

What is Really so Bad About a Different Rule of Law?: The Afghan Legal System Reanalyzed

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“Who would say the rule of law is in good shape in Afghanistan?”¹

Introduction

“Rule of Law” is a principle that politicians often discuss to evaluate the stability and progressive nature of another state. From the Western point of view—where Rule of Law is most commonly discussed—Rule of Law is predicated on sovereign, supreme, predictable, and fair legal systems. Failure to satisfy this formulation suggests that a state lacks Rule of Law. Rule of Law’s absence, in turn, evokes negative connotations and is often synonymous with a lack of democracy. The Islamic Republic of Afghanistan is war-torn, decentralized, and corrupt—but can it still have Rule of Law? Are these concepts mutually exclusive? Must Afghanistan’s legal structure function in the same manner as its Western counterparts in order to have Rule of Law, or does this principle have some practical flexibility in its application?

This Note contextualizes the Rule of Law analysis in Afghanistan to more accurately evaluate the Afghan legal system. Part I of this Note outlines the pluralistic nature of Afghan law, drawing particular attention to the importance of Shari’a law, custom, the civil code, and,

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1. Martin Krygier, *Approaching the Rule of Law, in THE RULE OF LAW IN AFGHANISTAN: MISSING IN INACTION* 15, 24 (Whit Mason ed., 2011).

in recent years, the various constitutions. Part II breaks down the Western conception of Rule of Law and how it applies to Afghanistan. First, it will begin by noting the various definitions of Rule of Law and how the principle has developed, rooting back to the workings of Plato and Aristotle. Second, it will address the role that the Western world has played in the application, interpretation, and evaluation of Rule of Law in recent decades. Third, it will discuss the difficulty of transplanting Rule of Law from one state to another and the common problems of failing to contextualize a legal system. Fourth, it will emphasize the existence of Rule of Law in Afghanistan, albeit one that does not necessarily mirror Rule of Law in the Western world. And fifth, it will argue that both traditional and nontraditional systems of justice can establish Rule of Law in a particular state, provided that the system is particularized to that state. This Note concludes that while Afghanistan admittedly has problems with corruption and decentralization, these facts are not enough to rebut their Rule of Law. Most importantly, this Rule of Law exists irrespective of whether it fits a strictly Western conception.

I. Afghan Law: A History

Afghanistan's history is a long and complicated one but hardly something that the Western world understands. The State was founded in 1747 when Ahmad Shah Durrani unified the Pashtun tribes.² As a British colony, Afghanistan served as a geographical buffer between the British and Russian Empires until gaining independence in 1919.³ It was in this historical context that Afghanistan set about creating its first of many constitutions. Until that time, Afghanistan had never possessed a written constitution. Instead, it had been informally ruled either by Afghan monarchs, local tribal leaders, or colonial powers.⁴ For centuries, the Afghan legal system had consisted of a combination of Sharī'a law, ancient Afghan customs such as the *jirga*⁵ and *Pashtunwali*, and their civil code. Formally, Afghanistan is a civil law state. Unlike states in

2. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK: AFGHANISTAN (INTRODUCTION), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html>.

3. Great Britain did not accept defeat and loss of control until two years later. See *id.*

4. MARTIN EWANS, AFGHANISTAN: A SHORT HISTORY OF ITS PEOPLE AND POLITICS 12, 15–17, 42–70 (2002).

5. A *jirga* is “a council of tribal elders convened to settle important issues.” See Hannibal Travis, *Freedom or Theocracy?: Constitutionalism in Afghanistan and Iraq*, 3 NW. J. INT'L HUM. RTS. 4, 6 (2005).

which the formal legal power of the state is supreme, the power and control of Sharī'a, Afghan customs, and the civil code have struggled to maintain their importance in the Afghan legal system; indeed, "the power of each has waxed and waned."⁶ Thus, as William Maley, a distinguished scholar on Afghanistan and its history, has noted, "[w]hen we come to Afghanistan . . . we confront a decidedly confused situation in which it is far from clear that there is any single rule of recognition on which to rely."⁷ One thing has remained true as Afghanistan's legal structure has changed over the last few centuries: its legal system is made up of a complex and delicate balance between important and competing sources of law.

A. Sharī'a Law

1. *Sharī'a's Variances in Islamic Countries*

Sharī'a is Islamic religious law. Roughly translated, it means "the path or track by which camels were taken to water."⁸ Practically, Sharī'a provides the path to God through which men may achieve salvation.⁹ It defines five different categories of acts: obligatory, suggested, neutral, discouraged, and forbidden.¹⁰ Generally, Sharī'a is comprised of two main sources.¹¹ The first source is the Qur'an.¹² A textual source, the Qur'an is said to have been received by the Prophet Muhammad from God through Gabriel.¹³ It is held to be the literal word of God.¹⁴ The second source is *sunnah*,¹⁵ which is the life and practice of Muhammad.¹⁶

6. Thomas Barfield, *Culture and Custom in Nation-Building: Law in Afghanistan*, 60 ME. L. REV. 347, 351 (2008).

7. William Maley, *The Rule of Law and the Weight of Politics: Challenges and Trajectories*, in THE RULE OF LAW IN AFGHANISTAN: MISSING IN INACTION 61, 66 (Whit Mason ed., 2011).

8. UGO A. MATTEI, TEEMU RUSKOLA & ANTONIO GIDI, SCHLESINGER'S COMPARATIVE LAW 362, 364 (7th ed. 2009). Other definitions include "the path upon which the believer has to tread." Lino J. Lauro and Peter A. Samuelson, *Toward Pluralism in Sudan: A Traditionalist Approach*, 37 HARV. INT'L L.J. 65, 114 (Winter 1996).

9. *Id.*

10. *Id.*

11. Lauro, *supra* note 8, at 114; Liaquat Ali Khan, *Jurodynamics of Islamic Law*, 61 RUTGERS L. REV. 231, 240 (Winter 2009).

12. MATTEI, *supra* note 8, at 364–65; Lauro, *supra* note 8, at 114.

13. Lauro, *supra* note 8, at 114; Eugene R. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 OHIO ST. L.J. 1, 41 (2009).

14. Lauro, *supra* note 8, at 114. For a brief history of the development and significance of the Qur'an, see Milhizer, *supra* note 13 at 40–44.

The incorporation of Sharī'a into modern Islamic states varies. For example, in Jordan, schools are relatively secular and structured similarly to those in Western States. For instance, it is possible to earn a law degree from a Jordanian law school without taking any courses in Sharī'a law.¹⁷ In other states, however—such as Afghanistan, Saudi Arabia, Pakistan, Egypt—Sharī'a is completely incorporated into society, state laws, and the education system.¹⁸

2. *Sharī'a and the Ulema in Afghanistan*

There is a large class of professional clerics known as *ulema* who believe that provincial customary law in Afghanistan is illegitimate because it strays too far from traditional Sharī'a law.¹⁹ Prior to the creation of the modern Afghan state in 1919, the *ulema* often questioned the legitimacy of customary law practice, alleging that it conflicted with standard Sharī'a interpretations. The task then fell to the *ulema* to issue opinions expressing their interpretation of Sharī'a.²⁰ Because roughly eighty percent of Afghans practice Sunni Islam²¹ and are a part of the *Hanafi* school of law to which the *ulema* belong, the *ulema* have greatly affected Afghanistan's application and interpretation of Sharī'a. Within the *ulema*, there are a group of trained religious judges known as *qadi*, who, in determining that religion and government are “inextricably melded,” are tasked with issuing *fatwa* (opinions on religious issues).²²

Until the formation of modern Afghanistan, the *ulema* “provid[ed] both the system of laws and the judges to interpret it.”²³ Secular reforms of the last century, however, have since limited the *ulema*'s control. But over the last couple decades, particularly with the control of the Taliban,²⁴ national legal codes restricting Sharī'a

15. Lauro, *supra* note 8, at 114.

16. *Id.*; Milhizer, *supra* note 13 at 45–46.

