



Rebuilding the Judicial Sector in Afghanistan: The Role of Customary Law

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Introduction

Afghanistan is in the midst of a security crisis. Lingering Taliban forces, a surging drug trade and crime threaten the country with destabilization and civil war.¹ This insecurity is fueled by an absence of the rule of law. As J. Alexander Thier says, "So long as impunity goes unchecked, citizens, civil servants and politicians will continue to serve military, rather than legal authority."²

Afghanistan's rule of law vacuum is the result of its violent history. Instability rendered by a communist coup, Soviet occupation, *mujahideen* warfare and Taliban rule have left the country with a "patchwork" of laws,³ untrained practitioners and little physical infrastructure.⁴ For decades, Afghans' interaction with their legal system was marred by delay, corruption, and human rights abuses.⁵

As national and international actors orchestrate Afghanistan's transition from a nation under "rule of the gun"⁶ to one where the rule of law prevails, they face innumerable challenges including ongoing conflict⁷ and a lack of human resources, physical capacity⁸, funding and coordination.⁹ Reconstruction¹⁰ tasks include training of police, judges and lawyers, law reform, bolstering corrections and establishing mechanisms for the administration of traditional justice.¹¹

Reform efforts should also account for local customary law. Afghanistan's legal system includes elements of secular, religious and

customary law, a compilation of indigenous tribal codes and customs¹² which is characterized by orality, elder councils, reconciliation and informal dispute resolution procedures.¹³ Regardless of their country's political and military landscape, Afghans have relied on customary law for centuries as a means of dispute resolution and communal reconciliation. Therefore, in re-establishing Afghanistan's rule of law to confront the country's growing insecurity, reformers should accommodate customary law.

Background

Prior to 1964, Afghanistan had a dual legal system: clergy-led *shariah* (Islamic law) courts heard criminal, family and personal cases while state courts handled commerce, tax and civil servant matters.¹⁴ The 1964 Constitution of Afghanistan unified the court system under a hierarchical structure headed by a Supreme Court.¹⁵ However, the attendant legal reforms of that time, including the codification of civil rights, never took hold in the country's rural areas due to the influence of tribal leaders.¹⁶

The insulation of traditional legal systems from central government control persisted despite a 1978 communist coup which brought the People's Democratic Party of Afghanistan to power.¹⁷ The new regime's reforms of customs concerning land tenure and marriage met with violent resistance led by rural tribal leaders and urban Islamists.¹⁸ The 1979 Soviet invasion and subsequent 10-year occupation also had little effect on customary legal systems.¹⁹ The Soviets were driven from Afghanistan by warring *mujahideen* factions that gave way to the Taliban over the course of the 1990s.²⁰ This period heralded a harsh application of *shariah* law by state courts consistent with the

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Taliban's pursuit of an Islamic state.²¹ Afghanistan is widely thought to have seen an end to active conflict after the U.S. invasion of 2001.²² However, violence persists throughout the country.²³

Afghan Customary Law

Afghanistan is home to approximately 55 distinct ethnic groups and as many customary legal systems.²⁴ While customary systems vary by tribe and geography, there are some key similarities that should be considered when planning for national judicial reform. First, the use of the customary tribunals – *jirgas*, *maracas shuras* or *mookee khans* – are employed by nearly all ethnic groups in Afghanistan.²⁵ While the precise makeup of the tribunals varies from elders²⁶ to *imams*,²⁷ the local mediation/arbitration panel is common among Afghanistan's customary legal traditions. Afghan traditional systems also share the core principles of apology and forgiveness.²⁸ These are seen as necessary precursors to reconciliation. Most Afghan customary systems are

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based on the principle of restorative justice. While many tribes utilize sentences of *poar* (blood money), such remedies are accompanied by requests of forgiveness and are intended to eliminate enmity between parties and restore harmony to the village.²⁹ Even the Pashtun *poar* for murder – two “fair and virgin girls” to be given by the perpetrator's family to that of the victim – is justified on restorative grounds.³⁰ “When the girls are wedded to the victim's family, kinship and blood sharing will transform the severe

enmity into friendship.”³¹ Precisely how restorative this practice is for Pashtun women is not considered. Indeed, Afghanistan could be held in violation of international human rights law for permitting such *poar*.³²

