RULE OF LAW IN AFGHANISTAN

CONFERENCE REPORT

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One of the most significant defects of state building in Afghanistan has been its failure to achieve rule of law after almost a decade of effort. Despite intense efforts made by the international community to build the Afghan government's capacity, the formal system of justice fails to meet the country's needs. Indeed, the government's incapacity and corruption are often cited as reasons for popular support of the Taliban, who have touted their ability to resolve the disputes that government-appointed officials cannot. In September 2010, the American Institute of Afghanistan Studies convened a conference to examine the rule of law in Afghanistan. Conference participants included lawyers, social scientists, diplomats and practitioners. Most had considerable on-the-ground experience in Afghanistan, but the group also included those familiar with rule of law issues in other countries. Participants agreed that too many plans for institution building in Afghanistan failed to account for historical and cultural implications, or consider how alternate systems of dispute resolution maintain social order in the absence of formal government institutions. For this reason, the conference first focused on the relationship between state and society in Afghanistan. It then examined traditional, local dispute resolution systems and their implications on the government's formal system of justice. Due to the international community's financing and support of the formal justice system, the conference next examined the tensions between Afghan cultural values and internationally accepted legal norms and standards. Finally, the conference proposed a set of policy options better designed to meet Afghanistan’s needs. However, a number of participants warned that plans for achieving the rule of law cannot be divorced from the political environment where impunity from legal consequences benefits those with political power.

STATE AND SOCIETY

Afghanistan is a society with a plural legal tradition historically composed of three competing parts: the state legal code, Islamic religious law (sharia), and local customary practice. The customary system employs common cultural and ethical standards to resolve disputes through mediation and arbitration within communities. In contrast, the Islamic sharia code is believed to be both divinely inspired and universal. Derived from the Quran and the sunna (the sayings and actions of the Prophet), sharia may be variously interpreted and applied to new situations only by trained Islamic scholars (who have created a number of legal schools). Similarly, the formal Afghan state legal system is universal in its theoretical scope and application, but unlike sharia, it is explicitly man-made and can be changed through secular legislation or government edicts. While the customary and sharia legal systems have a lengthy history in Afghanistan, the emergence of state law codes is a recent phenomenon that began in the late 19th century. Previously, Afghan rulers relied on sharia courts alone or recognized the authority of local communities to resolve their own problems. This changed when rulers in Kabul began to centralize power.

Afghanistan's first great centralizing ruler was Amir Abdur Rahman (1880-1901). He combated all opposition to his policies by using military force and then consolidated his power, in part by extending direct control over the formerly autonomous sharia courts in the country. In 1885, he
adopted Afghanistan's first state code of procedure and ethics, the *Asas al-quzat* (Fundamentals for Judges), which established the Hanafi school of Islamic jurisprudence (*fiqh*) as the basis for the country's judicial decision-making. Although the Amir portrayed his changes as simple clarifications of Afghanistan's historic tradition of sharia law, in reality they gave him the absolute right to interpret that law as he saw fit, even though he lacked religious training. Asserting a form of "divine right of kings," Abdur Rahman purged the judiciary of *qażîs* (judges of sharia law) who disagreed with him and made the remainder state employees. With this achieved, successor governments of Afghanistan in the 20th century expanded the reach of new state law codes as a way to bring about social change and modernization. Beginning with the reign of King Amanullah (1919-29), state law became legally distinct from sharia law, over which it was given precedence. Inspired by Atatürk's modernization policies, Amanullah drew up the country's first constitution (1923) and adopted new secular penal and civil codes derived from Egyptian and Turkish law. The Law of Basic Organization (1923) even required the *qażîs* to refer to statutory provisions in making their decisions in sharia courts. Legal reform became a radically divisive political issue after the enactment of a flurry of secular edicts on woman's rights and family law in 1929 that conservatives argued were in violation of sharia law principles. Within a year Amanullah was deposed and replaced by Nadir Shah (1929-33). While Nadir abandoned the most controversial reforms of his predecessor, he maintained the principle of secular law. The 1964 constitution promulgated by his son, Zahir Shah (1933-73), enshrined secular law by uniting the sharia courts and state courts into a single system. The establishment of a socialist government by the Peoples Democratic Party of Afghanistan (PDPA) in 1978 marked the highpoint of both the supremacy of secular state law and its use as a tool of modernization. When that government fell in 1992, the formal state system of justice almost completely disappeared and it later vanished under the Taliban (1996-2001) who only recognized the legitimacy of sharia court decisions. When the Taliban were ousted from power in 2001, the new government took on the task of reestablishing a formal state judicial system and recreated the institutional structure similar to that which had existed under the monarchy. The Constitution of 2004 closely copied its 1964 predecessor by proclaiming the supremacy of state law while calling for its compatibility with sharia principles.

