

Institutional Entrepreneurship in Afghanistan: How Afghan Merchants and Afghan Judges Negotiate Innovative Financing Solutions

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ABSTRACT

Formal institutions in Afghanistan have failed to offer credit in a way that works for the Afghan context. As a result, only a small percentage of Afghan merchants use bank loans. Despite the failure of formal institutions, Afghan merchants have developed a number of informal institutions to alleviate their credit constraints. This article describes two informal financing institutions in Afghanistan and their judicial treatment. By studying how Afghan merchants and Afghan judges negotiate informally developed institutions, this article paints a dynamic view of Afghanistan's institutional landscape and introduces new possibilities for legal reform in Afghanistan. It shows that a formal-institution-only lens provides a grossly incomplete view of Afghanistan's institutional landscape. At the same time, it challenges a strict informal-formal divide by describing the dynamic interaction between institutional entrepreneurs and Afghanistan's judiciary. By providing a success story of judicial formalization of an informally developed credit institution, this article argues that incrementally formalizing informal institutions may be the most effective way to create working formal institutions.

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INTRODUCTION

Formal institutions in Afghanistan have failed to offer credit in a way that works for the Afghan context. As a result, only a very small percentage of Afghan merchants use bank loans.¹ Despite the failure of formal institutions, Afghan merchants have developed a number of informal institutions to alleviate their credit constraints. *Gerawee* and *Sar qufli* are two of these informal institutions. *Gerawee* allows property owners to raise capital against the value of their property without formal collateral, while *Sar qufli* solves an important institutional problem by allowing property owners and property users to form mutually beneficial transactions. As this article will show, *Gerawee* and *Sar qufli* play a far more important financing role in Afghanistan than bank loans.

Despite their prevalence, neither *Sar qufli* nor *Gerawee* arose through formal rulemaking. Statutory laws of Afghanistan do not reference either and both developed outside the legal system. However, Afghanistan's judiciary has effectively formalized the rules surrounding *Sar qufli* but not *Gerawee*.² This article argues that the divergent historical development of *Sar qufli*, which is considered a commercial transaction, and *Gerawee*, which is considered a civil transaction, sheds light on the divergent judicial treatment of laws governing commercial and civil transactions in Afghanistan.

¹ A Survey of Afghanistan Capital Market Assessment ("Capital Assessment") in 2010 found that only 5% of their sample relied on banks for capital (\$14.81 million USD). AFG. FIN. SERV., AFGHANISTAN CAPITAL MARKETS ASSESSMENT: A SURVEY AND ANALYSIS OF CURRENT CAPITAL MARKET ACTIVITIES, THE DEMAND FOR CAPITAL, AND THE BASIC STRUCTURE AND GOVERNMENT DEBT MARKETS 10 (2010). Capital Assessment only included large businesses. *Id.* at 3. Capital Assessment defined a large business as one with 30 or more employees or initial capital investment of \$250,000 USD or more. *Id.* at 4. The 2009 Business Survey estimated that only 10% of the business establishments in Afghanistan had more than five employees. ASIAN DEV. BANK, INTEGRATED BUSINESS ENTERPRISE SURVEY IN AFGHANISTAN 23-24 (2009); *see also* AFG. CENT. STATISTICS ORG., BUSINESS ESTABLISHMENT SURVEY 8 (2016) (finding that in 2015, 77% of businesses in Afghanistan have one or two employees). Likely, these numbers have not improved because bank loan distribution in Afghanistan has been declining since 2013. *See* DA AFG. BANK, QUARTERLY FINANCIAL SECTOR FINANCIAL STATISTICS: I-2013 – II-2017 (2019), <https://dab.gov.af/Financial-Statistics>.

² *See infra* Part IV.

This article describes two informal financing institutions in Afghanistan and their judicial treatment.³ By studying how Afghan merchants and Afghan judges negotiate informally developed institutions, this article paints a dynamic view of Afghanistan's institutional landscape and introduces new possibilities for legal reform in Afghanistan. It shows that a formal-institution-only lens provides a grossly incomplete view of Afghanistan's financial landscape. At the same time, it challenges a strict informal-formal divide by describing the interaction between institutional entrepreneurs⁴ and Afghanistan's judiciary. By providing a success story demonstrating the judicial formalization of an informally developed credit institution (i.e., *Sar qufli*), this article argues that incremental formalization of informal institutions may be the most effective way to create working formal institutions.

This article consists of three sections. The first section describes *Gerawee*, estimates the size of *Gerawee* markets, and explains *Gerawee*'s legal standing under the laws of Afghanistan. The second section focuses on *Sar qufli* and its judicial treatment. The final section explains why the Afghan judiciary has reacted differently to *Sar qufli* as compared to *Gerawee* and examines the implications of these reactions.

I. GERAWEE

This section discusses *Gerawee* and illustrates the various forms of *Gerawee* practice through hypothetical examples. The aim is to highlight the underlying economics of *Gerawee* and demonstrate the nuances of its various forms in Afghanistan. The following examples introduce the most common variations of *Gerawee* transactions:

Example 1: *A*, who needs a sum of money (*Gerawor*), may enter a written agreement with *B*, who is willing to provide him with a sum of money (*Gerawe-ee*). Under the terms of their agreement, *B* agrees to provide *A* with an amount of money, to be fully repaid at a

³ The empirical data and references presented herein draws on the author's interviews with Afghan merchants, Afghan judges and Afghan real estate agents in five major provinces of Afghanistan (Kabul, Herat, Nangarhar, Balkh, and Kandahar) between March and August 2017 and the author's personal observations as an attorney and accountant in Afghanistan's private sector from 2008 to 2013. Some of these interviewees requested anonymity, and in those instances interviewees are referred to only by their profession. Further information about specific interviews may be obtained by making a request to the author. This article also draws on economic and judicial reports from Afghanistan's Central Statistics Organization and Afghanistan's Judiciary.

⁴ Institutional entrepreneur here is used to refer to the actors who have contributed to the creation, modification, and adaptation of the rules of *Sar qufli* and *Gerawee* (e.g., judges, lessors, and lessees).

later date, in exchange for the right to live in *A*'s house. The amount of money paid by *B* usually is much lower than the market value of the house. It is common for the agreement to specify the length of the contract (i.e., the date of repayment). However, *B* will have the right to live in the house until the debt is fully repaid, even if that right extends past the original termination date of the agreement.

Example 2: *B* agrees to provide *A* with an amount of money to be fully repaid at a later date in exchange for the right to lease *A*'s house for considerably lower rent than market price. Like the previous scenario, the amount of money *B* pays is usually much lower than the market value of the house. Similarly, it is common for the agreement to specify the length of the contract (i.e., the date of repayment). *B* usually has the right to retain the lease to the house until the debt is fully repaid, even if the term of the contract elapses.

Example 3: *B* agrees to provide *A* with an amount of money to be fully repaid at a later date in exchange for the right to lease *A*'s house to a tenant. Under this scenario, *B* will receive the rent from the tenant. Like the previous scenarios, the amount of money paid by *B* usually is much lower than the market value of the house. It is common for the agreement to specify the length of the contract (i.e., the date of repayment). However, like the other arrangements described above, *B* usually will have the right to receive the rent from the tenant until *B* has been fully repaid, even if the term of the contract elapses.

Example 4: *B* agrees to provide *A* with an amount of money to be fully repaid at a later date, in exchange for the right to lease *A*'s house to a tenant. However, unlike Example 3, *B* will lease back *A*'s house to *A* (meaning *A* will retain the possession of the house). *B* will receive rent from *A*. Like the previous scenarios, the amount of money paid by *B* usually is much lower than the market value of the house. Similarly, it is common for the agreement to specify the length of the contract (i.e., the date of repayment). However, *B* usually has the right to receive rent from *A* until the debt is fully

repaid, even if the term of the contract elapses. This scenario is closest to a mortgage contract.

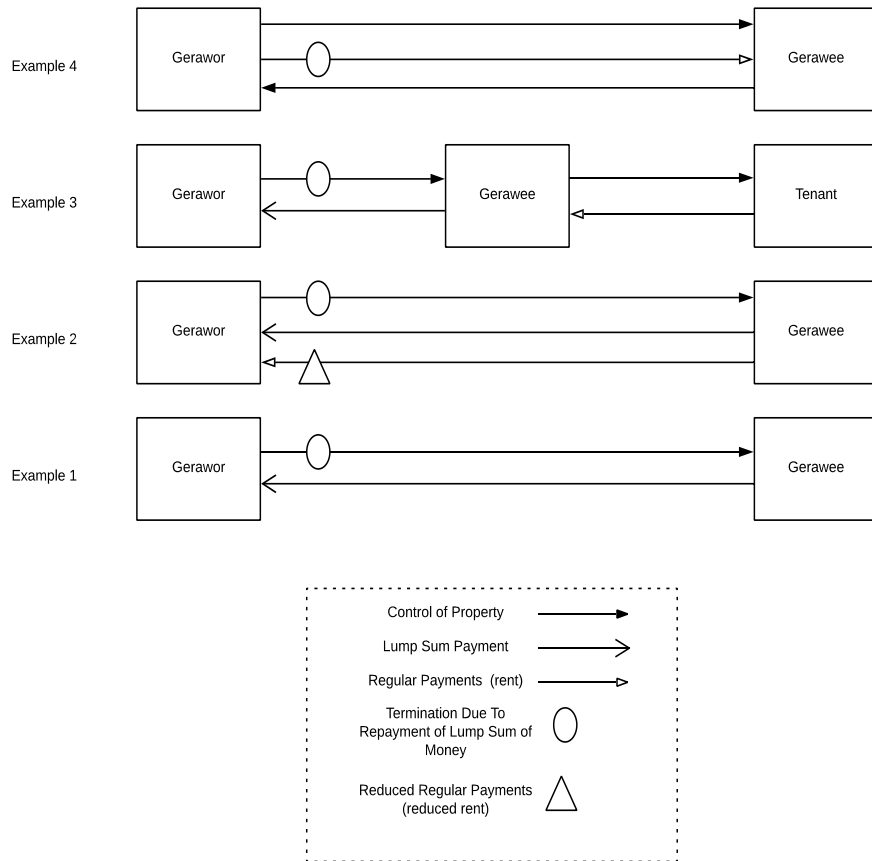


Diagram 1: Gerawee and its Variations

A. Important Characteristics of the Gerawee Market

In order to thoroughly understand the practice of *Gerawee* in its social context, one must be acquainted with the five main characteristics of *Gerawee*. These characteristics illuminate the dynamic of the *Gerawor*–*Gerawee* relationship. They also show the role local real estate agents play in concluding a *Gerawee* agreement.⁵

Houses are the most common property subject to the *Gerawee*. However, stores, warehouses, and agricultural land may also be subjected to the

⁵ The following description of *Gerawee* agreements and the *Gerawee* market is primarily based upon the author’s experience as an attorney and accountant in Afghanistan’s private sector from 2008 to 2013 and conversations with various participants and observers of the *Gerawee* market.