While Afghanistan's Ministry of Justice (MOJ) praises customary law as “flexible, adaptable justice, [which is] tailored to local beliefs and conditions,” it cautions that customary practices can violate human rights norms.³³ Yet customary law's

flexibility might be its very savior from designation as a human rights pariah. For example, tribes in the Hindu Kush have condemned *poar* of girls in recent times. The tribe's “blood money” for murder is now 200 to 250 cows.³⁴ The evolution of the *poar* for murder in central Afghanistan indicates that custom is flexible. Thus, Afghans may be able to retain traditional legal practices that promote forgiveness and reconciliation provided that tribes repeal particular practices which violate international human rights standards.

Notwithstanding questions surrounding the definition of customary law and its implications for human rights in Afghanistan, the reality is that it remains the population's venue of choice. War, corruption and ineffectiveness have reduced the formal judiciary to a non-option for many Afghans. The MOJ estimates that 90% of Afghans rely on customary law due to a lack of “trust and confidence” in the nation's formal judicial institutions as well as such institutions' “physical absence and low capacity.”³⁵ The Ministry warns that this reliance will take considerable time to reverse.³⁶ Such caution should weigh heavily on national and international rule of law reformers.

Theoretical Considerations for Customary Law in Post-Conflict Afghanistan

Customary law may provide the antidote to a major shortcoming of rule of law reform in Afghanistan. Surveying a variety of reform initiatives in post-conflict and developing states, Thomas Carothers offers a persuasive empirical critique of rule of law and democratic reform. Carothers concludes that traditional reform's “top-down” design has contributed to its lack of sustainability.³⁷ He argues that the international community's focus on state institutions and law drafting³⁸ has been less effective than recent “bottom-up” approaches.³⁹ Carothers recognizes that sustainability of reconstruction necessitates popular support. He avers that programs that work with judicial institutions as “connected in manifold ways with the societies of which they are a part are more successful than those that treat judiciaries as “self-contained entities that can be tinkered with as though they are machines that run on their own.”⁴⁰ Carothers thus recognizes that sustainability of reconstruction necessitates popular support.⁴¹ In Afghanistan, customary law may very well be the mechanism by which such sustainability is achieved.

Customary legal tradition, also known as chthonic law, has been the subject of a great deal of scholarship and debate. Though its oral, fluid

nature has complicated its evaluation by outsiders, some useful constants have been identified⁴² that can help frame the judicial reconstruction effort in Afghanistan. Most relevant to the post-conflict reconstruction process is chthonic law's relationship to the broader cultural tradition in which it operates.⁴³ Chthonic law has been mistakenly characterized as resting in the hands of a few select elders, rigid traditionalists impervious to change.⁴⁴ Yet an alternate view casts elders as informal procedural gatekeepers intent more on maintaining communal order than on perpetuating fixed norms. Indeed, chthonic legal norms are shaped by their overall society.⁴⁵ Tradition is not static, and traditional chthonic norms influence and are influenced by the forces around it.⁴⁶ *Shariah's* influence on customary law in Northern Afghanistan is evidence of this.⁴⁷ The consequences of chthonic theory for judicial reform are momentous. If customary law is viewed as an institution in a dynamic society, then by engaging with that society and its law, reformers have the opportunity to affect change.

The term "customary law" has also been cast as an imperialist construct that subordinates traditional legal institutions to those of the state.⁴⁸ Such critiques point out that modern state systems which purport to adhere to legal pluralism in fact undermine traditional systems by carving them up and relegating them to second-tier status.⁴⁹ A better view would be to cast customary law as a question of self-determination.⁵⁰ In practice, each culture would choose how it adopts state law, if at all.⁵¹ Proponents of this approach are adamant, however, that customary systems should adhere to

international human rights standards.⁵² Though a custom-centric system has its appeal, its realization in Afghanistan raises significant political and logistical challenges.