17. MATTEI, *supra* note 8, at 364–65.

18. Toni Johnson & Lauren Vriens, *Islam: Governing Under Sharia*, COUNCIL ON FOREIGN RELATIONS (Jan. 9, 2013), <http://www.cfr.org/religion/islam-governing-under-sharia/p8034#p4>.

19. Barfield, *supra* note 6, at 352.

20. *Id.*

21. CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK: RELIGIONS, available at <https://www.cia.gov/library/publications/the-world-factbook/fields/2122.html>.

22. Barfield, *supra* note 6, at 352.

23. *Id.*

24. The Taliban rose to power and took control of Afghanistan in the late 1990s. Travis, *supra* note 5, at 52. To quote President Hamid Karzai, the “Taliban emerged when

have been stripped and clerics have been hastily appointed.²⁵ The result has been a lack of legal code and a lack of properly educated clerics who are capable of understanding the complexities of Sharī'a to the same extent as the *ulema*.²⁶ Thus, the extent of Sharī'a's role and import within the formal legal system is murky.

However, it is clear that Sharī'a plays some role—indeed, one that is deeply rooted in Afghan history. In order to apply Sharī'a, one must understand the complexities of Sharī'a law itself and how it interacts with other sources of law. Sharī'a is not merely a set of rules “that can be formulaically applied by amateurs. A high level of sophistication is required for a defensible application of Sharī'a, and [due to the untrained clerics] such sophistication is not readily available in the Afghan context.”²⁷ This does not mean, however, that Sharī'a relies on application within a formalized legal system. Even in the 1980s, when Afghanistan was facing extreme instability within its formal legal system,²⁸ Sharī'a was still respected.²⁹ Sharī'a is so fundamental to Afghan society that it exists independent and irrespective of the state's formal legal system.

B. Customary Law

Customary law develops in provincial communities and is “the means by which local communities resolve disputes in the absence of (or opposition to) state or religious authority.”³⁰ Common cultural and ethical practices establish customary law, and, even as an unwritten code, it has the power to bind its members. Customary law varies greatly, depending on the region in rural Afghanistan, and can

Afghans were desperately looking for a savior.” *Id.* at 53. While the Taliban may have been originally supported (and funded) by the United States and a number of other countries, the Taliban became a violent, militant, and well-funded group that took control of Afghanistan by force. *Id.* at 55–57. Many recent social progressions were reverted and legal advancements ignored. *Id.*

25. See generally, Barfield, *supra* note 6, at 352, 363–68.

26. *Id.* at 353. See also Thomas Barfield, *An Islamic State Is a State Run by Good Muslims: Religion as a Way of Life and Not an Ideology in Afghanistan*, in REMAKING MUSLIM POLITICS: PLURALISM, CONTESTATION, DEMOCRATIZATION 213, 231–32 (Robert W. Hefner ed., 2005).

27. Maley, *supra* note 7, at 67 (internal citations omitted).

28. See Marzia Basel and Dana Michael Hollywood, *Under a Cruel Sun*, 12 WM. & MARY J. WOMEN & L. 205, 214–17 (2005).

29. Maley, *supra* note 7, at 67.

30. Barfield, *supra* note 6, at 351.

also be manipulated and changed through regime change or through internal challenges or varying interpretations.³¹

The most elaborate system of Afghan customary law is Pashtunwali, which is the Pashtun code of conduct. Pashtunwali is an oral tradition consisting of general principles and practices, known as *tsali* (literally, “trail marker”), which are then applied to specific cases.³² The general premise is that the rules should “generate behavior [that embodies] the notion of ‘doing Pashto,’ that is, enacting cultural values in the real world where they take on specific forms.”³³ Pashtunwali requires those involved in a dispute to choose community members or respected outsiders to serve as fact-finders and decision-makers. Instead of providing for fines and imprisonment, Pashtunwali focuses on social reconciliation and on the most appropriate forms of compensation³⁴ for the wrong done. Social reconciliation can be anything ranging from a public apology to the community at large to making a payment for *sharm*³⁵ (usually one sheep and 500 Afghani).³⁶ However, in cases of serious violence, reconciliation can be as extreme as retaliation or revenge, also known as *badal*.³⁷ Contrary to Pashtunwali, victims, or the families of victims, reserve the right to invoke eye-for-an-eye justice, although communities often attempt to end such disputes quickly so that they do not cause blood feuds between families.³⁸ Therefore, relying on forms of mediation and arbitration is both a strength and weakness of Pashtunwali.

Reliance on mediation and arbitration can be a problem because it “generally lacks the power of coercive enforcement. Failures to resolve serious problems, particularly those involving threats of

31. *Id.* at 352.

32. *Id.*

33. *Id.* at 356.

34. Compensation does not necessarily require monetary fines within this system. *Id.*

35. Directly translated, *sharm* means shame, but can also be used merely to indicate payment for an individual’s embarrassing behavior. *Id.* at 357.

36. *Id.* The afghani is the basic monetary unit of Afghanistan.

37. *Id.* at 358.

38. For more information on *badal*, see Tom Ginsburg, *An Economic Interpretation of Pashtunwali*, 2011 U. CHI. LEGAL F. 89 (2011); Elizabeth Peterson, *Two Sides of the Same Coin: The Link Between Illicit Opium Production and Security in Afghanistan*, 25 WASH. U. J.L. & POL’Y 215 (2007); NABI MISDAQ, AFGHANISTAN: POLITICAL FRAILTY AND EXTERNAL INTERFERENCE (2008); *Honour Among Them*, THE ECONOMIST (Dec. 19, 2006), <http://www.economist.com/node/8345531>.

bloodshed, therefore often prompt state intervention.”³⁹ Autonomy and consent to the settlement of a dispute are at the heart of Pashtunwali. Because *badal* is a right that cannot be taken away, the two parties involved in a dispute must voluntarily decide to agree to a peaceful settlement.⁴⁰ However, the parties, or the self-appointed mediators who are disconnected from the dispute, can initiate settlement at any point to avoid *badal*.

The usual setting for settlement is known as a *jirga*, which is “an open forum that puts great stress on the nominal equality of the participants.”⁴¹ During a *jirga*, the members sit in a circle (to equalize all members), and each member has the right to speak. Parties make decisions by consensus instead of a vote.⁴² Reaching a consensus may take days, weeks, or even months.⁴³ Those who disagree with the opinions of the majority can express their own disagreement or can leave the *jirga* to avoid being bound by its decision.⁴⁴ If too many members leave the *jirga*, the *jirga* may collapse. However, the right to refuse the authority of a *jirga* is tempered by the fact that it is in the community’s best interest to put an end to blood feuds, because if “left unresolved, they can lead to an ever-widening circle of revenge killings over time.”⁴⁵ This coincides well with the *jirga*’s goal of ending such feuds, because its purpose is to restore harmony in the community it represents. Granting the *jirga* power to stop blood feuds best serves Afghan society’s interests; and, relying on the *jirga* to stop blood feuds further legitimizes its role and purpose.

