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Judicial Reform in Afghanistan: A Case Study in the New Criminal Procedure Code

By FAIZ AHMED*

"[T]here is no rule of law in this country yet."
— U.N. Special Envoy Lakhdar Brahimi, speaking in Kabul after the Afghan provisional government approved a new constitution

Introduction

On January 4, 2004, the Islamic Transitional State of Afghanistan ratified a constitution. The document has been widely praised as an auspicious milestone for a country torn apart by a quarter-century of brutal occupation and civil war, particularly in its bringing together of diverse elements of the splintered country under a grand constitutional convention—the Loya Jirga—where delegates agreed upon a core set of principles to govern the making of a new Afghanistan. Prominent Afghan officials, U.N. representatives, and Western legal scholars have lauded the constitution with such descriptions as "a historic achievement," "a model..."
for the Islamic world,” and a process in which “there is no winner or loser—everybody has won.” In spite of such praise, a number of the document’s articles have been the subject of debate and controversy within Afghanistan. As a leading case in point, Articles 25-32 pronounce the need for a sound system of criminal procedure that ensures basic due process rights to defendants and prohibits coercive acts by prosecutors. The details and definitions, however, are filled in by a new criminal procedure code, recently drafted by Italian jurists hired by the Italian Ministry of Foreign Affairs. The code has thus been criticized by some as a foreign imposition of law, while defended by others as a necessary and


6. Quote from Afghan President Hamid Karzai. Afghan Charter Wins World Praise, supra note 2. Within Afghanistan, a group of 20 delegates to the Loya Jirga headed by Abdul Hafez Mansur claimed that the document signed into law by Mr. Karzai did not exactly conform to the draft agreed upon at the Loya Jirga. Kabir Ranjbar, head of the Afghan Lawyers Association, responded on January 29 by saying that while the draft of the constitution approved by the Loya Jirga was indeed altered, these “changes do not affect the content of the constitution and are not something to be taken seriously.” See Amin Tarzi, Hurdles in Implementing the New Afghan Constitution, RADIO FREE EUROPE/RADIO LIBERTY AFGHANISTAN REPORT, at Vol. 3, No. 5, at <www.rferl.org/reports/afghan-report/2004/02/5-050204.asp> (visited Nov. 29, 2005). The single notable international criticism has emanated from the Brussels-based International Crisis Group (ICG), claiming the constitutional drafting process was unfair and ill-informed. The ICG alleged in a report that the process favored certain factions over others. Afghan and U.N. officials have on the whole rejected the ICG report, saying it reached premature conclusions on a process that had barely started. See Sanjoy Majumder, Afghan Constitution Claims Rejected, BBC NEWS, at <news.bbc.co.uk/1/hi/world/south_asia/2999700.stm> (visited Nov. 29, 2005).


positive step toward establishing a "rule of law" in Afghanistan.\(^{11}\)

This note investigates the advantages and drawbacks of a criminal procedure code in Afghanistan, and compares national codification to the alternative of maintaining the decentralized tribal *jirgas* as the normative systems of adjudication in Afghanistan, the latter approach preserving the legal authority of local tribal counsels in Afghanistan’s diverse, multiethnic provinces. Historically, the Afghan *jirgas* (also known as *shuras*) have fulfilled the normative role of day-to-day dispute resolution and maintaining legal order in Afghanistan’s decentralized provinces, as well as in the North West Frontier and Balochistan provinces of neighboring Pakistan, the latter areas being the native lands of numerous Pashtun tribes and home to millions of Afghan refugees since the Soviet invasion in 1979.\(^{12}\)


11. While clearly a common term used by international legal analysts to refer to stable legal orders, “rule of law” is often assumed to be a value-neutral term. In truth, its usage has not passed without significant controversy and debate, though it is beyond the scope of this article to engage in polemics on this term. For further reading on this topic, see LAURA NADER, THE LIFE OF THE LAW: ANTHROPOLOGICAL PROJECTS (2002). For instance, Professor Nader comments: “Research on law and state power illustrates that, far from being neutral, law is often politically active, created by and for groups in power (Barnes 1961). This realization often separates anthropologists from development lawyers, who even today may still believe that ‘the rule of law’ creates a level playing field that works out in practice.” *Id.* at 6. *See also* UGO MATTEI, COMPARATIVE LAW AND ECONOMICS (1998): “Most less developed countries do not share either one or both of the basic legal assumptions of the rule of law as understood by the more developed countries that compose the Western legal tradition. In many countries . . . the political process and the legal process overlap. In others . . . the domain of law and that of religious beliefs overlap.” *Id.* at 227. Therefore, this article defines a rule of law not as a tangible political or legal condition, nor a political system based on Western notions of liberal democracy, but as a conceptual goal in which all members of a society (regardless of wealth or status) normatively abide by publicly known limits, and face legally-sanctioned punishment for transgressing them. For a particularly insightful discussion of “rule of law” concepts in post-conflict or transitional justice contexts, see RAMA MANI, BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOWS OF WAR 25-31 (2002).

While financial pledges to aid in Afghanistan's reconstruction remain scandalously unfulfilled by most participants, recent policy reviews indicate that the chief problem in rebuilding Afghanistan is not a shortage of funds for reconstruction per se, but the lack of local human capacity to implement proposed tasks. The closing of schools and destruction of educational institutions, a global diaspora of Afghan professionals, and decades of war are frequently cited as the root causes of this skilled labor shortage. In this manner several aid agencies working in Afghanistan after the fall of the Taliban have launched ambitious training programs for a variety of important services and civil servant positions, including judges, prosecutors, defense attorneys, municipal police forces, a national army, and health care personnel, just to name a few.

At first glance, such initiatives seem praiseworthy and instrumental to the building of a modern Afghan state in the twenty-first century. At the same time, there have been little or no critical evaluations of such reform projects in the context of Afghanistan's complex political, ethnic, and sociocultural predicaments, or in light of Afghanistan's extremely turbulent history with foreign intervention. Are Afghans taking a leading position in

Rights & the Administration of Criminal Justice in the Federally Administered Tribal Areas of Pakistan, 6 SING. J. INT'L & COMP. L. 541 (2002).


14. See, e.g., ESTABLISHING THE RULE OF LAW IN AFGHANISTAN, UNITED STATES INSTITUTE OF PEACE: SPECIAL REPORT 117, (Mar. 2004), available at <www.usip.org/pubs/specialreports/srl17.html> [hereinafter USIP SPECIAL REPORT 117]. "The nearly uniform view of observers inside and outside the justice system in Afghanistan is that the greatest need in building the system is to improve the quality of judicial personnel." Id.

The justice system and law enforcement suffer from a very low level of human resource and physical infrastructure capacity . . . Virtually nothing has been done to update the court structure, establish and apply qualifications for judicial personnel (Afghan legal experts consider many judges to be unqualified), ensure widespread access to legal texts for practitioners and students, develop court administration, improve the quality of legal education, or address deep-rooted corruption.

Id.


16. USIP SPECIAL REPORT 117, supra note 14.
the development of their legal system? Are diverse elements of Afghan society being incorporated into the legal reform process? Is the relationship between foreign aid agencies and local Afghan legal actors characterized by a cooperative partnership, or an employer-employee relationship? This paper seeks to raise and address these critical questions pertaining to legal reform in contemporary Afghanistan.

Taking the new criminal procedure code as a case study, this note reviews the process of the code’s adoption, its perceived benefits, and its role in the larger scheme of judicial reform in post-Taliban Afghanistan. It argues that the adoption of the new criminal procedure code embodies several defects that are instructive of larger problems in law and development movements, including the foreign imposition of law, a lack of local participation in legal reform processes, and a blindness to the multiple layers of indigenous law practiced on the ground by focusing exclusively on official state law – all weaknesses that will fundamentally hamper the rebuilding of stable legal institutions in Afghanistan in the long term. Specific problems with the new criminal procedure code include: (1) the instituting of a foreign-designed document with little or no local Afghan involvement in the drafting process; (2) a lack of foresight in addressing the practical difficulties with implementing a code in Afghanistan’s decentralized provinces, including overlooking a turbulent history of province-vs.-center conflict; (3) a need for including and respecting the diversity of Afghanistan’s legal traditions, especially in rural provinces where unofficial, non-state-sponsored “customary law” mechanisms govern; and finally (4) in the desire to professionalize Afghanistan’s legal system(s), aid agencies are excluding critical non-state actors on the ground, including prominent religious and tribal leaders, thereby exacerbating the problem of low capacity for implementing desired legal and political reforms.

I. Legal Reform in Afghanistan in the Twentieth Century

A sincere analysis of the contemporary judicial reform movement in Afghanistan must begin by contextualizing current initiatives with Afghanistan’s history, in particular the tumultuous center-periphery conflict that has strained relations between Kabul and the provinces throughout the twentieth century. State power in Afghanistan has historically been concentrated in the capital city of Kabul, with state institutions virtually absent in large pockets of the rural majority.17 The

17. LOUIS DUPREE, AFGHANISTAN 662 (1973). Also relevant to the theme of urban-
Afghan state has previously struggled for authority over the tribally-governed provinces since its inception in 1747, but to little avail, and indeed at any centralizing regime's own risk, with the autonomous tribes largely resisting government control whether the latter emanated from Kabul or Kandahar. With regard to the state's legal reform efforts in particular, there were two major attempts to modernize the judiciary in Afghanistan during the twentieth century. The first took place in what became known as the Nizamnama period of the 1920s, and the second under the 1964 Constitution. Afghan historian Senzil Nawid's work, *Religious Response to Social Change in Afghanistan: 1919-29*, illustrates how the Nizamnama reforms instituted by the Afghan King Amanullah in the 1920s attempted to modernize (along liberal Western lines) such broad areas of social life as rural education, women's roles, and prevalent marriage customs, only to conclude in abysmal failure. As a testament to the ambitious leader's defeat, widespread revolt eventually forced Amanullah's abdication, thereby establishing the legacy of Kabul's "hands off" approach to the provincial tribes which would last until the Communist regimes and eventual Soviet invasion of the late 1970s. Compared to the Nizamnama, the reforms of the 1960s focused on constitutional reform, and overall were seen as less radical and more realistic in the context of Afghanistan's decentralized tribally-administered provinces.

Dr. Mohammad Hashim Kamali, an Afghan legal scholar and professor of Islamic jurisprudence, writes:

"It is not accidental that the 1960s experiment in legal reform was less

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rural dynamics that runs throughout this note, Middle East historian Edmund Burke III writes,

As in Morocco, Yemen, and Iran, other Islamic states where pastoralist tribal forces maintained their power into the twentieth century against weak governments, the politics of Afghanistan have been characterized by sharp conflict between the forces of tradition rooted in the countryside and the forces of change based in the cities.