Rama Mani also provides a cautionary critique of customary law, which she calls "informal justice."⁵³ She notes that proponents of informal justice cite custom's focus on community, reconciliation and problem-solving as its strengths.⁵⁴ However, she argues that dual legal regimes create debilitating confusion when the relationship between the formal and informal justice sectors is not clear.⁵⁵ She also suggests that hybrid legal systems subordinate the rights of the disenfranchised by relegating their claims to

customary institutions while reserving formal courts for the rich and powerful.⁵⁶ These critiques have either been borne out in Afghanistan or pose a very real threat to its future rule of law and must be considered during the reform process.

Critique of Current Treatment of Afghan Customary Law

The Afghanistan National Development Framework states that "[t]he judicial system will be revived through a program that provides training, makes laws and precedents available to all parts of the system and rehabilitates the physical infrastructure and equipment of the judicial sector."⁵⁷ Afghanistan's justice sector is defined as the Judicial Reform Commission (JRC), the Supreme Court, the MOJ, the Attorney General's Office, police, corrections and legal training centers.⁵⁸ Neither the guiding framework nor the definition of Afghanistan's judicial sector explicitly recognizes customary law.

Moreover, the 2004 Constitution passed by Afghanistan's *Loya Jirga* (national assembly) is silent on customary law. Guidance may be inferred from the document's treatment of Islam. The new constitution precludes the adoption of laws which are not consistent with the tenets of Islam,⁵⁹ and *shariah* permits the practice of customary law provided it does not interfere with those tenets.⁶⁰

Since 2001, Afghanistan's Transitional Authority and the international community have been planning the reconstruction of the country's judicial sector. The JRC, a body of Islamic and secular law scholars, must reform Afghan law in concert with the national judicial sector and propose legal and regulatory amendments.⁶¹ No seats on this council were allotted to representatives from the customary law tradition. As a result, the JRC has given customary law scant attention.⁶²

A May 2005 needs assessment by the MOJ set forth an ambitious vision for the country's justice sector, including "stronger linkages where appropriate and where in keeping with the rights of citizens between the state system and the traditional systems that are for many Afghans their only regular justice system."⁶³ The report also includes customary law among several of its strategic principles. "Justice reform must be appropriate to Afghanistan. In its policy, it must reflect Afghan political circumstances, social and legal traditions and aspirations for the future... Justice reform should address... traditional institutions and their capacity to function within state and international norms."⁶⁴ Unfortunately, the Ministry's suggestions have yet to be absorbed

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by the strategies of either the JRC or the international community.

The international response to Afghan customary law has been tepid at best, prioritizing research over action and circumscribing the traditional system.⁶⁵ This is compounded by the marginal funding of the international community's judicial reconstruction effort as a whole, especially when compared to other rule of law efforts such as policing.⁶⁶

Internationally-aided judicial reform programs in Afghanistan center on state-centric, top-down initiatives to the exclusion of grassroots customary law. For example, the United Nations Development Programme's (UNDP) activities center on strengthening the JRC, training judicial staff, establishing a state judicial bureaucracy, constructing physical judicial infrastructure and improving legal education.⁶⁷

There are signs that the international community is broadening its approach to judicial reform by devoting some resources to local justice. In February 2005, Italy and UNDP launched

Recommendations for Integrating Customary and Formal Courts

Factors to Consider When Recognizing Customary Law

Despite the reluctance of reformers to adequately integrate customary law into the judicial reconstruction process, there are advantages to creating space for customary law in Afghanistan's judicial reform process. Customary law "reflects the needs of the citizens themselves and has continued to maintain social harmony within the communities for centuries."⁷³ The little documentation available thus far on traditional justice systems in Afghanistan reinforces this point. Afghans have long resorted to *jirgas* and *shuras* as a result of state judicial failure. Thus, it is the traditional systems in Afghanistan which engage with and embody citizens' sense of justice. Consequently, reform efforts that ignore or subordinate customary law will not win the support of those they aim to serve.

The second advantage to including customary legal institutions in any post-conflict reform process is cost.⁷⁴ It has been estimated that Afghanistan's judicial reconstruction effort will cost US\$ 9 million over two years.⁷⁵ By relying on existing customary courts to dispense justice in rural areas on issues related to property and minor crime, Afghanistan can fill the post-conflict rule of law vacuum while it determines the shape of its formal judicial system.