Customary codes such as Pashtunwali exemplify the Afghan preference for a legal system that does not include state-controlled dispute resolution. As William Maley has noted, codes like Pashtunwali “reflect the predominance in many parts of Afghanistan of *governance* rather than *government*: ‘governance structures enjoy local legitimacy even without having received the imprimatur of the state.’”⁴⁶ Those of a particular region can have complete, or near

39. Barfield, *supra* note 6, at 352.

40. Thomas Barfield, Neamat Nojumi & J. Alexander Thier, *The Clash of Two Goods: State and Nonstate Dispute Resolution in Afghanistan*, in CUSTOMARY JUSTICE AND THE RULE OF LAW IN WAR-TORN SOCIETIES 159, 166 (Deborah H. Isser ed., 2011).

41. *Id.* The word *jirga* is a Pashto word derived from the Turkish word for circle.

42. *Id.* at 167.

43. *Id.*

44. *Id.*

45. *Id.* at 168.

46. Maley, *supra* note 7, at 68 (emphasis in original).

complete, confidence in the available local remedy without involving the state. These disputes would, however, be “individually grounded, based on norms of revenge and giving rise to the risk of blood feuds; ostracism from the tribe [functions] as an ultimate sanction.”⁴⁷ Not only does the “civilized” world admonish such remedies as morally repugnant, more practically, they likely violate Afghanistan’s international human rights obligations.⁴⁸

C. The Civil Code

1. *Reformation in Afghanistan Begins*

The evolution of the formal civil code in Afghanistan began in the 1880s when Emir Abdur Rahman began the first phase of reformation in Afghanistan, creating a uniform state with a national army, defined borders, and a centralized government.⁴⁹ Emir Rahman believed that a coherent, defined legal system was the key to a strong, centralized state structure; thus, he adopted a code of procedures and ethics in 1885, known as the *Asas al-quzat* (“Fundamentals for Judges”).⁵⁰ The *Asas al-quzat* established that the *Hanafi* school of *Shari’a* should be the basis of judicial decisions, which allowed Emir Rahman to nest his authority and administrative reform within divine right. He essentially “simultaneously empowered the clergy, by making [*Shari’a*] the law of the land, and subordinated it to his executive authority.”⁵¹ Because the Emir was able to create the code himself and could justify it through *Shari’a*, he had a great deal of latitude to expand his own power and the formal legal system without alarming the populace.

In addition to the Emir’s redefinition of the legal system, Abdur Rahman also significantly influenced the functions and development of the judiciary. First, he required all judges of the *qadi* be vetted and appointed, ensuring that anyone appointed would serve the Emir’s will.⁵² Further, some areas of jurisdiction—such as commerce—were taken from the *qadi* and given to newly established district courts. Provincial administrators ran the district courts, which eventually

47. *Id.* (internal citations omitted).

48. See generally *World Report 2012: Afghanistan*, HUMAN RIGHTS WATCH (Jan. 2012), <http://www.hrw.org/world-report-2012/world-report-2012-afghanistan>.

49. Barfield et al., *supra* note 40, at 175.

50. *Id.*

51. *Id.*

52. *Id.* at 176.

became the forum for criminal law, commerce, and taxation.⁵³ This created a tension in the new dichotomous court system; a constant struggle for jurisdiction and authority between the executive and the religious right still exists today. Nevertheless, Abdur Rahman began to question customary law principles, thus reforming tribal practice and causing further tension.⁵⁴

2. *The Second Phase of Afghan Reformation: Rural Resistance*

The second phase of reform for the formal legal system began with the first constitution.⁵⁵ The new Emir, Amanullah, instituted Afghanistan's first penal code in 1924.⁵⁶ There were also several attempts to incorporate *Hanafi* jurisprudence into civil codes, largely modeled after Egyptian and Turkish law.⁵⁷ Typical of a civil law system, these codifications significantly limited judicial discretion.⁵⁸ Even at the height of its power, however, the centralized state never had the ability to enforce the legal code nationwide.⁵⁹ Officials in rural areas continued to apply customary law in their districts, regardless of whether it conflicted with the legal code.⁶⁰ According to Maley, "[i]n theory, state law has always applied to all residents of Afghanistan equally, but, in practice, government institutions were found almost exclusively in urban areas and in provincial centres [sic] of administration."⁶¹ In fact, the government's courts were often a threat used against reluctant parties in a dispute: If they did not settle the dispute, they would have to involve the government courts.⁶² Ultimately, rural areas, which have historically constituted roughly eighty percent of Afghanistan, continued to apply Shari'a and customary law—instead of respecting the code—both because those forms of law worked for them and because no enforcement mechanism was in place to make use of the government's civil system.⁶³

53. *Id.*

54. *Id.*

55. *See id.*

56. *Id.* at 177.

57. *Id.*

58. *Id.*

59. Barfield, *supra* note 6, at 353.

60. *Id.*

61. Maley, *supra* note 7, at 68.

62. Barfield, *supra* note 6, at 353.

63. *Id.*

D. Modern Afghanistan and Its Constitutions

1. Afghanistan's First Constitution

In 1923, after Afghanistan gained independence from Great Britain, the first Afghan constitution was born.⁶⁴ Emir Amaullah Khan secured ratification of the new Constitution by a *loya jirga*,⁶⁵ a form of *jirga* usually reserved for important political events like choosing a new king or, in this case, ratifying a constitution.⁶⁶ The new constitution provided greater rights for women and religious minorities than ever before. Most notably, it guaranteed that “all subjects of Afghanistan have equal rights and duties to the country in accordance with Sharī’a and the law’s [sic] of the state.”⁶⁷ It abolished torture, slavery, and forced labor; it created a legislature, made elementary education compulsory, and provided state protection to followers of religions other than Islam.⁶⁸

This ambitious document, however, essentially created a modern theocratic government by vesting authority in leaders who claimed to know the will of God. The 1923 Constitution made the king the “servant and protector of the true religion of Islam,”⁶⁹ required the legislature to give particular consideration to Sharī’a law,⁷⁰ and required the judiciary to settle all disputes in accordance with principles of Sharī’a law, with general civil and criminal law to serve as *subsidiary* sources of law, in that the courts were required to settle disputes “in accordance with the principles of [Sharī’a].”⁷¹ The religious elite, intent on protecting customary law, summarily denounced attempts to introduce legislative reforms, which led to the Emir calling a *loya jirga* to amend the constitution.⁷² After Emir Amanullah became the king in 1926, he attempted to implement

64. Barfield et al., *supra* note 40, at 176.

65. *Loya jirga* is a Pashto term meaning “grand council.” Q&A: *What is a loya jirga?*, BBC NEWS (July 1, 2002, 21:22 GMT), http://news.bbc.co.uk/2/hi/south_asia/1782079.stm.

66. For information on the role of the *loya jirga* in Afghanistan, see *id.*

67. NIZAMNAMAH-YE-ASASI-E-DAULAT-E-ALIYAH-E-AFGHANISTAN. [THE CONSTITUTION OF AFGHANISTAN] 20 Hamal 1302 [Apr. 9, 1923], art. 16 [hereinafter 1923 CONSTITUTION]. See also Travis, *supra* note 5, at 3.

68. Travis, *supra* note 5, at 8.

69. 1923 CONSTITUTION, *supra* note 67, at art. 5.