19. Id. at 14-15.


21. Id.

22. KAMALI, LAW IN AFGHANISTAN, supra note 18, at 15.

23. Id.
ambitious than the *Nizamnama* legislation over four decades previously. Indeed the failure of the *Nizamnama* reforms which culminated in the dramatic downfall of Amanullah has strongly influenced the scope and content of law reform in the 1960s. The fear, real or imaginary of provoking a similar reaction among the religious and tribal conservatives thwarted the reformist zeal of the Afghan leaders for decades to come.24

As the crowning achievement of the 1960s reforms, the Afghan government ratified a new constitution in 1964, since praised as a practical compromise between the state bureaucracy’s modernizing elements and the mainly autonomous provincial tribes, as well as for its high level of popular participation.25 The latter view arises because of the greater role public consultation and debate played in determining its contents (as compared to the previous constitutions), and the participation of large contingents of delegates from provinces all over Afghanistan in the 1964 *Loya Jirga* constitutional assembly.26 In this manner the constitution of 1964 was the first and most significant attempt at establishing an independent judiciary under the supervision of a Supreme Court, proclaiming the judiciary as an “independent organ of the state which discharges its duties side by side with the legislative and executive organs.”27 The ratification of this constitution thus marks the formal instituting of an officially state-sponsored but independent judiciary in Afghanistan.28 On a broader level the 1964 *Loya Jirga* and its accomplishments, achieved through consultation, ushered in a period of relative stability and national peace that has come to be remembered by Afghans as the “Decade of Democracy,” “the New Era,” or “the Constitutional Period.”29 Growth in this realm was short-lived, however, as the widespread chaos and trauma of consecutive military coups and Soviet occupation during the 1973-1991 years effectively destroyed the national accomplishments made by popular participation in this once-promising period.30

Similarly, attempts to reinstitute a functioning judiciary and rule of

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24. *Id.* at 205.
25. *Id.* at 203-11.
26. *Id.*
law after the Afghans defeated an occupying Soviet Union were stymied by the brutal civil war and ethnic strife that followed the latter’s withdrawal in 1991. Extreme sociopolitical factionalism developed in the Afghan population not only along ethnic lines but also within the broad ethnic groups as individual tribes warred against each other in a vacuum of power left by the Soviet withdrawal and the communist government’s collapse. Moreover, rivaling ideologies pitted an assortment of political parties and quasi-political militias of both Islamic and secular orientations against one another, each with their own branches and sub-divisions, each competing for the instruments of state control. The extensive intervention of Afghanistan’s neighbors—particularly Pakistan, Iran, Russia, and India—exacerbated the bloodshed as these states supported their respective proxies in the conflict. It was in this vicious civil war environment that the Taliban movement, with substantial financial and military support from Pakistani and Saudi intelligence services, emerged and established control over 90% of Afghan territory in 1996. Talibans rule, most often characterized in Western media by its draconian social policies, would last only five years in power, however, until its removal by U.S.-led military strikes in the Fall of 2001.

II. Judicial Reform and Legal Aid in Post-Taliban Afghanistan

On December 5, 2001, prominent members of the Afghan diaspora and representatives of industrialized countries from around the world gathered in Bonn, Germany to plan the reconstruction of a war-torn Afghanistan. With the Taliban removed from power and a new Afghan government in the making, donor countries assumed responsibility for

32. Id.
33. Id.
34. Id.
various aspects of the rebuilding process. For example, in building a new Afghan national army, the United States is currently training rank-and-file soldiers, the United Kingdom its non-commissioned officers, and France the remainder of officers. Germany has primary responsibility for training police, and a Canadian general currently commands the NATO-administered International Security Assistance Force (ISAF). In other realms of reconstruction, Japan has rebuilt civilian infrastructure such as primary schools and municipal buses, China has constructed a large public hospital in the center of Kabul, and Italy has assumed the preeminent role in judicial reform.

As one of its foremost contributions to Afghanistan’s judicial reform, Italy presented a complete criminal procedure code to the transitional Afghan government in February 2004. At a donor conference for Afghanistan held in Doha, Qatar in May 2004, Italian officials declared that its new criminal procedure code for Afghanistan is “a simplified text designed to make the work of the criminal police and judges easier and compliant with international human rights; the Code has been adopted by the Afghan Government.” The new code is to be implemented at all levels of Afghanistan’s judiciary. The present hierarchy of state-run courts in Afghanistan includes a Kabul-based Supreme Court (Steria Mahkama), provincial high courts of appeal, and local district courts dispersed in some of the major cities of the country, including Kabul, Herat, Kandahar, Nangrahah and Balkh.

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38. Id.
41. USIP SPECIAL REPORT 117, supra note 14.
42. L'Afghanistan e la Comunita Internazionale, una Partnership Per il Futuro, supra note 9.
Current efforts to rebuild Afghanistan's legal system are tremendously reliant on foreign aid. This is evident not only in the dependency on foreign governments fulfilling pledges from the 2002 Tokyo and 2004 Berlin donor conferences, but also in the wide-ranging role played by international non-governmental organizations (NGOs) in reconstruction.

In the realm of legal aid specifically, NGOs such as the Asia Foundation, USAID (and its various contracted subsidiaries), the International Legal Foundation (ILF), International Resources Group, as well as several private U.S. law firms and law institutes of American and European universities, have conducted workshops designed to train a new generation of judges, lawyers, and civil servants for the Afghan state's fledgling bureaucracy. Due to the shortage of official, state-sponsored legal institutions, legal reform efforts have been most concentrated towards rebuilding judicial capacity of the Afghan state by training a new judiciary. The new criminal procedure code is a fundamental contribution in this regard.

As reflected in the Italian minister's comments at the Doha conference, the driving inspiration behind the new code is to institute a formal system of codification, which allegedly will aid in professionalizing Afghans' judicial processes (which includes "educating" Afghan judges), reduce arbitrary decision-making, and hence ultimately strengthen the rule of law in Afghanistan. Codification, so it is often claimed, encourages predictability in the law, diminishes the absolute power of otherwise unaccountable judges, and protects the legal system from the arbitrary decision-making of tribal elders and mullahs in rural areas, who are seen as immune from the supervision of a sovereign state apparatus that would, in


46. Donors Pledge $8.2bn Afghan Aid, BBC NEWS, at <news.bbc.co.uk/1/hi/world/south_asia/3589437.stm> (visited Nov. 29, 2005).


48. USIP SPECIAL REPORT 117, supra note 14.

49. Id.; Conferenza Sulla Sicurezza Regionale e Cooperaeeione Di Polizia Sul Tema 'Riconstruzione Della Polizia In Afghanistan - Un Appocchio Regionale, supra note 43.
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their place, ensure equality before the law and its just implementation. In addition, a code promotes judicial uniformity, extending the centralized state structure through law to the outlaying provinces. Perhaps most

50. For example, see the description of tribal adjudicatory systems in Afghanistan by one prominent legal news agency: “The country has no codified statutes. Instead, its religious leaders—known as mullahs—produce occasional edicts on which activity is criminal and which punishments should be levied for infractions.” Note the dichotomy constructed between a system based on written codes, and an orally-based system such as that in Afghanistan. The article adds the words of one commentator: “This is rule by man rather than rule by law. The judicial system comes down to a group of elders and clergy making decisions. . . . And a lot of these people don’t have any schooling. There’s a lot of interpretive law based on personal judgments.” While the speaker here is commenting on the Taliban, similar views have been promoted about religious leaders in Afghanistan in general. Sam Handlin, Justice Takes on a Different Meaning in Afghanistan, COURT TV, at <www.courtv.com/assault_on_america/0928_afghanjustice_ctv.html> (visited Nov. 29, 2005); Democracy in Afghanistan: Mullahs in the Fold, Convincing Religious Leaders to Support Afghan Democracy, NPR, at <www.npr.org/templates/story/story.php?storyId=1892052> (visited Nov. 29, 2005); Shahabuddin Tarakhil, Some Clergy Still Oppose the Vote, INSTITUTE FOR WAR AND PEACE REPORTING, at <www.iwpr.net/index.pl?archive/arr_200410_143_4_eng.txt> (visited Oct. 26, 2004). Disdainful views of local religious leaders and tribal councils expressed by international legal commentators are not limited to Afghanistan. See, e.g., Marie D. Castetter, Note, Taking Law Into Their Own Hands: Unofficial and Illegal Sanctions by the Pakistani Tribal Councils, 13 IND. INT’L & COMP. L. REV. 543 (2003).


Germany has already made certain commitments in favour of a national civilian police, acting in accordance with . . . international instruments on human rights and humanitarian law to which Afghanistan already is a party. It is hoped this will include the creation of a Code of Ethics . . .

Id. at 16.

Likewise important is of course the training of new prison authorities and prison personnel, introduction of human rights standards and codes, organization of new prison services at central and regional districts, establishment of training centres for training personnel and preparation of training programmes and teaching modules.

Id. at 46. “Issues such as transparency and accountability are carefully being pursued, incl. Codes of Conduct into Principled Common Programming.” Id. at 55. For a description of remarkably parallel colonial motivations behind past codification movements in Muslim societies, see BRINKLEY MESSICK, THE CALLIGRAPHIC STATE: TEXTUAL DOMINATION AND HISTORY IN A MUSLIM SOCIETY (1993). For example, Messick writes, Criminal law was an early focus of Western indignation and intervention. The Dutch, for example, found it necessary to issue a new penal code for their Indian Archipelago colonies, because, as the translator of al-Nawawi and Abu Shuja’ put it, it was ‘clear that no civilized nation can push its respect for indigenous
important of all, a code enshrines fundamental human rights, and is thereby assumed to help prevent inhumane, vigilante forms of retributive justice, often cited by international organizations as responsible for atrocious human rights violations, particularly crimes against women.\textsuperscript{52} Finally, so as to combine the twin goals of promoting modern international human rights while satisfying unavoidable local cultural demands, instituting a code with "Islamic credentials" may even promote the positive perception amongst Afghans as an immediate implementation of Islamic law, thus appeasing public desire for a rule of Shari'a – likely to be a popular move for outspoken religious leaders and their constituencies.\textsuperscript{53}

The above claims constitute major underlying justifications and a normative reasoning pattern behind the new code's adoption, as indicated by comments from leading foreign advisors and legal development agencies on "the causes" of Afghanistan's judicial woes.\textsuperscript{54} Bearing in mind these introductory remarks, we will now examine the strength of these claims and the meaning of codification for Afghanistan in light of its recent history and contemporary sociopolitical realities.

\begin{itemize}
\item institutions to the extent of sanctioning the application of barbarian punishments, long practiced by virtually all oriental peoples. \textit{Id.} at 62. "From the point of view of the colonizers, custom had to be either standardized or abolished altogether in favor of a unified legal system." \textit{Id.} at 65.