This short history shows is that state legal codes have been at the forefront of political controversy in Afghanistan because each regime has used them to project its power, ideology and authority even though the laws themselves could never be effectively enacted and enforced. Determining what had been implemented often proved difficult because of the large number of successive and often mutually contradictory constitutions produced over sixty years. Rather than revise existing constitutional law, successive regimes instead produced new constitutions. Under Daoud’s Republic in 1977, a new basic law superseded the 1964 constitution and it was replaced with a series of PDPA constitutions in 1980, 1987 and 1990. These were overturned in 1992 by a never implemented Mujahideen constitution, and the Taliban emirate dismissed the need for constitutions entirely during its time in power (1996-2001). The process came full circle when the 1964 constitution was revived in 2002 until it was replaced by the 2004 constitution. However, in some respects the merry-go-round of constitutions was largely irrelevant because the bulk of Afghanistan’s laws were promulgated by executive fiat. Afghan state law codes—far from being a distilled consensus reflecting the will of the Afghan people and grounded in any constitutional process—were the idiosyncratic products of the regimes that imposed them. When regimes
collapsed, old laws were overturned and new contradictory laws came into force. Courts played a very minor role in this process, as they always remained subservient to the executive authority.

Despite the many different regimes, the administrative structure of the formal justice system in Afghanistan has remained largely unchanged for the past seventy years. It is based on three levels of courts that coincide with the country’s executive administrative structure. In principle each of the country’s districts (currently around 400) were supposed to have a Primary Court with a criminal bench, a civil bench, and a registration office for legal documentation of births, marriages, divorces, and property ownership. Secondary Courts, located in Afghanistan’s 34 provinces, were to take appeals from these primary courts to determine questions of fact and law. The Supreme Court in Kabul handles appeals based on questions of law from the Secondary Courts and administers the entire court system. In practice, the formal system never had the trained manpower to fully staff such a system. Indeed the justice sector was always quite small, far too small to have ever met in Afghanistan’s needs even if it had been well trained and efficient. For example, in the 1960s the entire Afghan legal community consisted of only about 1200 people (715 judges, 170 prosecutors and 100 lawyers) for a country the size of France that has a population of 12 million people. In 2003, when the population of Afghanistan was between 25-30 million people, the Afghan judiciary was not much larger, proportionately, and was debilitated by poor training and unfilled positions. While on paper the court system had 1350 judge positions listed in its official 2004 staffing scheme, half of those positions were unfilled, and one third of the sitting judges did not have advanced degrees. Similarly, the Justice Ministry needed to double in size to reach the goal of 5000 prosecutors and other legal staff. This staffing gap was made only larger by the absence of defense lawyers.