70. *Id.* at art. 72.

71. *Id.* at art. 21.

72. EWANS, *supra* note 4, at 93–94. Amendments included declaring the *Hanafi* school of Islamic Law the official religious rite of Afghanistan, decreasing protection for women’s rights, reintroducing torture in accordance with Sharī’a law, and allowing a Council of Islamic Scholars to review any proposed new laws. See Travis, *supra* note 5, at 4.

further reforms to protect women's rights, but the religious elite rejected such reforms and his successors overturned them.⁷³

2. *Afghanistan's Second Constitution*

In 1930, a *loya jirga* pronounced that Nadir Shah was Afghanistan's new king. In 1931, King Shah created the second Afghan constitution, which was significantly more socially progressive than the 1923 Constitution.⁷⁴ It retained many of the 1923 Constitution's reforms and added a national parliament with legislative power, "consisting of an elected National Consultative Assembly and a royally appointed upper House of Nobles, and made the ministers responsible to parliament."⁷⁵ However, the 1931 Constitution failed to protect the women's rights introduced in the 1923 Constitution and required the king to rule according to the tenets of Sharī'a law.⁷⁶ As before, the judiciary consisted of a secular and religious court, but now the secular court was required to apply *Hanafi* jurisprudence. The resulting system was disorganized and contradictory.⁷⁷

After King Shah's assassination in 1933, his nineteen-year-old son became king, but the new king's uncle served as prime minister through the end of World War II. It was only after the war that the 1931 Constitution's provisions providing for democratic election were actually used.⁷⁸ "The new liberal parliament enacted a free press law and ushered in a lively democratic period," but due to the high level of illiteracy, universal suffrage resulted in landlord dominance in the Afghan parliament.⁷⁹ The following decade was one of oppressive government, resulting in the king persuading the prime minister to resign in 1963. The new prime minister was responsible for preparing a new constitution.⁸⁰

73. Travis, *supra* note 5, at 4. Afghanistan has been consistently criticized for its record with respect to women's rights, which is often seen as an indication of the state's failure overall. See Nancy Gallagher, *The Ethical and Legal Issues Surrounding Systematic Gender and Race Discrimination*, 5 UCLA J. INT'L L. & FOREIGN AFF. 367 (2000-2001).

74. Barfield et al., *supra* note 40, at 177.

75. Saïd Amir Arjomand, *Constitutional Developments in Afghanistan: A Comparative and Historical Perspective*, 53 DRAKE L. REV. 943, 948 (2004-2005).

76. *Id.* at 949.

77. *Id.* at 949-50. See also LOUIS DUPREE, AFGHANISTAN 468 (1980).

78. Arjomand, *supra* note 75, at 950.

79. *Id.*

80. *Id.* at 951.

3. *Afghanistan's Third Constitution*

The Constitution of 1964 arose from a series of committees, culminating in a *loya jirga* that included six women. Progressive features of the prior constitutions were enhanced, with a bicameral parliament,⁸¹ a Supreme Court,⁸² and an Attorney General's office to investigate crimes.⁸³ Further, while laws still had to conform to Shari'a law, it was the secular National Center for Legislation in the Ministry of Justice that was responsible for determining the constitutionality of proposed legislation.⁸⁴ Further, *Hanafi* jurisprudence was only valid in the absence of statutory law.⁸⁵

Overall, the 1964 Constitution "ushered in nearly a decade of democratic politics, with a flourishing free press, student demonstrations, and political mobilization."⁸⁶ However, the democratic period ended with the overthrowing of the king in 1973, after which Mohammad Daoud Khan established a new republic with himself as President.⁸⁷ President Khan was then overthrown in 1977. During the civil war that followed, Communist and Islamist groups offered their own written constitutions that represented their respective ideals.⁸⁸ While President Najiballah promulgated an incredibly progressive constitution in 1987, that constitution was replaced after he was overthrown in 1992.⁸⁹ Additionally, when the Taliban became the dominant power in 1996, they disregarded the recent history of constitutionalism. However, in 2001, the United States invaded Afghanistan and overthrew the Taliban, temporarily restoring the 1964 Constitution through the Bonn Agreement, which allowed for a working constitution to be in place while a new one was being drafted.⁹⁰

81. ASSASI QANUN [CONSTITUTION OF AFGHANISTAN] 9 Mizan 1343 [Oct. 1, 1964], arts. 44–45.

82. *Id.* at art. 105.

83. *Id.* at art. 103.

84. DUPREE, *supra* note 77, at 579–80.

85. *Id.* at 579.

86. Arjomand, *supra* note 75, at 953.

87. *Id.* at 954.

88. *Id.* at 953–54.

89. *Id.* The 1993 Constitution was, however, never promulgated because those in society other than the governmental leaders opposed it. *Id.* at 954.

90. *Id.* at 955.

4. *Afghanistan's Fourth Constitution*

This progression of constitutional reform has led to the drafting and promulgation of the 2004 Constitution, which remains the current Constitution in place in Afghanistan.⁹¹ Given the state of the Afghan government and the recent devastation from a civil war that had raged for twenty-three years, the process of drafting the new constitution was far less notable this time around, with minimal public debate and publicity, such that many rural men and women were not even aware that there was a new Constitution.⁹²

The 2004 Constitution does, however, have a number of positive features, at least from a Western-centric, democratic point of view. First, it establishes a presidential system with a centralized administration.⁹³ Second, it mandates that the one-third of the parliament's upper house—all of whom are appointed by the president—be split evenly between men and women.⁹⁴ Third, it provides that the remaining two-thirds of parliament's upper house must be indirectly elected.⁹⁵ Fourth, the constitution provides for more ethnic, cultural, and religious pluralism.⁹⁶ While Dari and Pushtu are the official State languages, the constitution recognizes six other languages as official when they are predominant in particular regions, and “Article 43 makes provisions for supporting teaching each language in schools in the relevant regions.”⁹⁷ Perhaps more significantly, Article 45 requires religious school instructors to consider Islamic sects existing in Afghanistan during their teachings, which is a drastic change from previous religious tradition.⁹⁸ While this constitution is not perfect and some scholars argue it lacks the secular constitutional reviews of the 1964 Constitution,⁹⁹ the balance of religious tradition and constitutional protection has continued to develop and will likely continue to do so in the future. Afghanistan's

91. *Id.*

92. National Human Development Report 2004: Afghanistan, United Nations Dev. Programme, Security with a Human Face: Challenges and Responsibilities 128 (2004), *available at* http://hdr.undp.org/en/reports/national/asiathepacific/afghanistan/Afghanistan_2004_en.pdf.

93. CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, Jan. 3, 2004, arts. 136–37 [hereinafter the 2004 CONSTITUTION].

94. *Id.* at art. 84.

95. *Id.* at arts. 83–84.

96. *Id.* at arts. 110.

97. Arjomand, *supra* note 75, at 957.

98. CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, art. 45.

99. Arjomand, *supra* note 75, at 960–61.

current constitution is workable, even if it does not include everything the Western world would expect.¹⁰⁰

II. The (Un)Importance of a Formal Rule of Law

It is within the lens of the particular circumstances of Afghan law that the definition and implementation of Rule of Law should be analyzed. While Rule of Law is said to benefit all of society—and failure to have Rule of Law suggests a failed, anarchic state—such a view has been initiated and perpetuated from a Western-centric point of view, which is an inappropriate lens through which to examine and evaluate Afghan law. As illustrated above, the rich and complex body of law in Afghanistan is shockingly different from the sources of law in the Western world. Thus, the appropriate legal structure need not look like the Western structure in order to be effective. In fact, the interplay of different sources of law in Afghanistan strongly suggests that a Western-centric lens would be an ill fit. The Afghan legal structure may be different, but that does not end the inquiry of whether Rule of Law exists.