\item 53. \textit{MUHAMMAD QASIM ZAMAN}, \textit{THE ULAMA IN CONTEMPORARY ISLAM: CUSTODIANS OF CHANGE}: 95-96 (2002). Zaman's work is an exceptionally well-researched and in-depth study on the ulama of South Asia and Afghanistan.

\item 54. \textit{See supra} notes 14, 43, 50-52 and accompanying text.
III. The New Criminal Procedure Code — A Critical Perspective

The central problem with the new criminal procedure code is one of imposition of law. Foreign jurists drafted the document, and with little Afghan involvement, if any at all. The Washington D.C.-based United States Institute of Peace, a federally funded research center chartered to promote democratization and the rule of law abroad, has acknowledged criticism of the new code in its report *Establishing the Rule of Law in Afghanistan*. The report mildly states “[t]his interim code has been the subject of some controversy, as it was prepared by Italian officials with help from U.S. military lawyers but relatively little input or support from the Afghan justice institutions, and was reportedly adopted under strong foreign political pressure.”

Given the current Afghan government’s extreme reliance on the international donor community (especially the United States) for continued economic and military support necessary in post-conflict Afghanistan, such political pressure is not difficult to imagine. In addition to the new code already being perceived by members of the judiciary as a foreign imposition of law, when applied within Afghanistan it may well enflame the center-vs.-provinces conflict that has plagued the country’s history throughout the twentieth century.

One of the main sources of conflict between the Afghan central government and outer provinces in the past century has been competing systems of law and governance. On several occasions the Kabul government has attempted to impose a unified system of law on the provinces, but has been unable to displace local mechanisms of adjudication and political control, as demonstrated in the failure of Amanullah’s *Nizamnma* reforms in the 1920s and the rejection of communist agrarian programs in the 1980s. J. Alexander Thier, a consultant to Afghanistan’s Judicial Reform Commission and frequent commentator on Afghan legal development, writes:

> The historical reality is that power in Afghanistan has almost always operated through a negotiation between the central authority and local power-holders — and tensions between these two levels have existed for as long as there has been a state. Even the Taliban, which exerted a

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56. *Id.*
58. KAMALI, LAW IN AFGHANISTAN, *supra* note 18, at 5-6, 9.
59. *Id.* at 251; RUBIN, *supra* note 31.
greater measure of central control than its immediate predecessors, was forced to negotiate with local elites and accept a degree of local autonomy. Most of Afghanistan has always been remote from the center, and the infrastructure is insufficient to impose high levels of central control. Moreover, centralization has never been popular. This is due in part to strong local social organization and a tradition of independence, which means that decisions imposed from outside are usually resented locally. Distrust of central government is also based on the experience of authoritarianism and brutality.\(^{60}\)

In addition to Afghanistan’s history of extremely decentralized governance, the discontinuity of Kabul’s regimes and factionalized politics over the last quarter century of war have produced “a patchwork of conflicting laws, legal systems, and an overall incoherent collection of law enforcement and military structures,”\(^{61}\) at times even within single institutions of the Afghan state.\(^{62}\) Outside of Kabul and in most of the country, therefore, regional power holders—some holding official positions and some not—exercise de facto political, administrative, and judicial authority through control of their own militia forces.\(^{63}\) These warlords, as they are often referred to both inside and outside Afghanistan, are generally autonomous and independent from any state control, and normally entirely self-funded through profits from the opium trade and exacting taxes on commodities or travelers that pass through transportation routes under their control.\(^{64}\) Beyond the influence of official provincial governors and warlords then, day-to-day disputes are adjudicated by traditional Afghan shuras or jirgas (tribal councils), normally composed of the most prominent elderly men of the village.\(^{65}\) Outside of the major cities, shuras


\(^{61}\) USIP SPECIAL REPORT 117, supra note 14.

\(^{62}\) Id. for example, the three main permanent legal institutions of the Afghan state—the Ministry of Justice, the Supreme Court, and the Attorney General’s office (Saranwali). All are “coequal in stature, and for a variety of political, personality, and turf-consciousness reasons have fractious relations with each other.” Id. Others have noted “the combative relationship” that has emerged between the Ministry of Defense and the Ministry of Finance, discussed in Sedra, supra note 39, at 17-18.

\(^{63}\) USIP SPECIAL REPORT 117, supra note 14.


\(^{65}\) USIP SPECIAL REPORT 117, supra note 14. See also Fatima Gailani, Human Rights in Afghanistan: Law and Reality, in THE RULE OF LAW IN THE MIDDLE EAST AND THE ISLAMIC WORLD: HUMAN RIGHTS AND THE JUDICIAL PROCESS 144-149 (Eugene Cotran &
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have for generations played the predominant role in resolving disputes and administering justice in Afghanistan by means of locally produced law that—contrary to exotic depictions of “timeless law of the ancients”—appropriately adapts according to local context and circumstance. In this manner, non-codified “customary law,” de facto, governs the vast majority of the population, especially outside of Kabul and other major cities.

With such highly evolved mechanisms of localized justice in place, it is difficult to imagine these tribal councils tossing aside their historical roles as adjudicators in order to submit to, and be replaced by, state-employed judges, carrying hot-off-the-press copies of the Italian criminal procedure code in hand. Afghan history speaks to the resistance of provinces to the imposition of law by Afghans themselves, let alone by foreign drafted laws. As they refused to submit to Amanullah’s reforms in the early part of the twentieth century, and likewise under the Communist regimes in the latter part, local adjudicatory actors in the provinces are likely to reject the latest attempt to impose centralization. In this way, legal debates over the institution of a criminal code in Afghanistan will essentially become political debates and struggles, with

Mai Yamani eds., 2000).


67. “Customary law” is indeed a problematic term, implying untouched, static laws that have remained unchanged for centuries on end. The term often describes what in reality constitutes a biased assortment of law that colonial regimes selected as manageable and able to coexist with their own colonial rule. For example, see MARTIN CHANOCK, LAW, CUSTOM, AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA (1998) [hereinafter CHANOCK, LAW, CUSTOM, AND SOCIAL ORDER], for a critical explanation of the “customary law” concept. Speaking of customary law, Chanock writes:

Much of the customary was the winning representations of intense conflicts between ethnic groups, genders, and generations, winning because they found accord with the ideas and interests of the colonial rulers. But they were only partial representations of the value and practices in African communities, both those inherited from the precolonial past, and those adapted and reformed in the unfolding present.

Id. at iv. Professor Laura Nader has also criticized colonial (and neoliberal) views of customary law as inaccurate and unrepresentative of dynamic indigenous legal cultures, arguing “Research on ‘customary law’ illustrates that legal tradition is not petrified history; rather, legal tradition is constantly being invented.” NADER, supra note 11, at 66. While several legal agencies working in Afghanistan use the term “customary law” in a similarly homogenous or “petrified” fashion, this paper uses the term to refer to the diversity of unofficial, i.e. non-state-sponsored legal systems indigenous to Afghanistan.


69. KAMALI, LAW IN AFGHANISTAN, supra note 18, at 1-2.
volatile consequences for peace in the country as a whole.

It should also be noted that while local tribal elements and rural warlords traditionally compete with the central government for political control of the provinces, an alternative source of sociopolitical influence in Afghanistan exists—the urban ulama, or Islamic religious scholars. At the core of Afghanistan’s religious institutions, the Afghan ulama shared a complex relationship with the Afghan state, but broadly speaking they adopted pro-government stances in the country’s history up until the Soviet invasion. Professor Kamali writes,

Religious leaders in Afghanistan have historically been recipient of government grants and subsidies. . . . The qadis, muftis, and muhtasibs (religious superintendants) were keen enforcers of Shari’a which was the authoritative law of the land. The rulers proclaimed themselves to be patrons of the faith to whom allegiance was declared as a religious duty by the congregation leaders in their Friday sermon of khutba. In sum, so long as the government avoided radical measures against the religious leaders and did not attempt a direct clash with the principles of Islam, the religious leaders were, unlike the tribal chiefs, in potential alliance with the political authority.

In spite of such historical ties even several strands of this influential but diffuse class oppose codification, on both theoretical and pragmatic grounds. Theoretical objections boil down to an opposition to codifying Shari’a, out of fear of imposing human limits on Divine law. As the late professor of Islamic jurisprudence Joseph Schacht pointed out, “Islamic law, being a doctrine and a method rather than a code . . . is by its nature incompatible with being codified, and every codification must subtly distort it.” Practically speaking, perhaps most problematic for those seeking to institute a code is a traditional opposition amongst ulama to codification due to a preference for case-by-case adjudication. Dr. Muhammad Qasim Zaman, Professor of Religious Studies at Brown University, explains in his work Custodians of Change: The Ulama in Contemporary Islam that the principle arguments in opposition to codification amongst ulama are that codifying produces a rigidity in

70. Id. at 6-8.
71. Id.
72. Id.
74. ZAMAN, supra note 53, at 95-99. This is especially the case for muftis (jurists of Islamic law who are trained with issuing verdicts on new and novel issues, i.e. those not specifically addressed in previous jurisprudence).
judgments that might contravene some of the basic discretionary principles of the Shari'a, such as *ta'zir*, *istihsan*, and pursuit of the *maqasid al-shari'a*—the five underlying purposes of Islamic law. According to this view, codification is also a threat to the authority of the judge to decide individual cases in the light of his or her reasoned judgment—as guided by the foundational scriptural text, not human codes. Also, many *ulama* see codification as directly strengthening the state over the *ulama*, and thereby threatening to subjugate the latter to the former. In the context of Afghanistan, these are all substantial objections Afghan *ulama* may raise in challenging a criminal procedure code because of the inherent threat it harbors for their legal authority and normative method of adjudicating cases. This is all in addition to the traces of colonialism inherent in imposing a Western-styled legal code, an act not previously unheard of, and which *ulama* have staunchly resisted by deeming as inauthentic, obtrusive and unwelcome in several Muslim state contexts before. As a

75. *Ta'zir*: The principle which authorizes judges to prescribe penalties for offences in which the original Islamic legal texts (the Qur'an, *Sunnah* [traditions of the Prophet], *Qiyas* [analogy] and *ijma* [consensus of the Prophet's Companions]) have not quantified a punishment. While *Ta'zir* provided judges with some degree of flexibility in that “it is for the judge to quantify the punishment in light of the individual circumstances of the offender and the offense,” judges must nevertheless abide by textual limits that prohibit various punishments, such as those that amount to torture. MOHAMMAD HASHIM KAMALI, *PRINCIPLES OF ISLAMIC JURISPRUDENCE* 417 (3d ed., 2003) [hereinafter KAMALI, *PRINCIPLES*].

76. *Istihsan*: a principle of Islamic law authorizing departure from an established precedent in favor of a different ruling for a reason that justifies such a departure by seeking to uphold a higher value of the Shari'a, such as consideration of public interest. *Id.* at 323-31, 344-48.

