations of their leaders because of their institutionalized roles as interpreters

of the law, and the law necessarily remained conservatively interpreted.

The laws that guided Pushtun behavior were also extremely important in their social-political system. Feuding brought about by the law of revenge had definite class aspects to it. A family had to be wealthy in order to have both the manpower, the man hours and the weapons and ammunition to feud. The severity of the feud and the number of generations that it was passed on depended upon the socio-economic status of the feuding families. Feuding showed the community the courage, strength and the physical force that a family could mobilize in a feud; feuding was, therefore, a source of social status and authority within the community. The more feuds a man could carry and the more severe the feuds, the more followers he was likely to accumulate as he displayed his leadership capabilities in successfully carrying out his feuds. Badal was, therefore, a path to leadership positions.

Melmastia, hospitality, was also a path to leadership positions. The more generous a man, the more guests he was likely to have, and the more guests, the more followers he was likely to gain. Followers served the double function of providing either political or physical support, or both, when the leader needed it. The hospitality which the guests enjoyed at the expense of their leader-host placed them in debt to him, and to repay him both kinds of support were offered by the guests-turned-followers.

Both laws, melmastia and badal, also served as forces equillizing the distribution of wealth and power within the

Pushtun community. The more generous a man, the more quickly impoverished; the more feuds a man carried, the weaker he and his party became and the less politically potent as a result. Entire families were extinguished in feuds, and dead, they served no political or economic function in the community. The laws were, therefore, paths for both upward and downward social mobility with Pushtun tribal society.

The sources of power were within the traditions and the survival of the community was insured by adherence to custom. The Pushtuns had no history of legislated change from above. Change only occurred when it came from within the community as the community met new situation; the Yusufzai developed their custom of vesh as a way to equitably divide their newly conquered lands. The administration of justice was dependent upon the traditions, and the norm that it was dishonorable to appeal to outside authorities kept both the traditions and the traditional power structure intact. Social mobility was a built-in part of the system so frustrated elements were minimal. There were, therefore, few forces within Pushtun society to desire change of the traditions, laws and customs, and there were strong forces to keep the way of life reasonably static. Only when the socio-economic and political bases of power changed, such as with the establishment of the British in Peshawar Valley, did any radical changes take place in the social structure of a Pushtun tribe. Differences existed in the social structures between the various Pushtun tribes, but most remained relatively undisturbed in the 19th century.

The late 19th century monarch, Abdur Rahman, tried to

change the tribal way of life and the tribal administration of justice. His brutal reign of terror was perhaps a necessary step in the transition between tribal administration of justice and tribal rule and the attempted centralized, impersonal government rule and codified law. In the administration of justice his reign represented a step between retribution for the aggrieved and punishment of the aggressor. His horrible and sadistic punishments were given almost as a personal revenge by the Amir against a transgressor of his law in his kingdom. His power was absolute and impersonal, and the punishment was for the sake of example. He desired to change the social situation by making punishment inevitable for all criminals and far greater in severity than the crime called for. The crime was against him as protector of the kingdom and, therefore, the punishment was both conceived and received as revenge. But, it also had its social implications, and it was impersonal in that a position, the Amir, not a person had been insulted. It was, therefore, more like the codified laws that Abdur Rahman attempted to enforce than the personal tribal administration of justice with badal.

However, these punishments reached only the urban people of Afghanistan directly within reach of the Amir, and the tribal people were not basically affected by the changes. Their freedom to maraud became limited with the growth of power in the central government, but within their own communities the political structure and the administration of justice did not fundamentally change. The Pushtuns were secure in their traditions and resistant to change. They did not really change

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their tribal way of life when converted to Islam, when conquered by the British or the Durrani governments and today seem to show the same strength and resistance to the modern way of life which is slowly changing Afghanistan. The religion is still a conservative force within the Pushtun community, and change will only come about in a fundamental manner when the Pushtuns are given positive alternatives of ways to power and wealth and social status within their own communities and within the larger community of Afghanistan and are thereby convinced of alternatives to their definition of justice achieved through retribution.

CHRONOLOGY

Ahmad Shah 1748-1773

Timur Shah 1773-1793

weak rulers 1793-1826
and civil war

Dost Mohammad 1826-1838, 1842-1863

weak rulers 1863-1881
and civil war

Abdur Rahman 1881-1901

GLOSSARY

1. adat: custom
2. Badal: the law of revenge, part of the Pushtunwali
3. Badragga: safe conduct
4. boongah: ransom for stolen animals, usually one fifth of the value of the animals
5. brakha: family land possession
6. chars: hashish
7. fatwa: legal opinion
8. Fiqh: science of Islamic jurisprudence
9. Ghilzai: a Pushtun tribe of the Ghazni region
10. gundi; alliance group
11. hadiths: the traditions of the Prophet's model behavior and his legal decisions
12. Hazara: a separate ethnic group of the central mountainous region of Afghanistan

also a Pushtun group living in the North West Frontier Province of West Pakistan
13. hujra: a small room attached to the mosque for primary social functions
14. humsauyeh: a client of Pushtun tribes who enjoys protection but has no voice in decision making
15. Idjma: unanimous decisions of legal scholars
16. Imam: the religious functionary serving the Friday mosque
17. jihad: the holy war
18. jirga: tribal council
19. Kafir: pagan
20. khan: the formal position of leader of a clan, a subtribe or a tribe
21. khel: clan
22. kundi: a tribal or clan section of a village

23. malik: the formal leadership position in a village or a kundi
24. melmastia: the law of hospitality, part of the Pushtunwali
25. mohtesib: the religious policeman
26. mufti: the legal specialist of the religious court
27. mullah: the small community religious functionary and leader
28. nanawati: the law of suppliants and deputation, part of the Pushtunwali
29. niyyat: intent
30. por: debt
31. Pushtunwali: the Pushtun code of honor
32. qala: the fortified Pushtun residence
33. qazi: the Islamic religious judge
34. Qiyas: juristic reasoning by analogy
35. rawaj: customary law
36. Sayed: technically a descendent of the Prophet, but among the Pushtuns, any person of Arab descent was considered a Sayed
37. shamilat: tribal pasture land owned in common
38. Shariyat: Islamic jurisprudence
39. sirdar: technically, a clan leader of the Durrani, but also a sub governor or important leader in the provinces of royal appointment
40. tiga: the stone of peace or a time of truce
41. vesh: periodic land redistribution
42. waqf: religious foundations
43. zakat: alms, one of the five pillars of Islam
44. zhagh: announcement, usually concerning a claim on a girl or a claim of responsibility for a revenge murder

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