Customary institutions also afford parties a level of comfort that state courts cannot. *Jirgas* and *shuras* are close to the parties' communities and often comprised of people with whom they are familiar. While such ties can have the drawback of communal pressure on parties to settle disputes in unfavorable terms, proximity is viewed as favorable to distant state bureaucracies.⁷⁶ This could be the case in Afghanistan where the state system has been seen as the locus of abuse and corruption.

Customary legal systems also have the benefit of operating in the mother tongue of the parties.⁷⁷ Afghanistan is home to 34 languages.⁷⁸ It is unlikely that a state judicial system will immediately be able to accommodate such linguistic diversity. Due process and public trust demand linguistic-sensitive proceedings.

In addition, when a post-conflict state's national judicial system is as crippled as Afghanistan's,⁷⁹ traditions that do not require courthouses are able to function where the state cannot.⁸⁰ Moreover, as discussed earlier, some elements of customary law are more restorative than those of the state. Retributive state sentences

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Access to Justice.⁶⁸ Billed as a "judicial literacy" program, Access to Justice will educate rural populations about national legal reforms that could impact the realization of their rights before traditional courts. The program will teach rural Afghans how to demand their new legal rights in the face of discriminatory traditions. Rather than dismantle customary structures, Access to Justice

empowers villagers to defend their rights within existing local structures.

Another area in which the international community has been receptive to customary law has been research. In addition to UNDP's strategy for "mapping customary law,"⁶⁹ several international organizations such as the U.S. Institute for Peace,⁷⁰ the International Legal Foundation⁷¹ and the UN Children's Fund⁷² have undertaken comprehensive surveys on Afghan customary law. This research lays the groundwork necessary for effective partnering between international, national and local reformers. It is crucial that such research is applied in the judicial reform process via concrete programmatic strategies.

will be difficult to enforce at the local level given distance and lack of infrastructure.⁸¹

Of course, one should not minimize the disadvantages associated with recognizing customary law in any reform process, particularly one that takes place in a post-conflict setting. The unwritten nature of Afghan customary law renders it open to arbitrary application and abuse. Indeed, the current domination of *shuras* in the north by commanders is ample proof of the susceptibility of customary legal institutions.⁸² In addition, customary legal decisions are arguably undemocratic in that they rely largely on the judgment of a few male elders.⁸³ Some methods of adjudication and remedies may also be arcane and unsuited to the evolving Afghan state.⁸⁴ The lack of codified procedure can lead to unfairness in customary decisions⁸⁵ and Afghanistan lacks the civil society and state capacity to monitor such lapses. Without clear, written procedure, customary law can and has been open to abuse and thus may not be a legitimate partner in the reform process.

However, while the challenges to recognizing customary legal institutions in a manner which minimizes its weaknesses and maximizes its strengths are formidable, such results can be achieved through reforms that bring traditional practices into line with recognized human rights norms and foster clear relationships between state and tradition. By virtue of its chthonic nature, Afghan customary law can be affected by its inclusion in the reform process. Moreover, failed reform processes in other post-conflict states illustrate that top-down, state-centric reconstruction frameworks lack the bottom-up means to be sustainable because they neglect the populations served by these institutions. Judicial reform in Afghanistan may best take root in its customary systems. Key strategies for the reform process are outlined below.

Bring Customary Law into Line with International Human Rights Norms

Many customary practices violate international human rights norms. From the extreme example of *poar* of girls in exchange for murder⁸⁶ to procedural concerns about the right to cross-examine witnesses,⁸⁷ customary practice raises doubts about its ability to preserve individual human rights.

Human rights concerns have divided the Afghan legal community over the role customary law should play in the new national legal order.⁸⁸ However, given the pertinence of the customary system to the majority of Afghans and its role in promoting sustainable reform, Afghanistan should

consider integration as an opportunity to bring the existing traditional system into line with international human rights norms. Customary law's chthonic nature renders it particularly open to influence from such cooperation. The Constitution's recognition of Afghanistan's obligations under international human rights treaties can forestall abuse at the local level by providing grounds to appeal abusive customary practices in the state system.⁸⁹ Therefore, mindful of its legal obligations to uphold international human rights, Afghanistan can embark upon initiatives that marry the customary and formal judicial systems.