Historically, the formal system functioned, particularly as seen from the bottom, in a haphazard manner with low standards of professionalism. As one conference participant with direct experience noted, until the 1970s the formal legal system was, in reality, highly informal and involved few legal professionals at the primary court level. Litigants on both sides would travel to a court located in a market town and then would seek out street-corner para-legal scribes who clustered together outside of government offices and courts. These scribes served a vital function in a country where literacy rates were low and legal professionals were practically non-existent outside of the capital and also performed multiple roles in the system. They were paid both to write up the facts of the case and suggest lines of argumentation, based on Islamic law, that the court was likely to expect. They also produced the competing written case summaries judges would use to decide the case. While judges had the authority to demand that both sides present witnesses, they were under no obligation to do so. After the 1964 constitution came into force, government prosecutors (saromma) were added to the mix in criminal cases, but the accused had no right to a trained defense lawyer. Decisions, particularly concerning property disputes, were characteristically appealed and re-appealed to higher courts. It was not uncommon for unresolved cases to span years and decades, in some cases surviving the deaths of the original litigants. While the lack of finality and enforceability of court judgments was a common compliant, the greatest concern most Afghans had about this system (and one that seemed to be longstanding) was its lack of fairness and justice. Judges were regularly condemned for their willingness to sell positive decisions to the highest bidders, and they using their positions to solicit bribes from both civil
District and provincial governors regularly adjudicated civil and criminal cases instead of referring such matters to the court, undermining the authority of courts as an exclusive state mechanism for formal dispute resolution. An example from Nangrahar province in 2010 cited by one participant shows, this practice is still ongoing at the local level:

Sometimes people go to the woliswal (district governor) because he is the only government person that local people know exists. They do not know that there is a qazi who might be actually entitled to decide what happened to them, especially criminal cases. Instead they go to the woliswal who does not follow the legal procedure and sometimes takes decisions himself. These decisions are respected and the people abide by them. Sometimes the woliswal decides to send back the case to the community or to the elders, even though he lacks the legal authority to take such steps. There is a sort of appropriation of authority by the woliswal (and sometimes by the police chief of the area) who was in the past he was a former warlord used to taking decisions and to solving things himself. From the pedestal of his newly sanctioned government authority he continues to do that.

After the fall of the Taliban, the international community gave priority to rebuilding Afghanistan’s formal legal system and instituting the rule of law to bring more political legitimacy and stability to Afghanistan's new government. Interested parties generally assumed that the lack of capacity in this sector was a product of the country’s past quarter century of conflict and that the customary informal system had only risen up to fill this gap. The task at hand was viewed as a technical one that needed to focus on infrastructure (court building), standards (higher degree qualifications), increasing staff numbers to meet needs (judges, prosecutors, defense bar), sorting out applicable laws (monarchist, republican, socialist, mujahideen, Taliban) and instituting common procedures. Like many development plans for other sectors in Afghanistan, it was premised on the belief that there was a functioning system in the past that only needed to be restored and expanded to be successful. Achieving the rule of law in Afghanistan was defined as a capability problem rather than a political one—that is, if courts, prosecutors and judges were only trained and available they would create the rule of law. Little attention was paid to the larger question of how the relationship between state and society in Afghanistan set the environment in which the judicial system operated.

Conference participants agreed that Afghanistan did need a robust formal justice system and a stronger emphasis on the rule of law, but more importantly the first order of business should have been reviewing the functionality of Afghan government institutions and their appropriateness for current conditions. This review was sidestepped when the monarchical institutions embedded in the 1964 constitution were revived on the assumption that they constituted an accepted tradition of Afghan governance. This recreated a highly centralized administrative system with a strong presidential executive authority replacing that of the monarch. The only major innovation on the legal side was the recognition of Shia sharia systems as legitimate for use among Afghanistan's non-Sunni Muslims. Therefore, discussion at the conference centered on larger issues that participants believed had been unaddressed. They identified the following problems:
1. The formal system of justice is not accountable to the people. The lack of trust between people and the government in Afghanistan remains an unfortunate legacy of the last century. People do not trust the government and the government has no organic relationship with the people. Because the Afghan administrative system is highly centralized, officials in Kabul pay little attention to local complaints. A district primary court receives the judges that Kabul appoints and there are no mechanisms for impeaching or recalling officials who abuse their positions.

2. “Ruler’s law” has long trumped “rule of law.” The Afghan government has historically relied on making laws based on the decrees of its leaders. It never developed a legal tradition of state law that transcends regimes and is binding on both lawmakers and executive authorities.

3. Institution building exists only on paper. Too much of the international community's aid to Afghanistan has been driven by achieving planned numbers (courts built, judges on staff, defense lawyers available) rather than outcomes (cases resolved, ease of access, rights defended, satisfaction with system). For example, while the 2004 Afghan constitution guarantees the right of a criminal defendant to a defense lawyer, the number of criminal defendants who ever receive one is miniscule.