A. Rule of Law

1. *An Introduction to Rule of Law*

Rule of Law is often defined negatively in that it “is typically invoked as a contrast term, to be compared with life without it.”¹⁰¹ F. A. Hayek, a classic liberalism theorist, suggested that Rule of Law is a “*metalegal* rather than legal principle, a normative political ideal by which real-world systems could be appraised and evaluated.”¹⁰² It finds its historical roots as far back as any civilized society exists and suggests that society without formalized law would be something detestably similar to anarchy. Rule of Law has been linked with the stability and prosperity of both a state and its individuals, as noted by Plato: “Where the law is subject to some other authority and has none of its own, the collapse of the state . . . is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise.”¹⁰³

100. See *infra* Part III.D.

101. Krygier, *supra* note 1, at 16.

102. Maley, *supra* note 7, at 62 (emphasis in original).

103. PLATO, LAWS 174 (Trevor J. Saunders trans., Penguin Classics 1970) (355–347 B.C.E.).

2. *Rule of Law “Defined”*

There is no universally accepted definition for Rule of Law, as it has meant different things to different people at different times. However, Joseph Raz, one of the most prominent advocates of legal positivism, has identified eight key components of Rule of Law:

All laws should be prospective, open and clear; laws should be relatively stable; the making of particular laws (particular legal orders) should be guided by open, stable, clear and general rules; the independence of the judiciary must be guaranteed; the principles of natural justice must be observed; the courts should have review powers over the implementation of the other principles; the courts should be easily accessible; the discretion of the crime-preventing agencies should not be allowed to pervert the law.¹⁰⁴

Raz was careful to note that the appearance of judicial independence would not be enough—the judiciary *actually* has to be independent.¹⁰⁵

Other theorists, however, do not outline Rule of Law in such great detail. For example, scholars such as Ricardo Gosalbo-Bono posit that it incorporates four basic principles: first, power is not exercised arbitrarily; second, law is supreme and independent; third, law is applied equally; and fourth, domestic law incorporates universal human rights.¹⁰⁶ Still others, such as Martin Krygier, suggest that Rule of Law exists when there is a sufficient scope, character, application and social salience in the law.¹⁰⁷ At the very least, Western Rule of Law can be traced back to the writings of Oxford legal scholar A.V. Dicey who “not only argued for the importance of what he called ‘conventions of the constitution’ but also developed an account of the Rule of Law which required that law be ascertainable, prospective, and enforced by a distinct judiciary.”¹⁰⁸

Regardless of the definition, Rule of Law is “bound up with all those fundamental aspects of a state and society that determine the

104. Maley, *supra* note 7, at 63.

105. *Id.*

106. Ricardo Gosalbo-Bono, *The Significance of the Rule of Law and Its Implications for the European Union and the United States*, 72 U. PITT. L. REV. 229, 231 (2010).

107. Krygier, *supra* note 1, at 28.

108. Maley, *supra* note 7, at 62 (internal citations omitted).

extent to which it is rational for a person to behave civilly and within the law.”¹⁰⁹ For purposes of examining whether Afghanistan’s legal system amounts to Rule of Law, a composite definition should be employed. Accordingly, Rule of Law will be said to exist where a legal system is predictable, justly enforced, relied upon by society, and predicated on relevant morality particular to a given state.

3. *How Rule of Law is Applied*

If a state wants to implement¹¹⁰ Rule of Law, the state must consider the form of law (e.g., civil or common) and the institutions required for implementing that form of law. Thus, in practical terms, Rule of Law, at least as understood in the Western world, is often equated with democracy or Americanization. But it is also important to consider the existing law as it is, and how that existing system can be crafted into Rule of Law. As part of this step, the crafting and application of Rule of Law must be contextualized within the particular state, because not all states are perfectly alike. Perhaps the most important contextual element to consider when analyzing Rule of Law is the culture of the particular state.¹¹¹ As Rule of Law theorists have aptly noted, “[n]orms, routine expectations, common understandings and reactions that are ‘second nature’ are all of crucial importance, and these are commonly encoded in and transmitted by culture.”¹¹² Therefore, the stability in local tradition and culture often generates strength in the law.

Culture, however, is also often blamed for why a particular state’s implementation of Rule of Law has failed. Failure of Rule of Law is often explained by a “lack of ‘legal culture,’ ‘civil culture’ or just having a culture without the right ‘cultural’ elements and full of the wrong ones.”¹¹³ Culture appears to serve a dual and somewhat contradictory purpose. Irrespective of this contradiction, it is

109. Krygier, *supra* note 1, at 30.

110. Arguably, at least in this author’s opinion, Rule of Law is not something to be “implemented,” but is rather something a society has. “Implementation”—a common word used for the transplantation of Rule of Law—implies that Rule of Law can be forced into a society by structuring their legal system in a way that models the Western world. In this author’s opinion, this runs counter to the premise of Rule of Law, because one size does not, in fact, fit all. Different states will require different things from their legal structure, and they should be allowed to tailor that structure to their needs.

111. Yes, this is an unconscionably vague statement, which is part of the problem with the implementation of Western-centric notions of Rule of Law. See *infra* Part III.D.

112. Krygier, *supra* note 1, at 30.

113. *Id.* at 29.

generally accepted that “rule of law is not something that exists ‘beyond culture’ and that can be somehow added to an existing culture by the simple expedient of creating formal structures and rewriting constitutions and statutes.”¹¹⁴ Any adjustments to a state’s legal structure must consider the particular culture of that state, because failure to do so will inevitably lead to failure of Rule of Law. An individual and contextual analysis is, therefore, necessary.

Once Rule of Law is established, there is still variance in its application. A dichotomy has developed between clearly defined components within the law and attenuated components. Furthermore, there seems to be disagreement as to how Rule of Law should govern. Weighing in on this dichotomy at a very early stage, Aristotle noted:

Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement.¹¹⁵

Aristotle’s opinion on this dichotomy has since influenced the writings of modern jurists. In his seminal essay on the importance of Rule of Law, Supreme Court Justice Antonin Scalia discussed the dichotomy between the general Rule of Law and personal discretion in justice that Aristotle so aptly noted.¹¹⁶ While Justice Scalia may have originally believed that the highest court should confer discretion upon the lower courts, instead of establishing a general rule that *must* be applied,¹¹⁷ he has been of the opinion that clear general principles of decision provide predictability.¹¹⁸ At least in the context of the judiciary, uncertainty is incompatible with Rule of Law.¹¹⁹ As

114. *Id.*

115. ARISTOTLE, *POLITICS*, BOOK III, CHAPTER XI, § 19, at 127 (Ernest Barker trans., Oxford Univ. Press 1946) (350 B.C.E.).

116. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

117. *Id.* at 1177.

118. *Id.* at 1179.