Recognition Through Formal Legislation

There are a number of ways in which countries have recognized customary law through formal legislation, including recognition by exclusion or incorporation, general codification, incorporation, adjustment and accommodation.⁹⁰ While all of these models are instructive for Afghanistan, they subordinate the customary legal system to that of the state. However, a functional recognition of customary law would draw upon elements of each of these models in a manner that meets the host system's needs.⁹¹ Afghanistan should thus tailor a functional recognition of its customary legal systems to suit the self-determination needs of its many ethnic groups.⁹² An example of this method of recognition follows.

At the outset of the reform process, the MOJ should incorporate customary law. A constitutional amendment can give general recognition to customary law while reserving the right of the legislature and courts to interpret that recognition at a later date.⁹³ Additional legislation should set minimum standards for procedure in customary courts, such as the right to counsel and the weighing of evidence. This strategy establishes a stopgap measure for the dispensation of justice which, while not guaranteeing the full panoply of human rights, comports with basic principles of fair procedure. However, because it tables rights, this strategy should not end the process by which customary law's relationship to the state system is codified.

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A long-range plan should allow for more functional recognition of customary law within Afghanistan's judicial sector as a whole. The *Loya Jirga* should pass legislation that delegates specific areas of law to customary jurisdiction and reserves all other areas for the state. For example, given that many Afghan traditions have been successfully adjudicating minor crimes and property disputes for centuries, the state should formalize its jurisdiction over those matters. The legislation can include leave to appeal customary decisions to the state system or choice of venue for the parties. Moreover, given the human rights concerns and patriarchal nature of the customary legal system, serious and gender-based crimes should be reserved for the state system as well as issues of national interest such as inter-provincial commerce and foreign affairs.

The above strategy provides procedural guarantees of fairness in the short-term while opening the door to a preservation of human rights in the long-term. Additionally, this initial reliance on customary law could serve as the basis for long-term cooperation by building trust between the state and traditional sectors as well as identifying strengths and weaknesses in each. The legislative channel between the customary and state sectors also leaves room for the chthonic tradition to meet and ultimately internalize human rights benchmarks set by the state. Lastly, a national legislative structure which posits traditional courts as those of first instance while allowing for exceptions in cases of serious crime (including gender-based violence) or a choice of venue for parties would lighten the caseload on the state system, preserve cultural autonomy and maintain restorative justice in the regions.

Institution Building

While customary legal systems often do not possess their own buildings and law reports, they serve as legal institutions in that they promote social order.⁹⁴ Therefore, Afghanistan's judicial reconstruction effort should dedicate resources to building the institutions of its customary system. This is not to suggest that the government and donors should construct courthouses for the customary system as it has for the state but rather to recommend that Afghanistan locate the customary system within the country's overall judicial framework. It can accomplish this by permitting the application of customary norms in state courts or establishing formal customary courts subject to state control.⁹⁵ However, these approaches divest customary law of its very strength—its roots in tradition and community—and subordinate it to

that of the state, which could provoke resistance among traditional leaders.

Perhaps the most viable option is to develop Afghanistan's existing customary courts.⁹⁶ Admittedly, this approach requires the drafting of legislation regarding jurisdiction as mentioned above.⁹⁷ However, the heart of this reform strategy lies in projects that build the capacity of existing traditional courts.

The MOJ identified several strategies by which the government can cooperate with traditional justice institutions in order to "eliminate its unacceptable elements and maximize its positive features," such as training elders in adherence to human rights norms, "incentives to follow the best approaches" and links to the formal state system.⁹⁸ The Ministry advocated the use of traditional institutions in promoting the development of alternative dispute resolution (ADR). ADR can alleviate the burden on a burgeoning formal state system by mediating and arbitrating civil and minor criminal cases.⁹⁹

This reform is particularly suited to customary law since local *shuras* and *jirgas* have been providing this service to villages for centuries.

Specifically, customary ADR can supplant formal trials in areas of land dispute and minor crimes. This is especially true considering that state courts are not yet constructed, many laws are not yet written and most judges are not yet trained. To avert the potential legal vacuum that results at the close of active hostilities in many post-conflict states, it is in Afghanistan's interest to support customary legal institutions as a means of maintaining peace and order, particularly in rural areas.