4. Whose law, whose values? The question of whose values underline state law codes has created divisions since the 1920s. For most of Afghan history, modernizing elites in Kabul have been intent on using law codes to spearhead social change. This has politicized the legal process undermined its authority. Government opponents in rural areas have responded with their own counter legal systems: reactionary interpretations of sharia law or customary procedures as alternative systems to the state codes. The international community underestimated the significance of this values problem and failed to anticipate how its own attempts to restore the judicial system and state code of laws might not receive universal approval. There was no attempt to educate the general population about the legal system being put in place or to counter attacks against it.

5. The Afghan National Police acts as a force for security rather than a force for upholding the rule of law. Police fall under the Ministry of Interior and are trained by the military as a paramilitary force designed to ensure security rather than protect the public or enforce the law. As a consequence police are not properly trained to serve the court system, and the judiciary has no effective authority to review police officers' actions or punish unlawful actions.

6. A rule of law cannot exist in a climate of impunity. If the law does not curb the abuses of the powerful it will be seen simply as a tool for oppression of the powerless. Such abuses have been the norm in Afghan history because rulers have not used courts to control people rather than administer justice. The 2007 National Stability and Reconciliation Law prevented the prosecution of individuals responsible for large-scale human rights abuses committed before 2002. Since 2002, attempts to bring politically connected people to justice (particularly for corrupt acts) have invariably failed because President Karzai has
blocked their prosecution or pardoned those convicted. When there is no political will to enforce the law, it does not matter how well trained the judges are or how skillfully the laws are written. The international community failed to recognize how difficult it would be to change such a legal system.

These are fundamental, not technical, political issues. None have easy solutions, but all must be addressed if the formal system of justice is to succeed in its mission. The “rule of law” does not arise in a vacuum but is part of a process that is invariably contentious. Such political debates have been absent in Afghanistan but need to occur because Afghans themselves must sort these issues out. In one sense, Afghans already do this by making practical decisions: the vast majority of civil cases in Afghanistan (and a surprising number of criminal cases) are not brought to the formal system of justice. Instead, these cases are taken to non-state forums where communities resolve their own disputes. Subsequently, the conference turned its attention to this sector.

**THE INFORMAL SYSTEM OF DISPUTE RESOLUTION**

In a comparative anthropological study of African political systems Meyer Fortes and E.E. Evans-Pritchard contrasted societies with centralized and non-centralized governments. The first were characterized by “centralized authority, administrative machinery, and judicial institutions—in short, a government—and in which cleavages of wealth, privilege, and status correspond to the distribution of power and authority.” The second included “those societies which lack centralized authority, administrative machinery, and constituted judicial institutions—in short which lack government—and in which there are no sharp divisions of rank, status, or wealth.”¹ In Afghanistan both systems exist simultaneously. Although institutional state structures in the country are thousands of years old, they never displaced the informal systems used by egalitarian communities in rural areas. Indeed, in rural Afghanistan (where the majority of the population resides) informal self-governance has been the norm rather than the exception. The ability of communities to resolve problems in the absence of state institutions has also proved highly adaptive in a country where national governments have regularly failed thus forcing communities to fend for themselves.

One of the defining characteristics of such local governance is the resolution of disputes through mediation and voluntary arbitration. It is estimated that over 85% of disputes in Afghanistan are resolved informally using these methods. The procedures and principles they employ are grounded in widely accepted but unwritten cultural and ethical codes used both to resolve disputes and to impose sanctions against violators of local norms. While such systems of dispute resolution are found throughout rural Afghanistan, their specific content varies. Although often referred to as “traditional,” such codes are neither timeless, nor unchanging and are subject to a great deal of manipulation and internal contest. This informal system is “informal” only in the sense that it is not state sanctioned and does not rely on legal professionals. Although unwritten, the rules for how arbitrators are to be chosen, the procedures they will follow, and avenues for appeals (if any) are clear and well known. The informal system is deliberately ad hoc—prominent community

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¹ *African political systems.* London: Oxford University Press. 1940, p. 5.
members (or well respected outsiders) are selected to hear cases but their authority lasts only as long as the case itself. Unlike judges in the state system, arbitrators are generally acquainted with the disputants and are selected because they have excellent reputations, a necessity because cases proceed only when both sides agree to be bound by the arbitrators' decisions. Because the system lacks the power of coercive police enforcement (although community sanctions can be remarkably robust in their application), such mediation and arbitration lacks the capacity to resolve disputes when the parties refuse to participate.