77. *Maqasid al-shari'a*: literally, the “aims” or “objectives” of the Shari'a, it refers to the five essential values that the Shari'a seeks to protect in its rulings: (1) life, (2) religion, (3) intellect, (4) lineage/family, and (5) property. Judges sometimes use these discretionary principles to overturn convictions or advance a public interest; in this manner it is a legal correlative of “public policy” arguments in common law courts such as in the United States and United Kingdom. For further elaboration on this concept, see WAEL B. HALLAQ, *A HISTORY OF ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNI USUL AL-FIqh* 89, 112 (1997) [hereinafter HALLAQ, *A HISTORY OF ISLAMIC LEGAL THEORIES*]; KAMALI, *PRINCIPLES*, *supra* note 75, at 351.

78. ZAMAN, *supra* note 53.

79. *Id.*

80. *Id.* One may cite, by analogy, the traditionally protected concept of academic freedom in the U.S., whereby scholars of various ideological backgrounds preciously guard the right to pursue research and publish their opinions free from state supervision or political pressure.

81. *Id.* For additional studies on *ulama* and their interaction with codification movements of modern nation-states, see Brinkley Messick's historical ethnography of *ulama* in Yemen, in MESSICK, *supra* note 51; Said Amir Arjomand, *Constitution-Making in
relevant example, Justice Taqi Usmani of the Supreme Court of Pakistan has commented with regard to the region's experience with English law imposed in the colonial era and its continuing influence in contemporary times:

> Even if, hypothetically, everything that is explicitly in conflict with the Qur'an and the sunna is excised from English law, that law can still not be characterized as Islamic law. For the former is the product of an entirely different context, and its guiding concepts cannot be separated from the framework from which it has evolved.\(^2\)

In this manner the resistance of *ulama* to a foreign imposed code complicates any efforts to build a rule of law based on codification, especially given the profound influence and historically deep roots of *ulama* in social and political life in Afghanistan.\(^3\)

A related contextual problem with the criminal procedure code is its inflexibility to the ethnic diversity of Afghanistan. There are at least six major ethnic groups in Afghanistan—the Pashtun, Tajik, Uzbek, Hazara, Turkomen and Aimaq—though scholars of Afghanistan have recognized as many as twenty-one distinct Afghan ethnicities in all.\(^4\) The New York-based International Legal Foundation has conducted a survey of customary law of the different provinces of Afghanistan, illustrating the diverse systems of adjudication active across, and within, the various ethnic groups and provinces of Afghanistan.\(^5\) Each ethnic group, each individual tribe, each particular clan, and each unique village have evolved their own highly-sophisticated systems of adjudication and jurisprudence, uniquely adapted to local circumstances and cultures.\(^6\) Imposing an external code translates into demanding the abandonment of these indigenous legal practices and intermeshed social norms. Imposing a uniform code would also demonstrate Kabul's lack of respect for ethnic diversity in the provinces, by marginalizing local legal cultures and systems of justice in an

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\(^2\) ZAMAN, supra note 53, at 96.

\(^3\) See discussion of Afghan *ulama* in NAWID, supra note 20.

\(^4\) KAMALI, LAW IN AFGHANISTAN, supra note 18, at 4; DUPREE, supra note 17, at 59-64.


\(^6\) Id.
attempt to have it one way in Afghanistan. This produces yet another source of resistance and socio-political clash between the center and provinces. On a related note, the tragic rise in attacks upon foreign workers and those who cooperate with the central government in Afghanistan must be examined in this light, as opposed to some vaguely-defined and diffuse “Islamic terrorism.” Indeed, contrary to the dominant portrayal in Western media, the recently released Human Rights Watch report, The Rule of the Gun (September, 2004), insists that while most of the attacks are blamed incessantly on Taliban factions, the actual perpetrators are often independent local warlords who view the central government as encroaching upon their authority.87

In addition to the significant cultural, ideological, and political hurdles to instituting a legal code, basic logistical challenges endemic to Afghanistan’s official judiciary system preclude its sound implementation. The U.S. Institute of Peace describes the state of Afghanistan’s state-sponsored judiciary:

Afghanistan cannot be said to have a genuine system of justice at present. To be sure, there are many appointed judges and prosecutors in the country, there are laws on the books, and there are occasional trials, but there is no functioning system. Court management is archaic or non-existent, central judicial and prosecutorial authorities often have no technical means of communicating with colleagues in the provinces, and judicial appointments are routinely made on the basis of personal or political connections without regard to legal training or other qualifications. Moreover, the organization of the judicial apparatus fails to comply with existing law in important respects. . . . [J]udges routinely make decisions without reference to written law; there are effectively no means of enforcing decisions; and despite a theoretical right to counsel, there are virtually no defense lawyers in the country. To a great extent, the written law in Afghanistan is not applied—or even widely known, including by judges and lawyers. As one senior Afghan judicial official


[I]n most parts of the country Afghans told Human Rights Watch that they are primarily afraid of the local factional leaders and military commanders—not the Taliban insurgency. Far from a Taliban problem, most Afghans tell us that their main fear is jangsalaran—the Dari and Pashto word for ‘warlords.’ They say that Afghanistan has a warlord problem—a problem with military factions dominating government and national institutions, including local governments and the army, police, and intelligence services.

Id. at 2.
put it, Afghanistan "has many laws, but no implementation." With apparent good reason, Afghans do not trust the judiciary, and avoid recourse to it as much as possible.88

While the interpretation above is problematic in its assertion that Afghans "lack law"—a conclusion that can only be drawn by ignoring the sophisticated non-state-based, unwritten legal systems that operate in the primarily oral cultures of Afghan villages—it nevertheless highlights a disregard for the Afghan state's official legal institutions and documents. In this state of affairs, why is there such a push to impose a code, displacing local systems of justice that are historically in tune with each jurisdiction's constituency, and have evolved to be more sophisticated, reliable, and trusted by Afghans themselves? Such measures demonstrate the government's lack of trust and confidence in local adjudication systems, a stance that will only be met by provincial actors' mutual disregard for state-led centralization measures.89 To expand on the logistical difficulties argument, most provincial courts in Afghanistan still do not have copies of codes, let alone use them.90 These logistical realities have lead even state-employed judges to defer to local customary law principles over the state codes.91

Furthermore, if a code is applied on the provinces, a fundamental question then arises: who will regulate these provincial courts, overseeing compliance with the state's official legal standards? Here it is important to contextualize the introduction of Italy's criminal procedure code within its larger scheme of judicial reform in Afghanistan. As the centerpiece of their efforts to strengthen the justice sector, Italian legal technocrats have decided that the most urgent need in Afghanistan is to extend the state justice system to areas of the country where courts are presently not

88. USIP SPECIAL REPORT 117, supra note 14.
89. Examples of a lack of regard for legal aid assistance imposed from outside local contexts are plentiful to the observant development lawyer. Professor Ugo Mattei, comparative law scholar with extensive experience in law and development initiatives in Africa, Asia, and Latin America, stated that in one judicial reform project in Mongolia, for example, rural courts were using recently distributed copies of the newly instituted codes and legal texts as copying paper. Professor Ugo Mattei, Remarks to Comparative Law class at the University of California, Hastings College of the Law (Sept. 1, 2004).
90. USIP SPECIAL REPORT 117, supra note 14.
functioning. The Italian plan is to address this problem through a focus on selected district primary courts. Thus, by focusing initially on introducing the code in selected district courts, i.e., those located in provincial capital cities, in theory these courts would also hear cases from other districts in the province where courts are presently not functioning. Following this scheme, Italy is training an initial corps of twenty judges and twenty prosecutors in this new code, who will then be assigned to the selected districts.

In this fashion, the Italian criminal procedure code is part and parcel of a broader plan to professionalize and centralize Afghanistan’s judicial system by establishing district courts that will apply the same code. Afghan and international observers “have expressed skepticism regarding this plan, suggesting that an approach that focuses on use of a new code in a small number of district level courts produces inconsistency and isolated pockets of administration of justice.” Moreover, the absence of any real administrative control over Afghanistan’s provinces testifies to the virtual impossibility of enforcing this procedure. Finally, as a practical matter, the layman’s difficulties with traveling from one province to another, just to settle disputes and seek justice that would otherwise be administered through the local village shura (not to mention the latter’s efficiency compared to what a slow state bureaucratic apparatus would provide), all serve as an additional barrier to enforcing a highly-centralized court system in Afghanistan.

Given these tremendous practical challenges to the institution of a criminal procedure code in Afghanistan, the question should be asked: Why must there be such a formalistic professionalization of the law in the first place? Why is there a need to undermine local adjudicatory customs and transform local criminal procedure so dramatically, or to any degree at all? After all, such measures displace the socioculturally rooted legal systems in the provinces, particularly the honored tribal jirgas that on the whole are more politically legitimate, historically developed, and ultimately respected...
on the local level. 99

More than a few scholarly analyses have highlighted the deeply entrenched respect, sophistication, and binding authority local tribal adjudicatory systems (such as jirgas and shuras) hold in contexts like Afghanistan and rural African societies. 100 On this note, Boston University Professor of Anthropology Thomas Barfield, a specialist in cultures and politics of Afghanistan, warned of the dangers of imposition of law and ignoring local adjudicatory systems during a speech at the 2002 “Securing the Rule of Law in Post-Taliban Afghanistan” symposium in Connecticut. 101 Professor Barfield stated quite candidly,

I think one of the difficulties the international community is going to find in Afghanistan is that the Afghans have a very well-developed structure of law, of morality and of justice, but it’s following a different logic than our own. . . . [W]hile state structures are very undeveloped, the question of running a society without state structures is highly developed. And that is not something that people in the international community are used to dealing with, and unless they do recognize the fact that there’s a substratum in Afghanistan that’s a little bit different than the formal structure, it’ll be asking for trouble as it attempts to create a viable Afghan government over the course of the next two years. 102

In Afghanistan, local justice involves a historical fusion of Islamic and Afghan customary law that has responded to, and reflects, prevailing realities of war. 103 "In the majority Pashtun community of Afghanistan, this customary law is called the Pashtunwali." 104 In his recent study on judicial reform in Afghanistan, law professor Mark Drumbl writes that “[t]he Pashtunwali resonates among certain local constituencies as legitimate local law.” 105 In concluding, Professor Drumbl stresses the central point that it is “when international legal intercessions resonate with lives lived

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102. Id. at 443.
104. Id. (emphasis added). See also Gailani, supra note 65, at 147.
105. Drumbl, supra note 103.
locally that their potential to actualize social change is maximized," a lesson apparently ignored by the Italian Ministry of Foreign Affairs when they drafted the new code.