In addition to elder training and formal links between customary and state institutions, customary law practitioners should be allotted seats on the JRC and other national reform commissions. The number of various systems throughout the country suggests that this strategy will be difficult. However, this challenge can be met by rotating seats on a regional basis or establishing a national customary law organization that can elect representatives to various commissions.

Local civic groups will also be essential in the institutionalization of the customary legal system. Village groups inclusive of women, minorities and

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young people can serve as a check on traditional institutions by monitoring their compliance with human rights norms. This strategy would only require small provincial offices to receive complaints and conduct investigations while empowering local communities to play an even greater role in the restoration of justice. Such groups can be created as a follow-up to UNDP's Access to Justice program.

Political Considerations

Any analysis of Afghanistan's judicial future necessitates some discussion of the country's political past and present. Afghanistan is currently being pulled in various directions by elite émigrés, Islamists and foreign donors, each with their own vision of what shape the Afghan state should take.¹⁰⁰ Each of these parties will view the potential integration of customary law into the national judicial system with suspicion as it could be perceived as a threat to their own state constructs.

Islamist parties, for example, who hold great sway in present-day Afghanistan, have a vision of an Afghan judiciary that is in some ways diametrically opposed to the inclusive dialogue between local and national legal authority explored here. Islamists seek a nation-wide legal system based on *shariah* law, which would circumscribe the space in which traditional customary law can operate.¹⁰¹ This need not rule out the inclusion of customary practitioners in the judicial reform process. Instead, it suggests that the integration of customary law can be part of the negotiation process among proponents of various visions of Afghanistan's judicial system.

It is important to remember that many of Afghanistan's current troubles arise from the fact that its composition as a state was imposed by foreign powers.¹⁰² It has thus been proposed that the international community should refrain from dictating a modern secular structure for Afghanistan and instead support a loose confederation of provinces headed by a "mediation committee."¹⁰³ This committee will ensure that the "minimal conditions for medieval civilization" are met, specifically: the prevention of war, maintenance of trade routes and security of Kabul.¹⁰⁴ Such a confederation is well suited to the proposed integration of customary law. Customary law can provide a stopgap measure for dispute

resolution of minor crimes and land disputes at the local level while Afghanistan decides its national personality. It can therefore assist in the preservation of "minimal conditions" as the Afghan people decide how to move forward as a state or federation and what shape their judiciary will assume.

Without prescribing legal substance, there is a significant role for customary law within Afghanistan's reconstruction. Given that Afghans have embarked on a judicial reform program, donors should assist them in creating space for customary law within that process. The recommendations above suggest how that space may be created in the short and long term.

Conclusion

Afghanistan faces innumerable challenges as it creates some semblance of the rule of law. Part of its effort will include the reconstruction of its judicial system, a formidable task in light of the lack of human resources and physical and legal infrastructure. However, if Afghanistan turns to its customary legal system, which has maintained a modicum of justice in rural areas during decades of instability, it may soon be able to provide a minimum of procedural fairness while it weighs more expansive, long-term reform, including the preservation of human rights.

Without romanticizing the current or future role of customary law in post-conflict Afghanistan, it seems that the system has earned the trust of many citizens and is currently the only institution at work in many rural areas. Afghan and international actors should seize upon the strengths of Afghanistan's customary legal system in the process of reconstructing the state judiciary. If successful, this approach may hold lessons for other post-conflict states. Reformers should acknowledge the vital role of customary law in Afghanistan as both a reality and an opportunity.

The views and opinions expressed in articles are strictly the author's own, and do not necessarily represent those of Al Nakhlah, its Advisory and Editorial Boards, or the Program for Southwest Asia and Islamic Civilization (SWAIC) at The Fletcher School.

¹ J. Alexander Thier, *Reestablishing the Judicial System in Afghanistan* (Stanford, CA: Center on Democracy, Development and Rule of Law, Stanford Institute for International Studies, 2004), 4.

² Thier, 4.

³ *Special Report: Establishing the Rule of Law in Afghanistan* (Washington, D.C: United States Institute of Peace, 2004), 3.