Gerawee. Movable property, on the other hand, cannot be subject to a *Gerawee* transaction.

Who are the usual *Gerawee* actors? The creditor or *Gerawee-ee* is usually an unsophisticated party. Typically, *Gerawee-ee*'s have small or modest savings but do not conduct their own business ventures. They seek *Gerawee* to supplement their income, or, in some cases, as their sole source of income. By using a *Gerawee* strategy as outlined in Example 1 or Example 2, *Gerawee-ee*'s use *Gerawee* to reduce or eliminate their rental expense. Hence, salaried workers, widows, orphans, elderly, and low-ranking government employees are common *Gerawee-ee*. The debtor or *Gerawor* is often an entrepreneur or small business owner seeking to supplement their income, not speculate to get rich. It is equally common for the *Gerawor* to use the money for living expenses such as repaying debts.

The typical asymmetry of business experience between each party to a *Gerawee* transaction along with a dearth of legal protections make *Gerawee* transactions ripe for misuse, speculation, and predatory actions. Because the *Gerawor* is usually a business-minded person and the *Gerawee-ee* usually is not, abusive transactions are not uncommon in the *Gerawee* market, decreasing its popularity and efficiency. For example, a common form of misuse is when a *Gerawor* attempts to leverage the property for more money than the property is worth by entering into multiple *Gerawees*. In instances where the *Gerawor* retains possession of the property, after only a few months, the *Gerawor* may refuse to pay the agreed upon rent to the *Gerawee-ee*, knowing that it is extremely difficult for the *Gerawee-ee* to enforce the agreement, recover the money paid or retake possession.

Example 1, or "possessory *Gerawee*," is the safest and therefore most common form of *Gerawee* for *Gerawee-ee*'s. Under this form of *Gerawee*, the *Gerawee-ee* will retain possession and occupy the property until the *Gerawor* repays the balance of the *Gerawee*. Another reason for the popularity of this form of *Gerawee* is because it fulfills the growing need for housing in urban centers while also supplying a source of capital for entrepreneurs.⁶ It secures a loan through transfer of possession, but it does

⁶ The 2015 Afghanistan Country Report for HABITAT III (Report) estimated the total fixed private capital invested in the informal housing market (excluding land value) in Kabul alone by 2008 to be \$2.5 billion USD. MINISTRY OF URB. DEV., AFG., 2015 AFGHANISTAN COUNTRY REPORT FOR HABITAT III 22 (2015). The Report concedes that in absence of data, "it is impossible to state how [housing] development is financed." *Id.* However, the Report states that the low rate of using traditional bank mortgages shows that formal financing is not an important source of financing in the housing market. *Id.* The Report surmises that informal financing methods must be the main source. *Id.* Coupling this analysis with the rough estimates obtained from real estate agents (reported in Part II § E of this article) suggests that *Gerawee* plays an important role and fills an important gap in housing finance in Afghanistan. *See infra* Part II § E.

not have the same inefficient consequences as traditional possessory security transactions because the creditor acquires the right to live in the house, solving the need for housing. This form of *Gerawee* has great potential because many Afghan merchants invested in real estate when the economy was booming and currently own real property they would like to monetize.⁷ Meanwhile, fast-growing urbanization ensures a continued and increasing demand for affordable housing.⁸ These two dynamics make *Gerawee* an attractive solution for financing and housing provision.

Gerawee agreements are usually concluded through local real estate agents called “*Rahnanya Mua’malat*.”⁹ These local real estate agents have small offices responsible for limited geographical areas where *Gerawors* register their properties. Under the law, the sale and leasing of real estate must be conducted through a registered real estate agent who records the agreement on government-issued forms and reports the transactions to the finance department for tax purposes.¹⁰ However, it is not uncommon for parties to reach an agreement without involving a real estate agent to avoid paying extra fees and taxes.

Gerawee-ees also visit the agent’s office to research potential properties and *Gerawors*. Real estate agents usually charge both parties a 1% to 2% fee based on the *Gerawee* amount. The agents draft and retain copies of the *Gerawee* agreements. These agreements are usually standardized and are signed on a government-issued contract form.¹¹ Real estate agents are licensed by the Ministry of Justice and have an obligation to report their transactions to the provincial department of justice, and department of finance for tax purposes.¹²

Gerawee-ees rely on verbal confirmation from local real estate agents, neighbors, neighborhood representatives (in Farsi: *wakil ghuzar*) (in urban

⁷ See Fred Bezhan, ‘*There Are No Buyers*’ -- *Kabul's Housing Boom Goes Bust Amid Uncertainty*, RADIO FREE EUR. RADIO LIBERTY (July 31, 2012), <https://www.rferl.org/a/afghanistan-kabul-housing-market-boom-/24662327.html>.

⁸ See James Melik, *Property market in Afghanistan capital bucks trend*, BBC NEWS (Nov. 23, 2009), <http://news.bbc.co.uk/2/hi/business/8342200.stm> (“According to local [real] estate agents, prices in some parts of Kabul have risen by 75% in the past year. Part of this increase is due to the prices that international agencies are willing to pay to acquire properties in the best locations. But wealthy Afghans, who have seen their property portfolios in Dubai plummet over the past year, have also pulled their investments out of the Gulf to plough back into Kabul.”); see also MINISTRY OF URB. DEV., AFG., *supra* note 6, at 3 (“Afghanistan is amongst the fastest urbanizing regions of the world with an annual urban growth rate of 4 percent.”).

⁹ I will discuss their role further in Part II.

¹⁰ QANUN RAHANAMY MUAMALAT [LAW OF REAL ESTATE AGENCY] 1238 [2016] art. 7 (Afg.).

¹¹ See *id.*

¹² *Id.* arts. 4, 19.

centers), and village leadership (in Farsi: *Arbab*) (in villages) to verify ownership.¹³ This way, unlike bank loans, it is not necessary for the *Gerawor* to retain a formal deed for property.

A *Gerawee* can run for years, allowing it to be used as a long-term financing device. A *Gerawee-ee* is entitled to benefits from the property. Those benefits may include occupation or receiving rent, until the *Gerawor* can repay the balance owed. A *Gerawee* may last for several years if the *Gerawor* is unable to repay. A *Gerawor* may be unable to repay because of their limited financial condition or because they failed at the venture for which the money was used. Most *Gerawee* last more than a year, however in some cases they can last up to ten years. My personal estimates put the medium length of *Gerawee* at three years.

A *Gerawor* (the borrower) controls the length of *Gerawee*. The agreement can last as long as the *Gerawor* needs but cannot end before the original agreed upon date. There are two ways *Gerawors* can extend the arrangement beyond the original agreed upon expiration date. First, the parties may agree to extend the deadline because their respective housing financing needs persist. Alternatively, if a *Gerawee-ee* wishes to end the arrangement as soon as the original agreed upon deadline arrives, the *Gerawor* can find another *Gerawee-ee* for the property. Given generally increasing housing demand, most *Gerawors* can usually find another *Gerawee-ee* with relative ease.¹⁴ A *Gerawor* will often retain the borrowed money and replace several *Gerawee-ees*. This process may continue until the *Gerawor* repays the balance owed and retakes possession or decides to receive some other benefit from the property.

Local religious leaders often scrutinize *Gerawee* transactions. Most *muftis* argue that they violate *riba*, the prohibition of interest under Islamic law. Real estate agents have increasingly responded to *muftis*' objections by concluding *Gerawee* agreements under the title of a special, religious transaction that Muslim religious scholars historically approved of called *Bai al-Wafa*.¹⁵ This designation attempts to justify the legitimacy of the practice

¹³ Article 7 talks about the obligation of the real estate agent to verify ownership. However, it does not provide details on the mechanism of verification. That description comes from the authors observations and interviews with the Real Estate Agents and the Presidents of Real Estate Agents Unions. *Id.* art. 7.

¹⁴ "Over the past decade, Afghanistan has experienced almost a doubling of its urban population and (at an estimated 4%) has one of the highest rates of urbanization in the world. It is projected that the country's urban population may triple to 24 million within 35 years, having profound consequences for the country's development." MINISTRY OF URB. DEV., AFG., *supra* note 6, at 6.

¹⁵ See Nicholas Foster, *The Islamic Law of Real Security*, 15 ARAB L.Q. 131, 156 (2000) (describing the practice of *Bay' Al-Wafa* as a "principle mechanism" for conducting security transactions within the confines of Islamic law).

under Islamic Law by relying on the opinion of the *Hanafi* school of Islamic law, which is dominate in Afghanistan.¹⁶ However, as discussed below, this attempt has had only partial success. In fact, the author’s impression is that religious rulings, *fatwas*, condemning the practice have increased.¹⁷ The disapproval of *muftis* cannot explain the divergence of judicial opinions on *Gerawee* formalization on the one hand and *Sar qufli* on the other, because *muftis* often disapprove of *Sar qufli*.¹⁸

B. Bay’ al-Wafa: Sale with a Right of Repurchase

Rahn (commonly translated into English as “pledge”) is the prominent formal security mechanism over assets in Islamic law.¹⁹ The *Majalla*²⁰ gives the following definition of *rahn*: “A pledge [that] consists of setting aside property from which it is possible to obtain payment or satisfaction of some claims. Such property is then said to be pledged, or given in pledge.”²¹ Under *rahn*, the possession of the property must be transferred to the creditor.²² According to Article 706 of *Majalla*, “If the pledge is not transferred to the effective possession of the pledgee . . . such contract is incomplete and revocable.”²³

Under *Bay’ al-Wafa* (sale with right of repurchase), debtor A “sells” an asset to creditor B.²⁴ Then B “pays a price” for it, \$1000 for example. The contract contains a repurchase condition, which authorizes A to repurchase the asset by paying back the same price (\$1000) at a later date. Under the “sale” contract, the title of the property is transferred to B and remains with B during the term of the contract. Thus, B receives the benefit of the property (e.g., living in the house or renting the house) or receives rent from A for A’s continued enjoyment of the property. B as the owner, (i.e., holder of formal

¹⁶ See HAFIZULLAH EMADI, *CULTURE AND CUSTOMS OF AFGHANISTAN* 57 (2005).