119. *Id.* This opinion is, of course, expressed in the context of a common law system, which differs from the civil law system of Afghanistan. However, the narrow perspective on the Rule of Law still exemplifies how Rule of Law is interpreted in the Western world

he states, “[t]here are times when even a bad rule is better than no rule at all.”¹²⁰ For Rule of Law to be effective, general principles established by a court should extend as far as possible in interpreting a particular statutory or constitutional provision. The scope of such rules, therefore, will depend on the judicial understanding of the rules that govern—namely, a clear understanding of the particular statute or constitutional provision.¹²¹

Justice Scalia’s essay rests upon one very clear premise: Before a judiciary can decide whether it wishes to convey some level of discretion to lower courts, there must be established laws to apply. Thus, Rule of Law requires a clearly established and predictable body of law that may *then* be interpreted or applied by a judicial body. This formulation assumes that no Rule of Law can exist unless the formal legal system is well-defined, articulated in a manner that can be understood by the layman, and adhered to by society at large. At the end of the day, at least from a Western-centric perspective:

The concept of the rule of law . . . has to do with the way power is exercised [T]hat between circumstances in which power can be exercised *arbitrarily* and those where law . . . plays a real role in channeling the exercise of power, and in particular in constraining the possibility of its arbitrary exercise.¹²²

Thus, failure to have such a legal system, or to have one that is arbitrary or corrupt in its exercise of power, indicates that Rule of Law has also failed.

B. The Role of the Western World in Rule of Law

As previously stated, the modern conception of Rule of Law likely derives from ancient European political thought, found in Greek and Roman philosophy. Current Rule of Law of both the European Union and the United States stems from the works of these philosophers. For example, Plato opined on the universal application and respect for law and society in stating that “the laws that are not

at large; the assumption is that something other than a formal judicial system would be unworkable unless those subject to the system understand what the system prescribes. *Id.*

120. *Id.*

121. *Id.* at 1183–84.

122. Krygier, *supra* note 1, at 26–27.

established for the good of the whole state are bogus law.”¹²³ Aristotle further added that “what is just will be both what is lawful and what is fair, and what is unjust will be both what is lawless and what is unfair.”¹²⁴ In particular, Aristotle firmly believed that sovereignty of law was the best way to avoid and combat the highly detestable situation of popular tyranny in a democracy. He believed that tyrannical democracy resulted in law that was “open to the objection that it is not a constitution at all; for where the laws have no authority, there is no constitution. The law ought to be supreme overall, and the magistracies and government should judge of particulars.”¹²⁵

It is this basic principle—that law should be supreme and sovereign—upon which Western Rule of Law has been built. The United States and European Union, while differing to an extent, share both common history and basic principles: power must not be exercised arbitrarily; law is supreme; equality of the law is paramount; and there must be a respect for individual rights.¹²⁶ The application of these principles, however, does vary.

In Europe, for example, individual member states with admittedly different incorporations of sovereignty, constitutions, and individual rights in their domestic legislation were able to agree on general principles to represent what is known as pan-European Rule of Law. What binds these states together as one European society under one law is that the states were able to look beyond the differences between their legal systems and recognize the similar ideals and justifications for their respective laws. When one considers the “philosophical and political assumptions behind such diversities . . . they give way to a great number of similar legal institutions and political structures which provide a basis for a genuine pan-European rule of law acceptable to all European states.”¹²⁷

123. Gosalbo-Bono, *supra* note 106, at 233 (quoting PLATO, LAWS 174 (Trevor J. Saunders trans., Penguin Classics 1970) (355–347 B.C.E.)).

124. *Id.* (quoting ARISTOTLE, NICOMACHEAN ETHICS 117 (Terence Irwin trans., Hackett Publ’g Co. 1985) (350 B.C.E.)).

125. ARISTOTLE, POLITICS, BOOK IV 89 (Stephen Everson ed., Cambridge Univ. Press 1988) (350 B.C.E.).

126. Gosalbo-Bono, *supra* note 106, at 231–32.

127. Gosalbo-Bono, *supra* note 106, at 259–60.

The Treaty on the European Union is commonly viewed as the European Union's codification of the Rule of Law.¹²⁸ Article Two of this treaty provides:

[T]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the member states in a society in which pluralism, non discrimination, tolerance, justice, solidarity and equality between women and men prevail.¹²⁹

If this article codifies Rule of Law for the European Union, several important implications arise. Article Two implies that Rule of Law is a necessary component of the amalgam that binds the European Union. In turn, Article Two suggests that tolerance, justice, and equality are necessary elements of Rule of Law. By extension, it would appear that a society could have Rule of Law without meeting a list of criteria established by the Western world, provided that society shares the values articulated within Article Two. In essence, these enumerated principles—human dignity, non-discrimination, tolerance, etc.—are indispensable components of Rule of Law.

Because American Jurisprudence shares the same roots as its European counterpart, there exist similar assumptions within American Rule of Law. Modern political theorists such as John Locke and Thomas Jefferson have helped shape the fundamentals upon which the American legal system rests. Due to this influence, some would argue that American law “incorporates the most radical principles of individualism and liberty ever known to man . . . [proclaiming that] people have certain fundamental and inherent rights such as life, liberty, property ownership, and the pursuit of happiness. These rights have been endowed by ‘nature and God,’ and not by government.”¹³⁰ Inherent in these expressly afforded rights is

128. *Id.* at 260. See also Laurent Pech, *The Rule of Law as a Constitutional Principle of the European Union* 20 (Jean Monnet Working Paper Series No. 4/2009, 2009), available at <http://ssrn.com/abstract=1463242>.

129. Consolidated Version of the Treaty on the Functioning of the European Union art. 2, Mar. 30, 2010, O.J. (C 83) 17.

130. Gosalbo-Bono, *supra* note 106, at 272.

the necessity of a strong Rule of Law to maintain them. Without a predictable and stable legal system, such rights could not be guaranteed. This is perhaps why Rule of Law “has acquired a central position in American law to the point where the rule of law has become a ‘veritable civil religion.’”¹³¹

Arguably, the clearest codification of Rule of Law in the United States Constitution is in the Fifth Amendment’s Due Process Clause, incorporated to the states by the Fourteenth Amendment. The Due Process Clause guarantees that individuals shall not be deprived of one of those rights Americans hold so dear—life, liberty, or property—without due process of law.¹³² This protection of life, liberty, and property provides procedural and substantive protection to all persons, citizens or otherwise, within United States territory.¹³³ In *Solesbee v. Balkcom*, for example, the Supreme Court noted that it is:

[A] settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just.”¹³⁴

The principles underlying Due Process are the same principles behind the more general Western Rule of Law: predictability, equality, supremacy, and independence of law. Without the Fifth Amendment, American Rule of Law would neither be as stable nor would it represent the most radical and stringent application of Rule of Law; under the American system, law must be written in some form, be it through adjudicatory decisions, statutes, regulations, or constitutional provisions. Indeed, under an American view—and indeed the Western way overall—a law is not *the* law unless it is written down, allowing those words to be consistently interpreted and applied.

Both the European and American approaches to and interpretations of Rule of Law suggest that without Rule of Law,

131. *Id.*

132. U.S. CONST. amend. V.

133. Gosalbo-Bono, *supra* note 106, at 275.

134. *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950).

chaos would ensue—that the only manner in which modern, civilized society may continue is if it controls and fiercely protects the law upon which society is based. While this statement may be hyperbolic to an extent, the transplantation of Western legal systems—that is, the procedure of instituting Westernized legal systems in non-Western states, namely those “without” Rule of Law—evidences the West’s intent to civilize the rest of the world through the dissemination of Western Rule of Law. To wit, in order to preserve the Western legal order, the Western world must find a way for other countries to acquiesce to the Western Rule of Law.