Despite the warnings of these scholars, there are severe ideological obstacles in the path of foreign aid agencies toward building a more culturally authentic reform process in Afghanistan. As law professor Martin Chanock has persuasively argued,

Western-trained lawyers working in developing countries carry a problematic rule-based approach to the law with them; formalistic rules make up the narrow lens through which they analyze legal problems, creating an obsession with applying fixed legal standards to what are often totally disparate social contexts, all in search of finding a tangible net result and uniform product of "the law." 107

This rule-based approach is obvious in the emphasis placed on writing a formal code of procedure and requiring its implantation in all levels of Afghanistan's judiciary throughout the country. In this manner, the act of drafting a code by foreign legal advisors and requiring its national implementation actually reflects a colonial mentality, particularly in two ways. First, imposing a code demonstrates a censorious view of Afghan shuras, as if the latter were incompetent to rule themselves, and secondly, it reveals the judicial reformers' fear of the unknown, since shuras are highly localized, autonomous bodies that generally act beyond the coercive reach of the state's authority. 108 Furthermore, the drafters' clear circumventing of Shari'a in the code reflects a disdainful approach to Islamic law, similar to the Weberian derogatory view of Islamic law as the rule of a simpleton qadi dispensing raw and irrational justice under a tree. 109 The latter image represents a classic Orientalist view thoroughly debunked by contemporary scholars of Islamic law, yet apparently still holding sway in certain Western international development policies. 110 Professor Chanock's study

106. Id. at 353.
107. CHANOCK, LAW, CUSTOM, AND SOCIAL ORDER, supra note 67, at x-xi.
108. Id.
110. For sample critiques of Orientalist perceptions of Islamic law, see Jane F. Collier, Intertwined Histories: Islamic Law and Western Imperialism, 28 LAW & SOC'Y REV. 395-408 (1994); EDWARD W. SAID, ORIENTALISM 50, 65-6, 209, 255-56, 278 (1994); Wael B. Hallaq, The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse, 2 UCLA J. ISLAMIC & NEAR E. L. 1 (2002-03); MESSICK, supra note 51, at 58-66. For example, Messick writes,

   Among the colonial-era conceptions that contributed to decentering and bracketing
of customary law in Malawi and Zambia highlights the flaws of this parochial view that is characteristic of the colonial encounter, an environment which has some parallels to the relationships between foreigners and Afghans in Afghanistan today:

In colonial Africa the view that new law could be made only by state command belonged to the colonizers as the agents of both state power and of change. Colonized Africans, on the other hand, could not change their law. The concept of customary law was racist because it implied an absence of agency. The idea of customary law confined Africans to a subordinate political place, and in a subordinate time. However the fact that custom was and is continually being invented is not a sign that it is spurious and specious, but a validation of its genuine character as an expression of living interests and values.

In similar fashion, the disregard of provincial shura councils by foreign agencies reflects a view of local Afghan customary law as static, the discursive authority of the shari'a was that it was 'immutable.' This was in contrast to Western law, which, it was assumed, 'responds . . . to the ever changing patterns of social and economic life.' The thesis of doctrinal immutability also spawned related understandings, chief among them that the underlying system of [Islamic legal] instruction was 'inflexible.' The attribution of an ossified character to Islamic law fit general Western conceptions of non-Western societies as either dormant (simple societies) or stagnant (traditional civilizations) until the enlivening moment of Western contact or colonization. As a consequence, patterns of discursive vitality different from those known in the West would remain unacknowledged. . . . Following, in part, from the immutability thesis was the conclusion that the shari'a was largely irrelevant.

Id. at 59. Compare such views of Islamic law's "irrelevance" with Messick's observation that "[l]ittle attention has been given, by contrast, to the obeyed dimensions of the shari'a, or to the extent to which its categories and concerns have influenced behaviors [in Muslim societies]." Id. at 60. In an essay presented at the 1993 Critical Legal Conference in Oxford, British law professor John Strawson argued,

[D]espite its changing language, the Anglo-American critiques of Islamic law remain within the orientalist problematic. Islamic law has been represented within Anglo-American scholarship as an essentially defective legal system. The terrain of the critique has changed from the defence of colonial rule during the age of imperialism to contemporary claims about human rights, democracy and pluralism. The problem with this critique is that it replicates the power relationship between Europe (and the United States) and the Islamic world. The argument that Islamic law is defective nourishes the perception that European law is complete. As a consequence, a genuine engagement with Islamic law becomes problematic as every encounter is drawn onto the terrain of the orientalist narrative.


111. CHANOCK, LAW, CUSTOM, AND SOCIAL ORDER, supra note 67, at ix. For further discussion and arguments on the theme of neocolonialism in Afghanistan today, see MARTEN, supra note 10 and GREGORY, supra note 10.
frozen in time, and regressive, to be removed or "improved" in the post-Enlightenment era of universal human rights—the latter concept purportedly embodied by liberal Western norms of judicial procedure and substantive law. Such views overlook the constantly evolving, highly refined, and adaptive nature of local customary law mechanisms, systems of law that, as in Afghanistan, have survived vicissitudes of war, famine, and drought, and when compared to state-run judicial institutions and law enforcement, have succeeded far more in maintaining relative social order during eras of prosperity and national turmoil alike. Essentialist views on customary law also ignore the deeply rooted connections of customary law with virtually all aspects of social life in a local setting like a rural Afghan village, where each law or social norm is intertwined with another. On this topic Dr. Laura Nader, Professor of Anthropology at UC Berkeley, has described a common flaw of international human rights jurisprudence in the tendency to apply what are often Western-derived norms in totally dissimilar sociolegal contexts, as if certain social practices found to be unpalatable to international human rights standards can be neatly and cleanly separated from their local settings. In her recent book, The Life of the Law, she notes:

Another contemporary example shows the pitfalls of applying legal concepts worldwide, as if they were universal, without regard to local context. Aboriginal customary marriages include practices that conflict with human rights provisions, as for instance the practice of infant betrothal. Diane Bell (1992: 349) has produced a nuanced analysis of how the conceptual division between individual and collective affects the rights of aboriginal women. When one focuses on the individual rights of one woman without noting that marriage is a process that establishes alliances between families and that such marriages have implications for landownership and ritual obligations, the woman loses the checks and balances that earlier worked to protect women. In addition, Bell notes that women experience the power of the state differently than men do, to women’s disadvantage.

While this paper does not argue that international human rights discourses are fruitless endeavors in non-Western settings, it does imply that goals of remedying social ills in a society are best conceived, and achieved, by indigenous actors acting comfortably in their own sociolegal contexts. International intervention in the law of another society,

112. Barfield, supra note 99; Chanock, South African Legal Culture, supra note 100; Bennett, supra note 100.
113. Nader, supra note 11, at 220.
particularly when it relates to social and cultural norms, tends to only exacerbate internal conflicts by politicizing and distorting the original issues. The latter can often have the effect of transforming local disagreements into full-blown wars whereby parties can lodge their conservative arguments in a call for defending the homeland against foreign imperialist motives, thereby stymieing indigenously-supported legal growth and a more organic development of the local legal system. Such is precisely the predicament of Afghanistan in the current period, where it is not uncommon for Afghans to construe the widespread international attention to the conditions of Afghan women as another missionary war on Islam and an attempt to demonize Afghan men, as a precursor to outright colonialism of the country itself. These negative developments could be avoided by first respecting local sociolegal norms for what they are (which includes gaining a far deeper understanding of Afghan history, cultures, and rural societies), considering the complex dynamics of approaching another legal culture though the lens of Western secular-liberal modernity, and by refusing to attack local sociolegal customs as "the source" of human rights problems in Afghanistan. In an apt summary of the faults of the colonial-local legal encounter, Professor Chanock writes:

The essence of the failure of the colonial regime in the area of law was that it heard only one voice, or rather it chose only one partner for its dialogue with African culture. An approach to legal culture that acknowledges the presence of many voices is the best foundation on which to conduct the rights debate, as opposed to the essentializing and dichotomizing views of culture.

One means of recognizing the multitude of voices in Afghanistan is by not unilaterally codifying legal procedures (let alone imposing them), but to respect the diverse forms of established adjudication that thrive, de facto, throughout the country. If the rising Afghan state fails to do so and continues to ignore local sociocultural realities, it will be setting itself up for the return of tumultuous center-vs.-provinces conflict, thereby delivering an ominous message to Afghanistan's fiercely autonomous


115. CHANOCK, SOUTH AFRICAN LEGAL CULTURE, supra note 100.
tribes, and producing ill-fated consequences for the entire country.

**IV. Additional Lessons From Relevant Law and Development Contexts**

The North West Frontier Province (NWFP) and Balochistan province of neighboring Pakistan, adjoining regions which straddle the Afghan-Pakistani border and include large populations of Pashtun tribes, have also confronted the issue of the central state’s relationship to its autonomous tribes. The Pakistani state’s response has largely been a grant of nearly full autonomy. Tribal *jirgas* have virtually an unchallenged role in adjudication of disputes in NWFP and Balochistan. Advocates of administrative rule by *jirgas* have even defended their positions arguing that international law protects indigenous people’s right to autonomy. Critics assail the Pakistani government for giving a free reign to the independent tribal *jirgas*, which human rights groups argue violate international law standards in their treatment of women and collective guilt penal policies. Other analysts have suggested a solution lies in a compromise: a balance between maintaining the *jirga* system, but with fundamental human rights (as defined by prevalent norms of international law) to be protected by the State.

Experiences of law and development from other contexts provide enduring lessons, however, of the danger of foreign intrusion on local legal systems, whether in the colonial era, or in contemporary movements to promote universal human rights or the rule of law. Wael Hallaq,


117. *Id.* While tentative circumstances indicate the contrary due to Pakistani President Pervez Musharraf’s decision to increase army installations in these regions as part of the continuing search for Osama Bin Laden, Al Qaeda, and Taliban renegades, judicial administration remains in the hands of local *jirga* systems. *Pakistan Targets Border Militants*, BBC NEWS, at <news.bbc.co.uk/1/hi/world/south_asia/3994721.stm> (visited Nov. 29, 2005); Owen Bennett-Jones, *Radical Change for Pakistan’s Tribal Elders*, BBC NEWS, at <news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/3985477.stm> (visited Nov. 29, 2005); Jason Szep, *Pakistan Seeks Reform on Afghan Border*, REUTERS, at <www.ariana.com/ariana/ariana.nsf/AllDocsArticles/09AB3564D0DF847D87256E7500669119?OpenDocument> (visited Nov. 29, 2005).


119. *Id.*

120. *International Legal Updates*, 11 HUM. RTS. BR. 32, 32 (Fall 2003).