¹⁷ See, e.g., Fazlullah Mumtaz, *Bai Al-Wafa, Which Resembles A Pledge, Is Haram, Impermissible, And Void*, ALMOFLIHUN.COM (Feb. 12, 2017), <https://almoflihun.com/%D8%A8%D9%8A%D8%B9-%D9%88%D9%81%D8%A7%D8%A1-%D9%83%D9%87-%D8%B4%D8%A8%D8%A7%D9%87%D8%AA-%D8%A8%D9%87-%DA%AF%D8%B1%D9%88%D9%8A-%D8%AF%D8%A7%D8%B1%D8%AF-%D8%AD%D8%B1%D8%A7%D9%85%D8%8C-%D9%86%D8%A7%D8%AC/>.

¹⁸ See *infra* Part III § B.

¹⁹ Nicholas Foster, *The Islamic Law of Real Security*, 15 ARAB L.Q. 131, 134 (2000).

²⁰ INT’L ISLAMIC UNIV., *AL-MAJALLA AL AHKAM AL ADALIYYAH* (Int’l Islamic Univ. trans., 2000) (Majalla is a manual of Hanafi jurisprudence that was developed by the Ottomans to be used by judges in Ottoman courts. The Majalla is considered an authoritative collection of the rulings of Hanafis on most issues.).

²¹ *Id.* art. 701.

²² *Id.* art. 706.

²³ *Id.*

²⁴ Foster, *supra* note 15, at 146.

title) retains a legitimate and justified interest in the property. However, B cannot make any change to the title or the property that would render the repurchase condition ineffective.²⁵ Thus, the property is, in effect, a security for the debt. Some jurists have accepted this kind of contract as valid because of “economic imperatives.”²⁶ The *Majalla* acknowledges this position in Articles 396-403.²⁷

However, *Bai al-Wafa* has some weakness as a security contract. First, like *rahn*, it is a possessory security: possession of the property must be transferred to the creditor. Second, according to Article 397 of the *Majalla* the creditor cannot sell the property without the consent of the debtor, even if the time of contract elapses.²⁸ Finally, because of the resemblance to *riba*, the opinion of jurists has been widely divided on the question of which party is entitled to the revenue of the assets.²⁹ Article 398 of the *Majalla* allows the parties to agree that a portion of revenue goes to the creditor.³⁰ This version of *Bai al-Wafa*, which allowed for revenue sharing, has been widely practiced in Egypt, Algeria, Turkey, and less prevalently in Syria and Lebanon.³¹

C. Gerawee in Fatwas issued by the Afghan Muftis

Traditionally *fiqh*³² has developed in a grass-roots way. In order to live their lives in accordance with the laws of Islam, Muslims face questions about what they should and should not do. *Muftis*, who have been recognized through an informal system of peer-evaluation as competent, answer Muslims' questions about laws of Islam.³³ *Muftis* answer those questions in

²⁵ For example, selling the property without the consent of seller/debtor A.

²⁶ Foster, *supra* note 15, at 147.

²⁷ INT'L ISLAMIC UNIV., *supra* note 20, arts. 396-403.

²⁸ *Id.* art. 397.

²⁹ Foster, *supra* note 15, at 147.

³⁰ INT'L ISLAMIC UNIV., *supra* note 20, art. 398.

³¹ Foster, *supra* note 15, at 147.

³² *Fiqh* refers to the human interpretation of *Shari'ah*. *Shari'ah*, i.e., Islamic law, is only accessible through application of human reason to the scripture. However, since human reason is inevitably fallible, Muslim jurists distinguish between *Shari'ah*, which is Islamic law as understood by Allah, and the *Fiqh*, which is human understanding of *Shari'ah*, and therefore, inescapably subject to debate, evolution, and disagreement. In this article I use Islamic law, *Shari'ah*, and *Fiqh* interchangeably. For an explanation of *Fiqh* and *Shari'ah* and their differences, see CLARK B. LOMBARDI, STATE LAW AS ISLAMIC LAW IN MODERN EGYPT 16-17 (Ruud Peters & Bernard Weiss eds., 2006).

³³ See Wael B. Hallaq, *What is Sharia?*, in 12 YEARBOOK OF ISLAMIC AND MIDDLE EASTERN LAW (2005-2006) 151, 156-57 (Eugene Cotran & Martin Lau eds., 2007); Rudolph Peters, *From Jurists' Law to Statute Law or What Happens When the Shari'a is Codified*, 7 MEDITERRANEAN POL. 81, 82 (2002).

a non-binding ruling called a *fatwa*.³⁴ Although non-binding, these *fatwas* carry significant religious authority for Muslims.

Some Afghan *muftis* favor the practice of *Gerawee* and some oppose it.³⁵ The *fatwas* favoring the practice rely heavily on *Hanafi* jurisprudence.³⁶ *Hanafi* scholars have historically allowed *Bai al-Wafa* and similar transactions on the grounds that these transaction, formally understood, do not violate the prohibition of interest (*riba*). They also hold that economic imperatives compel jurists to take a formalistic, not a functional, approach to understanding the transaction.

The other *fatwas* that oppose *Gerawee* specifically argue that the practice is an obvious ruse to circumvent the prohibition of *riba*. Moreover, they argue that the practice discourages preferable Islamic practices such as *qard al-hasana* (benevolent loans), *mudaraba* (trust financing contracts) and *musharakah* (partnerships). Ultimately, they believe that the practice further increases social injustice.³⁷ The opponents of *Gerawee* argue that parties engaging in the *Gerawee* do not have *bai*, the genuine intention to conclude a sale contract. These critics believe that a *bona fide* intention to transfer title is an essential element of *Bai al-Wafa*; the *Gerawee* lacks such intention and hence the *Gerawee* cannot be considered legitimate.³⁸

D. Status of the Gerawee Under the Afghan Civil Code of 1977

Because of *Shari'ah*-based objections to the *Gerawee*, the practice has ambiguous standing under Afghanistan Civil Law. Articles 1136-1153 in the Afghan Civil Code of 1977 address *Bai al-Wafa*.³⁹ These provisions reflect religious concerns with the prohibition of *riba*. In most cases, these provisions are consistent with the arguments of those *muftis* who oppose the

³⁴ Peters, *supra* note 33, at 84.

³⁵ The *fatwas* discussed in this section are generally retrieved from the following resources. Islam PP, <http://www.islampp.com> and Eslah Online, www.eslahonline.net. The discussion is also informed by the authors many discussions with local *muftis* in Afghanistan.

³⁶ See Nik Abdul Rahim Nik Abdul Ghani, Ahcene Lahsasna & Muhammad Yusuf Saleem, *Beneficial Ownership: To What Extent It Complies with Shari'ah?*, 11 ASIAN SOC. SCI. 155, 162 (2015).

³⁷ See, e.g., *May I Rent A House That I Have Acquired Through Gerawee?*, ELSAHLONLINE (Aug. 18, 2020, 3:15 PM), https://www.eslahonline.net/2009/03/01/_-157-2/ (Finding that most Uluma [religious scholars] believe that *Gerawee* is not a genuine sales contract, therefore, the transaction is still *riba* and violates the prohibition of interest); *Fatwa 4445*, ISLAMPP.COM (Aug. 18, 2020, 3:18 PM), <http://www.islampp.com/index.php?id=144&ftwid=11174> (Arguing *Gerawee* is prohibited by Islam because, unlike Rahn, *Gerawee* generates benefits instead of merely acting as security for a loan).

³⁸ ISLAMPP.COM, *supra* note 37.

³⁹ QANUNI MADANI [CIVIL CODE] 1355 [1977] arts. 1136-1153 (Afg.).

practice of *Gerawee*.⁴⁰ Article 1136 statutorily defines *Bai al-Wafa* as “entailing the right of taking back the object of sale by the seller and that of taking back the price by the buyer.”⁴¹

The mandatory provisions of statutory *Bai al-Wafa* set forth in the Afghan Civil Code contradicts the common practice of *Gerawee* in several ways. First, according to Article 1137 of the Civil Code, the right of a seller and buyer to “take back” cannot be conditioned or limited to a specific period of time.⁴² In particular, the agreement cannot forbid the seller (i.e., the debtor or *Gerawor*) from taking back his property during a period of time.⁴³ Even if the parties agree to such a term, the second clause of Article 1137 voids such an agreement.⁴⁴ Furthermore, in contracts involving immovable properties, if the parties intend an agreement to be a pledge with the right to use the property (i.e., a mortgage), Article 1151 of the Civil Code explicitly renders the sale and pledge void.⁴⁵ Under this provision, the parties cannot use the statutory *Bai al-Wafa* as a means to secure a loan.⁴⁶ The parties must have the intention to transfer title; in other words, the party’s must have the intention of concluding a *bona fide* sales contract.⁴⁷

Civil Code Articles 1136 to 1153 are a synthesis of civil codes from a variety of Arabic countries. The codes after which the Afghan Civil Code is modeled were all either authored by the legendary Egyptian comparative law scholar, Abdul Raziq Ahmad al-Sanhuri, or they were drafted using his approach to codification of Islamic law.⁴⁸ As will be shown, Afghanistan’s Civil Code adopts the majority position of *Sanhuri* civil codes by prohibiting parties from using *Bai al-Wafa* as a security contract. However, it diverges from the majority position in adopting detailed provisions determining the rights and obligations of buyers and sellers under a non-security *Bai al-Wafa*.⁴⁹ In determining parties’ rights and obligations, the Civil Code adopts its provisions from the Lebanese Civil Code Articles 473-486.⁵⁰ The Lebanese Civil Code (1932) diverges from the majority of Islamic jurists and the majority of *Sanhuri* codes by allowing *Bai al-Wafa*’s use as a security

⁴⁰ *Id.*

⁴¹ *Id.* art. 1136.