The relationship between the formal and informal systems of dispute resolution in Afghanistan is both symbiotic and hostile. It is symbiotic when effective district governors (woluswol) view local mediation and arbitration efforts as the best way to preserve the peace and maintain social order, generally in areas where they have little power of coercion. The hostility to the system comes from those running the central government in Kabul who claim exclusive authority in all legal matters, and from less effective administrators who find themselves ignored by the people in their district. A recent example of the latter was provided by a conference participant:

After a new official was appointed to a remote valley he discovered that no one was coming to the district center. He was surprised and asked people, “What is going on and why there is nothing for me to do? Is the place always this quiet with nothing happening?” “No, no, no, no!” they said, “There are lots of things happening but the people take it to the shura, the local council of elders. We have always had a very strong one here.” This angered the administrator who sent his police officer to go tell the head of the shura to refer people with problems to him; “You tell all of them to come to the district center and I will meet with them. The government created this, the district center, for you guys. I, my staff, and everything is here. Since we are getting paid and we are here to take care of the problems that you have, why is it that you guys solve all the problems yourselves? This is my job, my staff’s job, so why are you doing it?” The head of the informal council stands up and very politely says, “Sir, even if you told the people to come and bring their problems to you they would not because they don’t trust you—they trust us. And that is why they come to us!”

In 2002, it was widely believed that that the informal system of dispute resolution had emerged as a stopgap response to the wars that had engulfed Afghanistan after 1978. The restoration of the formal system would replace the informal as soon as the country’s capacity grew. As the years passed, it became clear that not only would the formal system of justice never be robust enough to achieve such a goal; the informal system was still perceived as more efficient, less corrupt and fairer than the state justice system. However, because decisions produced by the informal system were not recognized by the court system, they had no legal standing. Some plans have proposed putting arbitrators on the government payroll and using them to apply state law as a way to solve this problem. This failed to recognize that separation from government institutions, along with the use of locally acceptable norms, was the core of the informal system. The separation of the two systems was also useful to disputants as a way to “forum shop”—the act of seeking the legal forum that would provide the best possible outcome for the disputant. As a cynic bluntly put it, “If you are in the wrong but rich, go to court; if you are in the right but poor seek community arbitration.” Even when litigants did not take cases to the government courts, they could always
threaten to do so and thereby pressure arbitrators to take account of more favorable statutes in place in the state system. More commonly the reverse was the case: arbitrators pressured recalcitrant, losing litigants into accepting their decisions by opining that going to court would cost even more time and money than the case was worth.

The conference participants agreed that the strengths of the informal system had become more appreciated over the past decade. Failure to do so earlier may have been rooted in a negative terminology (customary law, Pashtunwali, informal systems, etc.) and a lack of knowledge about how the informal system worked. For example, Afghan modernizers historically attacked non-state systems, calling them primitive and backward institutions that needed replacement. International experts whose only experience was within state systems were inclined to agree with these critics. There was also a strong belief that the informal system of justice in rural areas ignored human rights and needed to end. It later became clear that the few outcomes that met these criteria were agreements to exchange women in marriage to settle blood revenge murder cases. However, because such a practice was violation of both sharia and state law (and was rejected by non-Pashtun groups), such outcomes were actually atypical and instances of this practice had long been in decline. The state system did have an advantage (in theory if not in practice) on the use of the law to protect individual legal rights against majoritarian sentiments. By contrast the informal dispute resolution system did an excellent job of restoring harmony to a community by crafting decisions that were met with broad community approval—even when that meant ignoring the letter of state or sharia law. Recognizing that the two systems had different strengths that could complement one another made it easier to see that they were both needed in Afghanistan.