122. *See, e.g.*, JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980); SANDRA B. BURMAN AND BARBARA E. HARRELL-BOND, EDS., *THE IMPOSITION OF LAW* (1979); MARC GALANTER, *LAW AND SOCIETY IN*
Professor of Islamic Law at McGill University, has argued that the brutally intrusive processes of colonialism in the Middle East established a deep-seated conflict between Westernizing secular elites and Muslim majority communities that continue to hold fast to Islamic sociolegal norms in their daily lives—a blistering divide that endures in post-colonial Muslim societies until this day. The latter phenomenon has prevented the natural development of a stable, self-sustaining and indigenously grounded legal system in most Muslim states in the modern era. Professor Hallaq’s remarks in the 2003 Hastings Tobriner Memorial Lecture are poignantly relevant to current state-building efforts in Afghanistan today, deserving full quoting here:

Having codified the law on the basis of Western legal models, and having virtually decimated the infrastructure of the traditional legal profession, the nation-state jettisoned Islamic law altogether and reigned supreme as the unchallenged center of legal and political power. I am convinced that when the colonial powers pressed for these reforms, they did so without understanding either the dimensions or the ramifications of these changes. They surely did not realize that in doing so they were introducing a deadly combination that would one day produce a troubled and explosive area of the world. This effort at pushing traditional Islamic law aside and rendering it inoperable if not defunct should have alerted many to the fact that not only had the rule of law come to an end but that a major gap, a virtual black hole, had fairly suddenly been created without any real substitution or replacement. On the other hand, with the colonialist creation of the nation-state in the Muslim world, from Syria to Morocco, and from Iraq to Malaysia, a new political order was allowed to emerge without the benefit of the traditional legal structures that had systemically controlled the access by political authority to real wealth (mostly concentrated in civil society but administered by the traditional legal profession) as well as to legal and absolute political power. In other words, there no longer was an independent legal system that could restrain the powers of the new autocracies. And to make things far worse, these autocracies harnessed the best of technology and tools of modernity to enhance their dictatorial regimes, with brutal and tragic consequences. Small wonder then that of the 53 member-states of the Organization of Islamic Congress none is a true, real, or functioning democracy. The majority is ruled by truly oppressive regimes, and any claim they may have made in exhortation of Islamic law has been


superficial and ultimately designed to acquire what has been a thwarted political legitimacy. With the exception of only a few cases, Islamic law has meant little else to these regimes than chopping off of hands, the stoning of victimized women, and public floggings. It is a sad comment that these harsh penalties have come to embody and symbolize the vast entity that we call Islamic law.\(^{124}\)

By imposing a foreign drafted secular code, Afghanistan may well be setting up for the same self-destructive process and even a return to civil war implosions, especially by marginalizing religious scholars and tribal leaders who rely on Islamic jurisprudential principles as well as Afghan customary law for their authority and legitimacy in adjudicating disputes in Afghanistan. The resilience of Islamic law in several additional contexts illustrates the danger of imposing dichotomizing legal codes that do not draw from local legal traditions.\(^{125}\) For example, the dichotomization of state law and indigenous customary law that stemmed from Dutch colonization in Indonesia has likewise been a source of tremendous conflict in the Muslim-majority nation even up to the present time.\(^{126}\) The failure of the recent Indonesian government’s marriage reform laws highlight the problems with imposed codes that are not respected on the local level because they lacked the involvement of influential religious actors such as the Indonesian ulama in its legislative production and public education processes.\(^{127}\)

Similarly, Kenyan law professor H.W.O. Okoth-Ogendo, in his article, “Constitutions Without Constitutionalism: Reflections on an African Political Paradox,” emphasizes the importance of home-grown law. Far from serving democratic goals, he argues constitutions in post-colonial and developing settings can ironically serve to advance a minority elite’s interests at the expense of basic majoritarian rights.\(^{128}\) In another relevant

\(^{124}\) Id.
\(^{126}\) Id.
\(^{127}\) Id. Cammack et al. write: “The case of the Indonesian government’s efforts to regulate Islamic marriage practices illuminates the dynamic interaction between state sponsored legal rules and a local belief and practice grounded in a religious worldview.” Id. at 46.

The data show that while there has been a steady decline in the number of girls marrying below the age of 16, the marriage law has not had an appreciable effect on that trend. We interpret this ‘failure’ of the law to affect behavior as resulting primarily from a popular conviction that a marriage is valid if performed in accordance with Islamic law, regardless of conflicting statutory requirements.

\(^{128}\) H.W.O. Okoth-Ogondo, Constitutions Without Constitutionalism: Reflections on an
study, drawing from constitutional reform movements in Israel, Canada, New Zealand, and South Africa, University of Toronto Political Science Professor Ran Hirschl has questioned the value of constitutionalization in culturally divided polities. In his own words:

An examination of the political origins of these four constitutional revolutions suggests that judicial empowerment is in many cases the consequence of a conscious strategy undertaken by threatened political and economic elites seeking to preserve their hegemony vis-à-vis the growing influence of "peripheral" groups in crucial majoritarian policymaking arenas. In response to perceived threats by peripheral groups, elites who possess disproportionate access to and influence upon the legal arena often initiate a constitutional entrenchment of rights in order to insulate policymaking from popular political pressure. Power is transferred from majoritarian decision-making arenas to national high courts, where they assume their policy preferences will find greater support. Under such conditions, increasing judicial intrusion into the prerogatives of the legislature and the executive through the constitutionalization of rights and the establishment of judicial review may provide an efficient short-term institutional solution for ruling elites, who, given an erosion in their popular support, may find strategic drawbacks in adhering to majoritarian decision-making processes.

The above studies provide sociological evidence as to the inherent problems with imposing Western legal structures in contexts that do not share the former's histories, cultures, and sociopolitical norms. As a final point of relevance in this section, the failure of the American Law and Development movement of the 1960s and 70s has been well documented, analyzed and explored. The main reasons cited for the failure of the movement were American lawyers' parochial views of the law in non-U.S. jurisdictions, lack of consultation with local actors, and inexperience in interacting with the multiplicity of legal actors and layers of law in post-colonial/neo-colonial settings. Evan Davis, former Economics Editor for

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130. *Id.* at 91-92.


132. See GARDNER, *supra* note 122:

Have legal missionaries and legal elites learned from the law and development experience? ...[S]ome of the American participants learned a great deal about the legal models they carried abroad—and learned how little we know of law, change, and choice in developing nations, and in our own. The entire movement could be
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the BBC News, recalls how "in the 1960s, there was a naïve view that by simply channeling some resources to poor countries, development would follow,"\textsuperscript{133} overlooking social and cultural complexities and political dynamics that would stymie reform efforts.\textsuperscript{134} The forbearers of this movement included European Orientalists who in studying societies of Africa and Asia, implicitly compared the law of their own societies with what they constructed to be monolithic, inherently flawed, and overall lacking "non-Western" legal systems. On this topic, Professor Laura Nader writes:

Those who first investigated the difference between Western and non-Western law were largely armchair intellectuals, but they nevertheless collected enough data to begin to document differences; law was stratified variously by some into stages like savagery, barbarism, and civilization—stages that are still found in Western thought processes and law and development schemes.\textsuperscript{135}

The historical evolution of these comparisons culminated in the U.S. law and development movement of the mid-late twentieth century. "In the 1970s, conferences on law and development were also plentiful, as was optimism about tinkering with developing countries by means of legal transplants, an easy, fast, and cheap fix; a developing country need only buy a code book."\textsuperscript{136}

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\textit{Id.} at 174. Professor Nader's comments highlight the inapplicability of a criminal procedure code even further, which requires a state to monopolize criminal prosecution, which is

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\textit{Id.} at 285.

\textsuperscript{133} Evan Davis, \textit{Why Development Matters}, BBC NEWS, at <news.bbc.co.uk/1/hi/business/1875560.stm> (visited Nov. 29, 2005).

\textsuperscript{134} \textit{Id.}

\textsuperscript{135} NADER, supra note 11, at 75.

\textsuperscript{136} \textit{Id.} at 48. Professor Nader further explains the unique function of the plaintiff role in societies governed by customary law,

In nonstate societies of the sort traditionally studied by anthropologists, the plaintiff is motivated to secure justice, and certain kind of justice, because he or she is plaintiff as well as victim. This observation is often ignored when Western law is transplanted elsewhere, although the implantation of Western law models has been the cause of major unrest in developing nations around the world. In Zambia, for instance, the state as plaintiff began punishing defendants convicted of cattle rustling by sentencing them to jail, whereas under traditional law, compensation, not punishment, is a central interest for the "true" individual plaintiffs (Canter 1978). In such situations, plaintiff energy is frustrated. In the Zambian instance, the frustration caused major riots and precipitated a local demand that cattle rustlers be tried by the local court rather than taken out of the community. \textit{It is in the role of the active plaintiff that litigation in other societies differs from ours.}

\textit{Id.} at 174. Professor Nader's comments highlight the inapplicability of a criminal procedure code even further, which requires a state to monopolize criminal prosecution, which is
Now in the twenty-first century, several scholars have cited a return of the law and development movement, noting that the differences this time around are a profuse Western confidence in liberal economic structures following the collapse of the Soviet Union and the defeat of communism, the open backing of foreign judicial reform movements by Western governments and corporations armed with trillions of dollars, all bolstered by the support of an open-ended and amorphous "war on terrorism."137

Have proponents of this new law and development movement heeded the lessons of the past? In view of the imposition of a foreign legal code in Afghanistan, the answer seems to lie in the negative.

V. The Future of Judicial Reform in Afghanistan — Warnings and Recommendations

The plan to institute a uniform code of criminal procedure in Afghanistan suffers from a lack of contextualizing Afghanistan’s history of turbulent center-vs.-provinces conflict, its extremely complex politics and ethnically diverse societies, and multiple adjudicatory mechanisms that govern de facto in rural areas. The decision to draft a code, however, reflects an even broader problem with judicial reform in Afghanistan: a tendency to impose Western legal models in the name of “development” or “legal reform,” goals which are skewed from the start by the lack of sociocultural awareness of Afghanistan’s legal history, principles of Islamic law, or Afghan customary law systems.138 In a country that has clearly not possible in Afghanistan. For additional insightful comments and critiques of the Law and Development movement by this author, see id. at 112-15, 133-35. Note in particular her discussion of J.T. Guevara-Gil and Joseph Thome’s paper Notes on Legal Pluralism, a study which begins by quoting a question raised in 1984 by a Bolivian workers’ union:

‘Why is it that Roman and Napoleonic Law are thought better adapted to our reality than our own experience and age-long traditions?’ They further note: ‘This poignant question challenges the whole project of constructing Latin American nation-states as mirror-images of idealized European models of how societies should be organized (1992:75).’ To create national, integrated, and homogenous societies out of multiethnic social and cultural landscapes is for Guevara-Gil and Thome ‘mission impossible.’ They call attention to a paradigmatic shift ‘qualitatively different to any previous ethnocidal, assimilationist, or integrationist effort’ as simply the right to be different. They portray the centralizing nation-state as having a ‘civilizing mission’ in which law performs a critical role as a coercive discourse imposed upon society.