⁴² *Id.* art. 1137.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* art. 1151(1).

⁴⁶ *See id.* art. 1151.

⁴⁷ *See id.* art. 1151(2).

⁴⁸ *See generally* Nabil Saleh, *Civil Codes of Arab Countries: The Sanhuri Code*, 8 ARAB L.Q. 161 (1993).

⁴⁹ CIVIL CODE 1355 [1977] arts. 1136-1153 (Afg.).

⁵⁰ Code of Obligations and Contracts of 9 Mar. 1932 (Civil Code) (Leb.) arts. 473-486.

contract.⁵¹ The Lebanese Civil Code is based on the French Civil Code⁵² but shortens the term of validity of the repurchase right to three years as compared to the French Civil Code's ten-years.⁵³

Most *Sanhuri* codes summarily address *Bai al-Wafa* (sale with a right of repurchase). For example, the Egyptian Civil Code of 1948 has only one article on this type of sale, Article 465.⁵⁴ The article states, "When a vendor reserves to himself at the time of the sale the right to take back the thing sold, within a fixed time, the sale will be void." ⁵⁵ Similarly, the Syrian Civil Code (1949) and the Libya Civil Code (1954) each contain a single article regarding repurchase rights within sales agreements which are identical to Egyptian Civil Code Article 465.⁵⁶

While the Jordan Civil Code (1976) is silent on the issue of repurchase rights,⁵⁷ the Iraq Civil Code (1951) has a single article on *Bai al-Wafa*, Article 1333, which states, "Sale with a right of redemption is considered to be a possessory mortgage".⁵⁸ Iraq Civil Code Article 1333, in effect, states the provisions of Iraq's Civil Code on possessory *rahn* is applicable to *Bai al-Wafa* as well.⁵⁹ It should be noted that this approach does not solve the *riba* related problems with using *Bai al-Wafa* as a security contract because under *rahn*, the ownership remains with the pledgor (seller). The pledgee's (buyer) use of the property therefore raises a problem with the Islamic law prohibition on the use of interest, i.e. a *riba*-problem.

Notably, the Lebanese Civil Code recognizes the validity of a term of repurchase in a sales contract subject to a specified length of time under the condition that the length of time cannot exceed three years.⁶⁰ The Lebanese Civil Code sets forth the rights and obligations of buyers and sellers under *Bai al-Wafa* within fourteen articles.⁶¹ In effect, the Lebanese Civil Code, following the French Civil Code, and the minority view among Muslim jurists, allows *Bai al-Wafa* to function as a security contract.⁶² However, it

⁵¹ *Id.*

⁵² CODE CIVIL [CIVIL CODE] arts. 1659-1673 (Fr.).

⁵³ Civil Code arts. 473-486 (Leb.).

⁵⁴ Law No. 131 of 1948 (CIVIL CODE), *al-Waqā'i' al-Misriyah*, vol. 108 bis (a), 29 July 1948, art. 465 (Egypt).

⁵⁵ *Id.*

⁵⁶ Compare CODE CIVIL [CIVIL CODE], Decret No. 84 du 15 mai 1949 (Syria) and CODE CIVIL [CIVIL CODE], Jarida al-Rasmiyah, 13 Feb. 1954 (Libya), with CIVIL CODE art. 465 (Egypt).

⁵⁷ See generally CODE CIVIL [CIVIL CODE], Djarīat Ar-Rasmīya, 23 May 1976 (Jordan).

⁵⁸ CIVIL CODE, al-Waqā'i' al-'Irāqiyah [Iraqi Official Gazette] No. 3015 of 1951, art. 133.

⁵⁹ *Id.*

⁶⁰ Civil Code art. 474. (Leb.).

⁶¹ *Id.* arts. 473-486.

⁶² See *id.*; CIVIL CODE arts. 1659-1673 (Fr.).

adopts a shorter time period of three years, as compared to French Civil Code's five-years, for the validity of the right of repurchase.⁶³

Thus, the Afghanistan Civil Code adopts the majority position held by Arabic civil codes and a majority of Muslim jurists, by rendering the use of *Bai al-Wafa* void as a security device. The Afghanistan Civil Code adopts the Lebanon Civil Code's position in that it contains nineteen articles setting forth the rights and obligations of the parties under a *Bai al-Wafa* that is not used to securitize a loan. Thus, the Afghanistan Civil Code takes a moderate stance on *Bai al-Wafa*. It allows the sales contract to include a repurchase clause for a purpose other than securitizing a loan and it sets forth a series of legal provisions based on Lebanon Civil Code's *Bai al-Wafa*'s provisions that would regulate a non-security *Bai al-Wafa*.⁶⁴

Some Afghan judges do not recognize the *Gerawee* agreement as valid on the grounds that it violates the Qur'anic prohibition on *riba*.⁶⁵ Some courts cite Article 3 of the 2014 Afghan Constitution: "[n]o law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan."⁶⁶ However, they usually compel the *Gerawor* to repay the amount received based on the notion of fairness. Other judges recognize the *Gerawee* contract as valid by invoking the *Hanafi* jurisprudence on *Bai al-Wafa*, and the provisions of the Afghanistan Civil Code.⁶⁷ These judges usually rely on the stipulations of the parties that the agreement is a *Bai al-Wafa*, and refrain from further inquiry which may render the agreement void.

Afghan judges, however, do not usually find that *Gerawee* creates a security right. The property under *Gerawee* is not treated as collateral. Courts, both opposing and favoring, order the repayment of the price under *Gerawee*. However, they do not recognize priority for the lender under *Gerawee*, if the *Gerawor* is insolvent.

E. Size of Gerawee Market

Conservative rough estimates of the total value of *Gerawee* in four major provinces of Afghanistan (Kabul, Herat, Nangarhar, and Balkh) suggest *Gerawee* plays a large role in investment financing: Herat (\$120 million US),

⁶³ CIVIL CODE art. 1660 (Fr.).

⁶⁴ See *supra*, notes 46-64 and accompanying text.

⁶⁵ The following information on the judicial treatment of *Gerawee* is generally derived from the author's experience as an accountant and attorney in Afghanistan, as well as discussions with those involved in the *Gerawee* market and the court system.

⁶⁶ QANUN ASSASI AFGHANISTAN [CONSTITUTION] Jan. 26, 2004, art. 3.

⁶⁷ See Foster, *supra* note 15, at 147; CIVIL CODE arts. 1136-1137 (Afg.).

Kabul (\$240 million US), Balkh (\$69 million US), and Nangarhar (\$0.4 million US).⁶⁸

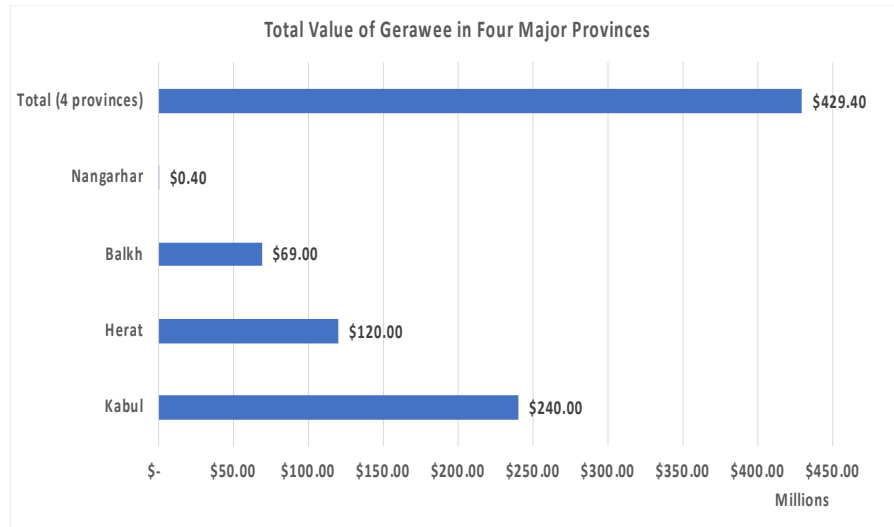


Figure 1 Total Estimated Value of Gerawee in Four Major Provinces of Afghanistan within the Last Year (2017)

My estimates of the value of *Gerawee* for four major provinces indicates *Gerawee* may play a large role in financing in Afghanistan. The total value of *Gerawee* contracted within one year in four major provinces may amount to as much as \$429.40 million or more.⁶⁹ This is almost two-thirds of the total value of outstanding bank loans for the entire country.⁷⁰ If we extrapolate these numbers to the entire country (34 provinces), it could be argued that the total value of *Gerawee* in a year exceeds the total value of outstanding bank loans. In Herat alone, my estimates suggest that between

⁶⁸ The total value of *Gerawee* in a province is estimated according to the following formula: the total number of active real estate agents times the median number of *Gerawee* brokered by a real estate agent per year times the median value of a *Gerawee*. These are rough, conservative estimates because not all *Gerawees* are conducted via real estate agencies. If *Gerawor* and *Gerawee-ee* know each other, they may decide to bypass going to a real estate brokerage to avoid paying a commission. The number of active real estate agents, the median number of *Gerawees* brokered by a real estate agent per year and the median value of a *Gerawee* is based on the estimates provided by an experienced real estate agent and Huquq Department in Herat, the President of the Union of Real Estate Agents in Kandahar, an experienced real estate agent in Kabul, and an experienced real estate agent and Huquq Department in Balkh.

⁶⁹ Figure 7.

⁷⁰ *Quarterly Financial Sector Financial Statistics*, *supra* note 1 (calculated by the author based on total gross loan data).