⁴ *Afghanistan: Judicial Reform and Transitional Justice* (Brussels: International Crisis Group, 2003), i.

⁵ Ibid.

⁶ *Special Report: Establishing the Rule of Law in Afghanistan*, 1.

⁷ *Afghanistan: Judicial Reform and Transitional Justice*, 20.

⁸ *Special Report: Establishing the Rule of Law in Afghanistan*, 1.

⁹ *Special Report: Establishing the Rule of Law in Afghanistan*, 2.

¹⁰ While reconstruction and reform have different meanings, they will be used interchangeably throughout this document to refer to the process by which the Afghan and international communities are rebuilding the rule of law.

¹¹ *Special Report: Establishing the Rule of Law in Afghanistan*, 5-13.

¹² *Afghanistan: Judicial Reform and Transitional Justice*, 3.

¹³ Ibid., 58.

¹⁴ J. Alexander Thier, *Reestablishing the Judicial System in Afghanistan* (Stanford, CA: Center on Democracy, Development and Rule of Law, Stanford Institute for International Studies, 2004), 5.

¹⁵ Ibid; 6.

¹⁶ *Afghanistan: Judicial Reform and Transitional Justice*, 4.

¹⁷ Ibid.

¹⁸ Ibid, 5.

¹⁹ Willem Vogelsang, *The Afghans* (Oxford: Blackwell, 2002), 4.

²⁰ *Afghanistan: Country Background* (London: Economist Intelligence Unit, 2004), 3.

²¹ *Afghanistan: Judicial Reform and Transitional Justice*, 6.

²² Ibid., i. and *Special Report: Establishing the Rule of Law in Afghanistan*, 1.

²³ *Afghanistan: Country Report*, 3.

²⁴ Vogelsang, 16.

²⁵ *The Customary Laws of Afghanistan* (New York, Kabul: International Law Foundation, 2004).

²⁶ Ibid, 7.

²⁷ Ibid, 52.

²⁸ Ibid, 37.

²⁹ Ibid, 10.

³⁰ Ibid, 11.

³¹ Ibid.

³² For example, Article 5(a) of the *Convention to Eliminate All Discrimination Against Women* states that parties will “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”

³³ *Justice For All: A Comprehensive Needs Analysis for Justice in Afghanistan* (Kabul: Ministry of Justice, 2005), 4.

³⁴ *The Customary Laws of Afghanistan*, 38-9.

³⁵ *Justice For All*, 12.

³⁶ Ibid.

³⁷ Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve* (Washington, D.C.: Carnegie Endowment for International Peace, 1999), 181.

³⁸ Ibid, 165.

³⁹ Ibid, 204.

⁴⁰ Carothers, 177.

⁴¹ Carothers, 205.