C. Implementation of Rule of Law: Do the Ends Justify the Means?

Why would a state want a Rule of Law? Rule of Law proponents note that contemporary societies lacking Rule of Law are hardly desirable.¹³⁵ While there are many ways in which contemporary polity can lack the formalistic Rule of Law, two in particular are worth noting. First, a state can have rule without law, meaning that the exercise of power is completely without legal authorization.¹³⁶ This system would function with a tyrannical or despotic leader, or as a failed state, in which “neither the people nor a single person or group rules.”¹³⁷ Second, a state can have rule *by* law, which arises when law is developed and used as a way to repress society.¹³⁸ In this way, law is used against, rather than for, society and allows the “exercise of unrestrained and uncivilized power.”¹³⁹ The result is a system in which those capable of effectuating change are those who would have the most to lose if formal Rule of Law were established; thus it is incredibly difficult to force change upon them.

These examples of systems that would emerge if no Rule of Law existed certainly serve as cautionary tales of why Rule of Law is so important and why states that lack Rule of Law would want to model their legal systems after the Western world. Stability, predictability, trustworthiness, and security are—after all—desirable traits in a government. The implementation of such traits, however, is not an easy process. First, Rule of Law is not merely an installable

135. See, e.g., Maley, *supra* note 7, at 61–62; Gosalbo-Bono, *supra* note 106, at 231; FRANCIS G. JACOBS, THE SOVEREIGNTY OF LAW: THE EUROPEAN WAY 7 (2007).

136. Krygier, *supra* note 1, at 16.

137. *Id.* at 17.

138. *Id.* at 19.

139. *Id.*

technology.¹⁴⁰ It is not a tool that can be transplanted from one state to another. Furthermore, if Rule of Law is to be equated with a transplantable technology, at the very least it is an “interaction technology,” which means it is “harder to transplant [and] harder to generate. . . . Patterns of interaction and interactional contexts vary dramatically between societies. If you want to affect them, it is now coming to be admitted, you can’t assume that institutions that work in one place will work similarly in another.”¹⁴¹

If Rule of Law is to be transplanted from the Western world into a society that “lacks” it, it must adjust to the society upon which it is being thrust. As expected, complications arise. It is not as if every society is ready and willing to have a formal legal system imposed. In some countries, where Rule of Law has not “existed” for some time, formal law is “thought of as ‘like a door in the middle of an open meadow. Of course, you could go through the door, but why bother?’ Such ingrained dismissiveness presents a challenge to an architect who would like his building to be used—even better, useful.”¹⁴²

D. An Afghan Version of Rule of Law

Unlike the Western conception of Rule of Law and much to the Western world’s consternation, Shari’a is supreme under Islamic Law. This flies directly in the face of the American and European formulations of Rule of Law because in the United States and Europe, law itself should rule and that law should be secular and independent from social influence.¹⁴³ Therefore, under the Western view, there is no Rule of Law in Afghanistan. Is this actually true, however? Or is it only true under a narrow, Western-centric interpretation of Rule of Law?

There are a few indications that Afghanistan does have a robust Rule of Law. It has manifested in a way that differs from Rule of Law in the Western world. In fact, Afghanistan’s constitution of 627 A.D. is considered the first written constitution in the world, established by the Prophet Muhammed himself.¹⁴⁴ Additionally, Shari’a recognizes individual rights that are very similar to those

140. *Id.* at 21.

141. *Id.* at 22.

142. *Id.* at 23.

143. See Gosalbo-Bono, *supra* note 106, at 287 (“In Western constitutionalism, democracy and the separation of powers presuppose secularism and this is not acceptable to Islamic democracy.”).

144. Gosalbo-Bono, *supra* note 106, at 285.

protected within Europe or the United States: “life, property, legal process, and individual rights arising from the relationship between individuals and the Islamic state.”¹⁴⁵ In terms of the rights to be recognized and respected by society, Shari’a law (and Afghan law in general) is not dissimilar from the Western world. Rather, it is merely the enforcement mechanisms that differ.

Regardless of similarities, Western Rule of Law theorists have difficulty acknowledging that Rule of Law exists in Afghanistan. The West’s emphasis on the law’s independence from social or religious influence suggests to the Western world that Rule of Law cannot exist without this division. However, the Afghan legal system and Rule of Law are not mutually exclusive concepts—the two may exist with each other. The only meaningful difference between Western and Afghan Rules of Law may, after all, be in how each region implements its respective legal regime.

In fact, Shari’a may draw Rule of Law into a deeper, more fundamental role in society than what exists in the Western world. This is due to the fact that Shari’a is not merely a set of legal rules; rather, Shari’a directly links the law, and its obedience, to the divine. It represents “a set of unchanging beliefs and principles that order life in accordance with the will of God and the idea that all human beings, and all human governments, are subject to justice under the law of God.”¹⁴⁶ Principles underlying Shari’a are thus constant and unlikely to be influenced by changes in political regime or opinion, which makes Islamic Law systems generally more predicable and reliable over time.

One could, therefore, argue that Rule of Law in Islamic states is rooted more deeply in society than in its secular, Western counterparts. This secularism would not be acceptable in an Islamic democracy, even one that is completely stable and would otherwise meet the Western definition of Rule of Law. Many Islamic states, for example, see the Western conception of democracy as:

[A] ‘doctrine or procedure, a mere method of dispensing, sharing and managing political power and secularism, nationalism and alike.’ According to these Islamic scholars, secularism is not an inevitable consequence of democracy: free elections, political parties, individual freedoms, and human rights can co-

145. *Id.* at 285–86.

146. *Id.*

exist within an Islamic constitution which upholds the basic principles of the Islamic faith.¹⁴⁷

It follows that if Western democracy, and indeed Western Rule of Law, is one acceptable method of dispensing the law, the system in Islamic states is yet another acceptable method. Sharī'a itself, or the pluralistic nature of the law in Afghanistan, does not preclude Afghanistan from having Rule of Law. Perhaps only Afghan conduct with respect to that system of law would dictate whether Rule of Law truly exists.

E. Traditional and Nontraditional Justice Systems, and Why They Work

Contrary to common Western beliefs, it is actually possible to have Rule of Law without a completely formalistic system. While Afghanistan's formal legal system is relatively crippled and not generally relied upon by the populace, the informal forms of justice, through the *jirga* for example, are still used and relied upon, serving the same function as a formal system. There are, of course, problems with informal justice. For example, Maley recounts a visit to northern Afghanistan during which he observed a provincial *qadi* issue an opinion on a commercial dispute.¹⁴⁸ He notes that the *qadi* was applying *Hanafi* Sunni jurisprudence, but he had been appointed by the local warlord and had no judicial authority over the case. Maley uses this example to show that there is no single rule to apply in Afghanistan, which severely undercuts its Rule of Law.¹⁴⁹ However, Maley also notes that the parties in the dispute were happy to accept the judge's authority and decision.¹⁵⁰ Thus, if the opinion of those who participate in—and suffer the consequences of—the legal system bears any weight, informal justice is both effective and preferable in some cases. Certainly, it satisfies the definition of Rule of Law, in that it is justly enforced, at least in the view of the parties, relied upon by society, and based on society's preferred morals. The weakest argument for an Afghan Rule of Law would be that of predictability, because judges' decisions may vary from case to case and do not necessarily apply the same rules and standards each time. However, the reliance of the parties and the belief that the judge's decision is

147. *Id.* at 287.