2016 and 2017, the total value of *Gerawee* was roughly \$120 million,⁷¹ almost triple the total value of outstanding bank loans in Herat during the same period.⁷² This suggests that *Gerawee* is likely a more common source of financing in Afghanistan than bank loans. It is difficult, however, to estimate what percentage of total value of *Gerawee* is used for investment purposes because *Gerawors* do not necessarily use the transaction to raise capital for investment. A *Gerawor* may use the *Gerawee* to raise money for personal expenses as well as investment opportunities.

Gerawee sits at the intersection of housing and finance. The supply of *Gerawee* is determined by the need to raise capital while the demand for *Gerawee* is determined by the need for housing. Therefore, it is hard to explain provincial variations in the distribution of total value of *Gerawee* in terms of access to investment financing. However, the data suggest that *Gerawee* is more common in Herat and Kabul compared to Balkh and Nangarhar.⁷³ According to the President of Nangarhar's Real Estate Agents' Union, the unpopularity of *Gerawee* in Nangarhar is due to the belief that the practice violates the religious prohibition of interest - *riba*.⁷⁴ According to an experienced real estate agent in Balkh, most property owners in the area prefer to lease their property rather than put it under *Gerawee* because the ratio of rent to *Gerawee*-value is high.⁷⁵ This means property owners in Balkh cannot raise enough capital through *Gerawee* to justify foregoing rent by putting the property under *Gerawee*.

If a party desires enforcement of a *Gerawee* contract, the party would have to seek enforcement in a regional civil court because commercial courts do not have subject matter jurisdiction over *Gerawee* disputes.⁷⁶ Despite its prevalence, *Gerawee* has not yet been recognized by the civil courts, possibly because they believe it violates Islam's prohibition of interest.

⁷¹ This is based on the estimates provided by Huquq Department and an experienced real estate agent in Herat using the following formula: the total number of active real estate agents times the median number of *Gerawee* brokered by a real estate agent per year times the median value of a *Gerawee*.

⁷² According to the data provided by the head of the Afghanistan Bank regional office in Herat, the total amount of bank loans issued by provincial branches of banks in Herat for the year 2017 was \$43.3 million USD. The actual bank loans held by Herati merchants may be higher because most banks in Afghanistan issue loans through their Kabul office. Therefore, the data on regional distribution of bank loans are not representative of actual bank loan distribution. It was not possible to obtain the data on outstanding loans for other provinces.

⁷³ See Figure 7.

⁷⁴ Interview with President, Nangarhar Real Est. Agents' Union, in Nangarhar, Afg. (May 2017).

⁷⁵ Interview with Real Est. Agent, in Balkh, Afg. (May 2017).

⁷⁶ See *infra* Part IV.

While the civil courts, which have jurisdictions over *Gerawee* cases, oppose these transactions on the ground that *Gerawee* violates the Islamic law prohibition of interest, the judges of commercial courts effectuate other interest-bearing transactions that fall under their jurisdiction.⁷⁷ The state's laws are not the cause of varied judicial attitudes because civil judges cite religious reasons independent of legal reasons as to why they do not enforce transactions that they think violate the religious prohibition of interest, including *Gerawee*. Commercial judges, while expressing concern about the religious aspects of interest-bearing transactions, accept that in a business context those transactions are allowed out of economic necessity.

The relatively weak formal protection for *Gerawee* increases the risk to creditors, making *Gerawee* less effective as a financing arrangement. This is one reason why the *Gerawors* can only raise limited capital through *Gerawee*. The sum of money paid to a *Gerawor* is sometimes less than one-tenth of the likely sale price of the property. The limited formal protection for *Gerawee* adversely affects *Gerawee-ee*'s too. Courts do not recognize a security right in the property for *Gerawee-ees*. The civil courts have refused to recognize the transaction as a secured transaction even though doing so would be most aligned with the parties' intentions. The unwillingness of courts to effectuate the parties' intentions by recognizing the property as collateral has made possessory-*Gerawee* the most common form of the transaction.

Gerawee also cannot be used to pool savings because it is a transaction between an individual saver, who often has housing needs, and an entrepreneur who has a financing need. This means that *Gerawee* cannot be used to diversify risk. It also means that *Gerawee* cannot be used to pool savings for investment purposes. As a result, *Gerawee* cannot substitute for a bank-based financial market.

II. *SAR QUFLI*

Sar qufli is an informally-developed institution that courts are slowly formalizing through judicial decisions.⁷⁸ The practice commodifies the future reputation of a business in cases where reputation is closely tied to a place.⁷⁹ By commodifying the future business reputation of a place, *Sar qufli* improves capital liquidity. *Sar qufli* can be used to raise capital to develop a property and it can also be used to raise capital against the value of developed

⁷⁷ The following description of judicial practices and protections concerning *Gerawee* is based upon the author's experience as an accountant and lawyer in Afghanistan and general conversations with legal practitioners and judicial authorities in Afghanistan.

⁷⁸ See *infra* Part III § B.

⁷⁹ See *infra* Part III § A.

property. Thus, *Sar qufli* can relax the capital constraints on property development projects.

A. *What is Sar qufli?*

Merchants and developers in Afghanistan have adopted *Sar qufli*, which literally means “main lock” or “head lock”, outside of formal institutions as a response to their practical needs. As a customary transaction, the specifics of *Sar qufli* transactions vary across localities. However, *Sar qufli* is best conceptualized as a transaction commodifying a business’s commercial reputation.⁸⁰

Oliver E. Williamson identifies asset specificity as a transaction problem that can give rise to opportunistic behaviors.⁸¹ The reputation value created by a tenant is closely tied to the place of business. Therefore, it is not easily transferable. This allows a landlord to extract a *quasi*-rent from the tenant. Because the tenant cannot move the reputation value to another place, the landlord will be able to ask for more rent or opportunistically evict the tenant.⁸² *Sar qufli* has evolved organically in Afghanistan and other places to curtail the opportunistic behaviors that Williamson argued arise from the problem of asset specificity in commercial leases of immovable property.⁸³

Sar qufli is a transaction whereby a lessee protects himself against eviction by paying a lump sum of money to the lessor. By paying a sum of money, the lessee acquires *Sar qufli* in the property. The lessor cannot evict a *Sar qufli*-holder lessee as long as he pays the comparable rent.⁸⁴ Lessees use *Sar qufli* to protect the reputation value that they create through their use of the property. A lessor uses *Sar qufli* to retain ownership of the property while raising capital to either further develop the property or invest in other ventures.

It is common for a developer or owner to offer stores and offices in a commercial building under development for a *Sar qufli*. If someone is interested in using an office or a store in the building, they will pay a lump sum of money, in addition to or without additional regular payments, to obtain a *Sar qufli* over the desired location.

⁸⁰ The following discussion of the mechanics of *Sar qufli* is primarily based upon the author’s experiences as an accountant and attorney in Afghanistan.

⁸¹ See, e.g., OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 30 (1985).

⁸² See *id.* at 43.

⁸³ *Id.*

⁸⁴ The comparable rent (in Arabic *ijarat al-meth’l*) refers to the amount of rent for a comparable property. For example, the comparable rent of a store would be the amount of rent for which a comparable store may be leased.

As the person uses the store or office for his business, the value of the space will increase depending on the success and popularity of the business. Customers will know that they can go to this address to obtain a certain product or service. Similarly, if the business is successful, customers will trust the service and goods they obtain from that location.

If a lessee does not have a *Sar qufli*, as soon as the lease expires, the lessor would be tempted to lease the space to a rival business or to keep the space for himself and launch a similar business. As a result, the lessor would benefit from the value created by the lessee. *Sar qufli* protects lessees against appropriation of the reputation-value created through use.

When someone has a *Sar qufli*, they enjoy continued use of the property, subject to reasonable increases in rent, unless the lessor pays the market price of the value created by the usage, essentially buying back the *Sar qufli*. The *Sar qufli*-holder lessee will hand over the *Sar qufli* only for a price equal to or more than the market value of the reputation created through use. The market value is determined by how much a *Sar qufli*-holder lessee is willing to accept to vacate the place of business. In this manner, *Sar qufli* commodifies the reputation value of a place of business. The market price is determined through supply and demand: the price the lessor or other businesses are willing to pay to obtain the location, and the price *Sar qufli*-holder lessee is willing to accept to vacate the place of business.

The market value of commercial reputation can be very significant. When a commercial building first opens it has a low property value. However, the value may substantially increase over time as the location becomes a hub for a certain market, such as electronics or stationary goods.

The *Sar qufli* property interest is transferable through several mechanisms. First, a *Sar qufli*-holding lessee can sell the right to use that property to someone other than the lessor. In such a case the lessor has the right of first refusal. Second, *Sar qufli* may be inherited. The person who obtains a *Sar qufli* through purchase or inheritance does not obtain ownership in the underlying property. This means the lessor can modify, expand, or renovate the building provided it does not substantially interfere with the *Sar qufli*-holder's right to use the property.

The value of *Sar qufli* is subject to market forces which may lead to a diminution of its value. If someone obtains a *Sar qufli* for a large sum of money and the property loses its commercial reputation for any reason, the *Sar qufli* holder may incur a loss. *Sar qufli*-holders are not guaranteed to recoup the money paid when they obtained the *Sar qufli*. In short, the value of *Sar qufli* fluctuates like a commodity based on supply and demand.

*Sar qufli*s are particularly valuable in Afghanistan because many markets are geographically concentrated in a few buildings. Therefore, the location

of a place of business plays a crucial role in its success. For example, it is practically impossible to operate a *hawala* outside a few neighboring *hawala* market-buildings. People associate having a store in the market with credibility. By acquiring either a store in or the right to use a store in the *hawala* market-building, the buyer is buying into a collective reputation. Thus, a *Sar qufli* price for a store in the *hawala* market-building can cost thousands of dollars.⁸⁵

From a developer/owner perspective, *Sar qufli* is a way to raise or recover capital without transferring ownership. The developer/owner retains ownership, enjoys a right of first refusal on the purchase of the reputation value created in the property by the lessee, and can improve the property while also receiving reasonable rent payments.