- ⁴² H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*. (Oxford: Oxford University Press, 2000), 58.
- ⁴³ *Ibid*, 65.
- ⁴⁴ *Ibid*, 70.
- ⁴⁵ *Ibid*, 66.
- ⁴⁶ *Ibid*, 72.
- ⁴⁷ *The Customary Laws of Afghanistan*, 52.
- ⁴⁸ Chris Cunneen and Melanie Schwartz, *Customary Law, Human Rights and International Law: Some Conceptual Issues*. (Perth, Australia: Law Reform Commission of Western Australia, 2005), 7.
- ⁴⁹ *Ibid*, 9.
- ⁵⁰ *Ibid*, 11.
- ⁵¹ *Ibid*.
- ⁵² *Ibid*, 26.
- ⁵³ Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity Press, 2002), 36.
- ⁵⁴ *Ibid*, 37.
- ⁵⁵ *Ibid*.
- ⁵⁶ *Ibid*.
- ⁵⁷ *Rebuilding the Justice Sector of Afghanistan* (Kabul: Judicial Reform Commission, 2003), 3.
- ⁵⁸ *Ibid*.
- ⁵⁹ Constitution of Afghanistan (2004) Ch. 1, art 3.
- ⁶⁰ Mark A. Drumbl, "Rights, Culture and Crime: The Role of Rule of Law for the Women of Afghanistan," *Columbia Journal of Transnational Law*, no. 42 (2004), 381.
- ⁶¹ In November 2002 President Karzai named the JRC to replace the Judicial Commission, a similar body created under art. 11(2) of the Bonn Agreement but which was dissolved in August 2002 due to lack of effectiveness. *Afghanistan: Judicial Reform and Transitional Justice*, 12.
- ⁶² *List of Priorities Identified by the Judicial Commission* (Kabul: Judicial Commission, 2003).
- ⁶³ *Justice for All*, 4.
- ⁶⁴ *Ibid*.
- ⁶⁵ *Special Report: Establishing the Rule of Law in Afghanistan*, 10.
- ⁶⁶ *Ibid*, 5.
- ⁶⁷ *Rebuilding the Justice Sector of Afghanistan*, 6-10.
- ⁶⁸ "Afghanistan: Efforts To Improve Justice in Rural Areas." United Nations Integrated Regional Information Networks. February 15, 2005.
- ⁶⁹ *Rebuilding the Justice Sector of Afghanistan*, 8.
- ⁷⁰ *Special Report: Establishing the Rule of Law in Afghanistan*, 10.
- ⁷¹ *The Customary Laws of Afghanistan*.
- ⁷² UNICEF Humanitarian Action Afghanistan: Donor Update (New York: UNICEF, 2004), 4.
- ⁷³ Christian Ranheim, "Legal Pluralism in East Timor: The Formal Judicial System and Community-Based Customary Law" (draft paper, The Role of Informal Justice Systems in Fostering the Rule of Law in Post-Conflict Societies, Fletcher/USIP, 2005), 18.
- ⁷⁴ *Ibid*.
- ⁷⁵ *Rebuilding the Justice Sector of Afghanistan*, 14.
- ⁷⁶ *Ibid*.
- ⁷⁷ *Ibid*.
- ⁷⁸ Central Intelligence Agency World Factbook: Afghanistan (Accessed October 25, 2005); available from <http://www.cia.gov/cia/publications/factbook/geos/af.html#People>.
- ⁷⁹ *Special Report: Establishing the Rule of Law in Afghanistan*, 7.
- ⁸⁰ Ranheim, "Legal Pluralism in East Timor," 19.
- ⁸¹ *Ibid*.
- ⁸² *Ibid*.
- ⁸³ *Ibid*.
- ⁸⁴ *Ibid*.

⁸⁵ Ibid.

⁸⁶ Violates art. 5(a) of the *Convention to Eliminate All Discrimination Against Women*.

⁸⁷ Violates art. 13, §3(e) of the *International Covenant on Civil and Political Rights*.

⁸⁸ *Afghan Legal Reform: Challenges and Opportunities*. (Cambridge, MA: Harvard Program on Humanitarian Policy and Conflict Research, 2003), 6-7.

⁸⁹ Constitution of Afghanistan. 2004. Ch. 1, art. 7. Relevant conventions and treaties include: *International Covenant on Economic, Social and Cultural Rights*; *International Covenant on Civil and Political Rights*; *Convention on the Elimination of Discrimination Against Women*; *International Convention Against Torture*.

⁹⁰ Ranheim, "Legal Pluralism in East Timor," 23-25.

⁹¹ Ibid, 24.

⁹² Ibid.

⁹³ For example, South Africa's Constitution Act 108 of 1996, Ch. 12 recognizes the role of traditional leaders subject to the constitution.

⁹⁴ Berman, Greiner, and Saliba, *The Nature and Functions of Law*, 6.

⁹⁵ Ibid, 25-6.

⁹⁶ Ibid, 27.

⁹⁷ Ibid, 27-8.

⁹⁸ *Justice for All*, 12.

⁹⁹ Ibid.

¹⁰⁰ Marina Ottaway and Anatol Lieven, *Rebuilding Afghanistan: Fantasy versus Reality*, Washington, DC: Carnegie Endowment for International Peace, 2002.

¹⁰¹ Dan Morrison, "Karzai Weathers Power Struggle, But at a Price," *Christian Science Monitor*, December 26, 2003: 1.

¹⁰² Anatol Lieven, "Afghan Statecraft," *Prospect* 70; 2002.

¹⁰³ Ottaway and Lieven, 5.

¹⁰⁴ Ibid., 6.