If the Afghan tradition of non-state mediation and arbitration had been initially recognized as a type of Alternative Dispute Resolution (ADR) that is common in developed countries, it would not have seemed so alien. Even in the United States, a notoriously litigious society, people turn to ADR for reasons similar to Afghans: it is quicker, cheaper, less bureaucratic and the disputants chose the finders of fact. In countries like the United States, the rules for recognition of ADR settlements are set by statute. The settlements are legally enforceable, but do not require state approval or review. This could provide a model for how to link the two systems in Afghanistan without compromising the capacity of either. A copy of a draft law currently under consideration to do just that was made available to the conference participants for discussion. While the draft law had the virtue of giving legal standing to Afghan ADR decisions, it has a problematic aspect: organizers could be prosecuted retrospectively for arranging jirgas or shuras if the state disapproved of them. The draft law circulated at the conference also appeared to require that arbitrators must use Afghan state law alone, making them agents of state policy.

Discussion produced the following conclusions:

1. Alternative dispute resolution in Afghanistan is robust and has a high degree of legitimacy. ADR seeks to reach decisions that are deemed fair and equitable by the community. It has a reputation for competence and probity that courts and judges have never achieved.

2. Informal dispute resolution cannot be used as an alternative method for enforcing state law
codes. This practice reflects the values of the community in which it occurs and only changes when those values change, not as a result of government mandate.

3. Regardless of public statements to the contrary, state officials have regularly promoted ADR in rural areas. District governors have regularly validated decisions by shuras or jirgas, and in some cases even presided over them. Communities regularly seek the aid of state administrators to pressure recalcitrant disputants to agree to arbitration.

4. Fears that non-state dispute resolution violates human rights standards have little foundation. Afghan ADR decisions seek to produce equity, a goal compatible with basic human rights. The few exceptions (such as exchange of women in marriage to settle disputes) are as much cultural issues as legal ones and need to be addressed as such.

5. Recognition of the validity of ADR agreements and giving them legal standing promotes rather than undermines the rule of law. Rule of law sets standards that apply to all and Afghan ADR hews more closely to this ideal than the state justice system. Since ADR is used to resolve the vast majority of disputes in the country, it will always be a necessary part of the justice system.

INTERNATIONAL STANDARDS AND AFGHAN IMPLEMENTATION

International actors expect that Afghan state law and its implementation will comply with the country's international obligations and be enforced domestically. Afghanistan has ratified and is accordingly bound by the following relevant instruments: The Geneva Conventions of 1949; the Genocide Convention of 1948 (acceded 1956); the Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968 (acceded 1983); the Convention on the Elimination of All Forms of Discrimination Against Women of 1979 (acceded 1980); the International Covenant on Civil and Political Rights of 1966 (acceded 1983, but not to the optional protocol); the Convention on the Elimination of All Forms of Racial Discrimination of 1966 (acceded 1983); the Convention Against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment of 1984 (ratified 1987); and the Convention on Rights of the Child of 1989 (ratified 1994). Afghan governments did not cite any reservations to these conventions when they acceded to them. While interpreting the validity of these conventions and the degree to which they currently apply in Afghanistan may seem clear from an international legal perspective, it is far less obvious from a domestic Afghan perspective. These conventions are neither known nor commonly applied. Their binding nature is unrecognized for three reasons.

1. Conventions were signed by regimes that were then replaced by new governments that rejected the substance of some conventions but never withdrew from them. The bulk of the accessions made under the socialist PDPA regime (conventions on rights of women, war crimes, elimination of racial discrimination, elimination of torture and degrading punishments) were completely ignored by the Taliban. They openly violated them with explicit policies that permitted inhuman forms of execution and gross discrimination against women and non-Sunni ethnic minorities. This occurred along with a broader
rejection of the legitimacy of secular civil rights in general.