While the most common subject of *Sar qufli* is a place of business it does not have to be; the subject of *Sar qufli* can be any leasable property. The *Sar qufli* is normally used to protect the lessee against forced eviction after the lessee has added value to the property. For example, a manufacturing business may opt to *Sar qufli*-lease a piece of land, rather than buy it, to erect a factory. This way, the *Sar qufli*-holder lessee can make sure that if he pays a comparable rent the lessor cannot take the erected structure (e.g., a factory) by evicting him.

Sar qufli is a transaction developed outside of Afghanistan's formal legal system, but it has been recognized by Afghanistan's courts.⁸⁶ Afghanistan's statutory laws do not mention *Sar qufli*. Although Afghanistan has yet to enact statutory laws regarding *Sar qufli*, the courts have responded by enforcing the customary norms that have grown surrounding the practice in marketplace.⁸⁷

⁸⁵ For example, a small store in Saray Shahrzada (Kabul's hawladari market) might have a *Sar qufli* price exceeding \$100,000 USD.

⁸⁶ AFGHANISTAN SUPREME COURT, JUDICIAL SEMINAR 172, 190 (2017).

⁸⁷ See *infra* Part III § B.

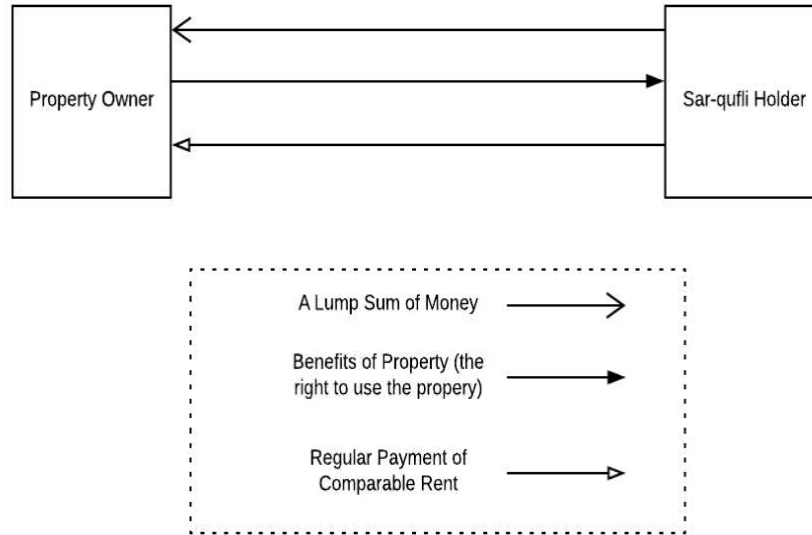


Diagram 2 *Sar qufli*

B. Recognition of *Sar qufli* by Commercial Courts

The use of courts to resolve disputes involving *Sar qufli* stems from the nature of *Sar qufli* as a claim, or rather a defense, involving an immovable property, most commonly a store or an office.⁸⁸ The majority of non-criminal cases in Afghanistan courts are disputes involving immovable property. According to the Head of Huquq's General Department at the Ministry of Justice, from the spring of 2016 to the spring of 2017, Huquq departments across the country processed 15,867 claims involving immovable properties, 9,966 monetary claims, and 3,266 claims involving family and personal disputes.⁸⁹ This means roughly 55% of requests for non-criminal court proceedings in Afghanistan are related to immovable property.

Court remedies are both necessary and effective when it comes to immovable property disputes. Court remedies are necessary because immovable property claims are brought against the person who is in actual

⁸⁸ Except where noted, the following discussion of the judicial treatment of *Sar qufli* in commercial courts is primarily based upon the author's experience as an attorney and accountant in Afghanistan, as well as various discussions with legal practitioners and judges.

⁸⁹ Author's written communication via Facebook with the Head of Huquq General Department at the Ministry of Justice (September 2017).

possession of the immovable property,⁹⁰ and a coercive action is required to remove the property from that person's actual possession. According to Judge Sediqi, *Sar qufli* disputes often arise when a landlord files a petition to evict a tenant, claiming the lease either expired or a provision was violated, and the tenant in response claims that he has *Sar qufli* over the immovable property.⁹¹ In response to a *Sar qufli* defense, courts require the tenant to prove the existence of *Sar qufli* in order to defend himself against an eviction petition.⁹²

Court remedies are effective when it comes to immovable properties because a major factor dissuading merchants from seeking court remedies is the uncertainty of successful enforcement. In a monetary claim, if the losing party does not have identifiable assets, a judgment against him is useless. Conversely, a judgment recognizing a party's right over immovable property will almost always be enforced because the property exists, and its possession can be transferred to the winning party. For example, in a *Sar qufli* case, if a tenant is able to prove the existence of a *Sar qufli*, the tenant will not be forced to vacate the store.

According to the Chief Judge of Kabul's Primary Commercial Court, no statutory laws recognize or address *Sar qufli*.⁹³ Based on Afghanistan's Supreme Court decisions, judges across the country rely on the agreement of the parties, local customs, and Judicial Seminar resolutions to decide *Sar qufli* disputes.⁹⁴ "The Seminar" is a judicial seminar where chief provincial judges and the justices of Afghanistan's Supreme Court convene, usually every two or three years, to discuss and resolve the most challenging legal questions facing the judiciary.⁹⁵ The Seminar answers questions posed by judges across several countries.⁹⁶ Then, the Afghanistan Supreme Court High Judicial Council approves these answers, making them binding on lower courts.⁹⁷

Questions about the legality of *Sar qufli* were first posed to the Seminar 1381/2002.⁹⁸ The question of the legality and *Shari'ah*-compliance of *Sar qufli* was raised in Afghanistan because *Sar qufli* limits the rights of the owner indefinitely.⁹⁹ The owner cannot forcefully evict a *Sar qufli*-holder

⁹⁰ See QANUN USUL MUHAKIMAT MADANI [CIVIL PROCEDURE CODE] art. 21 (Afg.).

⁹¹ Author's interview with Judge Sediqi, Chief Judge of Kabul's Primary Commercial Court (June 2017).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*; see also AFG. SUPREME COURT, *supra* note 86, at 190.

⁹⁵ See generally AFG. SUPREME COURT, *supra* note 86, at 190.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ AFGHANISTAN SUPREME COURT, JUDICIAL SEMINAR, 73 (2002).

⁹⁹ See *id.*

lessee so long as he holds the *Sar qufli*.¹⁰⁰ The potential for an indefinite constraint of rights incident to ownership made the legality and *Shari'ah*-compliance of *Sar qufli* suspect in Afghanistan.¹⁰¹ Therefore, the Seminar was asked to render an opinion on whether the practice of *Sar qufli*, “which is widespread in Kabul,” existed in the formative ages of Islam or emerged thereafter.¹⁰² And if it did not exist in the formative period of Islam, who first authorized the practice in Islamic history? And was the practice permissible or not?¹⁰³

The 2002 Seminar was asked to decide whether the practice was *Shari'ah*-compliant, and therefore legal¹⁰⁴, or whether it violated the *Shari'ah*, and was therefore illegal.¹⁰⁵ The legality of *Sar qufli* depended on its compliance with *Shari'ah* because the 1964 Constitution, which was in force at the time, required judges to resolve disputes according to *Hanafi* school of Islamic law jurisprudence if there was no pertinent legislation.¹⁰⁶ The 2004 Constitution reaffirmed this requirement.¹⁰⁷

The 2002 Seminar rendered the following opinions: (1) *Sar qufli*¹⁰⁸ did not exist at the formative age of Islam; (2) classical Sunni jurists did not issue an opinion on the permissibility of the practice; and (3) the practice originated during the reign of Sultan Ghor in the eleventh century.¹⁰⁹ When the practice spread to the rest of the Islamic world,¹¹⁰ Muslim scholars, especially Islamic scholars of Cairo, issued *fatwas* approving the *Shari'ah*-compliance of the practice.¹¹¹ The Seminar acknowledged that the practice is especially common in Kabul.¹¹² The 2002 Seminar concluded that the practice was *Shari'ah*-compliant, and hence legal. The Seminar cited several supporting opinions concerning *khlow hawaniat* (which the Seminar understood to be the Arabic term for *Sar qufli*). These opinions reflect an authoritative compilation of *Hanafi fatwas*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Under QANUN ASSASI AFGHANISTAN [CONSTITUTION] Oct. 1, 1964, art. 69 (Afg.), which was in force at the time, in the absence of legislation, courts were required to use Hanafi jurisprudence to resolve disputes. Art. 130 of QANUN ASSASI AFGHANISTAN [CONSTITUTION] Jan. 26, 2004, contains a similar provision.

¹⁰⁵ See AFG. SUPREME COURT, *supra* note 98, at 73.

¹⁰⁶ See [CONSTITUTION] Oct. 1, 1964, art. 69 (Afg.).

¹⁰⁷ See QANUN ASSASI AFGHANISTAN [CONSTITUTION] Jan. 26, 2004, art. 130 (Afg.).

¹⁰⁸ The 2002 Seminar understood *Sar qufli* to be identical to a similar transaction common in the Arab world called *Khlow Hawaniat*.

¹⁰⁹ AFG. SUPREME COURT, *supra* note 98, at 73-74.

¹¹⁰ *Id.* at 74.

¹¹¹ *Id.*

¹¹² *Id.*

(*al-Mukhtar*) and several exegeses of *Majilla* as proof that the practice is permissible under the *Hanafi* school of law.¹¹³ The seminar used these texts, especially *al-Mukhtar*, to elaborate on the rules governing different aspects of the *Sar qufli* in Afghanistan.¹¹⁴

The Seminar defined *Sar qufli* as a transaction whereby a lessee, upon payment of a lump sum of money to a lessor, is protected against eviction as long as he continues paying a comparable rent.¹¹⁵ It answered several legal questions concerning *Sar qufli* (which were presumably raised during the Seminar):

(1) Only receipt of a lump sum of money by the owner of the property creates *Sar qufli*.¹¹⁶ Therefore, if a lessee sublets the property in exchange for a lump sum of money, this does not circumscribe the ownership rights of the owner, who can evict the first or second lessee regardless of the *Sar qufli*.¹¹⁷

(2) Islamic law prohibits excessive uncertainty in transactions (prohibition of *qarar*).¹¹⁸ Therefore, a developer cannot accept payments from several people, in exchange for the promise that he will give them one or two stores, if the stores are not specified.¹¹⁹

(3) The government can collect payment from different individuals to build a shopping center on public land in exchange for the promise to lease the stores to those individuals.¹²⁰ In such a case, those individuals will acquire a *Sar qufli* in the stores. In fact, this was the paradigmatic case of *Sar qufli*.¹²¹

(4) If the holder of *Sar qufli* leaves the property for a period of time, and then the owner leases the property to someone else in his absence, the holder of *Sar qufli*, upon return, is entitled to receive his *Sar qufli* payment back or evict the current lessee to resume his lease of the property.¹²²

(5) The holder of *Sar qufli* can transfer his right to another person and this transfer can occur several times.¹²³ The current holder of *Sar qufli* can invoke *Sar qufli* against the owner as long as the comparable rent is paid without interruption.¹²⁴

¹¹³ *Id.* at 74-82.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 74.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 75.