Id. at 134.

137. Brooks, supra note 122.

138. Frank Vogel, professor of law and director of the Islamic Legal Studies Program (ILSP) at Harvard Law School, apparently came to the same conclusion after a recent trip to Kabul. The website for the Afghan Legal History Project, a program he introduced at ILSP,
long resisted foreign intervention, authenticity of law and participatory involvement on the local level are all the more important. If judicial reform initiatives are to take firm root in Afghanistan, they must spring from an authentic base of Afghan history and sociolegal cultures, of which both Afghan customary law and Islamic jurisprudence play integral roles. If history is not heeded here, judicial reform will follow the path of Amanullah’s *Nizamnama* reforms: resented and ignored on the local level, they will further taint an already bitter relationship between Kabul and the provinces.

In light of the above principles, this paper argues that legal aid and development projects should respect the non-state-sponsored, customary law structures that govern life de facto in the Afghan provinces. External advisors must not assume rural Afghan societies “lack” legal systems; to the contrary, provincial areas of Afghanistan have highly sophisticated, adaptable, even formal legal systems that outside observers may easily not understand or appreciate, and thereby dismiss as “informal” justice.\(^{139}\) Local and autonomous legal systems serve many advantages, including more prompt and effective justice processes than what otherwise slow, inefficient, and heavily red-taped state bureaucracies limp to provide.\(^{140}\) Moreover, legal anthropologists have demonstrated time and again that local adjudicatory systems in contexts like rural Afghanistan carry more authority on the ground than state-made law.\(^{141}\)

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*The idea for such a project began with a visit by the Director of ILSP, Frank Vogel, to Kabul in the fall of 2002, where he immediately recognized that reconstruction efforts were crippled by a lack of understanding of numerous issues concerning the role of law in Afghanistan.... The team’s starting point was that Islamic legal history is an essential and hitherto under-utilized tool for understanding current events, and that Afghanistan in particular offers an extraordinarily dramatic yet exemplary and instructive chapter in modem Islamic legal history. Appreciation of the role of Islam in Afghanistan’s legal past is vital to ongoing efforts to establish a viable legal system for the future of the country and its people.*


141. Barfield, *supra* note 99; Drumbl, *supra* note 103; NADER, *supra* note 11, at 51, 133-
This does not lead to the conclusion, however, that international development and legal aid agencies (which commonly employ Afghan expatriates and refugees returning to assist in the rebuilding of their country) are of somewhat marginal import in post-conflict Afghanistan. Rather, many continue to play a fundamental role in rebuilding vital infrastructure and promoting sustainable improvements in such areas as public health, access to education, and civil society promotion such as independent media training.\textsuperscript{142} Most importantly, expatriate Afghans working for such agencies could potentially play a vital role in promoting a more constructive dialogue between native Afghans who have remained in the country during the decades of war, and the present multitude of foreign legal advisors engaged in rebuilding the country. In the area of rule of law promotion, for example, legal aid agencies can assist constructively in the training of personnel for the state apparatus, which has traditionally held a presence in the largest Afghan cities, such as Kabul, Kandahar, Jalalabad, Mazar-i-Sharif, Kunduz, and Herat.\textsuperscript{143} The new state-based, official law has a greater chance of taking root in these major municipal centers and is less problematic of an imposition, because of the diversity of ethnic groups and legal traditions thriving in these cities (due to increasing urbanization and the influx of migrants from rural provinces to urban centers in search of economic opportunities and employment).\textsuperscript{144} The driving concept here then is not to supplant non-state legal structures that have prospered in the rural parts of Afghanistan, but rather to provide an official form of adjudication for residents of the major cities – where residents are often beyond the jurisdiction of their village or town of origin and associated legal councils, and the multitude of ethnic groups from different regions may benefit from a neutral third party and forum to adjudicate between Afghans from varying original jurisdictions and traditions.\textsuperscript{145} In light of growing urbanization and rural flight to cities in the wake of greater economic and educational opportunities, the Afghan state’s legal structures

\textsuperscript{35, 174.}

\textsuperscript{142.} See, e.g., Soutik Biswas, \textit{Exile Returns to Help Afghan Women}, BBC NEWS, at <news.bbc.co.uk/1/hi/world/south_asia/3706966.stm> (visited Nov. 29, 2005). For some examples of meaningful contributions international legal actors can often make in transitional justice settings, see MANI, \textit{supra} note 11, at 14-15.

\textsuperscript{143.} Gailani, \textit{supra} note 65, at 147: “Ninety percent of the Afghan nation use these codes of honour [such as \textit{Pashtunwali}] instead of official legislation, which is only used in the cities.” The paper hereinafter uses the term “municipal centers” to refer to these more relatively diverse, multi-ethnic cities in Afghanistan.

\textsuperscript{144.} USIP \textit{SPECIAL REPORT} 117, \textit{supra} note 14.

are far more suitable for these urban municipal centers than the more homogenous rural provinces, where decision-making and mediation by non-state-sponsored *shuras* or *jirgas* are the norm.

As to building a network of official courts limited to urban areas, this paper proposes one final recommendation: to rework the formal criminal procedure law code with the aid and participation of a diverse council of Afghan *ulama* and tribal leaders. In pursuit of this goal the judicial reform commission should recruit *ulama* from all the various provinces, sponsor an inclusive assembly in Kabul or any other municipal center (similar to the Constitutional *loya jirga* process), which for reasons of *ijma* would endow a code with far more local legitimacy than it currently holds. Such a gathering should focus on criminal procedure in Islamic law, such as the stringent rules of evidence required for prosecutions, mitigating circumstances for those accused of theft in a state of hunger, and other potential annulments in cases of doubt, duress, or poverty-contextual factors that are certain to arise and therefore must be taken into account in Afghanistan’s courts. In addition, an Afghan criminal procedure committee should go beyond striving to incorporate strong defense protections for the accused, including prohibitions on torture, arbitrary detention, and bribing of prosecutors—but do so by drawing as much as possible from Afghan sources of law—such as the robust precedents for the accused’s rights in Islamic jurisprudence. In addition, the judicial reform commission should continue to support the training of Afghan public defenders, who similarly would derive authority from Islamic law in securing defendants’ due process rights, protecting them from wrongful conviction, and arbitrary treatment by law enforcement authorities. The International Legal Foundation’s recently-established Legal Aid Afghanistan project, which is currently training public defenders in Kabul,

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146. *Ijma*: a unanimous agreement of Islamic jurists on a given matter that is subject to debate. A legal opinion that is deemed to have *ijma* carries significant legal authority and is often considered binding, as opposed to any one jurist’s opinion on a given issue. For further discussion of the concept of *ijma*, see Kamali, *Principles*, supra note 75, at 228-63; Hallaq, *A History of Islamic Legal Theories*, supra note 77, at 75-8.


148. *Id.*
Kandahar, and Kunduz, contains practical examples of Afghan lawyers who are trained in both Shari'a and Afghan customary law, and then use their knowledge of Islamic jurisprudential principles to defend their clients. The supportive role Islamic jurisprudence has played in training public defenders is just one example of how Afghan lawyers, judges and independent legal scholars can engage international human rights standards within their own interpretive framework of the Shari’a and Afghan customary law.

To overcome legitimacy problems, the state’s judiciary must encourage the involvement of a diverse council of ulama from the different provinces, and it has examples with the constitutional Loya Jirga process. While virtually all development agencies have stressed increasing spending on education, they should not shy from including traditional Islamic educational institutions that will promote a dynamic and nuanced study of Islamic law in the context of Afghanistan’s grave humanitarian realities and needs of a modern state. This will also alleviate fears and concerns on the part of Afghans and Muslims in the region that the international community is trying to do away with traditional Islamic seminaries (madrasas) and historically valued institutions of religious education in Muslim countries, to be replaced by Western-modeled secular schools.

149. For example, while witnessing criminal trials in Kabul the author observed that in spite of the instituting of a new criminal procedure code, lawyers continually referred to verses of the Qur’an, Prophetic traditions (hadith), or other well-known sources of Islamic jurisprudence in defending their clients. For more information on project Legal Aid Afghanistan, see Projects, The International Legal Foundation, Ltd., at <theilf.org/afghanistan.html> (visited Oct. 2, 2005).

150. Dr. Saleem Ali, Professor at the University of Vermont and currently conducting a wide-ranging study of madrassas in Pakistan, aptly summarizes the current atmosphere:

The proliferation of madrassas or Islamist schools in much of the Muslim World has been noted with particular consternation following the terrorist attacks of September 11, 2001. The perceived linkage between radical Islamic education and militant behavior against Western interests, has led development agencies and governments to focus their resources on educational reform. However, there is scant empirical research grounded in rigorous social science on the socio-environmental roots of this phenomenon and its consequences. While the topic has received widespread media coverage and has been discussed within the broader context of radical Islamization, the research has generally been predicated on observational accounts and anecdotes, that range from strongly positive to vehemently negative. Akbar S. Ahmad regards madrassas to be a “cheaper, more accessible and more Islamic alternative to education.” Singer calls them a “displacement of the public education system,” Jeffrey Goldberg terms them as means of “education of the holy warrior,” Jessica Stern while describing them as emblematic of “Pakistan’s jihad culture,” uses epithets and sub-headings like: “schools of hate,” “Jihad International Inc.”