2. No Afghan regime of any political persuasion ever attempted to enforce these conventions within Afghanistan or bring Afghan law into compliance with them. The PDPA’s accession to the Covenant on Civil and Political Rights of 1966 and Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968 were particularly hypocritical because these documents were signed at a time when the regime was engaging in the very war crimes and violent suppression of political opponents prohibited by the convention. While a mujahideen government ratified the Convention on Rights of the Child of 1989, it did nothing to implement the convention’s provisions domestically or improve the plight of children in the country where child labor was commonplace.

3. Some of the universal values embodied in these conventions are not accepted by the public at large and are not protected by Afghan law, particularly concerning freedom of religion. Except under the PDPA, all Afghan governments have maintained and enforced laws against apostasy that carried the death penalty for anyone who abandoned Islam or criticized the Muslim faith. Afghan law has also severely restricted or prohibited the public practice of all non-Muslim faiths. While the Taliban were the most aggressive with regard to this policy, the laws on apostasy and restrictions against other religions remain intact. Women’s equality is still politically contested.

In addressing this issue, conference participants agreed on the necessity of educating Afghans about the major human rights conventions their country has signed. While Afghan governments may be legally bound to enforce the conventions, this cannot be done when Afghan lawmakers, let alone ordinary citizens, remain unaware of the contents of these documents. The more vexing issue for conference attendees was how to deal with Afghan statutes or practices that violate elements of these conventions. Some human rights advocates, particularly from the United Nations, have argued that the Afghan government must comply with all of the conventions because they are legally binding. Others, particularly Afghan based human rights organizations, have expressed concern that a too legalistic approach risks making the conventions appear to be alien impositions. They seek to put such rights into an Afghan cultural context to demonstrate they are compatible with both Islamic tradition and Afghan values of fairness. This approach becomes problematic in areas where there is a split in society (such as the longstanding conflict over women's rights that has pitted modernists against conservatives). The matter of religious freedom, however, is most fraught because compromise or change appears highly unlikely. For example, the 2004 Constitution made a great stride towards ensuring religious freedom when it recognized the equality of all Muslim sects to practice their faith, even giving recognition (formerly lacking) to Shiite interpretations of sharia law for settling disputes within that community. On the other hand, it failed to recognize freedom of religion as an individual right and maintains strict punishments for apostasy. The disjuncture between various religious laws (or some interpretations of them) have also produced controversy. In August 2009 women's rights advocates excoriated President Karzai for approving a conservative Shia Family Code that gave husband who were denied sex the right to refuse food and money to their wives.
While the conference could not resolve such dilemmas, it was agreed that, in the end, an effective rule of law cannot be rooted in paper conventions or formal legal institutions alone, but instead has to be integrated into Afghan lives and Islamic values. In many cases, it must be recognized that some standards might be more aspirational than quickly achievable. Others put the blame on successive Afghan governments, all of which signed conventions to advance a positive image on the international stage with no intentions of implementing them at home.

POLICIES AND PRACTICALITES

Bringing effective rule of law to Afghanistan requires political, institutional and social change that will take generations to complete under the best of circumstances, let alone the existing reality. As noted earlier, strong executive powers allow the president to create laws by decree and interfere with the judicial process, showing that the “ruler’s law” still overshadows the “rule of law.” Given the past thirty years of instability that Afghans have experienced, they naturally hesitate to have much confidence in today’s fragile institutions or believe that all stand equal before the law. In a country where people have always been treated as subjects rather than citizens, regardless of a regime’s ideology, results are far more significant than plans or processes. It is not that Afghanistan lacks a tradition of self-government, but that this tradition has long been restricted to the local level and is absent at the national level. Montstuart Elphinstone, the first British envoy to the Afghan court in 1808, later commented on this paradox when he wrote,

There is some distinction of interests between the King and the nation, and still greater difference of opinion regarding his legal powers; the King, the Courtiers, and the Moollahs, maintaining that he has all the authority possessed by Asiatic despots; and the people of the tribes considering him a monarch with very limited prerogatives. This produces a good deal of diversity in the actual exercise of royal authority.

Substitute “president, government officials and the court system” for “king, courtiers and mullahs,” and the situation in Kabul two centuries later remains much the same. However Elphinstone observed with some admiration the pride Afghans took in ruling themselves in the absence of a central government.