148. Maley, *supra* note 7, at 66.

149. *Id.*

150. *Id.*

just weigh heavily in favor of such a system signifying Rule of Law. Ultimately, society's perception of the legal system may be the best indicator of the presence of Rule of Law.

Unfortunately, individual Afghans' opinions have minimal influence on which state-controlled legal system exists. In 2001, the Bonn Agreement "provided the foundation for the reconstitution of political authority, a process that led to the adoption of the 2004 constitution embodying international human rights standards, and to the holding of presidential and parliamentary elections in 2004 and 2005."¹⁵¹ However, Afghan citizens at large did not seem to recognize these newly implemented institutions and rules, particularly given the attenuated control that the central government had over provincial life.¹⁵² According to Maley, "the legitimacy of state-based law cannot simply be assumed; it is up to the state to ensure that it is applied in such a way as to satisfy ordinary people's craving for meaningful justice."¹⁵³ This "craving," to use Maley's word, could be completely satisfied by the informal justice options enshrined in Afghan history, if only the rest of the world would allow it.

In an effort to assert the availability of "meaningful justice," developments of the state-controlled legal system in recent years have led to an incorporation of an informal justice sector within the formal legal structure. This sector "enjoys no particular formal standing but may be the preferred choice for ordinary people seeking to solve problems."¹⁵⁴ According to Maley, this pluralistic system creates a "quandary," because while the Afghans trust the informal systems more, these systems are under suspicion due to their possible tendency to undermine human rights.¹⁵⁵ There is also evidence of corruption within the state courts, suggesting that they are not a reliable source for Rule of Law.¹⁵⁶ Recent recommendations consist of using the informal justice sector instead of the state system,

151. *Id.* at 69.

152. *Id.*

153. *Id.*

154. *Id.* at 70.

155. *Id.* at 70. Maley notes that in a 2009 survey, 69% of respondents believed the state courts were accessible, compared to 79% who thought the local *jirga* was accessible. Further, 50% said state courts were fair or trusted, compared to 72% for the local *jirga*. *Id.*

156. *Id.*

provided that it can be augmented in a way that will not violate Afghanistan's international human rights obligations.¹⁵⁷

Afghanistan's judicial system is currently under an immense amount of pressure. Failure to meet the Western world's expectations, particularly those of efficiency and transparency, is part of the reason the Western world appears to believe Afghanistan lacks Rule of Law.¹⁵⁸ First, the Bonn Declaration resulted in a demand for fair, just, and formal dispute resolution—a feat that presently challenges many states.¹⁵⁹ Second, and perhaps more importantly, the Afghan system must be evaluated with its attendant circumstances; for over two decades, Afghanistan has experienced internal population displacement (including the fleeing of millions of Afghans as refugees).¹⁶⁰ With many of those refugees returning and finding their former property seized by other individuals, the Afghan legal system is flooded with complex property disputes that would overwhelm any state.¹⁶¹

No legal system should be analyzed out of context and failure to consider context would be a flaw in a Rule of Law analysis. Nonetheless, this is a recurring flaw that appears frequently in Western critics' analyses. The general conclusion has thus been that the failure of the state-controlled system to properly handle these cases necessarily implicates a lack of Rule of Law.¹⁶² But this conclusion is incorrect and unwarranted because any legal system, regardless of how sophisticated, may become overwhelmed by crises. An inability to process such claims in a speedy manner should not be equated with a lack of Rule of Law because that logic would necessarily lead to the absurd conclusion that the United States,¹⁶³ the

157. *Id.* It should be noted, however, that violations of international human rights obligations are not limited to "failed states" in which the Western world does not recognize Rule of Law. Violations of international human rights, for example as enshrined in the International Covenant on Civil and Political Rights, are violated quite frequently, as we can see through the jurisprudence of the Human Rights Committee, which is the governing body of the Covenant. *See generally*, David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 *YALE J. INT'L L.* 129 (1999).

158. *See, e.g.*, Krygier, *supra* note 1, at 24.

159. Maley, *supra* note 7, at 70–71.

160. *Id.* at 71.

161. *Id.*

162. *Id.* at 71.

163. Amanda Lee Myers, *Overwhelmed Courts Need \$40 million for Border Plan*, AZCENTRAL.COM (June 29, 2010, 1:18 PM), <http://www.azcentral.com/news/articles/2010/06/29/20100629arizona-immigration-federal-court-costs.html>.

United Kingdom,¹⁶⁴ or even the European Union in general¹⁶⁵ also lacks Rule of Law.

At the very least¹⁶⁶ the Afghan legal system shows that Rule of Law exists in Afghanistan, even if it may not be the exact formulation as found in the Western World. Using the elements identified by Raz as an example,¹⁶⁷ such a system would fail under the currently accepted definitions of Rule of Law. There are no written laws, let alone those that are prospective, open, and clear. The application is relatively arbitrary in application. There is no indication that the decisions of a *qadi* would be subject to review. In just two facts, it is already clear that the pluralistic Afghan legal system looks nothing like Western Rule of Law.

Most importantly, however, Afghans rely on informal justice as their primary means of seeking resolution of disputes and a sense of equality—and that is *precisely* the function a justice system should serve. The system is by no means perfect,¹⁶⁸ but it is not so anarchistic as to justify an argument that no Rule of Law exists.

Conclusion

Arguably every society needs Rule of Law. This Note does not intend to underplay the importance of stability, predictability, and justice. However, it is a common Western mistake to narrowly define these terms, and therefore narrowly construe Rule of Law according to our particularized conception of what Rule of Law *should* be.

164. Robert Booth, *Epidemic of Marriage Breakdowns Overwhelming Courts Says Top Judge*, THE GUARDIAN (June 16, 2009, 9:03 PM), <http://www.guardian.co.uk/uk/2009/jun/17/divorce-epidemic-judge-warning>.

165. THE EUROPEAN COURT OF HUMAN RIGHTS OVERWHELMED BY APPLICATIONS: PROBLEMS AND POSSIBLE SOLUTIONS (Rüdiger Wolfrum & Ulrike Deutsch eds., 2009).

166. Given that many informal justice systems violate international human rights norms in the types of remedies they allow.

167. Maley, *supra* note 7, at 63. To reiterate, Raz's elements are as follows:

All laws should be prospective, open and clear; laws should be relatively stable; the making of particular laws (particular legal orders) should be guided by open, stable, clear and general rules; the independence of the judiciary must be guaranteed; the principles of natural justice must be observed; the courts should have review powers over the implementation of the other principles; the courts should be easily accessible; the discretion of the crime-preventing agencies should not be allowed to pervert the law.

Id.

168. Certainly the corruption within Afghanistan should be considered when analyzing the legal system, but this consideration is outside the scope of this note.

Afghanistan is hardly a perfectly stable state, but it would be unwise to suggest that the problems Afghanistan faces necessarily mean that the State cannot have Rule of Law. The history upon which Afghanistan's legal system is based is entirely different from the histories in the West. Their sources of law are completely different, far more pluralistic, and, one could argue, more deeply entrenched in society. A legal structure fit for the Western world should not be forced onto Afghanistan because it would fail to properly contextualize the Afghan legal system. Rule of Law can be established through informal and provincial justice, provided that justice is relied upon by society, reflective of social norms, predictable, and deemed to be fair. Absent evidence to the contrary, Rule of Law exists, and because Afghanistan evidences these elements, its Rule of Law should not be so often questioned.