¹¹⁸ *Id.* (translation of Arabic language material by author).

¹¹⁹ *See id.* at 76 (translation of Arabic language material by author).

¹²⁰ *Id.* at 77.

¹²¹ *Id.*

¹²² *Id.* at 78.

¹²³ *Id.* at 80-81.

¹²⁴ *Id.*

(6) The owner cannot evict the *Sar qufli* holder as long as the *Sar qufli* holder pays a comparable rent without interruption.¹²⁵ If the *Sar qufli* holder fails to pay the rent, the owner can evict the *Sar qufli* holder provided that the owner pays the *Sar qufli* holder the same amount of money that the owner received upon creation of *Sar qufli*.¹²⁶

(7) If a tenant with the permission of the owner performs improvements on the property, the tenant acquires a *Sar qufli* in the property, and cannot be evicted as long as he pays comparable rent.¹²⁷ If the *Sar qufli* holder fails to pay the rent, the owner can evict the *Sar qufli* holder upon payment of the value of the improvements.¹²⁸

(8) *Sar qufli* is an inheritable right; therefore, the death of *Sar qufli* holder does not void the *Sar qufli*.¹²⁹

The legal framework for *Sar qufli* is comprised of the 2002 Seminar's decisions, which were later confirmed by the 1395/2017 Seminar, agreement of the parties, and local customs.¹³⁰ The 1395/2017 decisions emphasized the primacy of customs (*'urf*) in commercial matters as a rationale for continued recognition of *Sar qufli* by commercial courts.¹³¹ The 1395/2017 Seminar stated:

Since *Sar qufli* is common in commercial customs and dealings, and under PCA commercial customs plays an important role in resolution of commercial disputes, and according to the decisions of the High Council of the Afghanistan Supreme Court commercial courts have the jurisdiction to resolve *Sar qufli* disputes, the courts shall decide *Sar qufli* cases in the following manner.¹³²

The 1395/2017 Seminar reiterated and specified similar rules decided in 1381/2002 Seminar.¹³³ Moreover, the 1395/2017 Seminar instructs the courts to use expert witnesses to determine the prevailing *Sar qufli* customs when deciding *Sar qufli* cases.¹³⁴

¹²⁵ *Id.* at 81.

¹²⁶ *Id.*

¹²⁷ *Id.* at 81-82.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ AFG. SUPREME COURT, *supra* note 86, at 172.

¹³¹ *Id.* at 336.

¹³² *Id.* (This quotation is the Author's foreign language translation of the quoted text from the relevant document).

¹³³ *Id.* at 336-337.

¹³⁴ *Id.* at 337.

The 1395/2017 Seminar, in response to a clarification request, opined that judicial decisions concerning *Sar qufli* are not subject to taxation because imposition of a tax without legislation is unconstitutional and there is no legislation concerning *Sar qufli*.¹³⁵ This may have contributed to the continued use of courts to resolve *Sar qufli* disputes, reducing the cost of formal dispute resolution. This suggests reducing the judgment tax might improve the popularity of formal dispute resolution in Afghanistan.

A question was posed in the 1395/2017 Seminar about the conflict between the security right and *Sar qufli* rights: for whom should a court decide if collateral held by a bank is also subject to *Sar qufli*?¹³⁶ In case of a conflict between a security right and a *Sar qufli*, the Seminar decided that the court should accord primacy to the holder of the secured interest, provided the holder was unaware of the existence of *Sar qufli* at the time of creation of the security interest.¹³⁷ If the holder was aware of the existence of *Sar qufli* at the time of creation of the security interest, the rights of the *Sar qufli* holder are not affected by the security interest.¹³⁸ The Seminar opined that it is a question of fact whether the security interest holder had prior knowledge or not, and courts should resolve this question.¹³⁹

According to Judge Sediqi, the majority of commercial judges have expressed discontent with the lack of codification regarding the transaction, which makes up the majority of disputes in primary commercial courts and is the second most common dispute on appeal.¹⁴⁰ To remedy the situation, some chief commercial judges drafted a directive proposal for approval by the Afghanistan Supreme Court.¹⁴¹ According to Judge Sediqi, the Afghanistan Supreme Court may soon adopt this directive.¹⁴² The 1395/2017 Seminar also mandated that a law should be drafted concerning *Sar qufli* which incorporates current jurisprudence.¹⁴³ No such law has been enacted as of August 2020.

¹³⁵ *Id.* at 184.

¹³⁶ *Id.* at 185.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Author's interview with Judge Sediqi, Chief Judge of Kabul's Primary Commercial Court (June 2017).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ AFG. SUPREME COURT, *supra* note 86, at 341.

III. THE CONTRAST BETWEEN JUDICIAL TREATMENT OF *SAR QUFLI* AND *GERAWEE*

The contrast between judicial attitudes towards *Sar qufli* and *Gerawee* is reflective of the heterogeneous normative attitudes toward informal practices within different sectors of the Afghan judiciary. Judges within the commercial context are more willing to recognize customarily created institutions and interest-bearing transactions than judges in a non-commercial context.¹⁴⁴ The divergent attitudes toward *Gerawee* and *Sar qufli* are interesting because Afghanistan does not have specialized judges. There is no difference between commercial and non-commercial judges; a criminal judge may get transferred to a commercial court and vice versa.¹⁴⁵ The judiciary nevertheless formalized *Sar qufli*, even though *Sar qufli* is an informally created institution concerning an intangible asset (future business reputation) that indefinitely unbundles property rights by making the owner of the property different than the owner of the business reputation connected to that property.

The difference in attitudes towards formalization of informal practices has significant consequences for the creation of efficient formal institutions. Two well-known economists of property rights and transaction costs, Hernando de Soto and Douglas North, both suggest that the remedy for an informal economy is to make the law more user-friendly.¹⁴⁶ They argue that informally held rights can be incorporated into formal institutions by removing the formal barriers for their inclusion, improving efficiency.¹⁴⁷ Formal institutions must be made responsive to actual user needs.¹⁴⁸ In Afghanistan, commercial courts have shown more willingness to recognize informally-developed transactions than civil courts. Expanding the jurisdiction of commercial courts to cover *Gerawee* and other economically important transactions may increase the likelihood of those transactions gaining official legal recognition and reflect the contracting parties' intentions.

There are multiple reasons for the business-friendly attitudes in Afghanistan's commercial context. One reason is the history of commerce and commercial law in Afghanistan. Commercial law traditionally held a

¹⁴⁴ See *supra*, Part II § D; Part III § B.

¹⁴⁵ This observation is based on the author's knowledge of Afghanistan's judicial system as he has witnessed such assignment and re-assignment.

¹⁴⁶ See DOUGLAS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 33 (1990); HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 6, 227 (2000).

¹⁴⁷ *Id.*

¹⁴⁸ See generally *id.*

unique status because it was never an exclusive domain of *Shari'ah* and religious scholars (*'uluma*).¹⁴⁹ Even before Afghan rulers attempted to centralize the juridical power in the late nineteenth century, it was generally accepted that commercial disputes could be resolved in special tribunals where commercial customs were the prevailing source of law, and experienced merchants acted as arbiters.¹⁵⁰ For example, the first commercial court in Afghanistan, *Panchat*, created by Amir Abdul Rahman Khan, consisted of several non-Muslim arbitrators.¹⁵¹ *Panchat* was supposed to resolve commercial disputes based on prevailing commercial customs.¹⁵²

Afghan rulers avoided codifying Islamic law in areas of private law until the 1980s, out of fear of backlash from the public and *'uluma*. However, in the 1950s, Afghanistan enacted major commercial legislation based on the French commercial code, without arousing public backlash.¹⁵³ Afghanistan's first bank began issuing interest-bearing loans as early as the 1930s.¹⁵⁴ Meanwhile, efforts to centralize the juridical power in other areas of law were met with fierce resistance.¹⁵⁵ This shows that Afghans have generally accepted that commercial laws were subject to different norms.¹⁵⁶ The reason for this discrimination could be that Afghanistan's commercial sector, until the start of a prolonged period of conflict in the 1980s, included a significant number of non-Muslims.¹⁵⁷

Historically, Hindus and Sikhs dominated the Afghan financial industry.¹⁵⁸ Until Nadir Khan, they were the only players in the financial

¹⁴⁹ See Amin Tarzi, *Islam, Shari'a, and State Building under 'Abd al-Rahmen Khan*, in AFGHANISTAN'S ISLAM: FROM CONVERSION TO THE TALIBAN 129, 139 (Nile Green ed., 2017); MOHAMMAD HASHIM KAMALI, LAW IN AFGHANISTAN: A STUDY OF THE CONSTITUTION, MATRIMONIAL LAW, AND JUDICIARY 38 (1985).

¹⁵⁰ See Tarzi, *supra* note 149, at 139.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See Haroun Rahimi, *What Can History Teach Us About Legal Reform in Afghanistan? A Historical Study of Codification of Substantive Private Law in Afghanistan* (Forthcoming); see generally Nadima Yassari & Mohammad Hamid Saboory, *Sharia and National Law in Afghanistan*, in SHARIA INCORPORATED, 270, 309 (Jan Michiel Otto ed., 2010).