We may easily appreciate the benefits of an exemption from the vexatious interference of the officers of a distant King, and from the corruption and oppression with which such interference is always accompanied in Asia; nor must we, amidst the alarms and confusion which will be forced on our attention, overlook the partiality of the Afghauns for their present constitution; the occupation and interest, the sense of independence and personal consequence which result from a popular government, however rudely formed; and the courage, the intelligence, and the

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2 Kingdom of Caubul. London: Longman, 1815, p. 173;
elevation of character which those occupations, and that independence, can never fail to inspire.\textsuperscript{3}

Conference participants reached the consensus that while rebuilding national level legal institutions and recreating a functioning government administration were necessary priorities, too little attention was paid to bottom-up development or how to link formal and informal traditions of governance. For that reason the conference suggested giving more emphasis to this in a rule of law context. Recommendations include:

1. **Give formal legal recognition to mediated or arbitrated settlements reached in local communities.** This has always been one of the most contentious areas of debate surrounding rule of law and the Afghan legal system. Afghan governments in Kabul have attempted to confine authority to the formal legal system by refusing to recognize agreements made in the informal system as legally binding, despite the fact that the vast majority of disputes are resolved in this way. How this is done is less important as long as voluntary mediation and arbitration are not subjected to formal judicial review or approval by government officials. While no litigant should be denied access to the formal court system by mandatory arbitration, voluntary agreements should be deemed legally binding unless it can be shown that they were made under duress or coercion, violated public policy or transgressed basic human rights principles. If such agreements are considered a matter of private law, then they can be treated like all other binding agreements under Afghan contract law that are considered valid unless they are illegal. Afghan sharia law already makes a distinction between \textit{baq ul-Allah} (rights of God), which underpins state prosecution of serious criminal cases, and \textit{baq ul-Abd} (rights of the person), which gives individuals and communities the authority to settle civil matters and punish petty crimes if all the parties are willing. If another model is needed, the United States has both federal and state statutes that have worked successfully to recognize mediation and arbitration settlement decisions by the formal court system with minimum interference by the government.

2. **Increase the capacity of Afghanistan's “paralegals” by providing better training and possible certification.** Afghans have a long tradition of employing \textit{wakil}, or legal agents, to act on their behalf. Such duly delegated agents have the power to handle contractual matters for their principals. Providing these individuals with more advanced training and information about the contents of state legal codes would increase the capacity of the whole legal system since the number of university trained lawyers is always likely to be small and their services confined to Afghanistan's major cities. Existing programs for this purpose should be expanded and a paralegal association and a lawyers' bar association should be created.

3. **Provide a better mechanism for registering and authenticating legal documents.** Lack of good records for legal decisions, administrative actions, and property registration (personal and community) undermines the legal system. Forged documents are common and valid

\textsuperscript{3} ibid.
documents difficult to verify. At the very least there should be a common numbered registry kept by local government offices with certified copies issued to the people involved. There should also be a process for registering arbitration agreements.

4. **Create a process of impeachment for the removal of corrupt or incompetent judges.** Nothing has undermined the confidence in the judiciary more than the belief that its judges are corrupt and that they act without fear of dismissal. Similarly, some judges lack qualification, which has never been properly addressed. New judges with good training serve alongside these unqualified individuals who are sometimes more senior. Without a mechanism for properly evaluating and acting upon public complaints, the situation will not improve.

5. **Recruit and hire court personnel and judges at the local level rather than centrally.** The Afghan government is highly centralized in its appointments. However, the Afghan government administers a diverse country, and since different regions have localized traditions, local recruitment would create stronger links with the local populations served by the center. All such appointees would be expected to meet national standards and enforce national laws.

A final issue that stands in the way of creating the rule of law in Afghanistan is so large that all others pale before it: curbing the sense of impunity held by the powerful. While removing the most notorious offenders may be politically difficult, it is striking that even weak and marginal figures have rarely faced any consequences for past crimes or present offenses. It is useless to talk of a rule of law without consequences. At a minimum, the international community should review its responsibility for a legal system that looks better on paper than in practice.