Saleem Ali, Pakistani Madrassas: A Balanced View, at
Continued reliance on foreign codes not only obstructs the natural development of Afghanistan's legal institutions, but fails to draw meanings from Afghanistan's reservoir of legal traditions that have been so pervasively influenced by Islamic jurisprudence. Professor M.H. Kamali, for example, comments on the dynamic nature of Islamic law and its pervasive role in Muslim societies, as distinguished from the formal instituting of a code:

Unlike its Western counterpart, Islamic jurisprudence is not confined to commands and prohibitions, and far less to commands which originate in a court of law. Its scope is much wider, as it is not only concerned with what a man must do or not do, but also with what he ought to do or ought not to do, and the much larger area of permissibilities (mubahat) where his decision to do or to avoid doing something is his own prerogative. Usul al-fiqh [Islamic jurisprudence; the study of the sources of Islamic law] provides guidance in all these areas, most of which remain outside the scope of Western jurisprudence.\textsuperscript{151}

As a final note, it would be a tragic and lasting mistake for judicial reformers to assume (either explicitly or implicitly) that Afghanistan's "lack of a rule of law" or "chronic warlordism" is a problem somehow built-in to Islamic law or Afghan cultures. A historically informed study of the underlying causes of violence in Afghanistan reveal that ongoing military conflicts do not boil down to innate cultural differences or abstract legal debates, but rather fundamentally political issues—feudal lords' rivalries over trade routes, resistance to foreign intervention and economic adventurism, or even the rampant dire poverty that induces laymen to participate in the lucrative drug economy, rural banditry, or foreigner kidnappings in the first place—just to cite a few common examples from within Afghanistan today. Such political and economic root causes are the issues that need to be tackled and "reformed," as opposed to blaming Afghanistan's provincial mechanisms of adjudication and tribal rule. As argued by Columbia University Professor of Anthropology Mahmood Mamdani, it is a commonly purported fallacy in Western policy circles and popular media to attribute political instability, widespread violence or just "conflict" in general in the Muslim world to Islamic cultures in some form or another, ignoring brutal histories of European colonialism in Muslim lands, the historical supplanting of traditional legal orders with Western codes and artificial legislation, and constant foreign intervention that constitute the chief causes of political upheaval in several Muslim country

\textsuperscript{151} KAMALI, PRINCIPLES, supra note 75, at 8.
In light of the brutal history of foreign invasions, occupations, and attempts at imposing colonialism, an indigenously-supported rule of law in Afghanistan will not grow from the importing of legal texts and institutions. Instead, reestablishing a rule of law in Afghanistan must be pursued cautiously by respecting presently functioning systems of legal order that are active in the provinces, and limiting new state legal institutions to the major cities, rather than supplanting traditional adjudicatory systems in provincial areas with foreign codes that will neither be respected nor authoritative. Needless to say, such efforts must be pursued in tandem with combating rampant poverty and gross economic inequalities in general, in addition to tackling widespread corruption on the official level. As to the future of judicial reform in Afghanistan, the new Afghan state's failure to respect local legal histories and customs, exacerbated by a reliance on highly-formalistic foreign-drafted codes, will actually promote trends of impunity and social disorder by displacing respected legal actors on the ground, precisely the people who can actually settle disputes and resolve conflicts in Afghanistan.

Conclusion

In the closing lines of his 1994 book *The Fragmentation of Afghanistan*, Professor Barnett Rubin of New York University predicted that if the international community did not strengthen its commitment to rebuilding war-torn Afghanistan, a country that served as the “Cold War’s” most devastating battleground, there would be disastrous consequences not just for Afghanistan, but for the world at large. To claim that this warning passed unheeded requires no elaborate proof—the somber events
Judicial Reform in Afghanistan

of September 11, 2001, and its subsequent global conflicts, have imposed an atrocious human toll around the globe. Three years later, with the Taliban removed from power, a new government established, and international relations resuming in full throttle, Afghanistan has received billions of dollars in foreign aid for the purpose of establishing a stable, secure, and unified modern state. A new constitution has been ratified and its first presidential elections have been held, with recent parliamentary elections conducted in September of 2005. Some have thus concluded

155. Official statistics on civilian casualties in Afghanistan are a conspicuously absent function of the "war on terrorism" (let alone investigations into errant bombs being an actionable violation of human rights). Reports on this incredibly important, albeit largely ignored, matter are thus largely investigated, gathered and published by independent media sources. One noteworthy example has been University of New Hampshire Professor Marc Herold’s effort to document civilian losses in the recent wars in Afghanistan and Iraq. Professor Herold’s Dossier on Civilian Victims of United States’ Aerial Bombing of Afghanistan, released in December 2001, concluded that as a conservative estimate, aerial bombardment killed over 3,700 Afghan civilians in the first eight and half weeks alone (aerial bombing by the U.S. and coalition forces has continued into 2005). Marc W. Herold, A Dossier on Civilian Victims of United States’ Aerial Bombing of Afghanistan: A Comprehensive Accounting, at <www.zmag.org/herold.htm> (visited Oct. 2, 2005).

Professor Derek Gregory in his 2004 book confirms this study and writes,

The high-level war from the air also took a heavy toll of the [Afghan] population. By May 2002 it was estimated that 1,300-3,500 civilians had died and 4,000-6,500 civilians had been injured, many of them seriously, as a direct result of American bombs and missiles. Probably another 20,000 civilians lost their lives as an indirect consequence of the American-led intervention; this includes thousands who died when relief columns from international aid agencies were halted or delayed, and others died through the secondary effects of targeting civilian infrastructure (especially electrical power facilities vital for hospitals and water-supply systems).

GREGORY, supra note 10, at 70. For more information on this scarcely covered issue, see Ian Traynor, Afghans Still Dying as Air Strikes Go On. But No One is Counting, GUARDIAN WEEKLY (Feb. 14, 2002), available at <www.guardian.co.uk/GWeekly/Story/0,,649476,00.html>; Ian Traynor & Julian Borger, Storm Over Afghan Civilian Victims, GUARDIAN WEEKLY (Feb. 12, 2002), available at <www.guardian.co.uk/international/story/0,,648866,00.html>. Professor Herold and other academics have also contributed to a dossier on an ongoing civilian body count for the war in Iraq. As of October 2, 2005, independent reports estimate civilian losses as a result of military intervention in Iraq to be, at minimum, 26,302; see <www.iraqbodycount.net>. The BBC has recently reported this account. See '25,000 Civilians' Killed in Iraq, BBC NEWS, at <news.bbc.co.uk/1/hi/world/middle_east/4692589.stm> (visited Nov. 29, 2005).


157. Eric Schmitt & Carlotta Gall, Karzai is Sworn In, Citing a 'New Chapter' for Afghanistan, N.Y. TIMES (Dec. 8, 2004), at A8; Karzai Poised for Afghan Poll Win, BBC NEWS, at <news.bbc.co.uk/1/hi/world/south_asia/3949147.stm> (visited Nov. 29, 2005); Philip Reeves, Afghanistan Prepares for Parliamentary Elections, NPR MORNING EDITION,
that Afghanistan is secure on the path to democracy and freedom.\textsuperscript{158}

Several agencies have exposed the fallacy of such erroneous assessments and gross simplifications of the harsh realities that exist on the ground in Afghanistan today.\textsuperscript{159} While various U.S. political figures continue to extol the country as "liberated,"\textsuperscript{160} and as world attention continues to be diverted to war in Iraq, post-Taliban reconstruction in Afghanistan has experienced an entrenchment of provincial warlords that are immune from prosecution,\textsuperscript{161} a 1400\% increase in opium production in 2002 that has since barely abated,\textsuperscript{162} and a scourge of violence against international aid workers.\textsuperscript{163} The latter has prompted the withdrawal of such leading humanitarian organizations as Médecins Sans Frontières (Doctors Without Borders)—the world-renowned relief agency that operated in Afghanistan throughout the Soviet occupation, civil war, and Taliban rule.\textsuperscript{164} To the surprise of many military analysts, the frequency of attacks claimed by Taliban members or supporters have not abated, thus even questioning the accuracy of terms like "post-Taliban" in the first place.\textsuperscript{165}

\begin{thebibliography}{9}


\bibitem{} \textit{See} Mani, \textit{supra} note 159.

\bibitem{} Pierre-Arnaud Chouvy, \textit{The Ironies of Afghan Opium Production}, \textit{Asia Times} (Sept. 17, 2003).

\bibitem{} Charles Haviland, \textit{Afghan Aid Workers Live in Fear}, \textit{BBC News}, at <\texttt{news.bbc.co.uk/1/hi/world/south_asia/3794973.stm}> (visited Nov. 29, 2005); Stephanie Holmes, \textit{Aid Workers Under Fire}, \textit{BBC News}, at <\texttt{news.bbc.co.uk/1/hi/world/south_asia/3935805.stm}> (visited Nov. 29, 2005).


In light of such setbacks the preeminent body for enforcing international law in the world has stated that rebuilding Afghanistan's own legal institutions is "essential to the peace process."\(^{166}\) Yet, despite this declaration there remains a paucity of research that addresses such critical topics as the synthesis of Islamic jurisprudence with a modern state in Afghanistan. The works of even the most monumental Islamic legal scholars such as the Hanafi jurist Abu Yusuf al-Qadi (731-798 C.E.)—whose celebrated treatise *Kitab al-Kharaj* examines the relevant topics of rights of prisoners, rules of evidence, and criminal procedure—have been completely overlooked, or at best ignored, assuming foreign legal advisors were aware of them.\(^{167}\)

In the present state, and with the current approaches to judicial reform described above, Afghanistan's prospects for long-term stability and peace are ambiguous at best. While it is indeed challenging, if not impossible, to point to any one set of recommendations that will pave the way to a rule of law in Afghanistan, the goal of this paper is not to provide simplistic answers, nor empty critiques, and for this reason it avoids offering prescriptive solutions. Instead, the underlying aim of this discussion is to promote a more constructive dialogue between the emerging Afghan government, the foreign advisors and development agencies working in Afghanistan, and most importantly, the local Afghan actors, in what has proved to be an extremely complex reconstruction process.

The government of Afghanistan stands at a momentous crossroads. Surrounded by international advisors and policy experts, each waving golden carrots of foreign investment running in the billions of dollars, it faces the prospect of rebuilding judicial institutions at the expense of its people's history, indigenous legal traditions, and support of a broad base of local actors on the ground. Such a trend does not portend well for Afghanistan in the long term. Indeed, if we have learned anything from the short-lived rise and fall of regimes that previously governed Afghanistan, from the reign of Amanullah Khan in the 1920s, to the Soviet-inspired communist parties of the late 1970s and 1980s, and most recently the


\(^{167}\) See e.g., *Abu Yusuf Ya’qub ibn Ibrahim, Kitab Al-Kharaj* 149-53 (Idarat al-Qur’an wa-al-Ulum al-Islamiyah 1987), especially chapter on *Haquq As-Sijeen* ("The Rights of Prisoners"). Going beyond this single text, one may add to this the voluminous jurisprudence compiled in commentaries on this work alone by jurists of the Hanafi *madhab*, a school of Islamic law that has widely influenced sociolegal norms of a majority of Afghans from the eighth century to the present.
Taliban of the 1990s, it is that an Afghan central government must not estrange itself from the Afghan people by unilaterally imposing ambitious but parochial visions of what constitutes—often to them and their allies alone—a progressive future and enlightened rule of law. History has demonstrated that such top-down reform programs in Afghanistan, no matter how coherent and promising to the outside observer (or to the central government in Kabul), meet with fervent and ultimately violent local resistance, producing tragic consequences for the country as a whole.

While the international community has arguably recognized its woeful error in abandoning Afghanistan after the latter’s appallingly costly defeat of the Soviet Union, there remains a corresponding, equally important lesson to be observed. Howsoever eagerly foreign investors now seek to rebuild the country, if there is to be a rule of law in Afghanistan in practice—beyond official constitutions and codes, that is—judicial reform agencies must be willing to entrust Afghans themselves and the indigenous legal systems they respect with the process.