¹⁵⁴ See ELI SUGARMAN ET AL., AN INTRODUCTION TO THE COMMERCIAL LAW OF AFGHANISTAN 36 (Daniel Lewis et al. eds., 2d ed. 2015).

¹⁵⁵ See Tarzi, *supra* note 149, at 138; KAMALI, *supra* note 149, at 37.

¹⁵⁶ See Rahimi, *supra* note 153, at 16.

¹⁵⁷ See Ruchi Kumar, *The Decline of Afghanistan's Hindu And Sikh Communities*, AL JAZEERA (Jan. 1, 2017), <https://www.aljazeera.com/indepth/features/2016/12/decline-afghanistan-hindu-sikh-communities-161225082540860.html>; see also SARA KOPLIK, A POLITICAL AND ECONOMIC HISTORY OF THE JEWS OF AFGHANISTAN 38 (2015).

¹⁵⁸ See ROGER BALLARD, THE HISTORY AND CURRENT POSITION OF AFGHANISTAN'S HINDU AND SIKH POPULATION 15 (2011).

market.¹⁵⁹ After Nadir Khan, their role increased and they maintained their relevance until the Taliban regime.¹⁶⁰ In the 1970s, there were approximately 700,000 Hindus and Sikhs living in Afghanistan, which made up roughly 10% of Afghanistan's population.¹⁶¹ However, currently Hindus and Sikhs are estimated to be less than 7,000 (i.e., approximately 0.023% of the population).¹⁶² Jewish people were active in the financial sector as well.¹⁶³ Sikhs, Hindus, and Jews in Afghanistan did not operate under Islamic Law or tribal traditions.¹⁶⁴ In fact, their ability to operate unbounded by the restrictive Islamic financial law doctrines, especially with regard to charging interest, was a reason for their success.¹⁶⁵ Another reason for their success, and perhaps the more important one, was their wide ethnic and religious networks in India, and, in the case of Jews, Europe and the United States.¹⁶⁶ These broad networks allowed them to diversify their portfolios while operating a vast financial sector and far-reaching *hawala* networks without relying on formal legal institutions.¹⁶⁷ The reason for these accommodations toward Hindus, Amin Tarzi argues, was to ensure that the Indian-Afghan trade would continue, and Hindu merchants would feel protected when they conducted business in Afghanistan.¹⁶⁸

¹⁵⁹ See SUGARMAN, *supra* note 154, at 36 (explaining that under Nadir Shah, Afghanistan's first bank was formed, motivated by the domination of foreign trade by religious minorities).

¹⁶⁰ See BALLARD, *supra* note 158, at 4-5 (explaining the troubles faced by Hindus and Sikhs during Taliban rule); see generally EDWINA A. THOMPSON, TRUST IS THE COIN OF THE REALM: LESSONS FROM THE MONEY MEN IN AFGHANISTAN 117 (2011).

¹⁶¹ See Kumar, *supra* note 157.

¹⁶² *Id.*

¹⁶³ See KOPLIK, *supra* note 157, at 38.

¹⁶⁴ See generally SUGARMAN, *supra* note 154, at 12, 29 (describing Islamic restrictions on financial activities, which limited certain financial sectors to non-Muslims).

¹⁶⁵ Nadir Khan attempted to end the reign of non-Muslims (and non-Afghans for that matters) in the area of financial law. To do that, he summoned the assistance of a prominent Afghan businessman, Abdul Majid Zabuli. However, Zabuli's efforts were not successful at ending Hindu control of Afghanistan's financial markets. Although he was able to work around the prohibition of interest by charging a repayment fee instead of interest, his company did not run a sufficiently diverse portfolio and did not enjoy the same vast ethnic/religious network as Hindus. See generally *id.* at 30 (showing that Islamic prohibition on charging interest created problems for the Afghan bank in their attempts to end Hindu and Jewish dominance in the commercial sector).

¹⁶⁶ See *id.*; see also Magnus Marsden, *Islamic Cosmopolitanism out of Muslim Asia: Hindu-Muslim Business Co-operation between Odessa and Yiwu*, 29 HIS. & ANTHROPOLOGY 121, 130 (2018) (showing that Sikh and Hindu traders in Afghanistan rely on their long-distance networks around the world for trade).

¹⁶⁷ The fact that they were not from any of the Afghan ethnic groups also helped Hindus to protect themselves against political turmoil and ethnic rivalry in the country. See Tarzi, *supra* note 149, at 140; KOPLIK, *supra* note 157, at 38.

¹⁶⁸ *Id.*

Another possible reason for the prevailing business-friendly attitude in Afghanistan's commercial context, even when it comes to interest-bearing transactions, may be that commercial space is specialized and excludes the general public. There are different active participants in commercial and non-commercial contexts. Non-commercial contexts include non-specialized and non-repeating actors, i.e., non-merchants, who are more sensitive to general norms of behavior like prohibitions on charging interest. However, commercial contexts include specialized and repeat actors who are bound together by the profit motive. Therefore, in this specialized space, participating actors, formal institutions, and wider society may be willing to carve an exception where general norms of behavior like prohibiting interest are tweaked to reduce the barriers to profit-enhancing transactions.

The normative divergence of attitudes within formal institutions concerning commercial and non-commercial contexts offers Afghanistan an opportunity. Afghanistan can formalize the informal credit transactions by categorizing them as commercial and giving jurisdiction over them to the formal institutions concerned with commercial transactions. For example, the Afghanistan Supreme Court should designate *Gerawee* transactions and disputes arising therefrom, when the *Gerawor* is a merchant, to the commercial courts. This may facilitate the formalization of *Gerawee* and increase the legal protections available to creditors thereby allowing the *Gerawee* market to realize its full potential and relax financing constraints on Afghan entrepreneurs.

The Afghanistan Supreme Court, while recognizing the need to expand the definition of commercial transactions and the jurisdiction of commercial courts, resists using judicial re-interpretation of commercial laws and jurisdictional rules to achieve that end.¹⁶⁹ Under the Afghanistan Supreme Court's current jurisprudence, transactions concerning ownership of non-fungible property do not qualify as commercial transactions, and therefore do not fall under the jurisdiction of commercial courts.¹⁷⁰ Transactions concerning ownership of fungible property, and benefits of non-fungible and fungible properties, on the other hand, qualify as commercial transactions; therefore, disputes from these transactions fall under the jurisdiction of commercial courts.¹⁷¹

Under the Afghanistan Supreme Court's current jurisprudence, *Sar qufli* is a transaction concerning the benefit of a non-fungible property or the right to use the property.¹⁷² The formal title of *Gerawee* in courts, *Bai al-Wafa*

¹⁶⁹ AFG. SUPREME COURT, *supra* note 86, at 190.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *See supra*, Part III § A.

(sale with the right to repurchase), is a transaction concerning the ownership of a non-fungible property. The court has ruled that *Sar qufli* is a commercial transaction while *Gerawee* is a non-commercial transaction.¹⁷³ As a result, the former falls under the jurisdiction of commercial courts while the latter does not.¹⁷⁴

The Afghanistan Supreme Court has welcomed legislation to expand the scope of commercial transactions since “commerce has expanded in complexity and scope.”¹⁷⁵ However, relegating the formalization of *Gerawee* and similar institutions to the legislature removes the work of formalization from the specialized space of the judiciary. Because the Afghan legislature is dominated by representatives who hold a conservative normative stance¹⁷⁶ and the process of legislation is very political, the deferral of specialized rulemaking to the legislature is likely to hinder the formalization of informal institutions.

This problem can be remedied by expanding the general scope of commercial transactions and jurisdiction of commercial courts, thus allowing commercial courts to judicially formalize informal institutions like *Gerawee*. Allocating *Gerawee* to the jurisdiction of commercial courts in cases where the *Gerawor* is a merchant can allow commercial courts to formalize *Gerawee* based on commercial customs and agreements of the parties. If the judiciary accords *Gerawee* the effects that the parties intend based on their agreements and commercial customs, it would transform those agreements into reliable security transactions. This change would remedy many of the challenges that *Gerawor* and *Gerawee* currently face. Such a solution would be superior to the current practice of relying on the framework of *Bai al-Wafa*, which does not confer security rights needed to effectuate *Gerawee* before courts.

IV. CONCLUSION

This article outlined the prevalence of informal financing, the lack of consistency in the judicial structure for adjudicating issues arising from these

¹⁷³ AFG. SUPREME COURT, *supra* note 86, at 336.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ See generally Mohammad Bashir Mobasher, *Understanding Ethnic-Electoral Dynamics: How Ethnic Politics Affect Electoral Laws and Election Outcomes in Afghanistan*, 51 *Gonz. L. Rev.* 355 (2015-2016); see also ANDREA FLESCHENBERG, *AFGHANISTAN’S PARLIAMENT IN THE MAKING: GENDERED UNDERSTANDINGS AND PRACTICES OF POLITICS IN A TRANSITIONAL COUNTRY* 19-20 (Heinrich Böll Found. & UNIFEM eds., 2009) (providing analysis of composition of Afghanistan’s legislature).

forms of financing, and the risks associated with a fractured judicial approach.

Afghan merchants seldom use bank loans, but this does not mean that Afghan merchants cannot access financing. Over the years, Afghan merchants developed a number of informal institutions that allowed them to raise capital against the value of their properties. Despite their limitations, these informally developed financing solutions are far more important than bank loans in Afghanistan.

Afghan judges have gradually recognized some of these solutions. By doing so, they have participated in developing the rules governing these practices. Judicial recognition of these innovative solutions has arguably increased their popularity. However, Afghan judges have resisted the formal recognition of some other informally developed financing solutions. By doing so, they have denied legal protections to those who use the latter group of solutions. This has put the vulnerable users of these informal institutions at greater risk.

This article outlined the split of judicial perspectives arising from the divergent histories of commercial and civil law in Afghanistan. Regardless of this split, there is a path forward. The Afghanistan Supreme Court can purposefully manipulate the rules dividing commercial and civil court jurisdictions to aid the formalization of informal financing solutions. This proactive solution will result in Afghanistan's judiciary entering into a productive negotiating posture with institutional entrepreneurs thereby creating a more facilitative legal environment for business and finance.